INFRASTRUCTURE, PLANNING AND NATURAL RESOURCES COMMITTEE

Members present:

Mr J Pearce MP (Chair)
Mr CD Crawford MP
Mrs AM Leahy MP
Mr AJ Perrett MP

Staff present:

Dr J Dewar (Committee Secretary)
Ms J Heap (Assist Committee Secretary)
Ms H Rae (Assist Committee Secretary)

PUBLIC HEARING—INQUIRY INTO THE LAND ACCESS OMBUDSMAN BILL 2017

TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, 5 JULY 2017

Brisbane

WEDNESDAY, 5 JUNE 2017

Committee met at 10.01 am

CHAIR: Good morning. I declare open the public hearing for the Land Access Ombudsman Bill 2017. I thank you for your attendance here today. I am Jim Pearce, the member for Mirani and chair of the committee. Other committee members here today are Ms Ann Leahy, the deputy chair and member for Warrego; Mr Craig Crawford, the member for Barron River; and Mr Tony Perrett, the member for Gympie. Mr Shane Knuth, the member for Dalrymple, and Mrs Brittany Lauga, the member for Keppel, are apologies for this hearing today.

Those here today should note that these proceedings are being broadcast to the web and transcribed by Hansard. Media may be present, so you may also be filmed or photographed. The committee's proceedings are proceedings of the Queensland parliament and are subject to the standing rules and orders of the parliament. Witnesses should be guided by schedules 3 and 8 of the standing orders.

MILLER, Dr Dale, Queensland General Manager-Policy, AgForce

PHIPPS, Mr Daniel, Projects and Mining Project Leader, AgForce

CHAIR: I welcome representatives from AgForce Queensland. Do you have an opening statement?

Dr Miller: Yes, we do. I want to thank the committee for the opportunity to present to you this morning. The intention of this bill is to develop a Land Access Ombudsman to provide an independent avenue for dispute investigation and resolution concerning conduct and compensation agreements and groundwater agreements between landholders and resource companies. Like many other stakeholders, AgForce Queensland are supportive in principle of this proposal to provide a timely and lower cost alternative to court or arbitration. However, as outlined in our submission, we do propose some amendments to the bill as it is currently drafted.

Briefly, these amendments include, firstly, providing a role for the ombudsman in resolving disputes that arise during negotiations for a CCA or a make-good agreement and not just post-agreement disputes. Recent survey work that the CSG projects team have undertaken has shown that more than half of landholders who have gone through that process were not satisfied with their CCA, so we think a significant number of disputes do arise in that negotiation period which would be usefully addressed by the ombudsman. Secondly, these amendments enable the ombudsman to hear a matter that is or has been the subject of a departmental investigation. Again referring to our survey, only a quarter of complainants were satisfied with the outcomes of investigations, so we believe that is still an area ripe for further work.

Thirdly, our amendments enable the ombudsman to make recommendations on improving the make-good legislative framework, which is currently out of scope, as well as the included land access framework. Groundwater impacts are obviously a key concern for many of our members, and we believe it would add significant value to the role of the ombudsman to be able to address those make-good systemic issues as well. Fourthly, our amendments would enable access to the ombudsman for landholders whose property directly neighbours a resource development and who are experiencing significant impacts but who do not have a CCA.

Fifthly, our amendments would expand the annual ombudsman's report to include key issues or disputes raised and—deidentified—the methods which lead to resolutions of those disputes and the success rate in securing resolutions and a clear summary of recommendations made to government on land access or make-good issues. We believe this could facilitate future avoidance of common disputes through proactive advice and a framework clarification and improvement.

In introducing an ombudsman, AgForce are particularly interested to understand how the role would interact with the case appraisal process currently being considered by the Land Court given the proposed extensions of the court's jurisdiction to include matters relating to an existing CCA. As these two proposed functions may well interact, we believe it is timely to clarify how they might interact together and discuss those initiatives concurrently so that they might work effectively. To facilitate

outcomes, AgForce supports the parties firstly making those reasonable efforts to resolve disputes through previously agreed processes through the CCA or, alternatively, through the statutory requirements applying to the make-good process before seeking to access the ombudsman's service.

Further, 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. AgForce supports a formal review of the operation of the ombudsman after an appropriate period—say, one to three years depending on the volume of disputes that are being addressed—in order to make required changes to the office and the role based on that experience.

Just to conclude our opening statement, AgForce are supportive of the proposed ombudsman's service and have proposed some amendments which we believe will improve the usefulness of that role. We are very happy to take questions at this point. I just point out that Daniel is pretty much on daily rotation in terms of dealing with issues that our members and other primary producers have, so he is a good source of knowledge of practical issues that come up pretty regularly.

CHAIR: Excellent. Thank you very much. I just want to clear something up from the very beginning for the committee, for the benefit of people who read the *Hansard* and those who are listening. There is not a very good understanding with regard to make-good provisions. What is your understanding of what make-good provisions are? I ask for just a simple understanding so people understand.

Mr Phipps: Basically, where a mining or a coal seam gas project is determined to have a predicted impact or an actual impact on a landholder's bore beyond a trigger threshold, the company is required to develop a make-good agreement with that landholder to offset that impact, either by fixing the bore or deepening the bore, or provide an alternative water supply or determine compensation to replace that lost supply.

CHAIR: Are there issues that keep coming up on a regular basis with regard to the make-good provisions process?

Mr Phipps: Yes, there certainly are a lot of questions that landholders continuously raise in relation to the make-good framework, particularly about the independence of assessments that are done on bores to confirm whether the predicted impact is likely to take place and also, importantly, to confirm whether the proposed make-good measures are going to be effective in providing a suitable supply or ensuring that supply long term. Obviously the recent amendments last year to allow landholders access to gain independent hydrogeological advice will go a long way in providing that reassurance to landholders. I have not yet been involved with landholders who have gone through that process by engaging independent hydrogeologists, but we do believe that that will go some way to relieving those concerns. Other concerns are obviously around the long-term effectiveness of a make-good agreement and the ability of modelling to capture both not-registered bores and unregistered bores and gaps in the regional monitoring network that may leave land or bore without being predicted as being modelled to be impacted but obviously long term being able to make sure that impacts or predicted impacts are detected early enough that make-good measures can be effectively negotiated.

Ms LEAHY: Currently, when a landowner is negotiating a CCA and they incur legal costs to do that, who pays those legal costs?

Mr Phipps: Under the legislation it states that landholders are entitled to get their necessary and reasonable legal, accounting and valuation costs reimbursed by the resource company. To our understanding, only a very small handful of landholders have been left with a legal bill as a result of negotiations with the resource company. In most of those instances companies do cover the entirety of those costs, with the exception of some smaller coal exploration companies where landholders have had ongoing negotiations over a discrepancy between what the company proposes to pay and what the landholder's legal bills are.

Ms LEAHY: In your examination of the proposed legislation, if a landholder had a dispute with an existing CCA and chose to have a legal representative represent them in the ombudsman process, who would then pay for the costs of the legal representation?

Mr Phipps: Our understanding is that those costs would be the landholder's to front up. We would obviously be seeking that the costs would be covered by the resource company in that process.

Ms LEAHY: Okay, but the bill does not detail any of that, does it?

Mr Phipps: That is right.

CHAIR: Should it?

Mr Phipps: I believe it should. 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. We certainly think it would provide an assurance to the landholders that they can access this service that is independent and that would help resolve issues rather than having to escalate to the Land Court or continue to resolve and degenerate relationships even further. Our recent survey of 227 landholders indicated that about 46 per cent of landholders felt they had a very unsatisfactory or unsatisfactory relationship with a resource company, so we feel that the ability to restrict landholders from accessing the ombudsman in relation to legal bills will create another hurdle and further erode that relationship.

CHAIR: Thank you. Good response.

Mr PERRETT: Thank you for being here today. I am keen to get an understanding of what is considered for these CCAs or these make-good agreements. Water seems to be the primary issue that comes up, but are there other factors that your members in particular raise as being issues that could be considered?

Mr Phipps: Certainly. When we did the survey earlier this year we asked landholders to identify their primary concerns in relation to resource development. The primary concerns came back as weed and biosecurity risks—so either an increased risk or an increased cost on the properties—potential devaluation of land prices as a result of those activities, the time and cost taken away from their business to both negotiate an agreement and manage activities post agreement, as well as looking at impacts to their own bore. We also separated that question to identify whether landholders were more concerned about cumulative regional impacts as opposed to their own individual bore, but survey results show that they are as consistently concerned about their own bore as they are about regional groundwater impacts. We asked this question in 2015 and 2014 and the results have been very consistent over those years.

Mr PERRETT: There are legislative requirements under different acts that impact on landowners that then become an issue for these make-good agreements or these compensation agreements, biosecurity being one where there are certain provisions and perhaps the resource companies are not quite as aware as they could be, whether it is weed or other matters that could come on to properties that could then create additional concerns.

Mr Phipps: Yes, that would be right. Certainly in our experience, industry should be congratulated for the proactive steps they have taken in managing biosecurity and weed risks. We have certainly seen a significant increase in their awareness of their involvement in the biosecurity space and, obviously with a new act coming into place, increasing obligations on everybody across-the-board. The emerging issues that we are seeing in relation to biosecurity are not just managing weed or propagated material that might be brought on to the property but also managing disturbance of weeds from those activities on property and whether those weeds were already in a seed bank on the property but were effectively being controlled by the landholder but have become an issue because of the disturbance by the resource company development. That is certainly an emerging issue and something that has been a particular issue with the pipeline development.

CHAIR: How would you monitor those issues?

Mr Phipps: In relation to weed outbreaks?

CHAIR: Yes, and who is having the major impact on the spread of a particular weed?

Mr Phipps: It is difficult to quantify, as you can probably imagine. The Coal Seam Gas Compliance Unit plays a very active role in working with resource companies to audit their weed management and biosecurity plans and conduct audits on property to make sure that those are done in compliance. We advocate for landholders to include in their individual CCAs effective biosecurity and weed management considerations regarding wash-down certificates and weed management procedures about proactively identifying areas of disturbance and monitoring them periodically as part of their agreement. As it sits, a lot of that onus of responsibility is up to individual negotiations rather than an industry-wide or a clearly spelt out legislative obligation.

CHAIR: It is clear that the process that is in place at the moment is not working, because we are getting a massive spread of weeds? How can we improve on the process that we already have?

Mr Phipps: I think there is an opportunity for increased education within the industry and an increased awareness of the importance of biosecurity and weed management. We are seeing that some restrictions have been placed on landholders being able to inspect equipment or vehicles being brought on to the property to say, 'That vehicle or equipment does not meet my biosecurity obligations or my requirements and that may be bringing an increased risk onto my property.' That is certainly one of the first points. We would like to see proactive measures put in place and preventative measures put in place, in the first instance, to avoid the spread or disturbance of weeds and then a subsequent effective framework that allows for clear obligations requiring the monitoring and ongoing provision of effective weed monitoring plans from a desktop analysis and also obviously on property.

Dr Miller: The industry is getting more proactive about managing biosecurity risk at the national level in terms of some of the Cattle Council of Australia initiatives around setting up biosecurity plans. They also have implications through to market access. I think on both sides of the equation biosecurity risk is becoming increasingly recognised and steps are being taken to manage that effectively.

Mr CRAWFORD: You raised some concerns about landholders who are neighbours to resource developments. Can you explain the impacts they may experience, what is currently available to them and whether this bill will give them an alternative pathway?

Dr Miller: In relation to the survey results, 63 per cent of those respondents considered that their land had been impacted, even though the operations were not occurring on their land. That could be light, dust, traffic and other issues like that. Daniel can probably provide further examples. At this stage, there is really not much opportunity, apart from referral to a court, to get some of those issues addressed. Really, it would provide a halfway house in taking forward those issues and getting them resolved. The challenge would be how you ring-fence that to an appropriate group who either are directly neighbouring an operation or can demonstrate quite significant impacts. Otherwise, it could be quite a big group that would get caught through that.

Mr Phipps: In some of the instances I have been dealing with with landholders in relation to either gas or large coal projects, where there is no direct access through their property to the mining lease or the gas tenure they are obviously not required to have a conduct and compensation agreement in place. A lot of the landholders I have been dealing with have indicated that they are experiencing a direct or indirect impact from those activities, as Dale said—from light, dust, noise or weed material spreading across from properties.

At the moment, the only ability is to refer a complaint to the environment department to investigate a breach of either an environmental authority or an environmental protection process. Without that ability, it just becomes a determination of the court to rule on those matters. We certainly see an opportunity to allow the ombudsman, if they are able to work with landholders who directly neighbour these developments and have had significant impact, to have a dispute resolution option to avoid having to end up in the Land Court.

CHAIR: When is a neighbour not a neighbour to a mining lease?

Mr Phipps: That is certainly a question that Dale and I have discussed at length—having to put some parameters around what constitutes 'directly neighbour'. It would be an idea of not just directly neighbouring the mining lease or the resource permit but also demonstrating that they are experiencing a significant impact. Rather than being 20 or 30 kilometres down the road and bearing an unnecessary burden, they need to be able to demonstrate that they directly adjoin the project and that they are experiencing a significant impact.

Ms LEAHY: Robert Scott made a recommendation that this process should be convenient, simple and low cost. I think we have covered the cost bit. Where does AgForce think this should be established? If it is established in Brisbane, it is going to have a huge impost on landowners' time. Do you think landowners should be compensated in some way in these processes for their time? Does AgForce have what they might call a baseline CCA that landholders use? If you do, would you be happy to give the committee a copy of that baseline CCA?

Dr Miller: AgForce's policy position in general around government functions—and acknowledging that this is an independent body—is that they be located in regional areas as far as possible where quality of service delivery is not compromised and depending on the function of the group. If it is largely a government role, it would not necessarily make sense for that to be located in the regions, but where there is ongoing contact with landholders and the industry it would make sense to look at a regional location for that. Obviously, they need access to appropriate services. AgForce has commented regularly that access to telecommunications is an issue in some of the regional locations. It would be a matter of locating it in an area where there are good services and ensuring it is adequately supported. Given that it is quite a field-facing role, if you like, that would be an appropriate consideration.

In relation to the third part of your question, AgForce is currently working with some of the resource companies around developing a standard CCA agreement. I think we are up to the second iteration of that. It is still under discussion, so I am probably not in a position to share that as a final agreed position at this stage. At this point it would be a bit premature to provide that.

Ms LEAHY: Could you share it as a draft only?

Dr Miller: It is not an area that I am responsible for. I might take that on notice and get back to you, if that is okay.

Ms LEAHY: Perhaps if you could give us the basic principles that are covered without the actual document. I think it would help the committee's understanding about weed management, gates being shut—what types of things are put in CCAs. The other issue was in relation to landowners' time. Obviously, to appear in any process there are considerable impacts. What are the thoughts of AgForce on how landowners should be compensated for their time?

Dr Miller: It does come up quite regularly as a key concern—that landholders are quite surprised by the amount of time it takes to go through these processes. That is an opportunity cost to them in terms of time away from their business and taking their own interests forward. Obviously, it is a very important area for landholders and companies to get right. I think we would all be supportive of the least amount of cost coming back to landholders, acknowledging that it is a much lesser cost than going through a Land Court process for those individuals to get involved in. I note that the recent amendments provided that for alternative dispute resolutions in relation to the make-good process the cost of the facilitator would be borne by the resource tenure holder. There are precedents for looking at allocating some of those costs. Our preference would be that it is as convenient as possible for landholders to take part in that.

Ms LEAHY: The bill does not specify any of those sorts of things, though, does it?

Dr Miller: Not that I am aware of.

Mr Phipps: Not that I am aware of, no.

Ms LEAHY: Thank you.

CHAIR: Will the appointment of a Land Access Ombudsman assist in the settling of disputes between stakeholders? I get a lot of responses from landowners saying, 'The process is drawn out. There is a lot of buck-passing going on. This is taking years. It is costing me money.' Do you think the Land Access Ombudsman will make a significant difference in that area?

Mr Phipps: We hope so. As Dale mentioned in our opening statement, based on our survey responses, only about 22 per cent of landholders who had a complaint raised those with the government. Of those who raised their complaint, only about 30 per cent to 40 per cent felt satisfied with the outcome of that dispute being raised with the department. That certainly indicates to us that there is both a large number of people who are not raising complaints to anybody and a large number of people who raise complaints and who are not satisfied with the outcome of that complaint. If the ombudsman is set up in a way that provides for a resolution process, it would give landholders an avenue to further resolve those disputes rather than have it to lead to the Land Court. The ability for the ombudsman to compel information from both parties we think will also provide some greater transparency and assistance to landholders to more confidently resolve disputes with resource companies based on full disclosure of information.

CHAIR: The success of it would be determined by landholders gaining confidence in the process as it moves along.

Mr Phipps: Yes.

Dr Miller: The other point is independence. There is obviously still distrust within the agricultural industry towards both the government and the companies. Although that is improving over time—and that is a very welcome trend—there are still issues out there. Having an independent broker of discussion and agreement would be quite useful in our view and would hopefully take away some of those issues of distrust that could exist.

CHAIR: Thank you very much, gentlemen. That is excellent. The time for this part of the hearing has now concluded.

Dr Miller: I would like to thank the committee for their time.

CHAIR: Thank you very much. Could we have the response to that question on notice by 12 July?

Dr Miller: Yes.

BRIMBLECOMBE, Mr Lachlan, Solicitor, Shine Lawyers

CHAIR: Do you have an opening statement?

Mr Brimblecombe: Yes. Thank you for the opportunity to have a hearing in relation to this bill. As you are probably aware from our previous submission, Shine Lawyers has a specialist division of coal seam gas and mining lawyers who act solely on behalf of landholders in their negotiations with resource authority holders. Our team and its predecessor, Shannon Donaldson Province Lawyers, have been extensively involved in the history of CSG and the mining industry in Queensland and have lobbied extensively over the years for landholder protections. I have had five years experience in the area whilst my co-submitter, Mr Peter Shannon, has had many more. Mr Shannon apologises that he cannot be here today. This is an issue that he has advocated strongly for in the past.

To understand our submission, it is first necessary to understand what a landholder is faced with when they reach a dispute with a resource authority holder. When a landholder comes into our office and says that they are having troubles with a resource authority holder abiding by the terms that they have reached in an agreement, the advice that we might give, depending on the circumstances, normally involves the following options. Option 1: talk to the company and explain the grievances and see what result you can get that way. The most common response that we get back from that is that they have tried that many times—umpteen times—and it is not worked. Then we move to option 2: involve the department. Ask it to call a conference, air the grievances through that process and attempt to reach an agreement on a way forward. However, due to the non-binding nature of decisions that the departmental officers can make, this is often a dead end. Option 3: sue for specific performance of the contract or damages as a result of any breach. The costs of doing this and the downside if you do not succeed mean that this remains a highly theoretical option for a landholder.

In conjunction with the state of flux that the landholder is left in, they are also caught on the wrong end of a power imbalance between himself or herself and the well-resourced authority holder who has a statutory right to access the land. This has been the basis of our advocacy in the past for reform in this area. We thought that reform was coming in the form of this bill; however, it has not eventuated—at least not to any meaningful or useful extent. We see this power imbalance as being akin to the financial services sector. In the financial services sector consumers are in a vulnerable position. They are at the mercy of the actions their provider takes and have very few options of recourse if their provider acts inappropriately or in breach of an agreement that they have reached. In that sector, however, the consumer is afforded the safeguard of an ombudsman who takes complaints only from consumers and makes a binding decision on the provider. That decision can then also be appealed to a court of a competent jurisdiction if the consumer does not agree with it.

This safeguard addresses the power imbalance between the two parties. In our opinion, the land access sector is no different and the Land Access Ombudsman should act the same way. To enable the resource authority holder to also refer disputes and to prohibit the ombudsman from making a binding decision in our view defeats the purpose of the ombudsman and merely creates a duplication of forums. An authorised officer under the PAG Act already has the power to call a conference, air the grievances and try to resolve the dispute in a cost-effective manner. We are of the view that the ombudsman forum should be one that truly addresses the power imbalances between the parties.

The matters that can be referred to the ombudsman should not be restricted, as they currently are, under clauses 7 and 18 of the bill. Of particular concern is that the ombudsman can only investigate matters related to executed CCAs and make-good agreements. The problem is that 'executed' is an issue. There are many disputes that arise before execution. There are also myriad other agreements wherein disputes can arise between landholders and resource authority holders that are not CCAs or MDAs. For example, a deferral agreement authorises activity to take place on a landholder's land, yet if a dispute arises in relation to that under this bill the landholder would not be able to refer that dispute to the Land Access Ombudsman. Other types of agreements—I will not go into detail today unless you would like me to—include plug-and-abandon or decommissioning agreements, which are an alternative to a make-good agreement, an alternative arrangement and opt-out agreements. They all relate to land access, at least in part, and those disputes will not be able to be referred to the Land Access Ombudsman.

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. We are also concerned there

will be a lack of education or understanding in relation to this process, and a landholder might unwittingly or unknowingly lose their right to refer the matter to the ombudsman if they go to the department first.

The committee will also note our submission in relation to the potential abuse of process that can occur in a number of ways, such as the potential to stymie an investigation by referring the matter to the Land Court. These things need to be considered when the bill is going through its consultation phase. While some might take the view that these are only theoretical arguments, in our experience the theoretical arguments often eventuate in reality when it comes to litigation.

Finally, we again emphasise the need for section 276I of the Mineral Resources Act to be incorporated into the Mineral and Energy Resources (Common Provisions) Act. That section provides that authority holders can be found to have breached their mining lease if they breach a term of an agreement relating to that mining lease such as a compensation agreement. Such a section does not currently exist in the MER(CP) Act for conduct and compensation agreements. If the act is truly to be common provisions then it should be imported. Given its absence the ombudsman assumes a vital role, and we submit that it should be amended as underlined today and in our written submission. I am happy to take questions.

CHAIR: You have just mentioned an abuse of power associated with the limitation on the ombudsman to hear matters referred to the Land Court. Can you go into a bit more detail in that regard?

Mr Brimblecombe: The abuse of power or the abuse of process?

CHAIR: The abuse of power.

Mr Brimblecombe: The abuse of power in relation to how they can transfer matters to the ombudsman?

CHAIR: Yes.

Mr Brimblecombe: What we can see potentially is that if a landholder is not being cooperative or the company is worried about their attitude, because what goes through the Land Access Ombudsman is then admissible in the Land Court, the power that rests with the company to refer that dispute to the ombudsman will be exercised and they will use those things that are admitted against them in the Land Court if it ever gets to that stage. Does that answer your question?

CHAIR: Yes. It is a fairly complex issue. I am aware of the processes that landowners go through such as trying to talk to the company. What can we do to ensure this sort of abuse of process does not take place? Obviously that sort of thing has been happening for years and years. I understand that what you are saying is correct. What can be done to correct and prevent that process from taking place?

Mr Brimblecombe: Basically, we are on board with an ombudsman. We feel that the ombudsman can address that issue if it is only capable of having disputes referred to it by the landholder. Those disputes are then decided and that decision is then binding, but appealable, by the landholder. In our view, because of the independence of the ombudsman that would address those issues.

CHAIR: What if the mining company is not happy with the position the landholder is taking? There are two sides.

Mr Brimblecombe: That is an interesting question. In our view, they have all the resources available to them. If it is truly contended that there is a very small company out there that has been trodden over by a very large landholder, discretion can be built into the bill for the ombudsman to hear disputes from companies under X dollars in value that are not subsidiaries of giant companies. On the flipside of the coin, Origin Energy or one of the four big gas companies out there, or Rio Tinto or BHP, for example, have all the money in the world to refer those disputes to the Land Court for determination. A landholder wants to do this as cost effectively as they can. In most instances these companies have all the time in the world; a landholder does not. They have a business to run.

Ms LEAHY: The bill gives power to the ombudsman for two purposes: investigation and mediation. Do you agree that it should have those two roles and functions?

Mr Brimblecombe: I do, but I am worried. Our key concern is that the decision which is then made is non-binding—and how does that investigation or mediation get to the ombudsman in the first place? If both parties can refer it there then we do not agree with that. It should only be the landholder that gets to refer. I am concerned that there is duplication of forums in that, if it is to be mediation as well, you will have mediation by department, mediation by a mediator and mediation by an

ombudsman—you can have even just a private round table—so there are a lot of different options available. Without knowledge of the pros and cons of each, a landholder might unknowingly be caught in a position that they do not want to find themselves in.

Ms LEAHY: We heard earlier from AgForce, who advised that companies pay reasonable legal costs for advice on CCAs. Can you advise if reasonable legal costs are paid by companies for the opt-out agreements, the deferral agreements, the alternative arrangements, the decommissioning arrangements and the PAG arrangements?

Mr Brimblecombe: I will have to take each of those separately. For opt-out agreements the answer no, because there are no legal costs in an opt-out agreement. An opt-out agreement is a new thing under the MER(CP) Act that was brought in to capture those companies that are dealing on large properties up in North Queensland where a goldminer is intending to conduct a small-scale activity perhaps. A big landholder up there does not really want to be bothered by going into a CCA. In our view, opt-out agreements should be totally gone, but there are no legal costs involved in negotiations there because there are no negotiations; it is simply signing off. Yes, legal costs are captured in deferral agreements. In relation to plug-and-abandon agreements, decommissioning agreements and alternative arrangements, each of those is separately a negotiated outcome with the company so there is no security under a statutory provision for costs in those negotiations.

Mr PERRETT: Getting back to the legal process, you explained very well the initial process that a landowner is faced with. What are the indicative costs associated with engaging your firm in respect of dealing with these issues, from some of the more minor sorts of issues that perhaps come to the fore or some of the major issues where it does end up potentially in the Land Court in a protracted legal case?

Mr Brimblecombe: It totally depends on the attitude of both parties and the firm's charge-out rate. It could be a simple dispute—'You're not locking the gates as you're leaving and stock are getting out'—which can be simply resolved in some instances with maybe the cost of a letter, so $500 or something thereabouts. If it is a large dispute such as a huge subsidence over a pipeline, weed spreads and things like that, you are talking about hundreds of thousands of dollars for a court action for special damages and things like that.

Mr PERRETT: It can be significant?

Mr Brimblecombe: Yes, absolutely. Weed spread is a huge issue. We have many landholders who come to us and say that weeds are being spread that were not there before or weeds are being disrupted that were not before. The costs of proving those sorts of actions—if it is not strict liability and not apportioned under the conduct and compensation agreement—can be huge. Engaging an expert to prove that the weed was not there before or has been disturbed as a result of the activities and that compensation has not been paid for it under the agreement can cost hundreds of thousands of dollars.

Mr PERRETT: Obviously landholders are directly affected, but is there scope under this proposed legislation for third parties to become involved?

Mr Brimblecombe: Third parties as in neighbouring landholders, or third parties as in third-party experts?

Mr PERRETT: Third parties, yes.

Mr Brimblecombe: It is one concern that I did have, and I think it was raised in other submissions in relation to the laws of evidence not being complied with. In our view, oftentimes the landholder is the best expert of what goes on on their place, yet if the ombudsman is strictly to abide by the laws of evidence such as the other submissions have said then that evidence would not be able to be considered in the investigation. It would fall to the landholder to bring evidence before the ombudsman. I think under the bill they can bring whatever evidence they like before the ombudsman for investigation. It is a matter of whether the ombudsman is interested or not. That is another issue.

Mr PERRETT: There is a potential there for third parties to be involved?

Mr Brimblecombe: As in third-party evidence?

Mr PERRETT: Yes.

Mr Brimblecombe: Yes, but the costs of that, as I understand it, would be borne by the landholder, which is not very satisfactory.

Mr PERRETT: Should that be clarified within the bill?

Mr Brimblecombe: I believe so.

Ms LEAHY: If we were to hypothesise that the bill as it currently stands becomes law, would your firm's professional advice to a landholder contemplating using the ombudsman process be to waive their right to legal representation or retain their right and foot the costs of that legal representation, if they were proceeding as the bill currently stands?

Mr Brimblecombe: Because any admissions made or evidence put forward is then provided to the Land Court if a dispute arises, we would say retain the right to legal advice.

Ms LEAHY: Have you looked at any particular costings as to what that legal advice might cost a landowner who is going through the Land Access Ombudsman process?

Mr Brimblecombe: We have not looked at it in detail. I would say that 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, yes.

Ms LEAHY: I suppose weeds would be a classic example.

Mr Brimblecombe: A classic example, yes.

Ms LEAHY: We have heard that there are a few of those around and they keep growing, so they would be quite complex.

Mr Brimblecombe: Very complex, yes, not only from the point of view of proving that the weed was a result of the activities of the company but also from a legal point of view in proving that the compensation has not been paid for those disruptions or that weed spread, and then there are other legal issues involved in there as well.

CHAIR: Other submitters have raised concerns with the powers of the ombudsman to compel parties to provide certain information and documents. Would you like to make any comments in this regard?

Mr Brimblecombe: Can I take it on notice? I have not considered that in detail. I have not read those submissions or those parts of those submissions. I would like to look at that a bit further, if I could.

CHAIR: There is another one that can go with that. You may have touched on it already, but that does not matter. We are just looking for ways that we can understand it. We do not have the brains that you guys have. It is all very confusing at times. Some of the submitters have raised concerns that the ombudsman is not bound by the rules of evidence. Would you like to make any comments with regard to that?

Mr Brimblecombe: What I said before is what I have considered at this stage. I will take it on notice and get back to you with a more detailed answer but, as I said before, oftentimes the landholder is the best expert. If that evidence would normally be for an expert to raise in a court, yet the landholder might say, 'Well, that bore used to pump X and now it doesn't,' that evidence would normally have to be given, in most circumstances, by an expert in a courtroom. If the laws of evidence were truly to be abided by in the Land Access Ombudsman process, that evidence would not be able to be given or heard or relied on.

CHAIR: Is that an issue?

Mr Brimblecombe: For us deeply so, yes.

CHAIR: For you as a legal firm?

Mr Brimblecombe: For us as a landholder representative, yes.

CHAIR: Earlier, and in your opening comments in particular, I had a feeling, from where I am sitting here, that you came down fairly hard on the mining companies. I guess that is from experience.

Mr Brimblecombe: Yes.

CHAIR: Working with landholders all the time?

Mr Brimblecombe: Yes.

CHAIR: Is there anything that the legislation has overlooked with regard to making things work a lot better between the two parties? I guess in this situation it is where you sit in the argument about how fair you think it is.

Mr Brimblecombe: Yes. Are you saying in terms of having a more collaborative process and trying to get something along those lines?

CHAIR: Yes, if it can be worked out earlier or before it needs to go to an ombudsman.

Mr Brimblecombe: Often we find that by the time the dispute arises it is too late: they have tried many times to resolve it with people on the ground. The ombudsman often would not be the first port of call, as I explained earlier. The first port of call would be to raise it with the on-ground land access adviser or something along those lines—whatever the company might refer to them as. The trouble comes through when you have sub-sub-subcontractors conducting activity on the land and there is no clear communication between their advisers or it just does not flow through in relation to access. That is where one problem arises. There is a lot of miscommunication, we feel, between company representatives and on-the-ground staff.

CHAIR: This ombudsman will be able to identify all those issues and address them?

Mr Brimblecombe: Hopefully so, yes. What happens from there might be a different thing.

Ms LEAHY: As the bill currently stands, the ombudsman can make recommendations about possible offences under other relevant acts but it will rely on information that is gathered in an investigative process but not subject to the rules of evidence. What sorts of complications can that cause for other courts like the Land Court and other processes, particularly for clients?

Mr Brimblecombe: My understanding was that the recommendations it could make were largely to the chief executive and other ministers. It can then also provide a notice of its decision and that notice would then detail the information it has relied on and that notice is admissible to the Land Court if a dispute is referred to it. It can create issues, I think—or it definitely should be considered, but I will probably have to take that on notice and get back to you with further detail.

Ms LEAHY: Do you think the ombudsman's brief should be limited to that mediation type process rather than as an investigator to recommend offences under other acts? Do you think it should be limited?

Mr Brimblecombe: No, not necessarily. I think it should maintain at least both roles but, again, with the provisos that we outlined at the start as to how disputes are referred there and any decisions on binding. That is a proviso that we would have with it.

Ms LEAHY: Even though—you mentioned earlier the imbalance—it could be used, as the legislation currently stands, in a more predatory way?

Mr Brimblecombe: At the moment, as it currently stands, it could, definitely.

Ms LEAHY: A company could be trying to get an agreement through and it uses the ombudsman process to frustrate and tie up time of a particular landowner but not actually use evidence?

Mr Brimblecombe: Yes, absolutely.

Ms LEAHY: Then it could still end up in the Land Court.

Mr Brimblecombe: Yes, definitely, and it is just another forum, in its current drafting, that we already have in place. We already have the department there. We already have the mediator there—or the arbitrator, if need be.

Ms LEAHY: Really, some of these processes are a duplication?

Mr Brimblecombe: I think so.

Mr PERRETT: Earlier you mentioned provisions within other acts and said that perhaps this legislation should link directly to those where there has been a breach of an MGA and perhaps the suspension or otherwise of another relevant authority under another act to then cease the operation until they are sorted. Is that what you mean by referring to other acts and the provisions that are contained within this and the breach of those?

Mr Brimblecombe: What I meant was: currently under the Mineral Resources Act there is a condition of a mining lease whereby if you breach a condition of an agreement that relates to that mining lease, which is a compensation agreement in our view, then that would constitute a breach of the authority—the mining lease. That is what we say should be imported into the MER(CP) Act and apply to petroleum leases, authorities to prospect and every other authority under the MER(CP) Act.

Mr PERRETT: If there was that amendment to this bill, would that then place greater onus on those resource companies to be fair dinkum in dealing and resolving these issues?

Mr Brimblecombe: We feel it could result in a more measured approach, yes.

CHAIR: You are not saying that the mining companies are not fair dinkum?

Mr PERRETT: I am not saying that they are not fair dinkum, but in respect of dealing with these issues or expediting the process and making certain that they do deal with these up-front, having a measure that would perhaps resolve the issues a bit more meaningfully in an expedited process would be advantageous to the landowners?

Mr Brimblecombe: Yes, we feel so.

CHAIR: There are a few questions on notice. Would you be able to get responses to the secretariat by close of business on the 12th?

Mr Brimblecombe: Absolutely.

KRULIN, Ms Vanessa, Policy Solicitor, Queensland Law Society

PLUMB, Mr James, Partner, Carter Newell; Chair, Queensland Mining and Resources Law Committee, Queensland Law Society

CHAIR: Would you like to make an opening statement?

Ms Krulin: Thank you for inviting the Queensland Law Society to appear at the public hearing on this bill. As you know, the society is an independent and apolitical representative body representing over 11,000 practitioners whom we represent, educate and support. In carrying out our central ethos for good law and good lawyers for public good, the society proffers views that are truly representative of our member practitioners.

This particular submission has been provided to the committee with the input of the Queensland Law Society Mining and Resources Law Committee, whose members represent both of the major stakeholders targeted by this bill, both landholders and resource companies. The chair, Mr James Plumb, of the Queensland Law Society Mining and Resources Law Committee will make comments, particularly on the following issues, which are identified in our submission. First, we believe that critically the Land Access Ombudsman is not bound by the rules of evidence but evidently should be. Secondly, as currently drafted, there are serious concerns in relation to the preservation of confidentiality and privilege for both landowners and resource companies. Thirdly, we see quite a conflict and confusion with contractually agreed dispute resolution provisions and how that will work in conjunction with the provisions of this bill. I will hand over to James. Should there be any questions from members, we would be happy to take them.

Mr Plumb: Thank you to the committee for the opportunity to address you this morning on behalf of the QLS on this bill. As Vanessa mentioned, I am the chair of the Mining and Resources Law Committee. The members of our committee do represent both sides of the debate in this regard, both sides of the CCA and MGA relationship: miners and landholders. From that perspective we consider our submission and perspective to be well informed in this regard.

Generally speaking, our committee is supportive of the stated policy aims of establishing a mechanism to assist in the timely and low-cost resolution of disputes that may arise out of the co-existence of resource operations and landowners. The bill to establish the office of the Land Access Ombudsman has, however, raised some concerns that Vanessa has touched upon. Before we delve into it, I will give a bit of background from our perspective.

It is important to note that CCAs and MGAs can be highly technical. They are very valuable long-term arrangements that have significant consequences for miners and for landowners in particular. There is the potential for disputes arising out of CCAs and MGAs to have very significant ramifications for the operations of a resource company and also for the landowner and most likely for both.

At this stage we note that the bill does not propose an upper limit or an upper threshold for the jurisdiction of the ombudsman in measuring or determining any disputes in this regard. While the determinations of the ombudsman are said not to be binding on the parties, the fact that the ombudsman has an obligation to provide a notice to the parties which will be admissible as evidence of the matters in that notice in any formal proceedings to determine the dispute, and also to provide a notice to the relevant regulators regarding any potential breach of tenure, means that the outcome of the ombudsman's investigations has potentially very significant ramifications for the parties involved.

On that note, our committee 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. This then we believe has the potential for unintended consequences, not least of which could be a situation where the parties fail to engage in genuine attempts to negotiate and resolve any disputes that do arise for fear that their efforts will ultimately backfire and be used against them inappropriately. In short, the QLS submits that the ombudsman be bound by the rules of evidence when carrying out an investigation into a dispute.

The issues I have just talked about are further compounded by the powers of the ombudsman to compel the production of evidence during an investigation. Key here is the proposed breadth of these powers. From our perspective, it is not appropriate for information that is gathered during an

investigative process—a process that is at the moment designed and intended to resolve what are effectively commercial disputes—to be provided to regulators that may be relied on in subsequent prosecutions, especially when considering that the ombudsman's investigations are not subject to the rules of evidence.

We consider that documents or information required by the ombudsman be central to the matters in dispute and under investigation and not broadly related to the dispute. As our submission has noted, the potential for a regulator to obtain and use information obtained by the ombudsman in the investigation of a dispute could lead to behaviours by resources companies in particular that are inconsistent with the stated aims of promoting the timely and efficient resolution of disputes.

It is the view of the QLS that the proposed power to refer matters to the regulators be removed from the bill and, failing this, that further protections be afforded to information disclosed during the ombudsman's investigative processes. For example, the ombudsman should not be permitted to rely upon correspondence or other information that has been given on a without-prejudice basis during the investigation.

Finally, the society is concerned about the confusion and uncertainty that will be created by the ability to refer matters to the ombudsman notwithstanding agreed dispute resolution mechanisms. Parties to CCAs and MGAs in many instances negotiate dispute resolution mechanisms with great care and diligence. 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. We submit that the ombudsman should accept a referral only in circumstances where any agreed dispute resolution procedures have been exhausted, unless otherwise agreed by parties. To allow otherwise casts doubt on the validity of the pre-agreement negotiation process entered into in good faith by the parties and may produce the opposite effect to that which was intended by this legislation—that is, it could bring about more uncertainty and disagreement rather than less. There are some other aspects to our submission that we would be happy to discuss, but they are our main concerns at this point.

CHAIR: Thank you very much. I may be reading it incorrectly, but I get the feeling that you do not really think much of this legislation with regard to the ombudsman. You do not seem to think a lot of it. You came up with plenty of reasons we should question whether the position should be there.

Mr Plumb: Speaking on behalf of the QLS more broadly, which is the capacity here today, like I said, I think we are all in support of a low-cost, timely resolution of these disputes. The concern is, I believe, unintended consequences. There is a potential that this does no more than replicate processes that may already exist, but the ability to take questionable evidence and turn it into a notice or an advice that becomes good evidence in a court of law is a real concern.

The extended aspect associated with regulatory breaches seemingly overextends into the regime of the regulator. I would have thought that, for something like the ombudsman to be successful, it needs to be a trusted and valued jurisdiction by landholders and resource companies. If you have a situation where one particular party—or any party—to that process does not believe that they are going to get a fair shake of the tree, or is concerned about significant impacts upon their overall operations out of what is supposed to be a relatively informal process, then they will look to avoid that process if they can.

CHAIR: From what you have just said, it would depend on the performance of the structure from the beginning to ensure that everybody has confidence in it?

Mr Plumb: Absolutely.

CHAIR: Tell me about questionable evidence.

Ms Krulin: This comes back to our point about the rules of evidence that underpin our entire legal framework and the confidence that we have in it. For such serious potential consequences for both parties that may result from any notice that is submitted, or progressed into prosecution, or otherwise, it is so critical that those well-established rules are adhered to. They are set up for the protection of everyone and we think they are instrumental to this process.

I will add to James' point and what I think you were saying, Mr Chair, about clarity in the process. Although we are very supportive of the workshopping of ideas and channels to make this process better and hopefully come to better, quicker, cheaper options for all parties, there is a real concern that this is a duplicating process. There are several other processes in place, notwithstanding the ones where parties will have had extensive negotiations to come to costs agreements and ADR provisions in their CCA or MGA at the outset. Any process that overlaps or adds another leg that necessarily does not lead to a faster resolution—keeping in mind the intention and the resilience of the parties through that time as well—is difficult to support at its outset.

CHAIR: When does questionable evidence become questionable evidence? Will the ombudsman be able to recognise that it is questionable evidence? How would he or she proceed after that?

Ms Krulin: That is a very difficult question to answer because of the complexities around that, but I think those issues could be removed easily if you removed the ability to refer and take that 'questionable evidence' and put it into something that can form the basis of a prosecution, because then that information can come freely and without the burdens of what might come next. It is not so much evidence as we would refer to the term under the Evidence Act, but it is information that can be given in a truly good-faith manner. If an ombudsman model eventuates, that is something that should be considered.

Mr Plumb: Just to expand further on Vanessa's points, the examples of circumstances that the ombudsman may take into account and perhaps should not would be issues of hearsay—evidence given by a resources company, 'I heard this landowner was doing X. I heard this landowner was overgrazing and that is why we have what we have.' It should be evidentiary. It should be, 'I have evidence that the landowner has overgrazed, creating the dust bowl conditions resulting in this and here is an expert report that has been independently prepared'—those sorts of things.

The concern would be that an ombudsman would do their level best to understand what was questionable evidence than otherwise but human nature might be to not overlook things that have been brought to their attention, even if maybe not all the circumstances or rights of reply have been offered such as evidence in isolation—'Look, here's an email which shows you X'—and the other side might have a perfectly good explanation for the circumstances surrounding that but they might not be given a right of reply or something like that. 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.

I think some of the other ombudsmen in Queensland have upper thresholds in terms of values. I know that they can make binding determinations. The scope of these issues can be so significant and, where the outcome can be so material, it is a real concern.

CHAIR: Thank you.

Ms LEAHY: Do other ombudsmen use the rules of evidence—for instance, the Queensland Ombudsman, the telecommunications ombudsman, the banking ombudsman, the insurance ombudsman? Does their statute of power give them that requirement?

Mr Plumb: I do not know in all circumstances. I know that perhaps the energy and water one does not but, like I said before, in that circumstance where it is both parties to an energy and water retail agreement either party can go to that ombudsman to satisfy the dispute. The ombudsman is boxed in to coming up with an outcome. That is maxed out, so to speak. You have a particular bill that might be in dispute. That is the extent of their jurisdiction. Here, we do not have the same fetters. It is essentially the ability to look at anything and then go further and look at issues associated with tenure reach and the like. The concern is the breadth of that jurisdiction in circumstances where you do not have that need to rely on good evidence.

Some of the other ombudsmen are in place to look over the government's function as well. It is a bit of a different process. I think the Queensland Ombudsman is a different body in that regard. I am sorry, I cannot answer whether they are all bound by the rules of evidence or otherwise.

Ms LEAHY: I go back to Robert Scott. He is a retired member of the Land Court. He was given the terms of reference to investigate whether an alternative model such as an independent resources ombudsman is needed to provide a mechanism. I am hearing from you that there is not a need for a duplicating mechanism, but there probably could be an avenue to deal with some of the other issues that arise. Obviously, Robert Scott found out that there is currently no convenient, simple, low-cost avenue for landholders. If we are saying that this is a duplication, there must clearly be some other problems in other areas. What is the solution rather than the duplication?

Mr Plumb: That is a really good question. I am not sure that we have the answer as to what the solution may be. I have read a lot of Robert Scott's report and I note his recommendations in that regard. I believe that Robert did not think an ombudsman was the appropriate mechanism to achieve that. The rationale there would be that this is not a true ombudsman situation, as he saw it. 'What is the solution?' is the $64 million question. Maybe it is additional trust in existing arrangements. You

already have this bill proposing to put the Land Court as the court of final determination, which potentially is less of an imposition and an easier jurisdiction for all parties to move within rather than the Supreme or District courts. Potentially, the model that you have already here with some changes would achieve what is ultimately required, but I have a feeling that both parties have some real concerns. We are trying to represent the members of the Queensland Law Society and come at this from a perspective of good law rather than the policy outcome. It is difficult for us to canvass those broad-ranging opinions. I think that maybe that question is better for either the industry associations, on both sides of the fence, or the particular practitioners where they can come at it from their own perspective rather than a broader one.

Ms LEAHY: I have read the Law Society's submission and I get the distinct impression, as the chair may have as well, that there is probably a view that this is not really good law because of the unintended consequences.

Ms Krulin: As you will of course have seen from our submission, we think at a minimum some changes need to be made to the bill. Of course we have talked about the rule of evidence and there was one suggestion we made, and I cannot recall which recommendation it was without flicking through. I believe the explanatory notes made reference to the fact that the parties should have made reasonable endeavours to go through any existing dispute resolution provisions which they had previously negotiated.

Mr Plumb: Sorry, you are saying the explanatory memoranda. I think the bill just says that they must have used reasonable endeavours to negotiate and that leaves uncertainty as to whether they need to go through the agreed processes or another process before the ombudsman would consider taking the referral, if that is what you are referring to.

Ms Krulin: Yes, that is exactly right. One thing that could be tweaked is to say, 'It's a requirement that you exhaust those contractual provisions,' that are usually really important to both sides entering into that agreement and really comprehensively and thoroughly thought through at that time. I think that is something that could be looked at quickly. Again, as James said, it is not the Law Society's place to comment on the policy behind it except to say that we support the intentions that we have seen. Our caution is that those intentions perhaps will not be borne out in the way that they were hoped through the drafting at the moment.

Ms LEAHY: You did make a fairly significant recommendation where you said that clauses 53, 54 and 55 should be removed.

Ms Krulin: Yes.

Mr Plumb: That is the referral to the regulator.

Ms LEAHY: That is probably a little more than a tweak, isn't it? I think that is probably to knock them out.

Ms Krulin: Yes, and that comes back again to what we were saying about the rules of evidence and the intention that the parties enter this process with completely good faith and without fear that what they may say, tender or otherwise could be later not just used against them but used in a way that perhaps was not their intention. As James also mentioned, that seems to extend beyond similar offices, moderators and ombudsman powers.

Ms LEAHY: Thank you.

Mr CRAWFORD: I am listening with interest; I am a little bit confused. Do you support the concept of an ombudsman or not, because it is going all over the place?

Mr Plumb: We support the policy. In terms of what it is called, I guess it does not really matter what anything is called from our perspective, although some members of our committee have raised concerns about it being called an ombudsman; they do not believe it is one. From the QLS's perspective it does not really matter what it is called, but we are in support of something that would achieve low-cost and timely resolution of disputes, as long as that engenders the confidence of all the parties. At the moment we are saying that there are some concerns in that as it is drafted it goes a bit too far.

Ms Krulin: Certainly that has been our feedback from those members that represent both sides, that they do not have confidence in the drafting as it stands to achieve those intentions.

Mr CRAWFORD: We heard from AgForce earlier and the Resources Council is up next. Both of those organisations are generally in support of the bill and one would think their respective clients and organisations are the ones that are going to be sitting at the table with an ombudsman. I am just trying to work out what is happening.

Ms Krulin: And they are better to speak on those policy considerations than the Law Society is. We are only trying to point out some of the legislative and practical implications that we foresee.

Mr Plumb: I will make an overall comment that I do not think it is, 'Oh, yes.' From the QLS's perspective, it is not something to be thrown away. We are overall in support of something that can be done, as long as some of the concerns we have raised can be addressed, and potentially they can be.

Mr PERRETT: Thank you for being here. I am very interested in rules of evidence, and I can understand why the Law Society would raise this issue. I will give you an example and what I would like to hear is what advantage the government or the minister may see in promoting something like this. I will give you an example: a committee that I was on previous to this one looked at the Vegetation Management Act and provisions were proposed about reverse onus of proof. The president of the Law Society made very strong representations in respect of this being bad law. Ultimately, the parliament did not pass that legislation, but there was a retrospective aspect to it and the whole thing was about it being bad law. I am picking up that this is potentially going to be bad law—components of it—because of the rules of evidence aspect and the fact that it may complicate or end up, worse still, that the penalties that are associated with this could ultimately outweigh any potential benefit. Why would a minister propose something that has the potential to create this for either party?

Mr Plumb: From my perspective it relates to the drive to create a low-cost and timely mechanism to resolve the disputes. Imposing rules of evidence will basically increase the workload of the ombudsman in this regard and increase the process generally. I would assume there are many perfectly appropriate circumstances where rules of evidence should not apply. I guess you need to balance that with the impact and the outcome. From the society's perspective, the far-reaching impact and outcome of the ombudsman's powers means that we consider that the benefits that are offered by being outside the rules of evidence are overshadowed by the potential negative consequences.

Mr PERRETT: We make recommendations to the parliament in respect of this, and obviously this is an area of interest. Is there any specific recommendation that you would give to us that we could include in a report to the parliament?

CHAIR: That is in the best interests of all parties.

Ms Krulin: I think we have covered quite a lot. The first recommendation in our submission is about the rules of evidence. I think that is clearly in the interests of both parties, so that is the society's submission. The society proposes that the recommendations that we have included—the seven that we have included—in our submission be considered by this committee. If you would like the society to provide a supplementary response to you with some further information, we would be happy to do so.

Mr Plumb: At this point in time, from my perspective at least, the recommendations have given certain fall-backs—that is, 'if this cannot be achieved, then at least this should be done'. If there are any particular aspects you would like us to make a supplementary submission in respect of, we would be happy to take those away and respond quickly, but at this stage I have not been asked anything specifically. Obviously from a legal perspective it would be ideal for the rules of evidence to be followed. We understand that other practical and policy implications might preclude that, so in those situations the fall-back is to make sure the scope of the ombudsman's powers are limited appropriately.

Mr PERRETT: It was more along the lines of if there was something that was not covered, and I note the recommendations that were there. Obviously we are about reviewing this and asking, where necessary, the minister to provide clarification—and perhaps they can—to the satisfaction of the parliament, but in the first instance good law should be the priority.

Ms Krulin: I will draw as well on what you said about our former president, Mr Potts, and what he said about the Vegetation Management Act. With regard to the justification for the reversal of the onus of proof, as with the rules of evidence—those fundamental rules that underpin our legal framework—we take them very seriously and we believe they should be present in every piece of legislation. It must be with very good evidence, as James said, and for achieving the outcomes that are intended that we would be dismissive of those fundamental rules. Those fundamental rules are noticed at a federal level. The federal Attorney-General and the state Attorney-General all have recommendations and processes and committees in place to ensure that our legislation is clear, well drafted and adheres to those rules. It is something we take very seriously.

Ms LEAHY: Robert Scott recommended that there should be a convenient, simple and low-cost mechanism. The way this bill is drafted, landholders can seek to have legal representation in the ombudsman. Would there be any benefit in capping the amount of expense on the legal

representation? Sometimes with these things it draws out and the lawyers' bill is quite often larger than any compensation might be. Should a cap be included in there? The objective is to try to get an outcome. Should there be some cap of the lawyers' fees in the ombudsman process?

Mr Plumb: At the moment each party bears their own costs, so would you anticipate that the parties cannot incur more—that is, as between one party's relationship with their individual lawyer, the lawyer cannot charge any more than X to help them with this particular matter? Without taking the views of everyone in the committee, I would imagine that is going to create some sort of tension between a party wanting to get the best representation they need and a lawyer. I guess I am speculating what the cap might be. It might be fairly low to keep the costs low, and the lawyers involved may be reluctant to agree to participate based on something like that. I can understand if it was a situation where one side of the debate was to wear the costs associated with this. If it was a cost jurisdiction, you would want some certainty going into that. I do not know whether the QLS has made submissions on that before, but there may be concerns and consequences which might impact some parties more than others.

Ms LEAHY: I am just thinking that might address some of imbalance, because you could have a multinational company that can afford to have international barristers representing them for a case that has to be negotiated with a 70-year-old landowner. I am just wondering if there is some way of addressing the imbalance by putting a cap on the legal fees that are applicable in a particular mediation or investigation.

Mr Plumb: So a legislated cap unless the particular party agreed could not be—

Ms Krulin: I am not sure. We would like to take that away and workshop it a bit more. I am also considering the unintended consequences that James has alluded to which might mean that you exclude certain more experienced solicitors from taking on those representative roles because they know that they will only get this much. We would have to go away and look at the optics of that and come back to you.

Mr Plumb: I do not know whether you will hear from any other lawyers that represent landholders or mining companies ostensibly, but it would probably be a question for them as well because I do believe that in their own business interests they would probably have a view as to what they could and could not do and what the impacts on their clients would be in those circumstances. We are happy to take it away and make a further submission if you like.

Ms LEAHY: Yes, we are happy for you to take that on notice. Thank you.

CHAIR: Does the Queensland Law Society have consultation with government agencies' legal advisers or the other way around? Do they consult with you guys about some of the stuff that they might want to be putting through to see how you read it?

Ms Krulin: Yes.

CHAIR: They do?

Ms Krulin: We did meet with the Department of Natural Resources and Mines and representatives of Environment and Heritage Protection at the outset. I am not sure if it was at the outset, but we were consulted. We gave some preliminary remarks and, yes, we do like to look at legislation.

CHAIR: What about the comments you have made today? Have you gone back to the department to raise your concerns?

Mr Plumb: It was a process whereby we were invited to meet with DNRM before the draft was made public and we made some submissions at that point in time. Some of those submissions were acted upon and are reflected in the draft bill. Some of them were not and they are pretty much the ones you are looking at at the moment. They were aware of them and I think they have taken them into account.

CHAIR: Thank you very much. That was an interesting session. You have some questions on notice.

Ms Krulin: Yes.

CHAIR: If we could have answers by 12 July, that would be great. Thank you very much for your attendance.

Ms Krulin: Thank you.

HANSEN, Ms Emma, Resources Policy Adviser, Queensland Resources Council

MACFARLANE, Mr Ian, Chief Executive, Queensland Resources Council

MULDER, Ms Katie-Anne, Resource Policy Director, Queensland Resources Council

PAULL, Mr Matthew, Policy Director, Australian Petroleum Production and Exploration Association

CHAIR: Do you have an opening statement?

Mr Macfarlane: Thanks, Mr Chairman. I thank the committee for asking the QRC to appear today to speak on behalf of our members. As you know, the QRC is the peak representative organisation for the resources sector companies and our membership encompasses gas and mineral businesses operating in the state's regional and remote communities as well as a wide range of businesses that provide services to our sector. In 2015-16, the Queensland natural resources industry was responsible directly and indirectly for $55 billion in income to the state and one in seven jobs in the Queensland economy. Queensland resources companies purchase supplies from over 20,000 Queensland businesses and more than 13,000 of those businesses are based outside the south-east corner.

Despite the downturn, the resources sector continues to be a major contributor to Queensland government royalties, with an extra $2.1 billion this financial year to help fund our health system's doctors and nurses as well as our state's teachers and police. None of these contributions would be possible unless the sector maintained a sharp focus and relationships with landholders which are socially responsible, environmentally sustainable and profitable to both parties involved.

The resources sector and landholders have worked tirelessly for several years to create a co-existence model that leads the nation and has been a major wealth creator and regional employer. The industry has worked with farmers, not against them, to thrash out sensible solutions on the hard issues. As a former farmer, it is my experience that if you work with farmers to strike a fair deal they will bring their rural communities along with them.

The resources industry has delivered many benefits to Queensland landholders. With farmers in agreement, the industry created an onshore gas industry in Queensland with one of the largest concentrations of private capital in Australia's history. With the best part of a $70 billion investment, it is, in today's dollars, the equivalent of three Snowy Mountains hydro schemes. That is the first Snowy scheme—the one that took 25 years to build, not Snowy 2.0. This could be achieved only by listening to the concerns of landholders and outlining the benefits of co-existence through the conduct and compensation agreements. These agreements enable farmers to share their land and share in the wealth of the resources sector below it. This resource belongs to all Queenslanders and it is all of our resources that sit under those Queensland farms.

For the gas industry alone, the number of CCAs with landholders in Queensland is almost 5,000, with over $230 million in compensation already paid to landholders as at July 2015. That number is two years old. Farmers can structure these payments to match their circumstances. For some, it funds their retirement and a transfer to the next generation. Others look to the security of an annual guaranteed payment every year. One company operating in the Surat Basin alone provides over $400 million to 100 landholders to access the gas below their land. I should note that our covering letter had a typo in it. It said that it was only 10 farmers. They would be very wealthy. I want to correct that. It is 100 landholders for $400 million.

Many landholders have also negotiated non-financial outcomes, adding to their productivity and value to their properties by securing new fences, roads, better irrigation with reliable access to electricity, upgrades to mobile and internet services as well as the sales of gravel and mortar. In some areas they have also gained access to treated CSG water for irrigating crops.

The QRC broadly supports the establishment of the Land Access Ombudsman, as it provides a no-cost option for both landholders and companies to refer a land access dispute. Having said that, it is clear by the examples that I have provided that Queensland's land access arrangements have already reached best practice. Our southern states could learn a lot from Queensland's successful experience.

There are a few concerns about the bill that the QRC would like to highlight. A few of the issues that I will raise are matters that we hope will be addressed operationally once the ombudsman is established. These are just examples of a few of our issues, which we have outlined in our submission.

Firstly, CCAs are negotiated agreements between the parties that ensure effective co-existence. The bill states that a party does not incur liability if they have referred the matter to the ombudsman without first using the dispute resolution mechanism of the CCA. The QRC would like to register its concern regarding this section of the bill as it overrides conflict resolution clauses in these agreements. The Queensland Law Society has also raised the issue in its submission. The QRC supports the QLS recommendation 5 to amend the bill 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 the CCA or make-good agreements.

The QRC takes some comfort in the fact that the bill also outlines that before parties can refer disputes to the ombudsman they must first make a reasonable attempt to resolve the dispute with the other party. The QRC understands that, should the bill pass, the ombudsman will likely produce a procedural guideline that will outline what is a reasonable attempt to resolve the dispute. This guideline will need to be robust and be developed with significant stakeholder consultation.

Collaboration over the years between the sector, the government and landholders has led to the introduction of CCAs, make-good agreements and strengthened regulation and guidelines through the Department of Natural Resources and Mines. There is no other industry in Queensland—or, indeed, Australia—that adheres to the strictest set of rules and regulations more than the resources industry. Although the QRC understands the government's intentions to establish a Land Access Ombudsman, it is concerned that its powers could duplicate those of other regulators that exist already. The overcrowding of avenues available to landholders and companies to resolve or regulate issues could lead to confusion, frustration and the neglect of tried and true processes that have been in place for many years. The QRC remains concerned about the ombudsman's function and how it may be confused with the existing statutory roles of the GasFields Commissioner, the CSG Compliance Unit and EHP's role in compliance.

In relation to the annual report and consultation, the QRC sees the ombudsman as playing a valuable role in delivering greater transparency to the number and types of issues concerning both landholders and resource companies. The bill provides for the requirement of an annual report and the QRC looks forward to working with the ombudsman regarding the structure of this report. It is the QRC's view that the report should include only matters investigated by the ombudsman and not overlap with other authorities and report matters referred to regulators.

In closing, the resources sector broadly supports the establishment of a Land Access Ombudsman to assist in a prompt and uncostly resolution between landholders and companies. If this bill is passed, we 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, just to name a few. Thank you.

Mr Paull: Thank you for the opportunity to appear today. We support the establishment of the ombudsman largely as proposed in the bill. The committee is obviously aware, but I think it is important to reflect, that the ombudsman in the bill originates from the independent review undertaken by Mr Scott. He did a very thorough job. He took on board 58 submissions. He met with 82 individuals, peak bodies and government organisations. From all of that work flowed a number of recommendations, one of which was to establish a land access moderator, which is essentially structured in the same way as the ombudsman in the bill before us.

I have been listening to the other submitters. I have read their submissions. I think a lot of the issues that have been raised in those submissions were considered in detail by Mr Scott—things like whether the negotiation of CCAs and make-good agreements should be within scope for the ombudsman. There were also a number of issues raised that were not considered in such detail by Mr Scott. In that bucket I would put things like the rules of evidence, what gets referred to other government agencies, confidentiality and things of that nature. As far as that goes, I think we share fairly similar concerns to the Law Society and the sorts of things that Ian has just raised.

In summary, I would say that this is a fairly complex policy area. I think we would all acknowledge that. There are obviously a number of options that have merit in terms of how you create a system for land access and make-good arrangements that works for the benefit of all parties. For our part, we think the core features that have been discussed and proposed in Mr Scott's review should be given a chance to work. They may need refinement down the track. Like any policy, they probably will. I think we should give it a chance to function and come back in 12 months, look at the evidence, and, if there are any problems of any nature, then work on how to resolve those. Thank you.

CHAIR: Thank you. Matt, in your submission you say that the policy intent should also be that the ombudsman's powers do not overlap with or duplicate those of other regulators. Can you give us a bit more detail on that?

Mr Paull: 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.

We would argue that the whole land access framework is already reasonably complicated. This is bread and butter for us and our members, but I do not think we should expect your average member of the public to read all of this stuff and understand it. It should be as simple as possible for any landholder to access. It is very important that they can easily understand it, that they can easily find the right person to resolve whatever issues that they have. Part of that is making sure the functions do not overlap with each other.

CHAIR: Mr Macfarlane, a point raised in the QRC's submission was that you are concerned that the bill overrides contractual mechanisms and calls into question the utility of dispute resolution clauses in contracts by way of section 34 of the bill and outlines that a party will not incur any civil liability for breaching a dispute resolution condition in a contract by referring the dispute to the LAO. Can you give us an in-depth comment?

Mr Macfarlane: A conduct and compensation agreement is a legal contract between the landholder and the resource company. Within that it has a dispute resolution process. That dispute resolution process is overridden—sidelined—by the opportunity under the legislation we are discussing today of the landholder to go straight to the ombudsman. What we are saying is that on the one hand you have a contract where you agree to a dispute resolution process and on the other hand you have legislation which basically negates a requirement to use that dispute resolution process. As I said in my opening comments, we are heartened by the fact that the ombudsman will require that other avenues have been exhausted before they sit and listen to the issue. That offsets it slightly, but I guess in a technical sense we have raised it as an anomaly.

Ms LEAHY: Mr Macfarlane, I note that the GasFields Commission review, which was done by Robert Scott, really only made recommendations regarding the gas industry. I think we would have to say that, in relation to CCAs, the gas industry and the coal and mineral industry are quite different in the way they operate. Do you foresee there being any issues for coal and mineral producers with being involved in another process again? Given that this will be new to that industry, I am not sure if there are a huge number of CCAs in the coal and mineral industry. Maybe you can advise the committee.

Mr Macfarlane: There are other agreements of other forms in other industries, but in terms of the ombudsman we accept that it has a role in terms of dispute resolution. Yes, it will be a new process for those industries, but in terms of those industries' operation certainly we see any form of added transparency and any formal dispute resolution process as a benefit to both industries in the long run—obviously a benefit to agriculture but also a benefit to our industry. We want to be in a situation where we are seen to be adopting best practice where we are treating landholders fairly. In a situation where—God forbid—the landholder may be being unreasonable, there is an opportunity for the ombudsman to perhaps call that out and vice versa of course where the resource company is acting unreasonably. Yes, it is another layer and another layer of regulation always concerns any industry, but the offset of transparency we hope will outweigh that.

Ms LEAHY: In relation to the CCAs in the coal and mineral industry, in gas there is always a CCA. Are there many CCAs in the coal and mineral industry?

Ms Mulder: Yes. With regard to the land access framework, which includes the CCAs for coal and mineral, if you have an exploration permit for coal or mineral you are required to have an agreement in place with your landholder to access that land. We mentioned that as of 2015 there were 5,000 CCAs for the gas industry. We do not have a number for coal and mineral, but we would think it would be at a similar level.

Ms LEAHY: He is going to be a busy ombudsman, isn't he?

Mr Macfarlane: Or she.

Ms Mulder: Yes, or she. We would like to think they would see minimal disputes being referred to the ombudsman, given that there are existing dispute resolution processes in the CCAs already and given the number of disputes being referred to the Land Court.

Ms LEAHY: Do you have any figures on the number of disputes that have been referred to the Land Court in recent times?

Ms Mulder: I do not have the figures on me, no. The Department of Natural Resources and Mines, I understand, keeps those. However, I am aware of two particular cases—one in coal and one in gas, a gas one quite recently and one with the coal industry some years ago.

Ms LEAHY: Thank you.

Mr CRAWFORD: I am interested in the provisions about parties being able to have legal representation and I am interested in a comment across-the-board about whether you think legal representation will affect the intended nature of the ombudsman's process. It has come up a little bit before, so I am interested in everyone's thoughts on that.

Mr Macfarlane: I will answer this backwards. I think there needs to be an understanding that if you are going to the ombudsman you are going to get an outcome. It is not an adversarial process; it is a process which requires cooperation similar to that which the principles of the Land Court are based on—perhaps not operating that much on it lately—but you should be going to the ombudsman because you have a dispute and you want to resolve it. As long as your legal adviser is of that same frame of mind and they are not going there to show how clever they are by tying the other side up in knots, then I think, particularly for the landholder, there would be an advantage in having legal representation. I would only urge the ombudsman to make it very clear to legal representatives that the process is to gain an outcome and not to tie it up in legal jargon and process.

Mr CRAWFORD: Is it fair, Ian, like in any situation, when one person turns up with a legal representative and the other side thinks, 'Okay, I need to, too'? Are we just going to end up having a battle of legal minds?

Mr Macfarlane: That is up to the ombudsman. I think processes are best resolved one on one but, to be realistic, by the time a dispute gets to the ombudsman it will have already been through a dispute resolution process of some sort—perhaps the formal one within a CCA. Yes, it would be ideal if it was sorted out between the ombudsman and the two parties without legal representatives, but that is probably, as I say, an ideal situation and not a practical situation.

Mr Paull: I think the words Mr Scott used in his report were that legal representation should be discouraged, so not prevented necessarily. In my mind, the model he has proposed is suggesting it is two parties and an ombudsman trying to work towards an outcome. If you involve lawyers automatically in that kind of discussion it will change the discussion to one that is more adversarial. At the moment there are avenues that people can follow that do involve lawyers and that do involve arbitration and legal processes, so you can do that at the moment. The ombudsman I think is intended to be a low-cost and therefore more accessible option than a legal dispute, which is what it effectively turns into if you have lawyers at the table in every case.

Again, I would go back to the points about things like rules of evidence and referrals and so on. In establishing the ombudsman those are quite important issues and we do have to consider them very carefully to make sure no-one suffers a detriment by not being represented and saying something they should not and then the ombudsman refers that off. That is the sort of issue that the rules of evidence and referrals throw up, so we do need to make sure there are not any unforeseen penalties for either party, but the model of low cost and accessibility is the right way to go.

Mr PERRETT: Thank you, Mr Macfarlane and others, for being here. I refer to the Resources Council's submission and the section headed 'Information collection admissibility' where you state—

> Section 52 of the Bill outlines that the notice produced by the LAO following their investigation is admissible in a Land Court proceeding. Section 42 of the Bill outlines that the LAO has the power to require information from parties as part of their investigation. It would be beneficial if the Bill could clarify whether the information collected under section 42 (which would presumably underpin the contents of the LAO's notice) would also be admissible as evidence in a Land Court proceeding.

Earlier the Queensland Law Society raised their major concern around the rules of evidence and the gathering of that. I would just like to hear from the Resources Council as to whether you think the concern in and around that part of it and the possibility of it being admissible in a court may have the potential to impact the process. The government was hoping to resolve disputes in a low-cost manner, but this component may create a situation where the potential process is impacted by this one provision.

Mr Macfarlane: I think we do need to have very strict rules of evidence. We have seen in other situations such as the Land Court where some of those rules are perhaps quite broad and that has seen situations where evidence is literally garnered off the internet one night and presented to the court as evidence the next day, so I think we do need to have a process. In terms of the evidence presented, the larger and more contentious it is the more there will be a requirement in terms of legal representation and the longer the process will take. I am going to ask Katie to perhaps add to that or Emma, who is a lawyer.

Ms Hansen: Not quite. I think it is just reiterating that concern of the QLS. 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.

Mr PERRETT: Presumably through that, if it is not strictly in line with what is considered to be good process with gathering evidence and there are obviously then claims and counterclaims against that, that could end up protracting the process and end up negating any possible good that could come out of that, regardless of the best intentions of both parties in the first instance to try and resolve the matter.

Mr Macfarlane: That is right, yes.

CHAIR: Do you support the inclusion of statutory time frames for the ombudsman in the bill? Is that a good idea?

Mr Paull: 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.

CHAIR: So the ombudsman could make a decision and say, 'I want you back here in two weeks time with an outcome,' rather than say that it has to be within a certain time frame?

Mr Paull: I think it is a judgement call for the ombudsman, yes.

Mr Macfarlane: I think the goal is always to have these matters dealt with expeditiously. We have seen in the Land Court one particular case just stretch out and stretch out and stretch out. In a day and age of modern political and green activism, that process is sometimes abused by those who just try to tie up the court's time or the ombudsman's time. We would like to see firm guidelines but, as APPEA has just said, not guillotined if there was more to be considered.

CHAIR: Unfortunately, as always, time has run out. I do not think you have taken any questions on notice this time.

Mr Macfarlane: No, we did not. If the committee had difficulty, we could provide some assistance in putting you in contact with the Department of Natural Resources and Mines in relation to CCAs for other industries, but we are there to help if we can.

Ms LEAHY: They are right behind you, Ian, so I will ask them. I am sure they have the answer ready to go!

Mr Macfarlane: Lyall will have all the answers—as always.

Ms LEAHY: Cover it in their opening statement!

CHAIR: Thank you for your attendance.

Mr Macfarlane: Thanks, Mr Chairman.

HINRICHSEN, Mr Lyall, Acting Executive Director, Minerals and Energy Resources Policy, Department of Natural Resources and Mines

HODGMAN, Mr Laurie, Director, Environmental Policy and Legislation, Department of Environment and Heritage Protection

REES, Mr Marcus, Director, Minerals and Energy Resources Policy, Department of Natural Resources and Mines

Mr Hinrichsen: I appreciate this opportunity to provide a further briefing to the committee on the Land Access Ombudsman Bill 2017. This bill seeks to implement recommendation No. 10 of Professor Scott's independent review of the GasFields Commission of Queensland. It proposes the establishment of a Land Access Ombudsman. The ombudsman will provide a free conciliatory dispute resolution service to parties to an existing conduct and compensation agreement or a make-good agreement.

Other recommendations from Professor Scott's review will certainly clarify the pathway for resolving disputes between parties who are negotiating a conduct and compensation agreement or a make-good agreement. They are being progressed separately, as I advised at the previous briefing, and our minister intends to introduce legislative changes to give effect to those recommendations to the parliament later in the current year. The bill also saves existing provisions that are contained in the Mineral and Energy Resources (Common Provisions) Transitional Regulation 2016, which will otherwise expire in September this year. I would like to briefly respond to some of the key issues that have been raised in submissions that have been made to the committee on the bill.

I would note that both landholder and resource industry stakeholders are generally supportive of the principle associated with the establishment of this bill, which is of course to establish the Land Access Ombudsman to assist landholders and resource companies to quickly and amicably resolve land access disputes. There was a noticeable divide between the views held by landholder stakeholders and resource industry stakeholders, particularly on the functions and purposes of the Land Access Ombudsman. As an independent body, the Land Access Ombudsman will investigate potential breaches of CCAs and make-good agreements, provide non-binding advice about the parties' positions and make recommendations about how disputes may be resolved. 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.

While the Land Access Ombudsman's notice to parties outlining the outcome of an investigation will be admissible as evidence in either a court or a future arbitration if the matter does subsequently proceed to hearing, the Land Access Ombudsman will not have the power to make binding decisions on the parties. This is certainly in line with Professor Scott's recommendation in the GasFields Commission review. The Land Access Ombudsman's jurisdiction does not extend to resolving disputes between parties that may arise during the negotiation of a CCA or NGA but instead deals with disputes about breaches of those agreements once they have been made.

As I mentioned earlier, legislative changes to give effect to the government's support of a number of Professor Scott's other recommendations which relate to these pre-agreement negotiations are anticipated later in the year. It is important that I reiterate that the Land Access Ombudsman is not a regulatory body and does not have regulatory, disciplinary or prosecutorial functions in relation to alleged breaches of agreement. This reflects the fact that the Land Access Ombudsman is neither an advocate nor a regulator; however, the Land Access Ombudsman can recommend that the relevant department investigate a possible regulatory breach and provide the relevant department with information relevant to that possible breach.

The Land Access Ombudsman is conferred power to provide government entities with advice about systematic issues associated with the land access framework. That is an important feedback loop which I think will help government deal with any broader issues and facilitate earlier interventions as they arise. That concludes my opening remarks, Mr Chair. I am happy to take any questions that you or your fellow committee members may have.

Ms LEAHY: We heard earlier that this legislation is a duplication and that perhaps this legislation should be held for another 12 months to give the other reforms that were recommended by Professor Scott an opportunity to come into play. I would be interested in your comments in relation to that, Mr Hinrichsen.

Mr Hinrichsen: As I am sure the deputy chair would appreciate, I am certainly not in a position to comment on matters that are obviously government policy. In relation to at least the first part of your question, in his report Professor Scott certainly identified this as an area where there was a gap. 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.

It was in that context that Professor Scott recommended that there be a low-cost accessible mechanism established. Professor Scott recommended that this be a land access moderator. The government, in considering Professor Scott's recommendation, thought that an ombudsman, as per an industry ombudsman, was a better term for the function to provide a mechanism where those types of disputes could be resolved before becoming embroiled in what may be a very extensive legal process, and it was on that basis that this bill has been brought forward.

Ms LEAHY: Why was the model of an ombudsman taken on board rather than some sort of binding mediation process prior to entry to the Land Court?

Mr Hinrichsen: That was not Professor Scott's recommendation. In terms of why this model as opposed to alternatives, that would be a question probably better directed to my minister.

Ms LEAHY: Professor Scott's recommendations related really to the gas industry. This legislation extends the ability of the ombudsman to hear complaints in relation to CCAs and MGAs in the coal and mineral industry. Why was the decision taken to step outside Professor Scott's recommendations on those issues?

Mr Hinrichsen: That was a decision of government so, again, the question might be better referred to my minister. I will make one point clear: conduct and compensation agreements apply to both activities under the Mineral Resources Act—exploration activities for coal and for minerals—and to gas. Professor Scott was making a recommendation around conduct and compensation agreements. Yes, he was particularly looking at the issues arising for gas, and the majority of existing conduct and compensation agreements do relate to the gas sector, but he identified issues where there is a conflict in relation to an existing conduct and compensation agreements and the necessity of potentially taking it to a court to receive resolution. Currently the Supreme and District courts apply equally to the scenario of a dispute between a landholder and a resource authority holder under the Mineral Resources Act.

Ms LEAHY: Earlier the Resources Council said there are about 5,000 CCAs in relation to gas. They could not give us the figures in relation to the coal and mineral industry. Can the department give us a breakdown on the number of CCAs and MGAs that are currently in existence?

Mr Hinrichsen: We certainly could. To ensure the accuracy of the numbers I will take that question on notice.

Ms LEAHY: Can you give a breakdown in relation to specific industries such as coal, gas and other minerals?

Mr Hinrichsen: We could certainly provide petroleum and gas under the Mineral Resources Act. I would be loath to commit to break it down metal by metal such as gold, silver and copper. We would not currently have that level of detail.

Ms LEAHY: I am just curious whether small gem mining or any of those are captured in CCAs; that is all.

Mr Hinrichsen: The framework relates to any exploration activities under the Mineral Resources Act, so it goes across the commodities. When it gets to production—so a mining lease or a mining claim—the conduct and compensation agreement framework does not apply because the exclusive possession associated with those mining activities is a compensation agreement under the Mineral Resources Act.

CHAIR: Have you been watching what has been happening today?

Mr Hinrichsen: We certainly have.

CHAIR: You heard the Law Society's contribution?

Mr Hinrichsen: Absolutely, and we have obviously read their submissions and we have had previous discussions with the Queensland Law Society as well.

CHAIR: They seem to suggest there are a few areas where there needs to be improvement. I think one of their comments was that the legislation is certainly not to be thrown away but it can certainly be improved. You have already had one lot of consultation with them and I believe you have probably followed it up to some extent?

Mr Hinrichsen: Absolutely.

CHAIR: Do you go back to the Law Society again after hearing what they had to say today?

Mr Hinrichsen: There was nothing new in what the Law Society presented to the committee. They have been very forthright with their views, and that was reflected in their submission as well. The bottom line is that there are many points in their submission that the government did not accept in preparing this legislation. There are many provisions in the bill as presented that seek to strike the right balance.

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.

The committee will note that in our response to the issues raised by the Queensland Law Society we do highlight that the Queensland Ombudsman is not bound by rules of evidence in conducting his or her investigations, the Energy and Water Ombudsman of Queensland is not bound by the rules of evidence in conducting his or her investigations and, for that matter, the Land Court of Queensland, under the Land Court Act 2000, is not bound by the rules of evidence. I guess in that context it is, we think, definitely a bridge too far to accept the Queensland Law Society's recommendation that this jurisdiction should be bound by rules of evidence. If you were to have an institution bound by rules of evidence you would be talking about establishing a court. I guess Professor Scott's recommendation at the outset was about saying, 'Look, a court such as the Supreme Court or the District Court is just too difficult for landholders, too expensive, to resolve the types of issues that they have ordinarily.' That is not to say that a dispute of such significance is denied from going to court; it is not. It absolutely can go to court. If parties want to take a matter to a higher court to get a binding decision they are at liberty to do that, but many people do not want to go to court. That is the feedback that Robert Scott got in his review. They do not want to go to court; they want to find a way of resolving this issue so that they can all get on with their businesses, be that farming or be that a resource company wanting to develop gas or other resources.

CHAIR: The society also recommends that clause 42(5) be amended so that documents or information which a party can demonstrate to be commercially sensitive or that contain confidential or personal information that is not relevant to the parties or issues in dispute should constitute a reasonable excuse. Do you have any response to that?

Mr Hinrichsen: I would point out clause 42(2), which says—

A requirement under subsection (1) may relate only to documents or information related to the investigation of the land access dispute referral.

The provision does not apply to information that goes above and beyond the matter that has been raised with the Land Access Ombudsman. It cannot be used as, if you like, a fishing exercise to get information that is not relevant.

Mr PERRETT: What are the advantages of the Land Access Ombudsman not being bound by the rules of evidence if that evidence could then be used against either party where the dispute ends up in the Land Court?

Mr Hinrichsen: As I have mentioned earlier, the Land Court itself is not bound by rules of evidence. The Land Court, in hearing a matter, has broad discretion as to the conduct of a case and how information is presented. I think it was the representative from Shine Lawyers who was saying that quite often a landholder will be the best expert when it comes to impacts on their property but, of course, when it comes to expert testimony they might not necessarily have the qualifications behind them to say, 'I have expertise in hydrology.' I guess that is the type of information that a Land Access

Ombudsman, in hearing either side's case, should be able to obtain directly from the affected party without necessarily needing to go through legal representatives or through experts to present evidence.

If the Land Access Ombudsman needs that type of expertise as part of his or her investigation there are provisions in the bill to get that. Otherwise, the information that is presented to the Land Access Ombudsman—and the Land Access Ombudsman will draw his or her own conclusions about the merits of that information that is presented, whether they need to seek further expertise to analyse some of that information to establish its veracity or otherwise—would be all at their discretion before they come to a final position.

I guess coming to a final position ultimately could be a notice to say, 'This is how I recommend it should be resolved,' but the primary objective is to reach resolution—to negotiate or, if you like, facilitate negotiation between the parties to get agreement. That is really the focus. It is almost like it is the last resort. The parties are still over here and the Land Access Ombudsman will say, 'I have heard from either side. I have expert advice'—if that is what the Land Access Ombudsman needs—'and this is what I believe would be a fair resolution to this issue.' It does not then deny anyone their day in court—far from it—but there is a recommendation from the Land Access Ombudsman—and that is only made after both sides get an opportunity through natural justice to comment or provide feedback on the Land Access Ombudsman's draft recommendation—and if either the landholder or resource authority holder then chooses to take it to court then it is on the table. The Land Court will not be bound on how it considers that report. There is no obligation to accept it. It can, I guess, have evidence led that challenges those recommendations. It is not binding on any subsequent court, but it is then able to be presented to the court as, 'This fair and reasonable statutory office holder, after considering all of the merits of both sides' positions, recommended this as the outcome,' rather than a Land Court needing to start from taws.

Mr PERRETT: The LAO is in place. Obviously there will be some regulatory processes put in place presumably to give confidence. Would one of those areas be around the gathering of rules of evidence so that there is some confidence in respect of what may be considered by that officer and whether hearsay would be something that would be acceptable to the ombudsman?

Mr Hinrichsen: There is a power within the bill for the Land Access Ombudsman to put in place basically procedural guidelines. There does need to be structure. That is certainly recognised in the framework. The Land Access Ombudsman, given that the purpose of this is to find resolution between the parties, does need to be given enough flexibility to do the job that they need to do, but we feel that the Land Access Ombudsman would be much better placed to provide those procedural guidelines, if you like, still with some flexibility because there will be all nature of disputes, minor and more extensive, and the last thing you want is a one-size-fits-all approach which means that the Land Access Ombudsman is effectively then limited or bound to a process that is not going to be fit for purpose.

Mr PERRETT: What is the normal process for those procedures that would be put in place? Is that a consultative process that the ombudsman would undertake in respect of the concerns that have been raised, should this legislation pass the parliament, by the Law Society in respect of the gathering of that evidence to give some confidence to the parties that are involved?

Mr Hinrichsen: Section 65 outlines the framework by which the Land Access Ombudsman would develop those procedural guidelines. It is a broad power for the Land Access Ombudsman to do that. Again, it does not seek to put any bounds around how the Land Access Ombudsman would execute his or her duties in that space. I would imagine that they would consult with relevant stakeholders, which is what you see occurring with other such offices. Certainly the legislation does not direct them to undertake such consultation, but it would seem a reasonable thing to do.

CHAIR: AgForce raised concerns about the avenues available to landholders neighbouring resource developments and who are not party to land access agreements. Could you outline if there are any avenues for neighbouring landholders to raise disputes and if the ombudsman may be a suitable low-cost avenue to investigate these possible disputes? Also, can you define neighbours to a lease? How far do you go? You have direct neighbours and then you have neighbours that are further down the creek or up the creek.

Mr Hinrichsen: 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. I will just ask my colleague to answer further.

Mr Hodgman: 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.

CHAIR: As local members we get concerned with regard to when a neighbour is a neighbour to a mining lease. Is that clearly defined so the ombudsman has a clear understanding of what a neighbour is?

Mr Hodgman: With respect to the Environmental Protection Act or an environmental authority, it does not matter how far away you are: if you are impacted by those things the act applies. You do not really need a definition in the context of the EP Act in that sense.

Ms LEAHY: You talked about the other ombudsmen in Queensland not having provisions in their legislation for rules of evidence. Can you advise the committee whether the other ombudsmen have provision to make recommendations to the chief executive officer in relation to the suspicion of offences? The Law Society specifically talked about three clauses they recommended be removed from this legislation. Do other ombudsmen have provision in their legislation to make recommendations to the chief executive about suspicion of offences?

Mr Hinrichsen: That is a question I will take on notice. The Queensland Ombudsman, for example, does have very broad powers when it comes to providing advice and recommendations to government agencies. I do not think there is anything particularly unusual about these particular provisions in that context.

Ms LEAHY: I would be happy for you to take that question on notice. I would be quite interested in whether the other ombudsmen under state statute have those provisions.

Mr Hinrichsen: Just to follow up on my comment, these provisions simply provide for if, as part of an investigation—and the investigation needs to be relevant, obviously, to the dispute that is raised with the Land Access Ombudsman in the first instance—the Land Access Ombudsman comes to a view that there may have been an offence in relation to the resources legislation, the Water Act or the Environmental Protection Act. That matter is brought to the attention of the relevant regulator for investigation. That is a fairly reasonable thing for a public office holder to do if they are aware of a potential breach of Queensland law: to bring that to the attention of relevant authorities.

There are, of course, provisions in the bill that say: before they act in such a way, so that there is no misunderstanding, they notify the resource authority holder in advance to provide them with natural justice to, if you like, correct the record before that matter is then referred to the appropriate regulator. If there is a good reason for what might otherwise appear to have been a breach, it will be able to be resolved at that phase, before the investigation is referred to the relevant regulator.

Ms LEAHY: I have a bit of a problem with that because, first of all, the Law Society raised the issue in relation to the rules of evidence. You have covered that, but there does not seem to be anything in the bill in relation to frivolous and misleading or vexatious complaints. That was particularly raised by APPEA as well. We could have a situation arise of frivolous and misleading complaints which then, on the grounds of those complaints that the ombudsman receives, could then get referred to the regulator and there is no mechanism in the legislation to deal with those frivolous and vexatious complaints.

Mr Hinrichsen: I refer the member to section 36(2), which states—

The Land Access Ombudsman must refuse to accept the land access dispute referral if—

…

(b) the ombudsman is satisfied

…

(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;

That puts bounds around the ability of the Land Access Ombudsman to deal with an investigation, but it does rely on the Land Access Ombudsman's judgement as to whether it does meet those criteria, as we think ought to be the case.

Ms LEAHY: But the ombudsman does not have the power to declare a complaint vexatious or serial.

Mr Hinrichsen: If the ombudsman is satisfied that it is vexatious, frivolous or trivial then the investigation will go no further.

Ms LEAHY: I think we will find a few problems in practice with some of that for the ombudsman.

CHAIR: Unfortunately we have run out of time. You have taken a couple of questions on notice. Can we have the answers to those back to us by 12 July.

Mr Hinrichsen: There was one question in relation to powers of other ombudsmen in referring and there was a question about the number of conduct and compensation agreements and make-good agreements and how they relate to the various parts of the resources sector.

CHAIR: That is it. Thank you once again for your attendance today. It is always a pleasure to have you come down and talk to us. Given that there are no more witnesses today I will declare this hearing closed.

Committee adjourned at 12.34 pm