

Your Ref: Ms Erin Pasley, Research Director
Our Ref: Planning and Environment Law Committee 16 May 2014

The Hon Bruce Young MP
The Acting Chair
State Development, Infrastructure and Industry Committee
Parliament House
Brisbane QLD 4000

By e.mail: sdiiic@parliament.qld.gov.au

Dear Sir

Submission on the Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Bill 2014 (the Bill)

Thank you for your invitation to the Queensland Law Society (QLS) to provide a submission on the *Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Bill 2014*. The following submission has been prepared by our Planning and Environmental Law Committee. This Committee's role, in relation to legislative or policy reform proposals, is not to advocate for one sector of the community or another, but rather to assist with comments on legal issues such as reducing complexity, addressing unintended consequences, drafting issues, fundamental legislative principles (if applicable) and the like. This is not intended to be a comprehensive submission that reviews each section of the Bill, taking into account that the timeframe for lodgement of submissions on this Bill is exceptionally brief.

Part A: Summary

In summary:

- (a) The QLS supports the stated objectives of the Bill in relation to infrastructure charging and this submission merely sets out some suggestions in relation to fine-tuning of the drafting, both for the Bill and Explanatory Notes;
- (b) We have not reviewed and provide no comments in relation to the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009*;
- (c) In relation to the amendments to the *State Development and Public Works Organisation Act 1971 (SDPWO Act)* – in principle, the QLS supports removal of duplication and streamlining of process, but we have some suggestions in relation to drafting detail. However, while we note that the purpose of the amendments is to create a 'one-stop-shop' under a future approvals bilateral agreement between the Commonwealth of Australia and the State of Queensland, it seems to us that the amendments so far represent only one

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step in the direction of a 'one-stop-shop' and that there is still a long way to go in that regard, including:

- (i) The amendments only relate to the Coordinator-General's process under the SDPWO Act and not to approvals by the Environment Minister under the corresponding EIS process for resource projects under the *Environmental Protection Act 1994* (EP Act). The experience of our members is that the alternative EIS process available under the EP Act is more streamlined and better adapted particularly for less complex projects.
- (ii) There appears to be too much focus at this stage on approvals resulting from an EIS process and not on all of the other available processes under the *Environment Protection and Biodiversity Conservation Act 2000* (EPBC Act). For example, until the State is able to undertake minor variations to conditions of existing approvals issued by the Commonwealth, we will still be a long way from a one-stop-shop.
- (d) Accordingly, in relation to the amendments to the SDPWO Act to support the proposed bilateral agreement, we respectfully disagree that: '*There are no other viable alternatives that would achieve the Queensland Government's objectives*' (p8) of the Explanatory Notes. A viable alternative would have been less rush towards a bilateral agreement which will achieve less than it could have done, particularly in terms of reducing duplication of process.

Part B: Comments on detailed issues relating to infrastructure charging

1. Conditions that may not be imposed - Section 347(1)(f)

The QLS welcomes the new provision that a condition may not require the applicant to enter into an infrastructure agreement. While it was already the law that conditions that are 'lacking in certainty and finality' may be struck down as invalid and it has always been the case that conditions purporting to require a future agreement are obviously lacking in certainty and finality, in practice local governments have continued to impose such conditions. Therefore, it appears that there has been a need for the obvious to be spelled out.

We would recommend two adjustments to this provision:

- (a) Rather than 'the applicant', we would suggest 'a person'. For example, if the applicant was a consultant, the provision could be circumvented by imposing the agreement on the owner, as currently drafted.
- (b) There has never been a problem with decision notices that merely acknowledge the existence of an infrastructure agreement that has been executed before the decision notice was issued. In practice, this can be quite helpful, particularly for interested purchasers or investors, because when a decision notice mentions the existence of an infrastructure agreement, this alerts them to obtain a copy. We would suggest an editor's note to the effect that Section 347(1)(f) is not intended to prevent this.

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2. Power to adopt charges by resolution - Section 630(2)(c)

Has consideration been given to the question whether State Development Areas should also be excluded? (Local governments may have an overlapping role within these areas.) The QLS is not suggesting a policy position one way or the other on this issue and is only asking whether it has been considered.

3. When charge may be levied and recovered - Section 635

The section begins: *'This section applies if – a local government has given a development approval...'*

Of course, the normal situation where a local government has not given a development approval is where a private certifier has given a building work approval for a type of development that is not assessable in relation to material change of use under a planning scheme.

Some local governments have recently devoted considerable effort to making more types of development not subject to assessment for material change of use under their planning schemes. Examples include duplexes within residential areas or warehousing within industrial areas. This was based on the assumption that the local governments could still levy a fair charge for the extra demand of these developments on their trunk infrastructure, when the building work approval was issued.

A likely unintended consequence of Section 635 will be that local governments will restore these types of developments to the assessable columns of their planning schemes in relation to material change of use, just for the purpose of being able to recover infrastructure charges. That consequence would appear inconsistent with the State's broader policy objectives.

The QLS is aware that the Department has already been working towards resolving this issue, but we include it here just as a reminder.

4. Limitation of levied charge - Section 636

The QLS particularly welcomes the new Section 636(1), as follows: *'A levied charge may be only for additional demand placed upon trunk infrastructure that will be generated by the development.'*

It should always have been the case that this principle followed logically from the existing over-arching principles about conditions (for example, that they must be within jurisdiction and that they must be reasonably required or relevant), but it appears that the provision has become necessary because experience has shown that charges have sometimes been imposed as if they were taxes, without regard to the specific link between the development and the trunk infrastructure.

It is suggested that both subsection (2) and the example in the Explanatory Notes may be too narrowly related to one particular type of abuse that has occurred in the past, that is, the imposition of charges on existing lawful uses.

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Could we suggest that these provisions (at least the Explanatory Notes) also spell out the more obvious point that a development does not impose 'additional demand' upon trunk infrastructure if the development is unrelated to the infrastructure in any way. An example would be a stormwater infrastructure charge, imposed on a development which bears no relationship to the trunk stormwater drainage system. This may seem obvious, but based on the experience of our members, apparently it has not been obvious enough in some local government areas.

5. Timing of refunds – Sections 654 and 655

Subsection (3) provides that 'timing of the refund is subject to terms agreed between the payer and local government.' What is the fallback if, at the time of the decision notice and the payment, there was no agreement or an agreement failed to address this issue? The Explanatory Notes currently provide no guidance. Perhaps the owner should lodge a permissible change application requesting a decision about the timing of the refund?

6. Conversion – Division 3 Subdivision 1

The QLS welcomes the new procedure for an application to non-trunk to trunk infrastructure. This will help where a local government has incorrectly required one owner to pay the whole of the cost of infrastructure which is in fact intended to benefit multiple landowners.

It may possibly also be worth considering whether there should be a converse right to apply for trunk infrastructure to be converted to non-trunk and identified as relating solely to someone else's land, not to the land the subject of the application. Perhaps the Department considers that this point is already covered by the new provisions about not levying charges except for 'additional demand', but if so, that intention is not sufficiently clear from the explanatory notes for those provisions, as noted above.

7. Conditions local governments may impose – 665(3)

In the experience of our members, when a statutory requirement is that the condition must state 'when' something must be provided, this can sometimes be (mistakenly) interpreted as referring to a specific fixed date. Normally, the timing for infrastructure to be provided should logically be linked to the sequencing of the development, whenever a particular stage happens to occur, for example: *'Before sealing of a plan of subdivision for Stage 6 identified on Plan ##, complete the following infrastructure...'*

Could we please ask that this should be explained in the Explanatory Notes.

8. Infrastructure agreement prevails over approval and charges notice – Section 676

Section 676(1) provides that: *'If an infrastructure agreement is inconsistent with a development approval or infrastructure charges notice, the agreement prevails to the extent of the inconsistency.'* This merely carries forward the corresponding existing provision.

This provision has always had some difficulties:

- (a) It appears to encourage infrastructure agreements to be inconsistent with development approvals, even in relation to conditions that have been imposed by a Court or conditions that have been negotiated with third parties (eg, a third party neighbour may have had an interest in negotiating infrastructure conditions, through the submissions and appeal process);
- (b) It allows for owners to circumvent the normal statutory criteria for amending conditions of approvals, including if there would otherwise have been third party rights relating to the amendment of the conditions, just by an agreement or amendment to the agreement with the local government;
- (c) It allows for inconsistent instruments to subsist side by side, creating uncertainty and a lack of transparency for interested purchasers or financiers undertaking due diligence;
- (d) It has never been explained why there is any good reason for infrastructure agreements to be inconsistent with the development permit.

On the other hand, landowners and local governments have now had some years of relying on the existing provision and working with it. If the State Development, Infrastructure and Industry Committee agrees with the view that the provision should be changed, we would suggest a transitional provision to the effect that this change should only relate to future agreements, unless the landowner applies to have the agreement converted to be treated under the amended Act.

9. Transitional provisions – existing notices and charges – Sections 977 and 978

The QLS welcomes the flexibility of Section 977(3) which allows a person who has previously been given a notice to apply (under the permissible change provisions) to change the development approval and have this assessed under the amended version of the Act. It seems to us that there ought to be a stated presumption in favour of such an application.

It is not apparent why landowners should be prevented from making the same type of application in relation to other corrections to their existing requirements, based on the more certain and transparent rules in the amended version of the Act. For example:

- An owner should be able to apply to have an offset, refund or repayment re-calculated under the amended Act, under Section 978, if the offset, refund or repayment has not already issued.
- An owner with a development condition requiring entry into an infrastructure agreement ought to be able to apply for this condition to be deleted under the amended version of the Act.

10. Changes to infrastructure charges upon an extension of a development permit

An important issue that has not been addressed in this Bill and which we would like to see addressed before the Act takes effect is the question of increased or new infrastructure charges imposed upon extension decisions. That is probably only because the Department may have been unaware that this was happening in practice. Under Section 388 of the *Sustainable Planning Act 2009*, there is no jurisdiction for an assessment manager to impose new infrastructure charges or increased infrastructure charges. However, in the experience of our members, local governments can (and do) circumvent this policy position, by advising applicants that they intend to refuse extension applications unless and until the applicant has applied for permissible change volunteering to pay new or increased charges.

It is not the role of the QLS to have a view one way or another whether it would be appropriate, as a matter of State policy, for local governments to have a jurisdiction to impose new or increased charges upon an extension application.

If it is the policy position that this power should be available, Section 388 should say so.

If it is the State policy position that this power should not be available, that needs to be spelled out. The current drafting is not expressed in sufficiently strong terms.

Additionally, the only reason why local governments are currently in the position to be able to threaten refusal of an extension application unless more money is paid to them is that the current statutory criteria for extension decisions are entirely negative and the local government is not entitled under Section 388 to consider any positive reasons in favour of the extension, such as personal or economic hardship, the complexity of conditions which are prerequisites to the commencement of the use, or the scale and complexity of the development.

This issue is causing hardship to landowners and uncertainty for local governments right now and we do not believe that it is appropriate to be deferred to future planning reform. It is an infrastructure charging issue.

Part C: Comments on detailed issues relating to amendments to the *State Development and Public Works Organisation Act 1971 (SDPWO Act)*

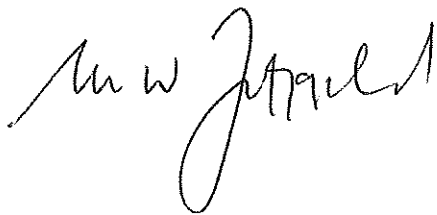
1. There are no time limits. While this is consistent with the current SDPWO Act, it is not consistent with the EPBC Act which does set time limits for the EIS and approval process under the EPBC Act.
2. Currently, under the EPBC Act (Section 131AA), a proponent must be given 10 days within which to comment on a proposed decision and proposed conditions. There does not seem to be any similar provision in these amendments.
3. The amendments give the Coordinator-General a broadly similar power to the Commonwealth Environment Minister to cancel an approval unilaterally (see Section 145 of the EPBC Act), but there is no power to suspend or reinstate as there is in the EPBC Act. Suspension and reinstatement is a more appropriate option in some circumstances.

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4. Section 54ZO of the new provisions will enable the Coordinator-General to recover the cost of third party reports the Coordinator-General may choose to commission in his assessment of a protected matters report. As proponents will be paying they should at least be first provided with a quote and asked to comment on both the area of inquiry and the expected cost.
5. The Queensland Law Society has a concern about the unnecessarily broad discretion of the Coordinator-General to take into account "any other matter the CG considers relevant in Section 54W. This is a broader discretion than the corresponding decision rules under the EPBC Act and seems likely to create uncertainty.
6. The new declaratory power in Section 54ZM is very broad. It allows challenges on the basis of the "lawfulness "under Part 4A of undertaking a coordinated project. This may well be creating a broader jurisdiction, akin to merits review, in the Planning and Environment Court, which does not currently exist under the EPBC Act. Under the EPBC Act a challenge under the Commonwealth ADJR Act is the only option. While the QLS obviously has no objection in principle to the creation of this broader jurisdiction, we are just raising the point in case the implications have not been fully considered.

Thank you again for the opportunity to provide this submission.

Yours faithfully



Michael Fitzgerald
Deputy President

