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Resources Sector Regulation
Productivity Commission
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By upload: www.pc.gov.au/inquiries/current/resources/make-submission#lodge

Dear Commission

Resources Sector Regulation

Thank you for the opportunity to provide a submission on the inquiry into Resources Sector Regulation. The Queensland Law Society (**QLS**) appreciates the opportunity to comment on this important matter.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Mining and Resources Law Committee, whose volunteer members have substantial expertise in this area. This includes members who represent key stakeholders in the resources sector including landholders, resources companies and native title holders.

This inquiry into Resources Sector Regulation addresses matters of economic, social and environmental policy, as well as matters of law. QLS is committed to advocating for good law that complies with fundamental legislative principles. We do not seek to comment on political matters that influence decisions in relation to the resources sector.

This submission therefore starts with a discussion of the key areas of legal principle that QLS believes should govern the regulation of the resources sector.

Based on those principles, QLS makes specific comment on several aspects of regulation within the Queensland context, including in relation to the following:

- timeliness of approvals and decision-making
- appropriate vesting of decision-making power
- duplication of processes
- native title considerations
- land access considerations.

GENERAL PRINCIPLES OF REGULATION

In terms of resources sector project development assessment and approvals, good law requires that the process for making decisions is appropriately defined and transparent, that decision making processes allow for natural justice in that all affected persons are given genuine opportunities to be heard, that decision making vests in the appropriate entity and that decisions are subject to appropriate mechanisms of review. However, good law also requires that decisions are made in such a way that affected persons are afforded certainty about the decision within a reasonable timeframe. Naturally, decisions must also be made within the framework of substantive law relating to various aspects of resources projects, such laws relating to safety, environmental protection, Native Title and landholder rights.

In order for the laws regulating the resources sector to both optimise investment for the good of the community and reach the standard of good law, balance must be struck between reducing the complexity of the decision making process (which impacts its timeliness) and the ability of affected parties to raise objections and seek review of decisions. Arguably, some resources sector projects in Queensland illustrate that the appropriate balance has not been achieved given that decisions on projects have taken an inordinately long time, leaving proponents, objectors and the community in an uncertain position.

While QLS would not support any measures that reduce transparency, accountability and access to justice, we recognise that there may be scope to rationalise some of the processes involved in resources sector development assessment and approvals. This does not mean that regulation should be reduced merely for the purpose of shortening the statute book nor that the decision making process should be any less rigorous. Rather, that each element of the development assessment and approval process should meaningfully add to the ability of decision makers to make a decision according to law to refuse or grant an approval and, if approving, to impose appropriate conditions.

It bears repeating that the exercise of these administrative decision making functions must remain subject to effective judicial oversight, as is a fundamental tenet of good law.

A further crucial matter in resources sector regulation is that any changes to law, whether arising through the recommendations of this review or for any other reason, must be made with the benefit of genuine consultation. QLS has seen a number of legislative changes impacting the resources sector made in compressed timeframes, making it difficult for stakeholders to properly consider the changes and provide useful feedback. In the complex legal landscape affecting the resources sector, adequate consultation time is essential to allow stakeholders to identify unintended consequences of proposed changes, which can be many and varied, and may include significant impacts on the legitimate expectations of stakeholders.

TIMELINESS OF APPROVAL AND DECISION MAKING PROCESS

The Issues Paper states that the focus of the review is on regulatory issues that impact on business investment decisions in the resources sector.

The paper also states that a specific issue that the inquiry will consider is efficiency of the approvals process and how "existing processes can be streamlined, simplified and resourced to expedite timelines and reduce costs without undermining regulatory efficiency".

While QLS does not take a view on the political decisions that prioritise the resources sector within Australia's economy or otherwise, QLS supports the opportunity to review project approval timeframes. Whether projects are ultimately approved or not, unreasonably long timeframes can be detrimental to all stakeholders.

A hallmark of a best practice law and regulation, in any sector or area, is that decisions are made in a timely manner. Applicants for resource project approvals should be able to have confidence that decisions on whether or not approval is granted will be made as promptly as possible. Equally, those persons or entities that may be affected by the grant or refusal of a resource project approval (such as landowners and communities in the project area or employees whose jobs may be impacted) should also be entitled to expect a decision within a reasonable timeframe.

Making decisions in a timely manner delivers all stakeholders a level of certainty. Prolonged approval processes with long or open-ended periods of uncertainty act as a disincentive to investment and leave relevant stakeholder unable to make appropriate future plans until the project approval decision is resolved.

The requirement for timely approval processes and decision making is not to say that this consideration should take primacy over other key attributes of the approval process, including a proper assessment of the merits of the project (including environmental assessment) and affording natural justice to relevant stakeholders. These are also important aspects of the project approval process and there is no suggestion that these should be sacrificed in the pursuit of hasty decision making. However, a reasonable balance needs to be struck.

There is an acceptance and community expectation that due to the size, novelty or complexity of some projects and their potential impacts (negative and positive) that the approval process will be something that often takes some years to complete, especially to allow for a proper assessment of the environmental impacts (normally requiring the project applicant to undertake detailed studies to ensure these are properly understood and mitigated) and thorough ventilation of any objections. However, there is a significant difference between a timeframe of say, two to four years for such a process, and a timeframe in excess of 10 years.

There has been a trend over the past decade or so for approval timeframes to lengthen beyond what is necessary to deliver a thorough assessment of the merits of the project and afford natural justice to all relevant parties with an interest in the project approval decision.

It is beyond the intended scope of this submission to examine in detail every approval process in every Australian jurisdiction, and it is acknowledged that different resource projects in different States face different approval processes with their own timing. It is also recognised that different resource applications have different approval timeframes – for example, the approval timeframes for an exploration approval will normally, and rightly, be shorter than for production approvals, as the likely benefits and impacts at the exploration stage will normally be significantly less than at the production stage i.e. the stakes are not as high.

Having said that, from a Queensland perspective, an example of why this issue is being raised as something that the commission should focus on in its review can be seen in the mining

sector, where there are now examples of mining projects that have taken in excess of 10 years to obtain final decisions on whether the projects are approved or not. The Carmichael Mine and the New Acland Mine are well documented examples of this. Whilst some may argue those are considered to be controversial projects, that does not detract from the point that the proponents of those projects and other affected stakeholders (including those objecting to the projects) have had to wait for a very long time to achieve certainty over whether those projects are approved or not. Arguably, many of the issues related to those projects that are central to any controversy have been known from early in the approval process and it is far from clear whether the protracted timeframes involved have contributed any additional benefit to the final decision that has, or is still, to be made.

That is not to say that every mining approval in Queensland will face a 10 year approval period. However, the fact that any such approval application may be subject to such a timeframe, and the lack of consistency and predictability as to whether any particular approval will be subjected to such a timeframe, introduces uncertainty to the process.

The source of increased project approval timeframes is in part linked to the issue of multiple approvals that will often be required and duplication in that process, which is discussed elsewhere in this submission. However, that is not the sole factor. Other contributors to extended timelines in project approval decisions are:

- additional regulation and increased complexity in the regulatory process governing the making of applications, which places not only an additional burden on the applicant for the approval but also the relevant government departments charged with assessing applications and also on third party stakeholders that may be affected by the project in understanding the regulatory process;
- related to the above, the availability of qualified and experienced staff within government departments, the mining sector and other stakeholder sectors to navigate the regulatory process;
- the sheer scope of newer resources projects, which has been made possible by increased technology;
- the likelihood of one or more legal challenges to a resources project, often involving difficult and evolving legal issues as to the bounds of the public interest and the extent to which downstream and cumulative effects of projects are relevant to approval decisions; and
- increased or open-ended timeframes in legislation for decision making and, likely due to the increased scrutiny on such decisions, a trend for decision makers to take longer to make such decisions.

It is submitted that the key attributes of a best practice regulatory approval process in regards to timing of the approval process are:

- the timeframe for the approval process is the minimum timeframe required to allow a proper assessment of the merits of the project (positive and negative, and including environmental impacts) according to law, and to afford natural justice to any person or community that may be impacted by the project and to the project proponent itself;

- wherever possible, regulation provides prescribed timeframes for decisions to be made at each stage of the application process, rather than open-ended and uncertain timeframes;
- the relevant decision makers (e.g. government agencies and departments) are appropriately resourced to assess applications and make properly informed decisions within the prescribed timeframes (or otherwise within a reasonable timeframe if there is no prescribed timeframe);
- there is finality in decision making, in that approval decisions avoid or minimise conditions that in effect build in a further round of decision making (e.g. a project approval is awarded at the end of a statutory approval process that includes a condition that the applicant must do something further that must be approved by the decision maker separately before a project can start); and
- review, appeal or objection processes for the approval process are transparent, accessible and efficient.

DECISION MAKING POWER – WHO SHOULD MAKE FINAL APPROVAL DECISIONS

The Issues Paper also raises the issue of regulator accountability and independence, and asks the question "whether (and why) resources approvals are best determined by an independent body or at Ministerial level".

In Queensland, the Minister makes the final decision as to the granting of mining leases and petroleum leases (the key production approvals in the State for the resources industry). There is provision for the Land Court to hear objections to mining leases from third parties before the Minister makes any final decision, but the Court only makes recommendations to the Minister, which must be considered by the Minister but are not binding on them. There is the ability for parties to seek judicial review of a Minister's decision, an essential check that applies to most administrative decisions a government may make, on grounds such as an error of law or failure to take into account a relevant consideration (i.e. a focus on whether the decision was made after following a correct decision making process, rather than challenging the merits of the decision itself).

By comparison in NSW, the Independent Planning Commission ("IPC") is an independent statutory body established to make decisions regarding mining approvals. We note that the IPC is currently under review.

The primary consideration, regardless of which entity within the executive branch of government holds decision making power, is that the process for decision making is clearly defined by legislation, exercised in a timely and transparent manner, and subject to appropriate checks and balances, including judicial review.

DUPLICATION ACROSS ASSESSMENT PROCESSES

The approvals process for Queensland resources projects can be complex, and is governed by a number of independent legislative regimes and processes.

In certain circumstances, some of the processes overlap, creating a situation where the same or similar considerations must be addressed multiple times. This creates undue burden, not just on project proponents, but on objectors and submitters, as well as the decision-makers (including various courts).

QLS acknowledges and endorses the need for robust regulatory oversight of the resources sector which inspires public and industry confidence. This is achieved where regulation is appropriately aligned to its objectives and where decisions are made in an efficient, transparent and timely manner. Unnecessary duplication detracts from this confidence and QLS is of the view that processes should be rationalised where it is possible to do so without diminishing the rigour of the assessment process as a whole. Several of the processes that should be examined are outlined below.

Environmental Impact Statements, Resource Authorities and Environmental Authorities

Resource projects in Queensland require a number of approvals, including the relevant resource authority (such as a mining lease under the *Mineral Resources Act 1989* (Qld)) and an environmental authority.

The EIS process

Queensland resource projects are often required to prepare an environmental impact statement (**EIS**) before an environmental authority can be formulated by the regulator. Pursuant to the *Environmental Protection Act 1994* (Qld), the purpose of the EIS process is to assess (among other things) the potential adverse and beneficial environmental, economic and social impacts of the project.

As part of the EIS process, any person may make a submission about a submitted EIS, and the proponent is required to respond to any submissions made. If the EIS is allowed to proceed following this process, an EIS assessment report is prepared, taking into account all relevant criteria, public submissions and the submitted EIS.

Resource Authorities and Environmental Authorities

Following submission of the EIS, a project proponent must secure an environmental authority (**EA**). Further public submissions may be made as part of this process. While submissions may be rejected if they repeat matters already considered and addressed as part of the EIS process, this discretion is often not exercised and the Land Court (which is tasked with reviewing the application against objections and making a recommendation to the relevant Minister as to whether to approve or reject the application) therefore considers further submissions on matters already considered.

In addition, for certain projects, both the resource authority approval (under eg the *Mineral Resources Act 1989)* and the EA approval (under the *Environmental Protection Act 1994)* processes each require consideration of environmental impacts and the public interest. Depending on the substance and nature of objections made, this duplication often requires the Land Court to balance criteria under separate Acts with separate objectives, resulting in a duplication of submissions and expert evidence, and an extension of hearing times.

Water

Under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), approval for coal seam gas (but not broader gas activities) and large coal mining projects must be

sought from the Commonwealth Minister to approve actions that may have a significant impact on a water resource. This is referred to as the "water trigger". As a result of the introduction of the water trigger, the Commonwealth Minister can set conditions for surface water, hydraulic fracture stimulation and groundwater as part of the project approval process. These issues are also assessed and conditioned at the Queensland state level.

In addition to the assessment and approval process, project proponents in Queensland also have general overarching obligations under Chapter 3 of the *Water Act 2000* (Qld) to continuously monitor and mitigate their underground water impacts. In many situations, conditioning of permit approvals at State and Federal level can overlap, and duplicate ongoing monitoring and mitigation obligations.

Regional Interest Development Approvals

In addition to the permit approval processes mentioned above, new proposed Queensland resources projects located within an 'area of regional interest' may need to apply for a regional interest development approval (a **RIDA**) in accordance with the *Regional Planning Interests Act 2014* (Qld).

The RIDA application process is distinct and independent from the approval processes noted earlier (including the EIS, resource authority, EA and water approvals processes). As a result, there is the potential for further duplication. For example, applications for certain resource authorities in Queensland require consideration of appropriate land use, both the RIDA and resource authority application processes require proponents and decision-makers to consider current and prospective uses of the land.

Similarly, some RIDA applications are required to consider and address environmental and water impacts, duplicating the EA and water approval processes mentioned earlier.

ISSUES AFFECTING NATIVE TITLE HOLDERS

There are several aspects of the resource approvals process in Queensland which adversely affect native title holders and which could be improved through greater efficiency in notifications, monitoring and compliance and coordination between government departments.

Notification

Native title holders often do not receive notifications of a tenement grant in a timely manner. This is particularly the case where exploration permits are granted through the expedited procedure under section 29 of the *Native Title Act 1993* (Cth) and subject to the Native Title Protection Conditions (NTPCs), however it also arises where a native title agreement is in place. Where the native title group does receive notification of the grant, it may not always receive additional information such as environmental authorities or resource authorities. The native title group does not always receive notification of applications to assign or transfer tenements.

An increased burden is placed on the native title representative body, often the first point of contact for notification of a tenement grant, and the native title group, where there is not a timely notification of grants or transfers and provision of relevant information, including authorities. Delay in notification often results in delay in consultation and payment of the first annual administration fee.

Tenement variations etc

Mining lease renewal processes, where an extension of the lease area is proposed, may not involve the native title group, even though an extension may impact upon cultural heritage or native title rights and interests. In some cases, a grant may even be retrospectively approved to extend a mining lease area where a miner has mined outside of that area. Again, this may have adverse effects on cultural heritage and native title rights and interests.

In some circumstances, tenements are transferred where there has been a breach of the tenement holder's obligations and administration payments, compensation payments and cultural heritage payments have not been made to native title holders. The native title holders must then pursue these payments from the previous tenement holder, which is extremely burdensome.

In other cases, tenements are retrospectively cancelled back to the application date where payments between the application and the cancellation remain outstanding. Again, the burden falls on the native title holders to pursue the outstanding payments in circumstances where tenements should not be transferred or cancelled before outstanding payments are made to the native title holders.

Compliance Monitoring

The lack of compliance monitoring of tenements is an issue that adversely impacts native title holders, particularly in relation to environmental impacts where tenements are being pegged and granted along watercourses and mining is occurring outside of tenement areas.

Annual administration payments are often not paid to native title holders in a timely manner. Native title holders are required to pursue the tenement holder where such payments have not been made. The Department of Natural Resources, Mines and Energy (DNRME) also pursues the tenement holder if they are non-compliant, as a tenement holder is required to provide DNRME with an expenditure statement which includes details of native title payments. Duplication could be avoided if DNRME pursued outstanding payments and remitted those payments to the native title holders.

Other areas where the lack of compliance monitoring creates inefficiencies includes exploration activities occurring without activity notices being provided, meetings or field inspections and without cultural heritage assessments or awareness training and without cultural heritage monitoring. This adversely affects native title holders, the environment and cultural sites that the NTPCs are designed to protect. Native title holders maintain a close connection to their country and where compliance monitoring is not being undertaken effectively native title holders are unduly burdened by having to undertake their own monitoring and report back to DNRME on non-compliance.

Coordination and Transparency

Information on the reasons for a particular decision as to whether to approve or not approve a mining lease is often not available to the native title holders. In some cases, this raises issues of the impact of certain legislation on the mining lease approval process. Open and transparent processes provide greater clarity to the native title group and support efficient engagement in the resource approvals process.

Where native title holders object to a resource approval on different grounds, for example on grounds including impact on cultural heritage, environment, sediment runoff to the reef and national heritage listing, different legislative and administrative processes overlap, each with its own timeframe and requirements. Often there is a lack of coordination between government departments and duplication in preparing evidence, which increases the burden on all parties involved in the objection process.

It is submitted that in order to improve efficiencies, DNRME should notify the native title group and the relevant native title representative body of the grant of all tenements to provide sufficient time to consult with the native title group and ensure timely invoicing of the tenement holder. DNRME should also provide notification of all applications to transfer, renew, surrender or cancel a tenement and copies of relevant authorities, including environmental authorities and surety calculations. Compliance monitoring should be improved, particularly in relation to the environmental impact of tenements along watercourses and mining outside of the tenement area. Before tenements are renewed, transferred or surrendered, compliance with the NTPCs should be confirmed.

Inclusion of native title holders in compliance and rehabilitation monitoring may increase efficiencies, including as a result of lower mobilisations costs by using knowledgeable local labour, avoidance of cultural heritage disturbance by early identification, familiarity with flora, fauna, declared weed species and bushfire management, and assistance with identification and collection of seed sourced from endemic species for rehabilitation purposes.

Duplication could be avoided by improved coordination between DNRME and the native title representative body/native title group in relation to the collection of annual administration payments. In order to reduce the administrative burden of invoicing annually, payments should be invoiced for a number of years when the tenement is granted.

Improved coordination and information sharing between government departments during the objection process would reduce the burden on all parties involved in this process.

LAND ACCESS PROCESSES

The Queensland approach to Land Access involves a staged process of compulsory negotiations as to how the resource company and the landholder (and any occupiers) will co-exist. Whilst there is a template provided by government as a starting point for negotiations, the parties are at liberty to negotiate at large.

If the initial phases of that negotiation process are unsuccessful, the parties can proceed to an imposed outcome via either arbitration or court determination.[1] Upon such referral (not determination), the resource company can enter the land. The law has traditionally been reluctant to have courts impose contractual relations on parties - requiring a landholder to enter into a contract of potentially unlimited scope is unusual at law.

A landholder is recompensed for reasonable and necessary professional (legal, accounting, valuation and agronomy) assistance in the negotiation phase only.

[1] The Land Court has very recently introduced a pre-court case appraisal process with outcomes that are not binding unless the parties agree, however the uptake of that option is yet to be seen.

The Agreements that follow the process bind subsequent title holders and are noted on the title. They necessarily affect the value of the land and bind successor parties to whatever was negotiated.

Negotiations can be robust and expensive in some cases. Notwithstanding those circumstances, very few matters have proceeded to an imposed outcome to date, however the framework has only recently allowed for arbitration, so it remains to be seen how often that approach is adopted.

The Society considers it wholly appropriate, and very necessary, that landholders be given significant protection and security where rights affecting access, compensation and the conduct of companies in respect of resource activities on their land are concerned.

It also considers it essential that companies must seek to minimise any impacts from their activities on the landholders family land livelihood and lifestyle and ensure landholders are adequately compensated for obtaining reasonable professional assistance in dealing with the co-existence required of them. These matters are currently enshrined in the legislative framework, however there are differing opinions amongst our members as to how effective they are.

The Society also supports transparency and disclosure of all appropriate information to landholders and accessibility to comprehensive educational materials to permit a landholder to properly understand relevant implications in respect of tenure grants that affect their land and the negotiation process required of them.

Much of the legislative framework is as yet untested, so there remains some conjecture as to how the courts will interpret aspects of it. That can lead to pressure on both parties, either or both of whom may be deterred by possible outcomes of litigation or the possibility of adverse cost orders.

QLS looks forward to following the progress of this inquiry and making further contributions if necessary. If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team

Yours faithfully

Bill Potts
President