

Quote in reply: Planning and Environment Law Committee

20 October 2010

Ms Julie Copley
The Research Director
Scrutiny of Legislation Committee
Parliament House
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Dear Ms Copley

**NATURAL RESOURCES AND OTHER LEGISLATION AMENDMENT BILL (NO. 2) 2010 –
CONCERNS ABOUT CLAUSE 17 – AMENDMENT OF SECTION 320 (DUTY TO NOTIFY
ENVIRONMENTAL HARM) ENVIRONMENTAL PROTECTION ACT 1994 (QLD)**

This submission has been prepared by the Queensland Law Society's Planning and Environment Law Committee.

The Queensland Law Society (QLS) would like to raise concern about the drafting of Clause 17 of the *Natural Resources and Other Legislation Amendment Bill (No 2) 2010*, which inserts substantial amendments to Section 320 of the *Environmental Protection Act 1994* (Qld) (EPA).

The amended provision is in our view in breach of a number of fundamental legislative principles under the *Legislative Standards Act 1992*, including:

- generally, Section 4(2) – as to whether the amendment has sufficient regard to the rights and liberties of individuals due to the practical difficulties associated with compliance;
- specifically Section 4(3)(k) – the scope of the required disclosure obligation is ambiguous and is not drafted in a sufficiently clear and precise way as it may be unascertainable in many circumstances within the permitted timeframe; and
- specifically Section 4(3)(f) - provides appropriate protection against self-incrimination' (ie, notification to the administering authority may be protected by the program notice provisions under the EPA, but not notification to occupiers).

The amendments of concern are:

- The insertion of a new requirement for persons who become aware of environmental harm to notify not only the administering authority, but also to 'give written notice, of the event, its nature and the circumstances in which it happened, to **each occupier** of land that is, or is likely to be, affected by the event (new subsection (3)(b));
- The new requirement that this must occur within 'not longer than **24 hours**' (new subsection (9)); and

- The increase in the maximum **penalty** for non-compliance fivefold (subsection (2)).

The proposed amendment applies to everyone throughout Queensland, but it does not appear that there has been any consultation about this amendment with any stakeholders at all. Consequently, there are likely to be numerous unintended consequences.

The QLS is not opposed to the policy objective of ensuring that individuals affected by an acute incidence of environmental harm are made aware of the occurrence in a timely manner. We are concerned that compliance with the amended provision within the stated timeframe may be impossible in many circumstances and may defeat the policy objective outside of the 24 hour period.

Some examples to illustrate the difficulties

As an extreme hypothetical example, consider a truck travelling a considerable distance, before the driver realises that the load had not been properly covered, leading to significant dust emissions potentially for the entire length of the journey. It would be impossible for the driver to determine the area of land affected. Even if the driver could determine the area of land affected, not only would registered landowners need to be notified, but also unregistered lessees, easement holders, permit holders and a range of other registered and unregistered interest holders. All this would need to be done within 24 hours. Additionally, without being sure of the extent of actual environmental harm or what caused the covering to become lost, the driver would be expected to explain all these unknown circumstances in a written notice. Note that the onus is on 'the person...who becomes aware', who may be an employee, agent, or contractor, not necessarily the trucking company.

A similar mobile example would be of an aerial spraying company which finds that it has sprayed the wrong area of land, perhaps involving numerous individual lots, affected by a variety of interests such as easements, reserves and permits to occupy.

Even if there is a fixed point source for the emission, for example, noise, vibrations and dust from a blast at a quarry which has been carried out incorrectly, it is unlikely that the blasting contractor would be able to work out within 24 hours all of the interest-holders in the neighbourhood who are likely to have been affected.

Summary of the practical issues

In summary, it is unworkable to require:

- (a) That a person who is an employee, agent or contractor should have a duty of notification to neighbours in any circumstances;
- (b) Notification within 24 hours;
- (c) Notification to 'occupiers' as opposed to landowners;
- (d) Notification for an indeterminate area;
- (e) Notification in circumstances where the required contents are likely to be unknown.

A further undesirable consequence of the amendment drafting is that it removes the obligation to provide notice to affected occupiers of land about the incidence of environmental harm once the 24 hour period has elapsed. Should the party carrying out the activity who becomes aware that serious or material environmental harm is caused or threatened not comply with their disclosure obligations within the stated timeframe the offence will have been committed. There is then no ongoing obligation in the drafting of the proposed section to oblige the party carrying out the activity to provide notice outside of the required period if that has not have been effected within 24 hours.

Apart from any legislative response, it is suggested that the common law already adequately addresses the situation, with considerably greater flexibility to adapt to the circumstances of the case, where there is a 'proximate' relationship. An entity which is aware that it is likely to have caused damage or have potential to cause damage to another entity may attempt to 'mitigate' the damage through notification and early action, which would be taken into account when assessing damages and other remedies. Also, there is nothing preventing the administering authority, upon having received a notification, from broadcasting the information to anyone likely to have been affected, for example, using the local media.

Yours faithfully

Peter Eardley
President