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17 January 2014

MQRA Project Team
Business and Stakeholder Solutions
Department of Natural Resources and Mines
Level 7, 61 Mary Street
BRISBANE QLD 4000

By email only: MQRA@dnrm.qld.gov.au

Dear Sir/Madam,

Modernising Queensland's Resources Acts: Discussion paper on legislative framework issues

Thank you for the opportunity to make a submission on the Modernising Queensland's Resources Acts: Discussion paper on legislative framework issues (the discussion paper).

Who we are

The Environmental Defenders Office Queensland (**EDO Qld**) and Environmental Defenders Office (Northern Queensland) (**EDO NQ**) are not-for-profit, non-government, community legal centres specialising in public interest environmental law. We provide legal representation, advice and information to individuals and communities, in both urban and rural areas, regarding environmental law matters of public interest. We also use our experience to deliver community legal education and inform law reform.

Our Submission

We appreciate that the Department (**DNRM**) is in the early stages of developing a framework for a new common resources act and are generally in support of simplicity and certainty in our laws. That said, at the outset, we would like to express our concern about the lack of representation of landholders, indigenous, community and environmental groups as part of the model framework sub-working group. The only groups consulted are listed in the discussion paper as miners, coal seam gas companies, industry groups, private law firms and universities. How can the government expect a well-rounded and balanced point of view on the administration of tenures in Queensland with such targeted consultation?

In our view, the State Government must acknowledge that **these are all Queensland's resources** and their extraction inevitably has impacts on communities and the environment. Whilst it is true that the MQRA project concerns only the tenure administration legislation (and not, for instance, the *Environmental Protection Act 1994* (Qld) (**EP Act**), DNRM is not doubt aware that the *Mineral Resources Act 1989* (Qld) (**MRA**) has long provided for community participation and objection rights to the granting of mining tenure as well.

Under the MRA, anyone is entitled to object to the grant of a mining lease[1] on a variety of bases including that it is not an appropriate use of land, or that the term of the lease is inappropriate or that the granting of the mining lease is **not in the public interest**.[2]

Similar opportunities for public objection also applied to applications for mining claims under the MRA until the State Government recently removed 'any person' rights in 2013 to just 'an owner of relevant land or the relevant local government'.[3] At the time, the Government acknowledged this removal of public rights was an infringement of fundamental legislative principles but claimed it was justified to 'reduce regulatory burden' to industry.[4]

Furthermore, it is worth noting that the very first purpose of the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) (**P&G Act**) which regulates, amongst other resources, coal seam gas tenures in Queensland is to:

> *"(a) manage the State's petroleum resources –*
>
> > *(i) In a way that has regard to the need for ecologically sustainable development; and*
> >
> > *(ii) For the benefit of all Queenslanders"*[5]

These important public interest considerations (ESD and the public benefit) have not been reflected anywhere in the discussion paper which is very concerning to us.

Those important points being made, we have answered the discussion paper's proposed questions in some detail below.

1. A new Act... a new name

The title of the new act should reflect the State's ownership of resources for the ultimate benefit ('on public trust') for all Queenslanders – current and in the future.

In addition, the name of the act should be easy for members of the community, particularly landholders, to locate and understand.

We therefore suggest the following new titles to reflect this:

- the 'Queensland Resources Act' (QRA);
- the 'Sustainable Extraction of Resources Act' (SERA); or
- the 'Responsible Use of Resources Act' (RURA).

2. Purpose and legislative objectives of the transitional Act

We agree with Option 1 in the short-term, and ask to be consulted during any future drafting of objectives.

We also make the point that any new objectives need to be developed with proper public consultation, not at the last minute expecting the parliamentary committee process to provide a proper forum for

[1] MRA section 260
[2] MRA section 269(4)
[3] MRA section 71. The *Mining and Other Legislation Amendment Act 2013* (Qld) section 94 brought in the amendment.
[4] See explanatory notes to the Mining and Other Legislation Amendment Bill 2013 (Qld) section 94
[5] P&G Act section 3(1)

debate on the details of the policy behind the Bill. We are encouraged by DNRM's MQRA team releasing a discussion paper on the new framework in this instance.

In our view, the creation of any new purposes should incorporate an important objective for the state to manage all resources for the benefit of the wider community. The act should also emphasise community participation in the overall administration of act, as is the case currently with the *Nature Conservation Act 1992* (Qld) and the *Environmental Protection Act 1994* (Qld).[6]

Lastly, we make the point that it is important to get the objects of the act correct in the first instance. Conducting broad public consultation when first drafting these purposes will avoid the potential for significant and highly controversial changes to the purposes being made in the future; for example, the State Government recently made significant and controversial changes to the object of the *Nature Conservation Act 1992* (Qld) to ensure greater commercial and recreational use of our protected areas – the only real 'no-go' areas in terms of development in the state. EDO Qld and many other groups and individuals strongly opposed those changes at the time.[7]

3. Underlying approach for drafting the new Acts

We recognise the need for modern legislation to be flexible in achieving public policy outcomes for a modern society using regulations and other forms of subordinate legislation.

It seems to us quite sensible to move detailed technical matters from the act to the subordinate regulations. However, it is extremely important not to create merely a 'skeleton act' with matters of important substance left to regulations which can be easily changed and provide no real certainty to anyone except the government of the day. A move away from 'prescriptive drafting' risks this result.

Professor Mark Aronson, Emeritus Professor of Law at the University of New South Wales and an expert in administrative law, warns against producing a skeleton act without any substance. In a recent publication, Aronson wrote:

> *"Skeleton acts raise a number of concerns, ranging from the transfer of substantively important legislative power from the parliament to the executive, and the diminution in the transparency of a legislative process increasingly **conducted without parliamentary debate**."*[8]

In our view, this is indicative of a worrying general trend of legislation these days. The most recent example being the Queensland Government's Regional Interests Planning Bill 2013, currently before a Parliamentary Committee. This Bill left significant decision making criteria to regulations yet to be seen and which totally subverted the parliamentary scrutiny process and was ultimately undemocratic. EDO Qld and EDO NQ made a submission on this Bill in this regard.[9]

The public can have absolutely no certainty in such an approach of placing matters of substance particularly rights to appeal or challenge or submit against decisions, in unseen and easily changed regulations.

In our view, the following are examples of some of the things which **must be contained** in the provisions of the act (not the regulations):

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[6] See section 6 of both Acts.

[7] See for instance EDO Qld submission on Nature Conservation and Other Legislation Amendment Bill (No.2) 2013: available at: http://www.edo.org.au/edoqld/wp-content/uploads/2013/12/2013-09-13-FINAL-EDO-submission-on-NCOLA-No.2.pdf

[8] Mark Aronson, 'Subordinate legislation: lively scrutiny or politics in seclusion' *Australasian Parliamentary Review*, Spring 2011, Vol. 26(2), pp. 4–19 at p 5

[9] https://www.parliament.qld.gov.au/work-of-committees/committees/SDIIC/inquiries/current-inquiries/14-RegPlanInterests

a) The criteria for Ministerial decision-making on the grant of a tenure;
b) The right of anyone to make submissions and on what basis;
c) The right for anyone to bring a Court appeal;
d) The jurisdiction of the Court for such an appeal;
e) The requirement of a public register to freely access information on tenures.
f) The exact entitlements and obligations of a tenure holder;
g) The time periods for tenure/authority applications, submissions and appeals;
h) Compliance and offence provisions.

There are no doubt other important matters of substance which must not be left to regulations.

Important legislation does not always need to be complex, lengthy, rigid and time-consuming to apply. We agree that in many ways, acts like the MRA and the P&G Act are unnecessarily complex. If re-drafted correctly and with proper and thorough public consultation well ahead of the final parliamentary committee process, a fair and transparent piece of legislation can be created. See for example, the recent 'Greentape' Amendments to the EP Act, which, whilst there were faults, now include clear stages of application, notification and decision. The *Sustainable Planning Act 2009* (Qld) has a similarly clear process of who has what rights and obligations and in what instances.

We agree of course that not all matters need to be in the act, the following could be placed in regulations:

a) Approved forms and minor processes for lodging applications, making an appeal or writing a submission/objection;
b) Any fees associated with lodging applications, making an appeal or writing a submission;
c) Any royalties or rents payable;
d) Maps or prescribed lists of relevant prohibited or restricted areas;
e) Any other matters relating to general (and insignificant) administration of the act.

We look forward to being involved in further discussions with DNRM about exactly what matters should be left to regulations in the new act.

4. Use of a common term for resource tenures

We have some reservations with the term 'licence' and believe wider consultation should take place with landholders, community groups and their representatives on this issue.

In property law, under the common law, a lease is a much stronger right than a 'mere' licence which is generally revocable at any time and provides no right to exclusion possession. Whilst we appreciate that mining tenures are created under statute (and not common law) and therefore not subject to this common law distinction, the ultimate goal of wording tenures must be not to create any additional confusion as to those words used in common vernacular.

In our view, whatever language is used must ultimately reflect the 'strength and risks and entitlements' of the permit/licence/lease/authority which has been issued. The ultimate focus must be on the community and landholders in this regard, not on what term industry feels most comfortable with using.

For example: would a landholder be confused if they were approached regarding a coal 'licence' application? Could they consider it insignificant or speculative until they found out (subsequent to approval) that it was a 'licence' to extract coal by the megatonne and build significant associated infrastructure for a term of 35 years?

To this end, it is important that laypersons are able to clearly and effectively understand the provisions and terminology in the tenure framework. In our view, the focus must be on landholders' and the broader communities' ability to understand the key processes and permits (or licences) granted under the law. The focus should not be on what the industry and government find easiest to use. Industry and government have access to significant legal and advisory services available to help them understand the processes under the law.

We also think that inevitably, questions will be asked about the extent of the entitlements of a holder and the type of minerals/energy they are allowed to extract. Using a naming distinction between each different activity type (prospecting, exploration, development, extraction, production) as well as the type of mineral (uranium, coal, coal seam gas etc) could help solve this issue.

This can be achieved by using the right combination of words, for example:

- Coal Exploration Licence
- Coal Production Lease
- Coal Seam Gas Exploration Licence
- Uranium Exploration Licence
- Uranium Extraction and Transportation Licence

We note in particular that a great deal of confusion can occur by calling coal seam gas 'petroleum'. Similarly would it be right to use a standard term of minerals for 'uranium' or 'oil shale'? The terminology used must ultimately reflect the activity that is being applied for in a common sense and easy to understand way.

5. Structure of the transitional common provisions Act

From an administrative perspective, this transitional framework seems sensible. However, we think there is likely to be a great deal of confusion across this 4 year period for end-user companies and individuals who may not have access to, or comprehension of, the interpretation of the framework during the transition. This could cause problems with compliance for industry and create scepticism amongst the public as the resources sector continues to develop over the coming decade.

Why not just consult widely from a policy perspective over the next four years and bring in the new look act in 2016?

6. Regulations framework

We provide no real comment on this part, except to reinforce our concerns of DNRM creating a mere skeleton act (see section 3. above) by placing large matters of substance in the regulation and not the act itself. We so no need to go into those concerns again here.

Our final thoughts

Thank you again for the opportunity to provide a comment on the proposed legislative framework for a common resources act.

We express our regret that you have not consulted more widely on matters relating to terminology such as with communities, rural groups and environmental groups. DNRM should bear in mind that lawyers at top firms and mining companies are not the only organisations that need to locate and understand the effect of the proposed new framework.

Our main concerns in the paper are that the act must contain the most crucial criteria for decision making and rights of appeal and access to information for the public. Decision making under the act

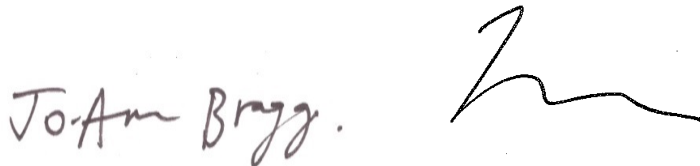
(not the regulations) must be transparent and in accordance with fundamental legislative principles at all times.

The objects, operation (and title) of the act must reflect the fact that **these are all Queensland's resources** and extraction and exploration can only occur insofar as it is in keeping with the principles of ecologically sustainable development (ESD) and consistent with the prevailing public interest in Queensland. The only way that this can be achieved is if those criteria (ESD and public interest) are built into the purposes of the act as well as the criteria for decision-making in respect of tenures.

We trust that your next round of consultations will take into account the widely accepted view that these non-renewable resources belong to all Queenslanders on trust **for both present and future generations**. The public interest must therefore be at the forefront of any such legislative framework.

If you have any further queries relating to this submission, please contact Evan Hamman at EDO Qld on (07) 3211 4466

Yours faithfully,



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