Parliamentary Committees



Land Access Ombudsman Bill 2017

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Infrastructure, Planning and Natural Resources Committee
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Infrastructure, Planning and Natural Resources Committee

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Abbreviations

ADR	alternative dispute resolution
APPEA	Australian Petroleum Production and Exploration Association
CCA	conduct and compensation agreement
committee	Infrastructure, Planning and Natural Resources Committee
CSG	coal seam gas
Department/ DNRM	Department of Natural Resources and Mines
EHP	Department of Environment and Heritage Protection
environmental authority or EA	Generally, an environmental authority issued under section 195 of the *Environmental Protection Act*
Environmental Protection Act	*Environmental Protection Act 1994* (Qld).
FLP	fundamental legislative principle
MGA	make good agreement
OQPC	Office of the Queensland Parliamentary Counsel
PAG Act	*Petroleum and Gas (Production and Safety) Act 2004*
PRA	Property Rights Australia
QLS	Queensland Law Society
QRC	Queensland Resources Council

Chair's foreword

This report presents a summary of the Infrastructure, Planning and Natural Resources Committee's examination of the Land Access Ombudsman Bill 2017.

The committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

The committee received eight submissions from stakeholders and held a public briefing and public hearing on the Bill. A number of key issues were identified in relation to:

- investigation procedure
- power to require information and confidentiality
- non-binding nature of investigation outcomes
- referral of offences or breaches under another act
- legal representation and costs
- definition and application of making 'reasonable attempt' to resolve dispute
- acceptance or refusal of referral
- exclusion of disputes referrals
- jurisdictional overlap
- timeframes

This report details the committee's examination of these key issues. It was clear that all parties support the establishment of the Land Access Ombudsman but different opinions existed in regard to the process which should be applied. The intent of the Bill is to establish an informal and quick mechanism and not a quasi-legal mechanism for dispute resolution in regard to CCAs and MGAs.

On behalf of the committee, I thank those organisations who lodged written submissions on the Bill. I also thank the committee's secretariat, and the Department of Natural Resources and Mines and the Department of Environment and Heritage Protection.

I commend this Report to the House.

Jim Pearce MP

Chair

Recommendations

Recommendation 1 **2**

The committee recommends the Land Access Ombudsman Bill 2017 be passed.

1 Introduction

1.1 Role of the committee

The Infrastructure, Planning and Natural Resources Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 27 March 2015 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's areas of portfolio responsibility are:

- Transport, Infrastructure and Planning
- State Development, Natural Resources and Mines and
- Local Government and Aboriginal and Torres Strait Islander Partnerships.

Section 93(1) of the *Parliament of Queensland Act 2001* provided that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles and
- for subordinate legislation – its lawfulness.

The Land Access Ombudsman Bill 2017 (Bill) was introduced into the House and referred to the committee on 23 May 2017. In accordance with the Standing Orders, the Committee of the Legislative Assembly required the committee to report to the Legislative Assembly by 7 August 2017.

1.2 Inquiry process

On 25 May 2017, the committee wrote to the Department of Natural Resources and Mines (the department) seeking advice on the Bill and invited stakeholders and subscribers to lodge written submissions.

The committee received eight submissions (see Appendix A). On 30 June 2017, the committee received written advice from the department in response to matters raised in submissions.

The committee held a public briefing with the department on Wednesday 14 June 2017 and a public hearing on Wednesday 5 July 2017 (see Appendix B for list of witnesses).

1.3 Policy objectives of the Land Access Ombudsman Bill 2017

The objectives of the Bill are to:

- establish an independent Land Access Ombudsman with the jurisdiction to provide an independent service that applies to disputes relating to an alleged breach of a:
  - conduct and compensation agreement between an owner or occupier of private land and a resource authority holder and
  - make good agreement between the owner of an impacted bore and a resource tenure holder
- save transitional provisions of the Mineral and Energy Resources (Common Provisions) Transitional Regulation 2016 that would otherwise expire in September 2017 and, as a consequence, amend associated provisions.

[1] *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

1.4 Consultation on the Bill

As set out in the explanatory notes, in relation to the Land Access Ombudsman:

> *The Department of Natural Resources and Mines has undertaken targeted consultation with key stakeholder groups regarding the establishment of the Office of the Land Access Ombudsman.*
>
> *Stakeholders included representatives from the Queensland Farmers' Federation, AgForce, the Queensland Resources Council, the Australian Petroleum Production and Exploration Association, the Association of Mining and Exploration Companies, the Environmental Defender's Office, the Australian and New Zealand Ombudsman Association, Lock the Gate Alliance, the Queensland Law Society, the Land Court of Queensland, Gasfields Commission Queensland and the Local Government Association of Queensland.*[2]

In relation to the saved transitional provisions:

> *Consultation was undertaken with stakeholders during the development of the provisions in the Mineral and Energy Resources (Common Provisions) Transitional Regulation 2016. There have not been any significant policy changes since consultation with stakeholders on the development of the transitional regulation.*
>
> *Provisions relating to the overlapping tenure framework, including the overlapping safety framework, were consulted on with targeted stakeholders in May 2017. Stakeholders consulted were coal and coal seam gas companies via an Industry Reference Group organised by the Queensland Resources Council and the Australian Petroleum Production and Exploration Association. Stakeholders were generally supportive of the Bill and feedback was incorporated where necessary.*
>
> *Consultation on the provisions relating to the overlapping tenure framework was also undertaken with the Queensland Productivity Commission in relation to the regulatory impact assessment system. The Queensland Productivity Commission advised no further regulatory assessment was required for the amendments. The remaining policy proposals relating to the land access and the overlapping safety framework are agency-assessed exclusions from the regulatory impact analysis system.*[3]

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend the Bill be passed.

After examination of the Bill, including the policy objectives which it will achieve and consideration of the information provided by the department and submitters, the committee recommends that the Bill be passed.

Recommendation 1

The committee recommends the Land Access Ombudsman Bill 2017 be passed.

[2] Explanatory notes, p 7.
[3] Explanatory notes, p 7.

2 Examination of the Land Access Ombudsman Bill 2017

This section discusses issues raised during the committee's examination of the Bill in regard to parts 1-7 which relate to the establishment of the Land Access Ombudsman. The committee was satisfied there were no unresolved issues with the saved transitional arrangements at Part 8 of the Bill.

2.1 Investigation procedure

Clause 41(4) of the Bill provides for the investigative powers and procedures of the Land Access Ombudsman. The explanatory notes state:

> *When carrying out an investigation, the land access ombudsman:*
>
> - *is not bound by the rules of evidence, but must comply with natural justice;*
> - *may hold meetings and conduct interviews for the investigation;*
> - *may make inquiries the ombudsman considers to be appropriate including consulting with an entity with relevant technical expertise about the land access dispute referral and requesting information from government entities relevant to a land access dispute referral;*
> - *may advise each party about the merits of their position in relation to the land access dispute referral;*
> - *may provide a party with information about entities that provide advice, treatment or care, if the ombudsman considers a party would benefit from health advice, treatment or care; and*
> - *must act in a way that is fair, reasonable, just and timely and maintains confidentiality.*[4]

Stakeholder comments

The committee received evidence from stakeholders in regard to concerns that the Ombudsman would not be bound by the rules of evidence. The Queensland Law Society (QLS) argued that the Ombudsman should comply with the rules and statutory framework established by the *Evidence Act 1977*, as this provides certainty for parties during the Ombudsman's investigations. Given that a notice may be tendered in judicial proceedings, QLS argued that it would be appropriate for evidence gathered by the Ombudsman to be obtained in accordance with the rules of evidence.[5] QLS advised that it:

> *… is quite concerned about the fact that the ombudsman will not be bound by the rules of evidence in conducting its investigations. While some protection is afforded to confidential information and to representations made during an ADR process, there is ultimately nothing to restrict the ombudsman from relying upon what might be considered to be questionable evidence to form an opinion which will ultimately then be admissible as evidence of those facts in the Land Court, in the court of law, to determine the dispute formally.*[6]

Similarly, the Australian Petroleum Production & Exploration Association (APPEA) noted that while the Ombudsman must give the involved parties a notice of the outcome of an investigation which may include advice, recommendations, and reasons obtained in the course of the investigation, the Ombudsman is not bound by the rules of evidence. APPEA raised its concern that this notice may then be admitted as evidence in a Land Court proceeding notwithstanding how the information in the notice was obtained.[7]

APPEA argued that 'either the Ombudsman be bound by the rules of evidence, or notices not include information obtained other than in accordance with the rules of evidence, or the Land Court should

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4 Land Access Ombudsman Bill 2017, 41(4), p 23.

5 Submission 3.

6 Public hearing transcript, 5 July 2017, p 12.

7 Submission 4.

not be allowed to admit information other than that obtained in accordance with the rules of evidence.'[8]

By not complying with the rules and statutory framework established by the *Evidence Act 1977*, the Bill might result, according to the QLS, in a potential perverse effect where parties to a referral would approach the process with caution, potentially undermining the intended outcome of the Ombudsman process.

> *It is a real concern in circumstances where the outcome of the ombudsman's investigative process is so significant—basically turning that questionable evidence into good evidence for the purpose of the Land Court but also for them making a recommendation to a regulator. If you go forward on that basis, there is some concern that any party to a referral would approach the process with some degree of fear and ultimately not achieve what it is intended to and that is an informal and quick procedure for an informal and quick outcome.*[9]

Queensland Resources Council (QRC) raised a similar point:

> *If evidence is obtained in a way that is not in adherence with the rules of evidence and then turned into, as they were saying, good evidence in being submitted with the notice to the Land Court, perhaps that would then be a concern. I think you are right in terms of altering that process because then parties would have that in the back of their mind while the investigation is going on, thinking 'Everything that gets turned over is going to potentially then come up in the Land Court as good evidence.' That will then—I think you are right—impact how willing parties are going to be to come to that conclusion at that point.*[10]

QLS recommended that clause 41(4)(a) be amended to clarify that the Ombudsman is bound by the rules of evidences while carrying out an investigation.[11]

In response to concerns that the Ombudsman is not bound by the rules of evidence, the department advised that this approach was to ensure that the Ombudsman could obtain information on the referred dispute with a minimum of formality:[12]

> *The Queensland Law Society maintains views on some sentinel issues around, for example, the Land Access Ombudsman not being bound by rules of evidence. Professor Scott's recommendations of low-cost, accessible jurisdiction are all about finding a solution. Ultimately, mediating a solution is the preferred outcome, and that is very much in the provisions of the bill as to what the mandate of the Land Access Ombudsman is. If you were to introduce a framework that required rules of evidence, then of course you would need to have lawyers and barristers and a much heavier reliance on expert witnesses. If you were to go down that path then you would really be setting up a court. That was never the intent. The ombudsman was about finding a way of facilitating resolution.*[13]

The committee sought to clarify this matter further and whether similar rules of evidence applied to other Queensland ombudsmen. The department advised:

> *This approach is consistent with the Energy and Water Ombudsman Queensland, Queensland Ombudsman and the Land Court (which will be able to hear matters relating to these disputes if the Bill is passed), none of which are bound by the rules of evidence (refer to section 28 of the*

8 Submission 4, p 4.

9 Public hearing transcript, 5 July 2017, p 14.

10 Public hearing transcript, 5 July 2017, p 22.

11 Submission 3.

12 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 7.

13 Public hearing transcript, 5 July 2017, p 25.

Energy and Water Ombudsman Act 2006, section 25 of the Ombudsman Act 2001 and section 7 of the Land Court Act 2000).[14]

QLS also expressed a concern regarding the Ombudsman as both an investigator and facilitator of dispute resolution. QLS stated that, given the Ombudsman's responsibility to prepare advice admissible in court proceedings and to make recommendations regarding existing or potential breaches of the legislation, it will be difficult for the Ombudsman to facilitate genuine and transparent negotiations between the parties.[15] QLS recommended:

If the Ombudsman is to retain the dual role status, that consideration be given to measures which will restrict overlap of the investigator and facilitator roles. The Bill should also expressly provide that any information retained by the Ombudsman during an alternative dispute resolution process cannot be used or relied upon by the Ombudsman in the course of conducting a subsequent investigation into the dispute, without the consent of the parties. [16]

Other stakeholders supported that the Ombudsman is not bound by rules of evidence. Shine Lawyers argued that:

It is the only sensible course – indeed Section 7 of the Land Court Act 2000 (Qld) provides that the Land Court is not bound by the rules of evidence. Submissions to the contrary are too heavily rooted in concerns as to the likely outcomes for companies, and ignore the intended informality and timeliness an ombudsman process is intended to achieve… and completely undermine what is presumably intended in constituting the Land Access Ombudsman.

Court judges regularly decide what evidence will and will not be admitted, and invariably place the weight they think appropriate to different types of evidence – evidence obtained through an ombudsman process would be no differently and it has long been within the capability of judges to make that determination.[17]

Shine Lawyers went on to argue:

… we urge the committee to ensure that a true ombudsman alternative is put in place so that the hope and promise that the proposal created amongst landholders is realised. As landholder lawyers, we are severely disappointed by and strongly disagree with the position of The Queensland Law Society Committee in its submission to this Committee and particularly its failure to insist upon informality and a truly "ombudsman" like approach to protect the imbalanced party – the landholder.[18]

Committee comment

The committee notes the comments of the QRC that the department had consulted genuinely on the amendments proposed in the Bill.[19] The department also informed the committee that it was cognisant of the issues raised by stakeholders in regard to the rule of evidence.[20]

The committee is satisfied that the Ombudsman's investigation powers involve fact finding and clarification of issues in dispute. The Ombudsman will not be able to investigate any potential breaches

[14] Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 7.

[15] Submission 3, p 6.

[16] Submission 3, p 6.

[17] Shine Lawyers, correspondence dated 12 July 2017, p 1.

[18] Shine Lawyers, correspondence dated 12 July 2017, p 4.

[19] Submission 7, p 1.

[20] Public hearing transcript, 5 July 2017, p 25.

that may arise and the Ombudsman will not undertake any compliance action. As a facilitator the Ombudsman provides a service to assist the parties to resolve disputes. [21]

The committee notes that the intent of the Land Access Ombudsman is to provide a low-cost, accessible mechanism to resolve disputes without going to court. Additionally, as similar rules of evidence applied to other Queensland ombudsmen, the committee is satisfied with the investigation procedures as set out in clause 41 of the Bill.

2.2 Power to require information and confidentiality

Clause 42 confers powers on the Land Access Ombudsman to require from a party to a referred dispute stated documents or information. The Ombudsman's power to require documents under this clause extends to documents or information that are pertinent to the investigation of the land access dispute referral.[22]

Stakeholder comments

The committee heard from QLS that:

> *The law relating to the derivative use of compelled evidence is exceptionally complicated and technical and as such, the current draft may have unintended and adverse consequences.*[23]

QLS raised concerns that if a party is compelled to provide information which may later be used in a court proceeding or prosecution, that information must be material to the land access dispute and parties in the dispute should reasonably be able to claim privilege against self-incrimination.[24] This was identified by QLS as a fundamental right which underpins the rule of law and the justice system as a whole. However:

> *In its current form and in the context of clauses 53, 54 and 55 of the Bill, the provision abrogates the right to claim privilege against self-incrimination. Any breach of a fundamental right, such as the right to claim privilege against self-incrimination, should be a last resort…*
>
> *On balance, the Society recommends that clause 42 be narrowed and clauses 53, 54 and 55 be removed from the Bill.*[25]

QLS also had concerns in relation to the preservation of confidentiality and privilege for both landowners and resource companies.[26]

> *… the Bill does not offer an opportunity for a party to withhold information or documents whose content is commercially sensitive or valuable or contains confidential or personal information.*[27]

QLS submitted that confidentiality provisions within conduct and compensation agreements (CCA) and make good agreements (MGA) are often negotiation between the parties to protect commercially sensitive or valuable information, and that the Bill does not offer an opportunity for a party to withhold this information or these documents for reasons of commercial sensitivity.[28]

However, AgForce argued that:

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21 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 7.

22 Explanatory notes, p 17.

23 Submission 3, p 3.

24 Submission 3.

25 Submission 3, p 3.

26 Public hearing transcript, 5 July 2017, p 12.

27 Submission 3, p 3.

28 Submission 3, p 3.

> *… the proposed disclosure powers appear reasonable as they are limited to matters under consideration and include reasonable excuse provisions. The bill also provides protection of commercial confidentiality and other admissions as necessary.*[29]

In response to the concerns raised by QLS, the department informed the committee:

> *The Land Access Ombudsman's power to require documents under this clause extends only to documents or information that are pertinent to the investigation of the land access dispute referral. In undertaking an investigation the Ombudsman must comply with natural justice and must act in a way that is fair, reasonable, just, timely and maintains confidentiality (refer to clause 41).*
>
> *Clause 59 of the Bill provides a provision which allows a party to advise the Ombudsman that the disclosure of a document or information might be to the detriment of the party's commercial interest. Under clauses 51(9) and 56(3)(c) the Ombudsman is further prohibited from disclosing information which the Ombudsman is satisfied is confidential and the disclosure of which might be detrimental to a person's commercial interests.*
>
> *Furthermore clause 60 provides for how the Ombudsman or an officer must treat confidential information. Under this clause, the Ombudsman or an officer must not make a record of confidential information (including personal information), disclose the information or use the information to the benefit of any person unless it is in the performance of the functions under the Bill, with the consent of the person to whom the information relates, or, as required by law.*
>
> *These provisions provide adequate protection against the improper disclosure of confidential information obtained by the Ombudsman or an officer.*
>
> *The reasonable excuse clause of 42(5)(c) has been designed to legislatively enshrine the privilege against self-incrimination which would otherwise be available to a party that is an individual at common law. At common law, this privilege is only available to individuals, rather than corporations.*
>
> *Protection is also provided for documents subject to legal professional privilege and 'without prejudice' privilege under clause 42(6).*[30]

In support of the Ombudsman's power to compel parties to provide certain kinds of documents, Shine Lawyers argued:

> *Fundamental to answering this question is the need to determine whether it is intended to provide an ombudsman process that is a genuine comparatively informal alternative of access for the imbalanced bargaining party to address matters in an accessible, fair, just, informal and quick process or whether it is intended to effectively provide another quasi-judicial-type forum.*
>
> *In the former case, it is clearly eminently sensible to allow an ombudsman to compel the provision of documents and generally impose as few formal restrictions as possible. Absent such a power, the companies can withhold documents that may be critical to a proper understanding of the issues – indeed we are commonly met with a refusal to provide documents and/or frustrated in so accessing when attempting to resolve matters informally.*[31]

Committee comment

The committee acknowledges the matters raised by QLS in regard to the use of compelled evidence without the claim of privilege against self-incrimination and the protection of commercially sensitive

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29 Public hearing transcript, 5 July 2017, p 2.

30 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 9.

31 Shine Lawyers, correspondence dated 12 July 2017, p 1.

or valuable information. The department provided the committee with information which addressed these concerns and informed the committee that:

> *The bill as drafted attempts to strike a balance between the varying interests of landholders and resource companies and provides appropriate protections in relation to confidential information, legal privilege and legal representation.*[32]

The committee is satisfied that the Bill provides appropriate protections in relation to confidential information and privilege against self-incrimination. The committee notes that the intention of the Bill is to provide an informal and quick process rather than another quasi-judicial forum.

2.3 Non-binding nature of investigation outcomes

Clause 51 provides for the process following the Land Access Ombudsman's investigation. Once the investigation has been finalised, the Ombudsman must give the parties to the dispute referral a written notice. Clause 51(7) sets out that the written notice only provides information or advice to the parties; it is not binding.

Stakeholder comments

Several stakeholders representing landowners were concerned about the non-binding nature of investigation outcomes. From the landholder perspective, Shine Lawyers argued that the Bill has failed to address the power imbalance that exists between landholders and resource companies and that any decision made by the Ombudsman should be binding on the resource authority holder.[33]

Property Rights Australia (PRA) also argued that the non-binding nature of Land Access Ombudsman investigation outcomes may disadvantage the landholder. They were concerned that resources companies may use the Ombudsman as a strategy to deplete landowners' finances and limit further action. If legal advice is necessary, PRA argued that landholders may be better off in the Land Court where the decision is binding.

Lock the Gate was also concerned about the non-binding nature of investigations on resource companies. They argued the Bill should have binding outcomes imposed on companies, which would prevent landholders from being "bullied" or having to resort to expensive court processes.[34]

In response to these concerns, the department stated that:

> *The intention is to provide a free dispute resolution service that can be accessed by either party to the CCA or MGA if required. Access to the Ombudsman's dispute resolution service for the resource company and landholder is considered appropriate for either party to the agreement, given both parties have spent time negotiating the terms of the agreement and the varied circumstances which may factor into each particular agreement.*
>
> *Mr Robert Scott, in his Independent Review of the Gasfields Commission Queensland, recommended that the established independent statutory body provide non-binding advice to the parties to the dispute. The Bill reflects this recommendation.*
>
> *Whilst the Ombudsman has not been provided with the power to make binding decisions on the parties, the Ombudsman does have the power to provide written advice on the respective parties' positions and how the dispute may be resolved. This advice is ultimately admissible in an arbitration or Land Court proceeding which may follow.*[35]

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32 Public hearing transcript, 5 July 2017, p 23.

33 Submission 6, p 2.

34 Submission 5, p 2.

35 Department of Natural Resources and Mines, correspondence dated 30 June 2017, pp 3, 18 and 23.

Committee comment

The committee notes the concerns of Shine Lawyers, PRA and Lock the Gate in relation to the non-binding nature of Land Access Ombudsman investigations. The committee refers to the concerns raised in Mr Scott's *Independent Review of the Gasfields Commission Queensland* that there is no avenue available to landholders or resource authority holders to discuss any complaints concerning an alleged breach of a CCA or an MGA once any dispute resolution provision in the agreement has been exhausted, other than resorting to a court of competent jurisdiction or to arbitration. The committee also notes recommendation 10 of the review which recommended the provision of non-binding advice. The committee is satisfied that should parties wish to obtain a binding decision, they may agree to go to arbitration, or a party may make an application to the Land Court. The Ombudsman does have the power to provide written advice that is admissible in any proceeding that may follow.[36]

2.4 Referral of offences or breaches under another act

Clauses 53, 54 and 55 allow the Land Access Ombudsman the discretion to notify a chief executive of the administering department where the Ombudsman reasonably suspects a resource authority holder or resource tenure holder has committed, is committing or is likely to commit an offence against:

- a Resource Act
- Chapter 3 of the *Water Act 2000* or
- the *Environmental Protection Act 1994*.

Additionally, Clause 53 allows the Ombudsman to notify a chief executive of the administering department where the Ombudsman reasonably suspects a resource authority holder or resource tenure holder has *breached*, is *breaching* or is likely to *breach* a condition of a resource authority that relates to land access.[37]

Stakeholder comments

APPEA expressed concerns about the powers of the Ombudsman to refer potential offences or breaches against other acts:

> *The Ombudsman has the ability to refer a possible offence under a Resource Act or Environmental Protection Act to the chief executive and the Ombudsman may disclose information obtained in the course of the investigation. This could result in referral of possible yet not actual offences as well as disclosure of information to the chief executive which may not be ordinarily entitled to in their independent investigations.*
>
> *The Ombudsman's powers in this regard should be limited to only referring information the chief executive would ordinarily be entitled to.*[38]

In response, the department stated:

> *If the Ombudsman reasonably believes that a regulatory breach has occurred, or may occur, a power has been provided for these matters to be referred to the appropriate regulator.*
>
> *Any information obtained by the Ombudsman during an investigation which may be included in a referral to a regulator must be relevant to the possible breach or offence.*
>
> *Additionally, a natural justice process has been included in these sections which would require the Ombudsman to provide a notice to the party stating the proposed action and inviting*

[36] Department of Natural Resources and Mines, correspondence dated 30 June 2017, pp 19-20.

[37] Explanatory notes, pp 21 – 22.

[38] Submission 4, p 5.

submissions about the proposed action. These submissions must be considered by the Ombudsman prior to the matter being referred to the regulator.[39]

PRA stated its support of the Ombudsman's powers to refer breaches and offences under other acts:

It is heartening that the Ombudsman is to report breaches, or likely breaches of Resources Acts, the Water Act 2000 *and the* Environment and Heritage Act 1994 *and recommend investigation under sections 53(c), 54(c) and 55(c). How successful this is will depend on the incisiveness of the Ombudsman and the responsiveness of the government and its departments.*[40]

AgForce was also supportive of such provisions:

Agforce are supportive of the proposed functions and powers of the Ombudsman particularly noting powers to:

…refer to government departments, or recommend to government departments the investigation of, possible offences or possible breaches of resource authorities.[41]

Committee comment

The committee notes the concerns raised over the referral of potential breaches or offences to a regulator. The committee also notes the department's response. The committee is satisfied that any information provided to a chief executive must be relevant to a possible breach or offence, that parties will be provided with an opportunity to oppose any proposed action and that the Ombudsman will be required to consider such submissions prior to referring to the regulator.

2.5 Legal representation and costs

Clause 43(4) provides that a party may have legal representation at a meeting only with the leave of the Ombudsman. In addition, clause 43(5) provides that the Land Access Ombudsman must not unreasonably withhold leave for a party to be represented at a meeting, and clause 43(6) provides that a party must bear its own costs of representation for a meeting.

Stakeholder comments

QLS expressed concerns that a party must seek leave to be represented. The two key concerns were:

- a party may unintentionally waive legal professional privilege and that there are serious implications for future potential litigation
- the seriousness of possible implications which may result from the Ombudsman's referral to a regulator of information and documents gathered.[42]

QLS argued that clause 43(4) perpetuates a false assumption that excluding lawyers from this process reduces costs. QLS stated skilled legal practitioners can ensure their clients speak to key issues streamlining the process and avoiding delays and other errors that would escalate costs.

QLS recommended the insertion of a new subsection at clause 43(5) to clarify that a party need not apply for leave to the Ombudsman if the party is seeking to be represented by a legal practitioner who is the holder of a current practising certificate.

AgForce, PRA, QLS and Lock the Gate raised concerns regarding the cost of legal representation. According to AgForce, potential legal costs further exacerbate the imbalance between landholders and resource companies. AgForce stated:

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39 Department of Natural Resources and Mines, correspondence dated 30 June 2017, pp 10 and 17.

40 Submission 2, p 1.

41 Submission 8, p 3.

42 Submission 3, p 5.

> *In our experience, one of the biggest issues that landholders raise is the discrepancy in negotiating position between a resource company and a landholder. If a landholder was put in a negotiation with an ombudsman without legal representation, we think there would be a certain belief that they would be put at a disadvantage in that process and that significant potential legal fees during the ombudsman process may act as a deterrent for people wanting to engage the services of the ombudsman.*[43]

PRA noted:

> *It must be remembered that there are significant financial disparities between resource companies and landowners. This raises a cautionary note when both parties approaching the Ombudsman must bear their own costs but the recommendations of the Land Access Ombudsman are not binding … A resources company, in contrast, might view the Ombudsman as a useful strategy to run the landowner's finances down and limit further action.*[44]

Further to this, QLS explained:

> *One example of the society's concerns is the potential costs implications. Parties will be required to bear their own costs of any referral to the ombudsman despite the fact that they may have previously agreed on a costs regime for disputes arising.*[45]

Lock the Gate argued that the Bill does not provide consumer protection for the landholder:

> *The problem in achieving an equitable playing field is always that landholders do not have the same access to the courts as companies, by virtue of the costs of legal action and the costs implications of losing. This proposal categorically fails to fix that problem, and continues the massive advantage which companies have in that regard.*[46]

Lock the Gate recommended all and any costs of the process should be paid for by resource tenure holders.[47]

The committee requested further information on the likely legal costs for the Land Access Ombudsman process. Shine Lawyers provided the following information:

> *… it would entirely depend on the type of dispute that is going to the Land Access Ombudsman. If you have a simple dispute it could be only $1,000 or $2,000, but if you have a very complex dispute involving a highly profitable property and you are up against a company that is vehemently opposed to whatever is being said, those costs can run into the tens of thousands.*[48]

The committee also sought information from QLS on the benefit of capping the cost of legal representation. QLS advised that:

> *It will be difficult to prescribe a cost ceiling which is appropriate for the costs accrued in each and every situation … It is for this same reason that a figure has not been included in the* Mineral and Energy Resources (Common Provisions) Act 2014*… Rather, legal costs are defined in that Act as those which a claimant 'necessarily and reasonably incurs to negotiate or prepare' an access agreement.*[49]

In response to the stakeholder comments, the department advised:

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43 Public hearing transcript, 5 July 2017, p 3.

44 Submission 2, p 1.

45 Public hearing transcript, 5 July 2017, p 13.

46 Submission 5, p 2.

47 Submission 5, p 4.

48 Public hearing transcript, 5 July 2017, p 9.

49 Queensland Law Society, correspondence dated 12 July 2017, p 2.

- *Mr Robert Scott, in his Independent Review of the Gasfields Commission Queensland, recommended that legal representation be discouraged unless both parties agree.*[50]
- *The Land Access Ombudsman is intended to provide a free service to assist in the resolution of disputes and avoid the need to go to court. However, if the parties do not wish to use the Ombudsman's services, or do not agree with the findings of the Ombudsman, there is nothing preventing the parties from taking their dispute to arbitration or a Court if they so choose.*[51]
- *Government decided that it would be more appropriate for the Ombudsman to determine whether representation (including legal representation) should be permitted during an interview under clause 43. This clause also provides that the Ombudsman is not permitted to unreasonably withhold consent for representation. This is intended to reduce costs for the parties and to ensure that the investigation process is informal and focused on resolving the dispute at hand.*[52]

Committee comment

The committee notes the concerns of stakeholders regarding the potential cost of legal representation as part of the Land Access Ombudsman dispute resolution process and the financial disparity between resource companies and landholders.

The committee acknowledges the intent of the Bill is to provide a mechanism in which parties can resolve disputes without legal representation and therefore with minimal cost.

2.6 Definition and application of making 'reasonable attempt' to resolve dispute

Clause 32 provides that a land access dispute may only be referred to the Land Access Ombudsman by a party to a CCA or an MGA and that it may not be referred for a party by another person, unless the party is a person with impaired capacity.[53] Additionally, clause 32(2) provides that a land access dispute may not be referred 'unless the party has made a reasonable attempt to resolve the dispute with the other party to the dispute.'[54]

The definition and application of *reasonable attempt* in clause 32(2) raised concern for some stakeholders.

Stakeholder comments

QRC sought more information about what would constitute a *reasonable attempt.*[55] The department advised that a procedural guideline would be developed by the Ombudsman under clause 65 of the Bill, which will establish what constitutes reasonable attempts for the Ombudsman.[56] The department provided the following examples of what would constitute a *reasonable attempt* by a party to resolve a dispute with the other party prior to referring it to the Land Access Ombudsman:

> *… attempts, made in good faith and at reasonable times, to establish contact with the other party for the purpose of discussing the issue the subject of the dispute.*[57]

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50 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 5 and 11.

51 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 3.

52 Department of Natural Resources and Mines, correspondence dated 30 June 2017, pp 5, 6 and 11.

53 *Impaired capacity* has the meaning under the *Guardianship and Administration Act 2000*: clause 32(4). Explanatory notes, p 14.

54 Clause 32(b).

55 Submission 7, p 4.

56 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 27.

57 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 4.

QRC expressed its support for the provision but emphasised the need to consult on the procedural guideline.[58]

Shine Lawyers expressed concern the clause might result in 'well-resourced companies' arguing that 'they don't have to participate in the Ombudsman investigation process until "reasonable" attempts have been made.'[59] In response to the concern that one party to the dispute might obstruct the process in this way, the department advised that the Bill makes provision for the Ombudsman to 'direct the parties to make reasonable attempts if they have not done so or must refuse to accept the referral.'[60]

Both QRC and QLS expressed concern regarding how clause 32 would be applied alongside any agreed dispute resolution procedures in CCAs or MGAs given that clause 36(3) provides that the Land Access Ombudsman may be satisfied the referring party has complied with section 32(2) regardless of whether the referring party has used, or attempted to use—for a CCA—the dispute resolution process, if any in the agreement; or—for a MGA—the dispute resolution process, if any, in the agreement, or the process under the *Water Act 2000*, Chapter 3, Part 5, Division 4.

QLS stated that the provisions could lead to confusion and uncertainty if parties were not required to exhaust any agreed dispute resolution procedures in CCAs or MGAs prior to referring a matter to the Ombudsman.[61]

> *It is the Society's position that this is a critical component of any dispute resolution powers held by the Ombudsman. There should be a clear expectation that the parties should act in accordance with negotiated dispute resolution provisions prior to relying on the Ombudsman.*[62]

Similarly, QRC stated that the 'reasonableness of the attempts does not seem to have any relationship to any dispute resolution clause which is already in most CCAs or MGAs, including the Queensland Government's own standard CCA template.'[63] QRC suggested:

> *… that the Bill should consider whether one of the thresholds for a dispute to be referred is that the complainant should justify why they are looking to step outside these agreed mechanisms. Alternatively, the circumstances where it is not appropriate to utilise the CCA dispute resolution mechanisms should be defined and justified.*[64]

In relation to its concern, QLS further advised:

> *The Society has concerns in relation to clause 32(2), which states that a party to a land access dispute may not refer the dispute to the Ombudsman unless they have made a 'reasonable attempt' to resolve the dispute with the other party.*
>
> *As is contemplated by clause 34(b), it is common for CCAs and MGAs to contain a process for resolving disputes that may arise. Therefore it is problematic that the Ombudsman is empowered to accept a referral from a party at any time while an agreement is on foot – this may include at such time that the contractual dispute resolution provisions have been initiated.*
>
> *This introduces an unacceptable degree of uncertainty for both parties, and diminishes the utility of dispute resolution provisions which have been negotiated and settled prior to the parties entering into the agreement.*

58 Public hearing transcript, 5 July 2017, p 19.

59 Submission 6, p 4.

60 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 27.

61 Public hearing transcript, 5 July 2017, p 13.

62 Submission 3, p 5.

63 Submission 7, p 4.

64 Submission 7, p 4.

> *Further, it is unclear how the Ombudsman's powers would work if the dispute resolution provisions set out in the relevant agreement includes arbitration. If it is the case that the Ombudsman would not accept a dispute referral which has already been the subject of an arbitration, this exception should be expressly included in the Bill.* [65]

QLS concluded that dispute resolution functions are only 'effective if they provide certainty to the process of resolving a dispute' and, in this regard, recommended that 'clause 36 be amended to specify that the Ombudsman would refuse a referral received from a party until such time that the parties exhausted any alternative dispute resolution processes which were required by the relevant CCA or MGA.'[66] QRC supported this recommendation.[67]

However, the department disagreed with the recommendation, as one of the Bill's purposes is to provide an avenue for parties to access a 'low-cost' dispute resolution service prior to parties exhausting dispute resolution clauses in their CCAs and MGAs, which may involve a more lengthy and costly process:

> *The Bill contains provisions which allow a party to refer a dispute to the Land Access Ombudsman before accessing the dispute resolution clauses in their CCA and MGA (refer to clauses 36 (3) and 34 of the Bill). This allows the parties to access the free services of the Land Access Ombudsman rather than proceeding down a potentially costly dispute resolution process under the CCA or MGA.* [68]

The department explained that clause 34 provides that where a CCA or MGA includes a dispute resolution process other than that provided under the Bill, a party to that agreement who refers a dispute to the land access ombudsman does not incur a civil liability if they have breached the dispute resolution condition. The purpose of this clause is to ensure 'that parties are able to access the land access ombudsman's no-cost dispute resolution services without complying with any dispute resolution clauses and risking civil liability of their agreement.'[69]

The department further advised:

> *There are other mechanisms that would be available to resolve disputes. Usually in CCAs there are in-built dispute resolution mechanisms. These agreements are confidential, so government does not necessarily know what they are, but I guess the feedback that Professor Scott received was that they can be onerous, expensive and time-consuming for landholders and that the current legal remedy, which is taking it to a court of competent jurisdiction—being a commercial agreement, that could involve the District Court or the Supreme Court—was certainly a pretty onerous thing for a landholder to contemplate in relation to what for a court might seemingly be a fairly minor issue but for a landholder might have very significant impacts on the operation of their property.* [70]

Committee comment

The committee notes the recommendation from both QRC and QLS that the Bill be amended to specify that the Ombudsman will refuse a referral received from a party until the parties have exhausted any alternative dispute resolution processes that are required by a CCA or MGA. However, the committee supports the department's advice that implementing this recommendation would be contrary to one of the aims of the Bill, which is to provide access to a timely and low cost mechanism to resolve land

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65 Submission 3, p 5.

66 Submission 3, p 5.

67 Public hearing transcript, 5 July 2017, p 19.

68 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 10.

69 Explanatory notes, pp 14, 15.

70 Public hearing transcript, 5 July 2017, p 24.

access disputes for parties to CCAs and MGAs prior to the parties having to take potentially time-consuming and costly legal path.

The committee notes concerns in relation to the process of referring land access disputes, including the potential for a party to take advantage of the process due to 'power imbalances'. While the committee acknowledges that the procedural guideline to establish what constitutes a reasonable attempt will be developed by the Ombudsman at a later time under clause 65, the committee considers that the examples provided by the department (i.e. attempts, made in good faith and at reasonable times, to establish contact with the other party for the purpose of discussing the issue the subject of the dispute) address concerns that well-resourced companies would not have to participate in the process until a 'reasonable attempt' had been made to resolve the dispute. The examples indicate that both parties will be aware of the issue prior to the referral, and the Ombudsman would therefore be able to be satisfied that clause 32(b) had been met.

The committee notes QRC's statement regarding the need for the department to undertake stakeholder consultation on the procedural guideline, and the committee is in agreement.

2.7 Acceptance or refusal of referral

Clause 36 outlines the responses that the Land Access Ombudsman may make to a land access dispute referral, the grounds under which the Ombudsman must refuse the referral, and provides guidance for the Ombudsman in determining when it may refuse the referral.[71]

Clause 36(2) provides the reasons why the Land Access Ombudsman must refuse to accept a land access referral including:

(a) the referral is about a matter mentioned in clause 18(1); or

(b) the ombudsman is satisfied—

  (i) the referring party has not complied with clause 32(2); or

  (ii) the land access dispute referral is frivolous or vexatious or has not been made in good faith; or

  (iii) the subject of the land access dispute is trivial; or

  (iv) in the circumstances, the investigation of the matter the subject of the land access dispute is unnecessary or unjustifiable; or

(c) the referring party has not given the ombudsman reasonable help as required under clause 35(2).

Stakeholder comments

In regard to clause 36(2) APPEA's specific concern was that the Bill would provide 'avenues for a landholder to raise issues regarding the behaviour of the authority holder with little or no risk to the landholder if the claim is frivolous or misleading.'[72]

The department provided the following response:

> *Clause 36 of the Bill gives the Ombudsman the discretion to refuse to accept a land access dispute referral if it is frivolous or vexatious, the subject matter of the referral is trivial, or, in the circumstances, the investigation is unnecessary or unjustifiable. The Ombudsman may also refuse to accept a dispute referral if the referring party has not given the Ombudsman reasonable help during a preliminary inquiry.*[73]

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71 Explanatory notes, p 15.

72 Submission 4, p 3.

73 Department of Natural Resources and Mines, correspondence dated 30 June 2017, pp 14-15.

PRA recommended that section 36(3) be amended to read that 'the land access ombudsman *must* be satisfied the referring party has complied with section 32(2) regardless of whether the referring party has used, or attempted to use a CCA or MGA, instead of *may*.[74] PRA explained as follows:

> *Section should read 'Ombudsman must be satisfied' instead of 'Ombudsman may be satisfied'. This is because the CCA may have a dispute resolution process which excludes the landowner from referring a case to the ombudsman.*[75]

The department provided the following response to the recommendation to change the wording from *may* to *must*:

> *Clause 36(3) is drafted to provide the Ombudsman with the discretion to accept land access disputes where a party has tried to use, or attempted to use, the dispute resolution processes contained in the CCA or MGA. It is not the intent to make this a non-discretionary provision by including the word 'must' instead of 'may'.*
>
> *This will allow the parties to access the free services of the Land Access Ombudsman, if the referral is accepted, rather than proceeding down a potentially costly dispute resolution process.*[76]

In regard to clause 36(3), APPEA recommended that the words 'attempted to use' be removed as '[p]arties should be required to take the first step in the dispute resolution process under a CCA or MGA (which is usually formal notification of a dispute).'[77] If this was not possible, APPEA suggested:

> *Alternatively, parties should at least be required to provide formal notification or a dispute to the other party including the nature of the dispute, the action sought as rectification, and provide a reasonable timeframe for the other party to respond and resolve the issue.*[78]

In response, the department reiterated that parties approaching the Ombudsman were required to have made reasonable attempts to resolve the dispute and that it was within the Ombudsman's powers to direct parties to make reasonable attempts if they had not done so when referring a land access dispute. Otherwise, if the Ombudsman was not satisfied that a reasonable attempt had been made in this regard, he or she must refuse to accept the refusal. As noted above, the Ombudsman will develop a procedural guideline to establish what constitutes reasonable attempts.[79]

Committee comment

The committee is satisfied that the Bill addresses potential abuse of the referral and dispute resolution process by providing the Ombudsman with the discretion to refuse to accept referrals based on the criteria outlined in clause 36 of the Bill.

2.8 Exclusion of disputes referrals

Clause 18(1) sets out the matters about which the Land Access Ombudsman cannot accept a dispute referral.[80] Clause 18(1)(f) refers to a matter that is or has been the subject of a proceeding or an arbitration; Clause 18(1)(g) refers to a matter that is, or has been, the subject of an investigation by a department.

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74 Submission 2, p 3.

75 Submission 2, p 3.

76 Department of Natural Resources and Mines, correspondence dated 30 June 2017, pp 4-5.

77 Submission 4, p 4.

78 Submission 4, p 4.

79 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 16; clauses 32(2) and 36(b)(i).

80 Explanatory notes, pp 11-12

The purpose of placing these limitations on what the Land Access Ombudsman can investigate is to ensure that the Ombudsman is available to parties only for the purpose for which it was established—that is, to facilitate the timely resolution of current land access disputes.[81]

Stakeholder comments

PRA and QLS argued that there was a potential for confusion between clause 18(1)(f) and clause 32. Clause 18(1)(f) states that the Land Access Ombudsman cannot accept a dispute referral relating to 'a matter that is or has been the subject of a proceeding or an arbitration' while clause 32 states that a party may not refer a land access dispute unless the party has made a reasonable attempt to resolve the dispute with the other party to the dispute.[82] PRA explained:

> *If the landowner chooses a formal dispute resolution procedure as mentioned in S 18 1. (f) he will be disqualifying himself from making a referral to the ombudsman, but he may not refer to the dispute to the Ombudsman unless has made an attempt to resolved the dispute.*
>
> *It seems clear to PRA that unless a landowner is very familiar with this piece of legislation, and particularly if arbitration is the dispute resolution method in his agreement, he may make a wrong decision about a dispute resolution process or be persuaded to make a wrong decision which excludes him from this process in spite of S 34.*
>
> *…*
>
> *There needs to be public discussion and information on what may exclude a landowner from referring his case to the ombudsman.*[83]

In regard to Clause 18(1)(g) stakeholders raised concerns over the exclusion of matters subject to a departmental investigation. AgForce sought clarification on whether this section precludes the landholder from referring a matter to the Ombudsman if they have previously raised the matter with the department's Coal Seam Gas Compliance Unit or similar.[84] AgForce argued that the function of the Ombudsman should be to allow landholders additional independent dispute resolution options, should a matter be unsatisfactorily or unsuccessfully resolved through existing avenues, such as referral to departmental agencies.

Shine Lawyers noted that most landholder matters they have handled were as a result of an impasse following some form of departmental investigation.[85]

> *The restrictions also mean that where a departmental investigation has taken place the party will not be able to refer the dispute to the ombudsman. We are very concerned that this will severely restrict the number of disputes that can be referred, because often the first course of redress the landholder seeks is with the governing authority, that is, the department.*[86]

PRA argued that:

> *Excluding a matter that is, or has been, the subject of an investigation by a department is removing one of the key duties of most Ombudsmen, namely ruling on unfair or disputed decisions of Government departments. There has been a noticeable inability of Government departments to find against resources companies for breaches such as dust and noise, as well as on other issues. This subsection will negate against many of the systematic complaints against resources companies and will limit its usefulness. PRA believes it should be omitted. If the*

81 Explanatory notes, pp 11-12

82 Submission 2, p 2.

83 Submission 2, p 2.

84 Submission 8, p 4.

85 Submission 6, p 3.

86 Public hearing transcript, 5 July 2017, p 6.

Government really believes the Land Access Ombudsman can play a useful role in bringing balance to this area, it will not seek to exclude scrutiny of departmental conduct or decisions.[87]

In response to these concerns, the department advised:

Clause 18 of the Bill defines the matters that the Ombudsman cannot investigate to avoid jurisdictional overlaps or the re-opening of matters that have already been determined (for example through an arbitration process or Court proceeding).[88]

With regard to Clause 18(1)(g), if the dispute to be referred to the Ombudsman has been the subject of a departmental investigation, it would be subject to judicial review or in the jurisdiction of the Queensland Ombudsman. If a landholder or resource company has an issue as a result of a departmental investigation, it can be referred the Queensland Ombudsman for investigation.[89]

Committee comment

The committee notes the concerns raised by these landholder representatives. The committee appreciates the need to ensure that there is no duplication of dispute resolution mechanisms and is satisfied that issues arising as a result of departmental investigations would still allow parties to move to other arbitration processes and allow the Land Access Ombudsman to facilitate the timely resolution of current land access disputes.

The committee notes concerns that stakeholders might be confused about what the Land Access Ombudsman can and cannot deal with under the Bill. The committee is satisfied that the department will inform stakeholders of the functions of the Access Land Ombudsman when the office is established.

2.9 Jurisdictional overlap

Stakeholder comments

Several stakeholders highlighted the potential overlap of the Land Access Ombudsman's functions with existing dispute resolution processes. Shine Lawyers submitted:

If the Bill is left unamended there will be a duplication of forums between a dispute referred to the ombudsman and a conference called by an authorised officer under section 734B of the PAG Act. We also note that the role of the authorised officer at those conferences (i.e. to endeavour to help those attending to reach an early and inexpensive settlement of the subject of the conference) is almost identical to the purpose of the Bill (i.e. to facilitate the time resolution of disputes between parties to conduct and compensation agreements and parties to make good agreements). In our view there should be a clear difference between the two forums (which was presumably the intention in any event).[90]

In response, the department stated:

The Ombudsman's role is that of a dispute resolution service for CCAs and MGAs, independent of government and of direction from a chief executive or Minister. The Ombudsman will also have the ability to obtain information and conduct a fact-finding investigation.

Parties will continue to have the option of a 'general concerns' conference run by the Department, should this be their preferred approach.[91]

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87 Submission 2, p 2.

88 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 36.

89 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 36.

90 Submission 6, pp 4-5.

91 Department of Natural Resources and Mines, correspondence dated 30 June 2017, pp 26-27

The QRC was concerned about potential confusion regarding the functions of the Land Access Ombudsman and existing regulatory bodies:

> *QRC remains concerned about the Ombudsman function and how it may be confused with other existing statutory roles of the Gasfields Commission, the CSG Compliance Unit and EHP's role in compliance.*[92]

Additionally, APPEA expressed its support for establishing the Land Access Ombudsman but noted the policy intent should also be that the Ombudsman's powers do not overlap or duplicate those of other regulators.[93] APPEA explained:

> *It is making the point that there are already authorities, or arms of government, in place to manage a whole range of issues. EHP—the department of environment—manages environmental authorities and breaches of those authorities. The NRM has a role. There is the CSG Compliance Unit. The Land Court has a role. There is a statutory land access process. There are all of these things that are already in place. It is important that, however it is defined, the ombudsman does not overlap with those, because I do not think it helps anybody to have multiple government agencies with similar, but different, or overlapping functions.*[94]

In response, the department reiterated that the Ombudsman's role was not to be a regulator, undertake any compliance action, or investigate any potential regulatory breaches that may arise in the course of an investigation, and therefore, there would be 'no overlap or duplication of any regulators' powers.'[95]

Additionally, the department advised that it will develop appropriate communications materials to inform stakeholders of the role and functions of the Ombudsman.[96]

Committee comment

The committee notes the concerns of Shine Lawyers, QRC and APPEA regarding the Land Access Ombudsman's potential duplication of functions with existing regulatory entities. The committee also notes the department's advice that Clause 18 of the Bill prescribes the excluding functions of the Ombudsman in order to avoid jurisdictional duplication:

> *Within the Bill, clause 18 sets out matters that the Land Access Ombudsman cannot investigate. These matters have been prescribed to clarify the ombudsman's jurisdiction and to avoid jurisdictional duplication, for example, with the functions of the Queensland Ombudsman.*[97]
>
> *Clause 18 of the Bill defines the matters that the Ombudsman cannot investigate to avoid jurisdictional overlaps or the re-opening of matters that have already been determined (for example through an arbitration process or Court proceeding).*[98]

Therefore, the committee is satisfied that the functions of the Land Access Ombudsman do not duplicate the functions of the existing land access framework. The committee is also satisfied that the department will develop clear guidelines and material to inform stakeholders of the role and functions of the Land Access Ombudsman and the Land Access Ombudsman will establish its own website on which guidance materials will be available.[99]

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92 Submission 7, p 3.

93 Submission 4, p 1.

94 Public hearing transcript, 5 July 2017, p 20.

95 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 12.

96 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 29.

97 Public briefing transcript, 14 June 2017, p 2.

98 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 24.

99 Department of Natural Resources and Mines, correspondence dated 30 June 2017, p 29.

2.10 Time frames for Land Access Ombudsman process

Stakeholder comments

Stakeholders welcomed the introduction of the Land Access Ombudsman as a means to provide a timely mechanism to deal with disputes between landholders and resource authority holders. The QRC told the committee that:

> *the resources sector broadly supports the establishment of a Land Access Ombudsman to assist in a prompt and uncostly resolution between landholders and companies.*[100]

The committee is aware that some land access disputes are protracted and questioned if the Ombudsman investigation process should have defined time frames on when the Ombudsman is required to reach a conclusion on an investigation.

However, APPEA argued they would not support the inclusion of statutory time frames in light of the complexity and breadth of issues which could be brought before the Ombudsman:

> *I would not insert firm time frames. I think there does need to be some indication that it will be undertaken in a reasonable and timely manner, but there are a whole breadth of disputes that may be brought to the ombudsman and some of them may be more complicated and may take more time and you would not want to guillotine the process to meet a particular time frame. At the same time, there should be a lot of disputes that could be dealt with fairly quickly and there should be an obligation on the ombudsman to do that, but I would not suggest putting in a specific time frame like 10 weeks or three months or whatever it may be. I think it should be more qualitatively based.*[101]

The department told the committee:

> *It was really difficult to come up with a time frame that would fit all of the types of disputes that might go to an ombudsman. Some of those disputes by their nature I think you could expect to be resolved in a very short period of time, a matter of days. Others, if they are more substantial, could take several months to investigate.*
>
> *Rather than putting arbitrary time bounds within primary legislation, the bill does emphasise the imperative of timeliness in the decision-making process and sets up an ability for the ombudsman to establish guidelines and, as part of that process, what we would consider to be key performance indicators so that a party going to an ombudsman as part of seeking a resolution can reasonably know what to expect in terms of the time frames that it would take for the ombudsman to conclude their investigation.*[102]

Committee comment

The committee is concerned that resolution of some land access disputes are protracted and result in significant financial and emotional costs for the parties involved. The application of a time frame to resolve investigations undertaken by the Land Access Ombudsman may appear beneficial. However, the committee believes that the fundamental role of an ombudsman is to provide for the independent resolution and redress of disputes in a fair and timely manner and that this process cannot be prescriptive. The committee is satisfied with the department's approach to time frames.

> *Rather than the department stipulating the time frames that the ombudsman should complete their investigations in, we think a preferred approach would be for the ombudsman to develop*

100 Public hearing transcript, 5 July 2017, p 19.

101 Public hearing transcript, 5 July 2017, p 22.

102 Public briefing transcript, 14 June 2017, p 5.

those key performance indicators, which is consistent with processes that are utilised by other ombudsmen within Queensland.[103]

The committee notes that the QRC indicated that they 'look forward to working closely with the ombudsman to deliver a set of guidelines on matters such as what would be considered a reasonable attempt, the information in the annual report and the time frames for dispute resolution'.[104] The committee encourages the department to work with all stakeholders in regard to developing key performance indicators around the Land Access Ombudsman dispute resolution process.

2.11 Other issues

Several submitters raised issues not within the scope of the Bill. The committee appreciates these are important issues for the stakeholder and notes them below.

2.11.1 Neighbouring landholders

AgForce raised the issue of landholders who neighbour resource developments and are significantly impacted by the development being unable to access the Ombudsman's dispute resolution mechanism. AgForce argued that many landholders, even though operations are not occurring on their land, are experiencing a direct or indirect impact from the activities of resource companies. These impacts include light, dust, noise or weeds. AgForce advised that the only avenue available to neighbouring parties is to refer a complaint to the Department of Environment and Heritage Protection or the Land Court.[105]

AgForce proposed that:

> *… neighbouring landholders, not subject to a CCA but are experiencing a material impact, would benefit from access to the Ombudsman to hear disputes otherwise only resolved through departmental investigation or a Land Court hearing.*[106]

In response, the department advised:

> *We certainly were listening when AgForce raised that particular issue and noted that they found that concept challenging as well. The point they were raising seemed to us to be about those landholders who might be impacted by some type of nuisance, or worse than nuisance potentially, associated with the activities of a resource authority holder. I think they mentioned things like spread of weeds, noise, dust, maybe pollution impacting on their property. I guess at face value they seem to be things that would relate to an environmental authority held by the resource authority holder, in which case it would be a matter referred to the regulator, in this case the Department of Environment and Heritage Protection.*[107]
>
> *… In that case it may be that there are conditions on the environmental authority about release of those sorts of contaminants or nuisance or air quality issues. The neighbour could report that to the department and it would be investigated as a compliance incident potentially. It could be a breach of a condition of the environmental authority, or separately there are general provisions in the act about environmental harm and nuisance that apply anyway, regardless of whether there is a specific condition. Most large mine sites would have conditions relating to air quality specifically.*[108]

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103 Public briefing transcript, 14 June 2017, p 6.

104 Public hearing transcript, 5 July 2017, p 19.

105 Public hearing transcript, 5 July 2017, p 4.

106 Submission 8, p 4.

107 Public hearing transcript, 5 July 2017, p 26.

108 Public hearing transcript, 5 July 2017, p 27.

The committee is satisfied with the department's advice that neighbouring landholders can refer such matters to the Department of Environment and Heritage Protection.

2.11.2 Pre-agreement disputes

AgForce and Shine Lawyers raised concerns that the Bill excludes disputes occurring during negotiations of CCAs and MGAs. AgForce explained that a significant number of disputes arise during negotiations and the Ombudsman would be a useful mechanism to resolve such disputes.[109] Shine Lawyers explained that the conduct leading up to the agreement can also be the subject of a complaint.[110]

The committee acknowledges that land access disputes can arise before, during and after the negotiation of CCAs and MGAs. However, the committee notes the department's advice that the Bill addresses the gap identified by Mr Scott in his *Independent Review of the Gasfields Commission Queensland*, as there were limited options available to parties to resolve disputes over alleged breaches of CCAs and MGAs once these agreements have commenced.[111]

[109] Public hearing transcript, 5 July 2017, p 1.

[110] Submission 6, p 3.

[111] Department of Natural Resources and Mines, pp 25 and 34.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- The rights and liberties of individuals and
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the House.

3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals.

It is considered that clauses 45, 42 and 43 raise potential issues of fundamental legislative principles.

Clause 45

Summary of provisions

Clause 45(1) provides the circumstances in which the Land Access Ombudsman may enter land in relation to a conduct and compensation agreement which has been accepted by the Land Access Ombudsman. The Land Access Ombudsman may enter the dispute land when they have obtained the consent of:

- the party to the land access dispute who is the owner or occupier of the dispute land
- any owner of the dispute land who is not a party to the land access dispute and
- any occupier of the dispute land who is not a party to the land access dispute.

The Land Access Ombudsman may also enter the dispute land on which there is a coal mine, operating plant or mine with a safety and health management system, where consent is provided by the party to the land access dispute who is the resource authority holder.

Clause 45(2) provides that before entering the dispute land in relation to a make good agreement, the Land Access Ombudsman should obtain the consent of:

- the party to the land access dispute who is the bore owner
- any owner of the dispute land who is not a party to the land access dispute
- any occupier of the dispute land who is not a party to the land access dispute.

Clause 48(a)-(c) provides that before requesting consent for entry to the land the subject of the CCA or MGA, the Land Access Ombudsman must give a reasonable explanation to the owner, occupier, bore owner or resource authority holder:

- about the purpose of the entry, including the powers intended to be exercised
- that the person does not have to consent to the entry and
- that the consent may be given subject to conditions and may be withdrawn at any time.

Potential FLP issues

Clause 45 allows the Land Access Ombudsman to enter the dispute land when undertaking an investigation. This potentially breaches section 4(3)(e) of the *Legislative Standards Act 1992* which provides that legislation should confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

The OQPC Notebook provides that this principle supports a long established rule of common law that protects the property of citizens. Power to enter premises should generally be permitted only with the occupier's consent or under a warrant issued by a judge or magistrate. Strict adherence to the principle may not be required if the premises are business premises operating under a licence or premises of a public authority.

THE OQPC Notebook states:

> *FLPs are particularly important when powers of inspectors and similar officials are prescribed in legislation because these powers are very likely to interfere directly with the rights and liberties of individuals*.[112]

The explanatory notes acknowledge the potential FLP and provide the following justification:

> *These entry powers raise potential issues related to the fundamental legislative principle of having sufficient regard to the rights and liberties of individuals. However, they have been appropriately and narrowly tailored to meet the purposes of the Bill. Entry is limited to the land the subject of the dispute being investigated, and the powers exercisable upon entry are limited to actions for the purposes of the land access ombudsman's functions (of investigating and facilitating the resolution of disputes). Further, the land access ombudsman has not been conferred the power to take anything from the land.*[113]

Committee comment

The committee notes the justification provided and in particular the limited terms of entry afforded to the Land Access Ombudsman. In all circumstances, clause 45 requires the consent of a relevant party before the Land Access Ombudsman may enter the dispute land. Clause 48 provides a further protection in that consent may be made conditional and may be withdrawn at any time.

In light of the restricted terms of entry and consent requirements, the committee considers that appropriate regard has been given to fundamental legislative principles in this instance.

Clause 42 and 43

Summary of provisions

Clause 42(1) provides that the Land Access Ombudsman may, by notice given to a party, require the party to provide a stated document or information at a stated reasonable time and place or provide access to a stated document or information.

Clause 42(4) provides that a party of whom a requirement is made under clause 42(1) must comply unless the party has a reasonable excuse. The maximum penalty for a failure to comply is 100 penalty units. However, pursuant to clause 42(5)(c) it is a reasonable excuse for a party not to comply with the requirement if the party is an individual and complying with the requirement might tend to incriminate the individual or expose the individual to a penalty.

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112 Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 45.

113 Land Access Ombudsman Bill 2017, Explanatory Notes, p 6.

Clause 43(1) provides that the Land Access Ombudsman may, by notice given to a party, require the party to attend a meeting at a stated reasonable time and place and answer questions related to the Ombudsman's investigation.

Clause 43(2) provides that a party of whom a requirement is made under clause 43(1) must comply with the requirement unless the party has a reasonable excuse. The maximum penalty for a failure to comply is 100 penalty units. However, pursuant to clause 43(3) it is a reasonable excuse for a party who is an individual to fail to answer a question if answering the question might tend to incriminate the individual or expose the individual to a penalty.

Potential FLP issues

Clause 42 allows the Land Access Ombudsman to require a person to produce a document or provide access to a document, when requested. Clause 43 provides that a person must attend a meeting and answer questions at the direction of the Land Access Ombudsman. In being compelled to provide a document or answer questions, a person may incriminate themselves. This potentially breaches section 4(3)(f) of the *Legislative Standards Act 1992* which provides that legislation should provide appropriate protection against self-incrimination.

The OQPC Notebook states:

> *this principle has as its source the long established and strong principle of common law that an individual accused of a criminal offence should not be obliged to incriminate himself or herself.*[114]

The explanatory notes acknowledge the potential FLP but also point out the protection against self-incrimination which is provided by clauses 42 and 43. The explanatory notes advise:

> *Parties must comply with the requirement unless they have a reasonable excuse. It is a reasonable excuse for individuals (but not corporations) to refuse to comply with the requirement if doing so may tend to incriminate them or expose them to a penalty. This affords individuals the privilege against self-incrimination or exposure to a penalty and is in line with the common law privilege against self-incrimination.*[115]

Committee comment

The committee notes that both clauses allow for the defence of self-incrimination as a reasonable excuse for an individual. In light of this, the committee considers that sufficient regard has been given to fundamental legislative principals in this instance.

3.2 Proposed new and amended offence provisions

A table with details of the proposed new offence provision is at Appendix C.

3.3 Explanatory notes

Part 4 of the *Legislative Standards Act 1992* relates to explanatory notes. It requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

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114 Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 52.

115 Land Access Ombudsman Bill 2017, Explanatory notes, p 5.

Appendix A – List of submissions

Sub #	Submitter
001	Queensland Environmental Law Association
002	Property Rights Australia
003	Queensland Law Society
004	Australian Petroleum Products & Exploration Association Limited
005	Lock the Gate Alliance
006	Shine Lawyers
007	Queensland Resources Council
008	AgForce

Appendix B – List of witnesses at public departmental briefing and hearing

Department of Natural Resources and Mines

- Ms Nicole Buchanski, Deputy Director-General, Policy Division
- Mr Lyall Hinrichsen, Executive Director, Minerals and Energy Resources Policy
- Mr Marcus Rees, Director, Resources Policy and Project, Minerals and Energy Resources Policy

Department of Environment and Heritage Protection

- Ms Deborah Brennan, Manager, Environmental Policy Division

AgForce

- Dr Dale Miller, Queensland General Manager-Policy
- Mr Daniel Phipps, Project and Mining Project Leader

Shine Lawyers

- Mr Lachlan Brimblecombe, Solicitor

Queensland Law Society

- Ms Vanessa Krulin, Policy Solicitor
- Mr James Plumb, Partner, Carter Newell, Chair, Queensland Mining and Resources Law Committee

Queensland Resources Council

- Ms Emma Hansen, Resources Policy Adviser
- Mr Ian Macfarlane, Chief Executive
- Ms Katie-Anne Mulder, Resource Policy Director

Australian Petroleum Production and Exploration Association

- Mr Matthew Paull, Policy Director

Appendix C – Proposed new offence provisions

A table with details of the proposed new offence provisions is set out below.

Clause	Offence	Proposed maximum penalty
29	**Return of identity card** If the office of a person as an officer ends, the person must return the person's identity card to the Land Access Ombudsman within 21 days after the office ends unless the person has a reasonable excuse.	20 penalty units
42	**Power to require particular information** (1) If a land access dispute referral has been accepted by the Land Access Ombudsman, the Ombudsman may, by notice given to a party to the land access dispute the subject of the referral, require the party to give the ombudsman— (a) a stated document or information at a stated reasonable time and place; or (b) access to a stated document or information. (2) A requirement under subsection (1) may relate only to documents or information related to the investigation of the land access dispute referral. (3) A requirement under subsection (1) may be included in an investigation notice. (4) A party of whom a requirement is made under subsection (1) must comply with the requirement unless the party has a reasonable excuse. (5) It is a reasonable excuse for a party not to comply with the requirement if— (a) the document or information is not in the party's possession or control; or (b) the document or information is in another person's possession and— (i) the party has taken all reasonable steps to obtain the document or information from the other person; and (ii) the other person has not given it to the party; or (c) the party is an individual and complying with the requirement might tend to incriminate the individual or expose the individual to a penalty. (6) A party is not obliged to disclose a document or information under this section if the document or information— (a) is protected by legal professional privilege; or (b) is a communication of an admission made by a party before the land access referral was made, and in the course of	100 penalty units

	negotiations to attempt to settle the land access dispute between the parties.	
43	**Power to require attendance** (1) If a land access dispute referral has been accepted by the Land Access Ombudsman, the Ombudsman may, by notice given to a party to the land access dispute the subject of the referral, require the party to— (a) attend a meeting with the Land Access Ombudsman at a stated reasonable time and place; and (b) answer questions, related to the investigation of the land access dispute referral, asked by the Ombudsman. (2) A party of whom a requirement is made under subsection (1) must comply with the requirement unless the party has a reasonable excuse. (3) It is a reasonable excuse for a party who is an individual to fail to answer a question if answering the question might tend to incriminate the individual or expose the individual to a penalty. (4) A party may be represented by someone at a meeting only with the leave of the Land Access Ombudsman. (5) The Land Access Ombudsman must not unreasonably withhold leave for a party to be represented at a meeting. (6) A party must bear the party's own costs of representation for a meeting.	100 penalty units
60	**Secrecy** (1) This section applies to a person who— (a) is, or has been, the Land Access Ombudsman or an officer; and (b) obtains confidential information in the course of, or because of, the person's functions under this Act. (2) The person must not— (a) make a record of the information; or (b) whether directly or indirectly, disclose the information to a person; or (c) use the information to benefit any person. (3) However, subsection (2) does not apply to a person if the record is made, or the information is disclosed or used— (a) in the performance of the person's functions under this Act; or (b) with the consent of the person to whom the information relates; or (c) as required by law.	100 penalty units

	(4) In this section— ***confidential information*** means information, other than information that is publicly available— (a) about a person's personal affairs or reputation; or (b) that would be likely to damage the commercial activities of a person to whom the information relates.	

Statement of Reservation