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Our ref: P&E - GEN

To the Honourable Members of the Infrastructure, Planning and Natural Resources Committee

Draft Planning Bills 2015

Queensland Law Society (QLS) would like to make a submission about the:

1. draft *Planning Bill 2015*; and
2. draft *Planning and Environment Court Bill 2015* (PEC Bill).

QLS would like to acknowledge its appreciation for the opportunity afforded to it to consult in relation to the above Bills. It respectfully seeks the Committee's acceptance of its submissions outside the Inquiry's nominated deadline.

While this submission does not comb all of the provisions of the relevant Bills in order to identify possible shortcomings or potential improvements, it in large part focuses on a series of higher order matters.

That said, QLS offers to continue to participate in future reviews which can consider the minutiae of the Bills and members of QLS' Planning and Environmental Law Committee will be made available for further consultation, as required.

While acknowledging the late notice, QLS wishes to reiterate its willingness to participate in the Infrastructure, Planning and Natural Resources Committee's hearing concerning these Bills next Friday, 26 February 2016, if QLS can be at all accommodated.

Planning Law – Overview

Unlike other established areas of the law in Queensland, planning law is a relatively modern concept. In this context, it is worth remembering that the first planning scheme was only gazetted in Brisbane in 1967.

In that sense, it is understandable that planning law has been in something of a state of flux since its inception as legislators, local governments, land owners, those who develop land and the wider community have come to terms with the wide ranging impacts and ways to improve it.

The taking effect of the *Integrated Planning Act 1997* ("IPA") represented a seismic shift in Queensland planning law, the impact of which is still being felt today.

Perhaps more than most other areas of the law, planning law has always had its fair share of detractors. Recurring themes are that the approval process takes too long, costs too much and that the process is either not flexible enough, too flexible or lacks certainty.

As successive governments have attempted to respond to the ongoing criticisms, the principle planning legislation has ballooned to exceed 650 pages with almost 1,000 operative provisions, making it amongst the largest and most complex pieces of legislation in Queensland.

Accordingly, while it is hard to argue with the sentiments of the Deputy Premier, the Hon Jackie Trad, when she said, earlier this year:

"We believe that planning reform can deliver a more efficient system that supports investment and jobs..."¹,

it should also be borne in mind that reform comes at a cost, not the least of which is the loss of established jurisprudence which means that applicants, local governments and others involved in the planning system will undergo a period of uncertainty until the Courts develop a replacement jurisprudence.

Developing that replacement jurisprudence takes time and those who are involved in the system will face periods of uncertainty which itself erodes the confidence in the planning system.

In QLS' opinion, an appropriate yard stick then to measure whether reform is necessary involves notions that:

1. the legislative process should be reformed only where there is confidence that measurable improvements in the efficiency and certainty of the system can be achieved; and
2. change for change's sake should be avoided, wherever possible.

It also needs to be borne in mind that not all criticisms of existing planning law are validly made and much of what the existing planning law does now, it does reasonably well.

Some Preliminary Comments

In QLS' submission of 26 September 2014, in relation to an earlier reform package, QLS acknowledged its support of the concept of the Planning and Environment Court (PEC) having its own legislation, which reflects the importance of the Court in the planning and development regime in Queensland, the work the Court does and the workload it shoulders, and the esteem in which it is held in this State and elsewhere.

Insofar as the Planning Bill is concerned, an overarching concern previously expressed is that a decision to limit the size of the Bill and consequently relegate provisions that were historically in the

¹ May 2015

primary legislation to regulations and other places will, it is feared, adversely affect the legibility of the legislation regime and the reforms in it, the public's confidence in that regime and compliance with legislative standards.

The Planning Bill

This submission deals with six issues which we consider are of particular importance:

1. transitional provisions;
2. the truncated Planning Bill;
3. making change application;
4. notice of change applicable decisions;
5. development assessment rules; and
6. decision rules.

Transitional Provisions

Typically, the first provisions of new legislation that is normally the source of most interest are its transitional provisions.

By and large transitional provisions have historically taken a similar form since the *Local Government (Planning and Environment) Act 1990* took effect and both the IPA and the *Sustainable Planning Act 2009* ("SPA") have included provisions that clearly articulate a range of important transitional provisions ranging from the continuing effect of development approvals to the process to be employed in assessing and deciding existing development applications.

By contrast, the transitional provisions included in the Bill are new and represent a style of drafting which is confusing and unclear. Whilst the current provisions are lengthy, they are clear and legible and have developed consistency from earlier legislation in a common way. The new provisions are unclear and should be abandoned for an approach which favours certainty over a process which seems to be driven largely by contemporary drafting approaches.

A Truncated Approach

QLS does not support the relegation of important machinery and other provisions to a regulation for no proper purpose. The provisions of previous legislation have incorporated into the Act all important aspects of the legislation, whilst leaving the role of the regulations to one which is subordinate in a practical sense to the Act.

The Planning Bill approaches the matter in a different way and one which appears to be driven by considerations which are at best cosmetic in nature.

Further, QLS' views about the relegation of important provisions of Acts to regulations are well known and the dangers that emerge because Parliament does not give the regulations (or their subsequent changes) the same level of scrutiny which the proposed Bill (and its amendments) will receive.

It is respectfully suggested that the approach taken by the Planning Bill is inconsistent with fundamental legislative principles contained in the *Legislative Standards Act 1992* and in particular, the constitution of Parliament² and the requirements that rights and liberties are subject to appropriate review³.

One of the best examples of an inappropriate relegation of important machinery provision to the regulation is the Development Assessment Rules, discussed below.

Making Change Application

Section 76(3)(b) of the draft Planning Bill states that the responsible entity, if the development approval was given because of an order of the PEC and there were properly made submissions for the application, is the PEC. Section 76(4) states that if the PEC is the responsible entity, the Court must, for a change other than a minor change, refer the application to the assessment manager for assessment and decision.

This seems to mean that where the PEC is the responsible entity, all change applications must be made to the PEC in the first instance. There appears to be no mechanism for the change application to be made directly to the assessment manager where the change application is for a change other than a minor change. This will result in an applicant incurring unnecessary expense and delay. It is unclear whether a referred change application needs to again comply with section 77 of the draft Bill following referral (which will include paying another required fee). This process will also result in unnecessary delays for an applicant and the involvement of the PEC in a way which is unnecessary.

The PEC ought to be the responsible entity only for a change application for a minor change. If the PEC determines that a change application is not for a minor change, the applicant ought to make a fresh change application to the assessment manager. This would mean that an applicant could make a change application to the assessment manager in the first instance where the applicant considers the change is not a minor change.

Notice of Change Application Decision

Where the PEC is the responsible entity for a change application for a minor change, section 78 of the draft provides that a referral agency is an affected entity and has the ability to provide a response notice. However, the referral agency may choose not to join the change application proceedings in the PEC. Section 81 provides for the responsible entity, other than the PEC, to give a decision notice for the change application to the referral agency. There is no requirement for the PEC to give a decision notice (i.e. final order) to the referral agency. It follows that the referral agency may not receive a copy of the decision notice (i.e. final order) for the change application.

There ought to be a requirement that a referral agency (which is an affected entity) be given a copy of a decision notice (i.e. final order) of the PEC for a change application for a minor change.

² *LS Act*, section 4(2)(b)

³ *LS Act*, section 4(3)(a)

Development Assessment Rules

The development assessment process under the Draft Planning Bill is split between the provisions in Chapter 3 of the Bill and the Development Assessment Rules (*DA Rules*), making it difficult to follow the process. The difficulty in following the process is exacerbated by the various provisions in the DA Rules, which ostensibly seek to provide flexibility to an applicant, but in reality make it very difficult to determine the next step in the process. Some of these matters are discussed further below.

The four stages of IDAS (application, information and referral, public notification and decision) have become the two stages of the DA Rules (assessment and decision).

The assessment stage seeks to combine the first three stages of IDAS, but without the certainty of the IDAS timeframes. For example:

1. once an application is lodged, it is either deemed properly made (following the expiry of 5 business days), the assessment manager notifies the applicant that the application is properly made (within 5 business days) or the assessment manager issues an action notice (within 5 business days) that the application is not accepted as being properly made. There is no requirement for an acknowledgment notice;
2. where the development application requires public notification, the assessment manager must give the applicant a confirmation notice within 5 business days after the development application is properly made;
3. the applicant can give written opt-out evidence with the approved form where the applicant wishes to opt-out of the further information step, however, there are rules surrounding the ability to opt-out of the further information step. Further, even if the applicant opts-out of the further information step, this does not stop the assessment manager and referral agencies from providing advice and "*informally*" seeking further information from the applicant;
4. the applicant may give a referral agency the referral agency material at the same time as it gives the development application to the assessment manager and must give the referral agency material to the referral agency within 10 business days after the development application is properly made. This step will be impacted if the applicant receives an action notice from the assessment manager;
5. there is a deemed properly referred period and the ability for a referral agency to give a referral action notice, similar to the process described above for a development application;
6. the applicant decides when to give public notice of a development application, however, the earliest a development application can be publicly notified is 5 business days after the date of the confirmation notice and there are also rules about the latest date on which public notification can occur. There is some flexibility in relation to the manner in which public notice is given;
7. the time periods for an assessment manager to assess, decide and give notice about a development application are short (20 business days for standard/code and 30 business days for merit/impact), with no ability for the assessment manager to unilaterally extend these periods. Particularly with standard/code development applications, this may result in more development applications being deemed approved or expressly refused;
8. all time periods can be extended by written agreement of the relevant parties before the prescribed period ends. There is no limitation on the length of any such extensions; and
9. the applicant may stop-the-clock at any time after a development application is made. This process can be utilised as many times as the applicant wishes, for a cumulative period of up to 6 months (which period can also be extended with the agreement of the applicant and the assessment manager). There are rules about stopping-the-clock.

Under the SPA, the development assessment process is a linear process, where parties to the process and third parties can readily determine the stage of the process that has been reached and the further steps required to complete the process. Under the draft Planning Bill, the development assessment process under the DA Rules, is not a linear process, but one in which steps can be taken at different times, where all timeframes can be extended (provided the applicant consents) and where the process can be stopped (either unilaterally by the applicant or with the agreement of the applicant and the assessment manager).

There is a concern that the lack of rigor and certainty in the process is likely to result in steps being missed, timeframes being miscalculated and applications lapsing (at which point the PEC will be asked to excuse the non-compliance).

In addition to the above uncertainties, the process also seeks to over-regulate the pre-referral process for referral agency responses.

The current IDAS process has a number of advantages over the process in the DA Rules, including:

- (a) it is contained in one document;
- (b) it is a linear process;
- (c) there are fixed timeframes (with the ability to extend, where needed); and
- (d) all parties and non-parties can readily determine the stage a development application has reached in the process.

The advantages of the DA Rules (e.g. the increased control of timeframes by an applicant) could have easily been incorporated into the IDAS process (with this process remaining as part of the legislation).

The perceived advantages of the DA Rules (e.g. the ability for applicants to take various steps at a time of their choosing, the ability to opt-out of the information request stage and the ability to stop-the-clock) are likely to result in an increase in procedural non-compliances and difficulties for parties and non-parties to understand the progress of an application through the development assessment process.

Decision Rules

Whilst the decision to remove the notion of "*conflict*" with a planning instrument increases the flexibility to the assessment manager and the Court, there are a number of things that may be said about it:

1. the Queensland Courts have developed significant jurisprudence about the notion of conflict and sufficient grounds and it is well understood;
2. it was decided decades ago that in the approach to planning outcomes, the planning scheme, which had the input of the community, would be the pre-eminent planning instrument and significant time and cost was invested into preparing the schemes adopted in Queensland in a way which measured outcomes having regard to whether there was conflict with its provisions; and
3. the changes do create uncertainty because they allow more potential for argument. The use of the expression, for example, that the application must be assessed "*against the assessment benchmark*" simply means there will be more room for argument by both those who propose a development and those who oppose it about competing outcomes.

Put simply, there is no evidence that the current provisions regarding conflict do not still have their place and the flexibility that is now considered appropriate cannot be achieved by other mechanisms including widening the factors that might overcome a conflict. Indeed, the change creates greater uncertainty.

The PEC Bill

The following issues are dealt with below:

1. providing the PEC with a criminal jurisdiction; and
2. some other issues.

Providing the PEC with a Criminal Jurisdiction

QLS' view is that it is preferred that the Magistrates Court and the PEC have a concurrent jurisdiction. The notion of concurrent jurisdictions is well known to the law. For example, in the civil context:

1. the Federal Magistrates Court and the Federal Court have concurrent jurisdiction regarding bankruptcy, administrative, consumer protection, copyright, human rights and equal opportunity, migration, privacy and workplace relation matters⁴;
2. the Federal Magistrates Court and the Family Court have the concurrent jurisdiction regarding matters under the *Family Law Act 1975* (Cth); and
3. the Victorian County Court and Supreme Court have concurrent jurisdiction to hear civil matters as a result of the removal of the monetary limit on the County Court.

Concurrent jurisdiction is also evident in criminal jurisdictions. For example, in an equivalent context in South Australia, the Environment, Resources and Development Court has jurisdiction to try a charge of an offence under the *Environment Resources and Development Court Act 1993* (SA). This jurisdiction is not exclusive as the Magistrates Court remains concurrent criminal jurisdiction in relation to summary matters⁵.

The Supreme Court and District Court of Western Australia also have concurrent criminal jurisdiction, with the District Court having all the jurisdiction and powers that the Supreme Court has in respect of any indictable offence, except those offences with a maximum term of imprisonment of imprisonment for life⁶.

Providing the PEC with concurrent jurisdiction does not mean the workload of the Magistrates Court would decrease or the workload of the PEC would increase. If provided with a choice, the prosecution will likely decide to only refer serious or complex matters to the PEC. In any event, the Court could have the power to remit matters to the Magistrates Court with the parties' consent or of its own volition.

To the extent it is said that there are already a range of mechanisms to enable complex environmental and planning matters to be dealt with, where appropriate, by Judges with PEC experience, that is simply not true in a practical sense. There is currently no opportunity for complex or serious matters regarding development offences to be dealt with other than in the Magistrates Court and the only opportunity for a Judge with Planning and Environment Court experience to be involved is in the event of an appeal under the *Justices Act*⁷.

The following matters are also noted:

⁴ *Young and Others v The Neil Jenman Group Pty Ltd and Anor* [2009] FMCA 947, [6].

⁵ *Integrated Waste Services Pty Ltd v Harvey* (1999) 73 SASR 314.

⁶ *District Court of Western Australia Act 1969* (WA), s 42.

⁷ *Justices Act*, section 222

1. the PEC already has jurisdiction to deal with development offences, but its jurisdiction is currently limited to enforcement orders and the like, which is part of the Court's statutory civil jurisdiction;
2. there are obvious advantages in ensuring that the PEC's powers are extended so as to avoid the current situation with proceedings that have to be commenced in the PEC and the Magistrates Court. A recent case study highlights the current problem. In *Southern Downs Regional Council v Kemglade*, the Council sought urgent orders in the PEC to restrain the use of premises to accommodate seasonal workers in a large marquee. That order was made on 3 April 2014. Separate proceedings had to be commenced in the Magistrates Court to prosecute the same parties for the same offences. That approach is simply not efficient or in the public interest; and
3. the Judges of the PEC are an important and valuable resource, particularly given the complexity of the legislative regime. In QLS' view, it makes little sense to deny the Court a concurrent criminal jurisdiction.

There is a collection of other issues worth mentioning:

- (a) section 9 of the draft PEC Bill deals with the Court's power to remit a matter to the tribunal. Subsection (2) provides that, on the making of an order remitting a matter to the tribunal, sections 228 and 260 of the *Planning Act* are taken to apply as if the order were a document starting a tribunal proceeding. It is suggested that the notice of appeal and originating application should continue to be regarded as the documents starting the proceeding as they contain the grounds which frame the disputed issues, whereas the remitting order may not. Also, in the case of an appeal to the tribunal under section 228, the appeal must be started within a prescribed timeframe relative to the decision being appealed against. If the remitting order is taken to be the notice of appeal, it may be well outside the appeal period;
- (b) section 18 (Resolution agreement) – it is suggested that the words "*after an ADR process*" be changed to "*as a result of an ADR process*". The section requires the ADR registrar to sign an agreement if the parties agree on a resolution of their dispute or part of it at an ADR process, or also "*after an ADR process*". Parties to a P&E Court proceeding may resolve a proceeding through extensive without prejudice negotiations directly between themselves, which can occur after an ADR process has finished. Technically, this would be "*after an ADR process*", triggering the section 18 requirement for the ADR registrar to sign an agreement. Presumably, however, it is not intended that the section's requirement for a resolution agreement, signed by the ADR registrar, also apply to such later resolutions;
- (c) section 43 duplicates section 46(1). These two sections should be consolidated; and
- (d) section 46(5) contains a typographical error. It should read: "The P&E Court cannot consider a change to the development approval the subject of the development change application unless the change is only a minor change to the approval".

Yours faithfully



Bill Potts
President