Committee Secretary
State Development, Tourism, Innovation and Manufacturing Committee
Parliament House
George Street
Brisbane Qld 4000

SUBMISSION ON THE FOREST WIND FARM DEVELOPMENT BILL 2020 (Bill)

The Submission on the Bill sets out the following comments for the consideration of the Committee:

- Subject to 2. below, there are substantive issues, risks and consequences that the Bill has not dealt with expressly or directly and accordingly, and consequently since the Bill purports to create tenure and associated rights over public assets; the impacts (whether short or long term) that could have upon the local residents and the taxpayers and voters of the State of Queensland; and
- Suggested pragmatic solutions which will ensure a balance is struck in respect of the rights of the developer and those of the taxpayers and voters of the State of Queensland and the adversely affected residents and land owners in providing transparency and accountability in relation to the proposed Bill and its outcomes.

1.SUBSTANTIVE ISSUES WITH THE FRAMEWORK OF THE BILL

Whilst the Bill provides for the inclusion of certain mandatory provisions (e.g. Cultural Heritage, Compensation) in the Development Agreement, Access Licences and Project Leases (Transaction Documents) which are clearly important, there are either no or limited provisions that deal with the following risks and issues. This part focuses on the identification of the Significant Risks and Issues and their risk management/ treatment.

SIGNIFICANT RISKS AND ISSUES IDENTIFIED	USUAL LEGAL AND COMMERCIAL RISK MANAGEMENT PROVISIONS
1.Bush Fires Set out below are a number of Significant Risks that have been identified which may arise from the project. **(a)Fire Risk** The Bill makes no express provision for dealing with any requirements in respect of Fire Risk. The starting point is that introducing another industry into that region of State Forests invariably raises the risks of bush fires overall. Therefore, by the undertaking of the project whether through construction or its operation phases is a high risk activity in a State Forest and should not be permitted for the reasons outlined below. However, the State Government has issued its Development Approval on 21 February 2020 by including relevantly a condition requiring a Bush Fire Management Plan (BFMP). Some examples of those risks are as follows: (i) the developer proposes in the BFMP during the construction phase to continue to operate field welding, cutting and grinding in High Fire conditions; (ii) further, there are examples of where the wind turbines have combusted in other wind farms throughout the world. In any of those circumstances, it is reasonably foreseeable that combined with high winds/ low humidity/ conditions (e.g. westerly winds), that a fire could take hold and spread a bush fire from the project area to the local coastal communities of Boonooroo, Tuan and Wallu which are situated within 4 kms of the wind turbines. Of course, there will be the best of intentions of the Queensland Fire and Emergency Services (QFES) and Rural Fire Service Queensland (RFSQ) in trying to deal with the containment of such a bush fire in accordance with the BFMP.	**1.Credit Enhancements** The concepts and principles set out below are usual and found in large infrastructure/ commercial transactions which reflect the treatment of the risk by the inclusion of the appropriate credit enhancements concepts whether they be by way of insurance, indemnities or security. Those concepts are applicable to 1, 2 and 3 (where relevant) in the column headed Significant Risks and Issues Identified. **(a)Insurance** **(i) Public Liability Insurance** It is submitted that the developer should, in addition to its usual construction insurance, have significant public liability insurance coverage during the construction and operation periods, and bear the risks and cover the liabilities that may emanate from their project and cause loss to local resident property owners and residents. Accordingly, the levels of public liability insurance would need to be significant and at least in the 100s of million dollars. Insurance advisors could assist in determining the appropriate level of coverage for these potential liabilities.

The above scenario is not out of the question since their operations would be akin to a public utility (e.g., electricity generation/distribution; and dam-owning entities), and there are enough examples of where bush fires have got out of control and caused loss of life and catastrophic devastation of property e.g.
(i)in the Victorian Bush Fire in 2009 which originated from the operations of utilities;
(ii) the North Coast bush fires at Peregian Beach and the surrounds of Noosa; and
(iii) there is even the more recent example of the devastation of the Australian Bush Fire Season in 2019/2020.

In light of the fact that all the coastal residential communities in the area to the east of the proposed project development site have only one State road to use as a point of egress in emergencies; these communities had recently identified the genuine prospect of a Mallacoota-like scenario, in the event of a bush fire advancing from the forestry areas where the proposed development is to be located, and the waters of the Great Sandy Strait.

(ii)Class Action Litigation Risk

The State of Queensland in providing its Development Approval to the project has opened up the potential risk of bush fires emanating from the project with the consequences of the potential loss of life and property. In turn this has opened up the State of Queensland to and set the future scene to the second risk of large scale litigation.

Unfortunately, it is a fact of life now that Australia has become a highly litigious society. If the scenario outlined above eventuated, it is highly likely that it would result in the commencement a mass tort class action for environmental liability/ other general form of litigation whereby the plaintiffs would be seeking recourse from the relevant defendants.

In determining who are defendants, it is usual for the plaintiffs to pursue the owner of the land and any operators of activities on that land from which the bush fire emanated.
In this case, it would be the State of Queensland and the developer, on the basis of the following causes of action:
(a) negligence;
(b) nuisance;
(c) trespass.
The State of Queensland is very familiar with the workings of, and those type of causes of action in Class Actions with its recent experience in the Brisbane Floods Class Action.

To that end, of further relevance in establishing ultimate liability is the Civil Liability Act 2003. This Act determines the proportion of liability between defendants.

Recently in the Brisbane Floods Class Action, the court determined that the proportion of liability for the State of Queensland was for 20% of the judgment due to its involvement in the operations, and for the owner of the dam, 50%. There has been a great deal of debate in the media of the potential quantum of the judgment being in the

Principal Concepts of Insurance Requirements

Set out below for consideration are the principal concepts relating to insurance requirements

1.Since the activities of the developer would be akin to, or similar to those of the electricity (generation, transmission, distribution) or water state owned utilities, guidance may be gained as to what type (if any) of, and amounts of insurance they hold hold with insurance companies. If they do, it should be for an amount equivalent at the least to what those entities hold for public liability fire risks.

It is noted that in the Plantation Licence between the State of Queensland and Forestry Plantations Qld Pty Ltd (a Hancock company) dated 30 June 2010 (some nearly 10 years ago) that the public liability insurance required was for not less than $20m. Of course, they may have had more insurance but that has not been disclosed in public documents, only the minimum required.
In the proposed circumstances of permitting this additional high risk activity, the amount referred to in the Plantation Licence as the minimum would be woefully inadequate and the only prudent levels of insurance required would be those in the vicinity of what State owned utilities hold.
2. In arriving at those amounts, those State entities have no doubt had those amounts calculated by insurance experts in risk coverage to be commensurate and cover the liability that those entities may be called upon to meet claims for fire;
3. Mechanisms to ensure for a review of an increase in the levels of insurance to ensure that it keeps pace with the ever-changing risk profile;
4.That the State of Queensland's interests are protected though either notation or as a co-insured;
5. That the insurance is effected with a licenced insurer and that it holds a satisfactory credit rating;

vicinity of $1billion. That means that the State of Queensland's 20% proportion could equate to approximately $200 million in that case. Whilst all cases turn on their facts on liability and quantum (with the actual quantum still to be determined in that case), that case demonstrates that even where the State of Queensland has a lesser involvement in operations, it can still lead to significant liability.

A further example in support of the point on the significant liability is the Victorian Bush Fires Class Action whereby the settlement amount was in the vicinity of approximately $500 million.

Therefore, which of the parties would bear the responsibility for the liability?

Naturally, it would be expected that a developer which had the overall control of operations would bear the significant burden of the liability and therefore should carry the obligation of that risk. Accordingly, it would be usual to expect that the developer as a matter of sound commercial and risk management practices to hold adequate public liability insurance to cover that liability.

In respect of the State of Queensland, it is understood from media reports about the Brisbane Floods Class Action that the State of Queensland does not hold public liability insurance. Any of its liabilities must be met from Consolidated Revenue.

In light of the above risks and potential liabilities, it begs the obvious question of whether a cost-benefit analysis has been undertaken to determine whether the risks outweigh the benefits to the State of Queensland.

(iii)Increase or Refusal to Insure
These elevated risks may also impact insurance risks for Non-Host property owners and residents. For example, an increase in insurance premiums, or worse, a refusal to insure local resident property owners and residents, because of that heightened risk. This has been seen in the case of the refusal to insure some flood affected properties or prohibitively exorbitant insurance premiums.

These issues all arise as consequences of the State of Queensland's approval of, and involvement in this project. Accordingly, for the reasons outlined above these risks are completely unnecessary risks to be borne by the State of Queensland and its taxpayers and voters.

In proceeding with this Bill without the significant risks that have been identified having been adequately dealt with by the appropriate Credit Enhancements, begs the obvious question of why is the State of Queensland taking on these additional risks without any disclosures or clear statements of how that risk will be managed in the best interests of the taxpayers/ voters of the State of Queensland and adversely affected residents and land owners.
It could be seen as sending a message to the taxpayers/ voters of the State of Queensland and adversely affected residents and land owners that the State Government is not interested in acting in their best interests but that of the developers.

6. Otherwise, the terms of insurance are reasonable, cover the risks and are certified as such by an independent insurance policy.

As part of this exercise, it would be expected that there would be an exercising of commercial acumen by the State of Queensland to ensure that the developer in bearing the risk would include the payment of the full cost of the insurance premiums.

(ii) Environmental Clean Up Insurance
Again, it would be prudent to ensure that there is an adequate level of insurances to cover any Environmental damage and clean up of that damage. Of course the premiums would be payable by the developer.

(b)Indemnity
Again, it would be usual to ensure that a fulsome indemnity would be provided by the developer for various acts such as:
(i)their negligence causing loss to the counterparty and third parties resulting from its operations;
(ii)environmental damage.
The developer may seek the following:
(i)an exclusion from consequential loss such as profits;
(ii)a cap on its liability.
In the scenario of a class action, it raises the issues of the limitations of recourse to the developer's insurance policy if the State of Queensland makes a cross claim against the developer as its insurer may seek to take the benefit of that cap and only pay up that amount.

(c)Security
Security should be provided to support the performance of the obligations of the developer, particularly when it can not perform those obligations or is insolvent.
The requirements for security should include with limitation the following:
(i) requirement for the provision of the security such as bank guarantees or cash deposits;
(ii)the timing of the giving of the security e.g. usually at a financial close;

To that end, consideration should be given on suggestions to how to manage this risk and ensure there are appropriate provisions in the Bill. Also has consideration been given to: (i)the fact that there is a Royal Commission into the Bush Fires earlier this year currently being conducted and that the findings/ recommendations are scheduled to be released in August of this year in readiness for the fire season; and (ii)what steps or processes does the State Government intend to take to deal with those findings/ recommendations to apply them retrospectively to a project that it has approved already and now wishes to put in place the Bill before those findings/ Recommendations are handed down? It is submitted that it would be prudent to wait and ascertain what are the findings/ recommendations of that Royal Commission and evaluate their impact upon the project and whether there are adequate safeguards in the Bill to recognise and implement those findings/ recommendations to protect the interest of the State of Queensland.	(iii)the formula for calculation of the amount of the security and for future increases in remediation costs at its most basic being CPI to cover the liability e.g. the Remediation Costs referred to in 2 and in 3. in the column headed Significant Risks and Issues Identified; (iv) the top up of the amount of the security if drawn down for remediation works or is found to be insufficient to ensure coverage for the future risks.
2. Decommissioning Rehabilitation **Part 6 of the Bill** The Bill does not make provision for or clear the following: (i) that there is a remediation obligation from the outset; (ii)make it express that the developer meets the cost of the Remediation; (iii) the risk if the developer fails to complete the remediation for whatever reason including an event of default, lack of sufficient funds or it becomes insolvent. **(a)Extent of the Remediation Obligations** This Part establishes the circumstances and machinery for the issuance of a Remediation Notice to the relevant party to remediate the land. The definition of "remediate" in Schedule 2 Dictionary states that, "in relation to the land, **includes** the following- (a)remove from the land equipment associated with the project; (b)decommission or remove any building, structure, infrastructure or works associated with the project that are on or below the land." The definition is inclusive. It may be intended by the draftsmen to be broad enough to include civil works by way of the clean-up of the land associated with the items of infrastructure (including for example, what is below the surface of the land such as concrete pads for the wind turbines and electrical cabling) referred to in paragraph(b) of the definition. However, that is not clear on its face and since civil works of this nature can be costly, there should not be any uncertainty as to whether this remediation obligation is included and placed upon the developer or that it resides with the State of Queensland. In either of the cases, the cost of that aspect of the Remedial Obligations should be met by the developer so there is no residual liability on the taxpayers/ voters of the State of Queensland.	

(b) Who meets the Cost of the Remediation The cost of decommissioning a wind farm is very significant. There are many examples in the United States where these costs have been or are to be incurred and those costs are referred to in USD. It is difficult to provide a precise sum due to the current economic circumstances and the fluctuations of the conversions of the USD to AUD. However, it seems on the public information available(see The Cost of Decommissioning Wind Turbines is Huge November 2019 www.INSTITUTEFORENERGYRESEARCH.ORG) , the costs of decommissioning a wind farm of the size proposed(226 wind turbines), on current conversion estimates (USD532,000/ AUD813,953 per wind turbine x 226 wind turbines) is in the vicinity of current figures of AUD183,953,378.00. Of course, this does not factor in taking into account other infrastructure associated with the project and the effects of inflation over the lifetime of the project. Suffice to say the cost is very significant even taking into account variances in the cost figures and that recycling techniques may improve to reduce costs. It is fair to say that it is rare to see costs reduce and since these are long term liabilities, it is more likely to increase in the future. **(c)Developer's Failure to Remediate** If the developer fails to complete the remediation for whatever reason including an event of default, lack of sufficient funds or it becomes insolvent and there is no or inadequate security requirements from the developer, then who carries the risk? Logically it would be funded by a future generation of taxpayers and voters of the State of Queensland.	
3.Environmental Damage and Clean Up Costs In the construction and operation phases of the project, there can be environmental damage caused through e.g. oil or chemical spillages. These are serious matters and it should be the obligation of the developer to clean up and pay for the damage and costs of clean-up and consequential losses. This also raises the same type of issue in 2(c) above.	

Recommendation

It is submitted that just like the State of Queensland has already included mandatory core principle provisions in clauses 9(a) and 28(a) of the Bill dealing with e.g. Cultural Heritage and Compensation, the points in 1. above equally should be enshrined or where there is a reference to the concepts of Security or Remediation they should be expanded to take into account the Significant Risks and Issues Identified referred to in 1. Above in the Bill.

2. WHAT ASSURANCES/ SAFEGUARDS ARE IN PLACE TO ENSURE THAT THE BILL DEALS WITH THE SIGNIFICANT RISKS AND ISSUES IDENTIFIED IN 1. ABOVE

If the Minister perseveres with the approach to use what appears to be the technique of including additional Conditions Precedent and other conditions in the base document of the Development Agreement that then systemically flows through to the Access Licences and Project Leases, how does a member of the public have an assurance that the Significant Risks and Issues Identified in 1. above. have been adequately dealt with in the Bill. Otherwise it is essentially circuitous as you can not check whether the Transaction Documents have dealt with the Significant Risks and Issues Identified in 1. above because you are not able to source that document from a public record.

This raises some fundamental issues with the proposed approach regarding the following:

- The implementation of the Delegation by Parliament and the possible usurping of the role of Parliament;
- Its transparency and accountability;
- The Oversight to ensure that the State's Interests are Protected.

(a)Delegation by Parliament
In respect of the proposed Delegation by Parliament, relevantly the following is extracted from the Explanatory Notes which states:

"Clauses in the Bill which refer to the satisfaction of conditions contained in a development agreement potentially involve a delegation of legislative power, by allowing a development agreement to specify additional pre-conditions to the exercise of the statutory power (Henry VII provisions).
Arguably, this arrangement **infringes** on the fundamental legislative principle that legislation has sufficient regard to the institution of the Queensland Parliament. However, it is considered that this possible breach is justified and appropriate, having regard to the policy objectives of the Bill.

Although **Parliament will not have an opportunity to review the proposed development agreements**, as the State will be a party to the development agreements, the State will have the ability to influence the content of those agreements, to ensure that the **State's interests are protected**."

Effectively, these statements are advocating that Parliament abrogate its responsibility and accountability for what should be part of their Parliamentary consideration, debate and approval function of legislation relating to the contents of the Transaction Documents and delegate that function to the Minister. This means that the Minister who can determine the contents of the key Transaction Documents under the guise of flexibility to cater for changing or new circumstances as they arise for each stage of the project.
That begs the obvious question namely, is if there are such significant changing or new circumstances, isn't that the very circumstances which require the sanction of Parliament?

In such a critical issue, has Crown Law provided a legal opinion generally on this subject of delegation or specifically on this Bill confirming the Statements in the Explanatory Notes?

(b) Transparency and Accountability v Commercially Sensitive Information
In respect of the issue of Transparency and Accountability, relevantly the following is extracted from the Explanatory Notes which states:

"Each development agreement will contain commercially sensitive information and the parties may suffer loss if the commercially sensitive information is disclosed.
For these reasons, the proposed development developments agreements will not be tabled in Parliament with the Bill."

This is another reason proffered as to why Parliament should not be involved in the oversight of the Transaction Documents. In other words, this seems to be a perfunctory way that the Explanatory Notes deflects any form of review by Parliament and no doubt any member of the public.
It would seem that the message being delivered in the Explanatory Notes is, "trust me, as you do not need to see these Transaction Documents that the interests of the State of Queensland and its taxpayers/ voters and the adversely affected residents and land owners are being looked after."

Whilst it is acknowledged that commercial parties need to protect their commercial information such as the financial aspects and their Intellectual Property details of which may be included in the Transaction Documents, a balance has to be struck that also recognises the rights of the public to ensure transparency and accountability to ensure the interests of the taxpayers/ voters of the State of Queensland and the adversely affected residents and land owners are protected.

Otherwise any other approach is absolutely inconsistent with the State of Queensland's messaging in written and verbal communications that it stands for ensuring transparency and accountability in the way it conducts government.

Usually, the following types of provisions are contained in a development agreement for infrastructure projects:
• Conditions Precedent;
• Financial covenants (pricing, escalation formulas, payment obligations etc.)
• Covenants and agreements in relation to the operation and management of the project;
• Events of default (financial, non-financial and Insolvency Events), Suspension, Termination, Force Majeure;
• General Machinery (assignments, security, confidentiality, notice).
Generally, large tracts of provisions in these types of documents are similar and well known to commercial parties and their lawyers and it is difficult to see how a sustainable argument could be mounted that these sorts of provisions are commercially sensitive. However, there is a case to be made for Financial Covenants and other conditions dealing with the protection of a parties' Intellectual Property**.** It is difficult to see how providing copies of the Transaction Documents to the public which deal with the Significant Risks and Issues Identified in 1. above less the provisions dealing with the Financial Covenants and other conditions dealing with the protection of a parties' Intellectual Property could offend the commercially sensitive mantra espoused in the Explanatory Notes.

Like all things, a balance can be struck for all parties' rights if sensible approaches are adopted by all**.**

To that end, in order to provide transparency and accountability that the Assurances/ Safeguards are in place to ensure that the Bill deals with the Significant Risks and Issues Identified in 1. and that it balances the protection of the developer's rights, that a solution is that a redacted copies of the Transaction Documents be made available to the public access.

(c) Oversight to ensure that the State's Interests are Protected
If the approach outlined in the Explanatory Notes on Delegation and Commercially Sensitive Information is persisted with, it is respectfully submitted that it is unacceptable to not have some mechanism to check that there is adherence in substance to the statement in the Explanatory Notes that the " State's interests are protected". This could be achieved through either:
(i)Parliament discharging its duties by its oversight of; or
(ii)an independent person such as the Queensland Auditor General (who reports to Parliament) through its audit function of,
the conditions imposed in the Transaction Documents cover the Significant Risks and Issues Identified and are reasonable, pragmatic and in the interests of the State of Queensland and its taxpayers and voters and the adversely affected residents and land owners.

It is suggested that the timing of that oversight review should be prior to the execution of the relevant Transaction Documents.