

Your Ref:

Our Ref: Planning and Environmental Law Committee

4 November 2011

The Research Director
Environment, Agriculture, Resources and Energy Committee
Parliament House
George Street
BRISBANE QLD 4000

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Dear Research Director

STRATEGIC CROPPING LAND BILL 2011

The following submission on the *Strategic Cropping Land Bill 2011* has been prepared by the Queensland Law Society's Planning and Environmental Law Committee. It is not the role of the Queensland Law Society (**QLS**) to have a view on the fundamental policy of providing special legislative protection to 'strategic cropping land' and the committee does not have expertise in agricultural science. Accordingly, this submission is intended to be from a more limited legal perspective, assisting the Committee with comments on:

- Fundamental legislative principles (FLPs) under the *Legislative Standards Act 2011* (Qld);
- Drafting errors and other technical legal issues involved in structuring and drafting the legislative framework;
- Any obvious inconsistencies, either within the Bill, or between the Bill and the Government's previous announcements of its policy intentions, or between the Bill and other legislation or instruments; and
- Implications for legal transactions (such as ease of public access to relevant information upon property purchases) and procedural issues.

It is impossible for this submission to be comprehensive or thorough. This is a complex and lengthy Bill (195 pages), establishing a novel framework, and in many ways departing from various previous policy announcements and fact sheets. The QLS received the call for submissions on Friday, 28 October 2011 at 5:28pm, with a closing date of today, Friday, 4 November 2011, that is, only 5 business days. It is not clear what justifies rushing through this legislation with errors and inconsistencies that could have been resolved with consultation on the Bill's text prior to introduction. The QLS would also like to take this opportunity to raise a more general concern about the hazards of rushing legislation for introduction to

Parliament, which recently seems to have become the normal approach rather than being an exception to the rule.

Definition of ‘strategic cropping land’

Originally, there were various policy announcements that the intention was to protect only ‘the best’ of Queensland’s cropping land.¹ At various times, food security reasons have been identified in support of this policy.

However, in Section 9(1) of the Bill, ‘strategic cropping land’ is only whatever land is recorded in the decision register as being SCL and similarly, ‘potential SCL’ is just whatever land happens to be trigger mapped as SCL under Section 10 (either at the outset or from time to time).

Potential SCL

In the previous submission by the QLS to the former Minister for Natural Resources and Mines and Trade, the Hon Stephen Robertson MP, in relation to the Policy Framework document, the QLS supported the concept of mapping potential cropping land, but only in the context of providing a framework for offsets and legal mechanisms for the management of offsets.

Our previous submission explained (on p4): *‘While casting the net widely may work for prohibiting land from being used for purposes other than cropping, it will not, in itself, have the effect of compelling landowners positively to use their non-cropping land for cropping purposes, which will either lead to sterilisation of the use of that land when it could otherwise have been put to an alternative beneficial use, or alternatively, unnecessary expense and delay in order to restore the landowner’s ability to put the land to those other beneficial uses.’*

In contrast, penalising the productive use of ‘potential SCL’ even for temporary purposes (under Section 77), where the landowner does not want to use the land for cropping purposes, does not appear to have any possible justification, on the face of it.

On the other hand, if ‘potential SCL’ had been mapped only from the perspective of creating a ‘pool’ of land for offset purposes, this would have increased the value of that land and created a commercial incentive for the land to be actively managed for actual cropping purposes.

Definitions of ‘permanent impact’ and ‘temporary impact’

In general, the QLS is opposed to definitions which have a vastly different meaning from the ordinary meaning of the words in everyday speech as this tends to create confusion and is misleading. For example, in the definition of ‘permanent impact’, some of the legal fictions which are likely to be confusing include:

- (a) The definition of 50 years as ‘permanent’. Fifty years would be considered by most people to be ‘long-term’ but not ‘permanent’.
- (b) The confusion between merely ‘impeding’ cropping and actually stopping it. In normal speech, an impediment can be a surmountable obstacle. Deferring the further definition of this issue to a future regulation is of concern under Section 4(4) of the Legislative Standards Act 2011, as it would appear to be a fundamental concept in the Bill.
- (c) It is questionable whether open-cut mining is necessarily either a permanent or 50 years impact on the future ability to undertake cropping, given recent developments in rehabilitation science.

¹ For example, refer to paragraph 2 of the Policy Framework document.

(The QLS is not attempting to provide a scientific analysis of the research, but merely notes that it would be unfortunate for a statutory legal fiction to undercut the progress of this area of work.)

Exclusions and exceptions

The lists of exclusions and exceptions appear to be confusingly scattered throughout the Act, rather than being concentrated in one schedule or section, eg in Section 6, Schedule 13A and exceptional circumstances. The lists also appear to be somewhat random. A few examples of the apparent inconsistencies and drafting issues include the following:

- (a) Section 6(d) exempts strategic port land, but not either airport land or the Port of Brisbane (which has been privatised). Just like strategic port land, there is normally a wide range of port-related or airport-related development on this land, not just core infrastructure. This is not covered by the TIA exemption under Section 6(b).
- (b) Electricity transmission grids and supply networks are exempt, but not either other critical linear infrastructure such as water pipelines, and not power generation.
- (c) There are anti-competition issues embedded in the exemptions, with the protection of TIA transport infrastructure but not private transport infrastructure or PPPs.
- (d) We can expect to see an undesirable proliferation of State Development Areas overriding local government planning, because SDAs are exempt, but not other methods of delivering similar scale industrial projects.
- (e) Schedule 13A is also confusingly drafted as some of the items are land uses but some are locations.

The historic cropping test in Sections 49 and 50 is quite different from what was previously set out in the factsheet published on the DERM website. In particular, there are new provisions that even if a tiny part of a large property was used for cropping, 'it does not matter to what use the rest of the property was put during the relevant period'. Why does it not matter?

It is pleasing to note that some items for domestic purposes are no longer included, but there is still a question about items such as orchards which have not been harvested commercially or otherwise for more than a decade and have simply been abandoned.

Existing development approvals and resource authorities

Section 78 protects development authorised under a development approval, but this would not assist if the existing approval is a preliminary approval, or the first in a series of approvals which contemplated related approvals (such as a material change of use approval contemplating operational works and building works).

There are obvious concerns about this impact on the rights and liberties of individuals under Section 4 of the *Legislative Standards Act 2011*, including retrospective impacts under section 4(3)(g).

Transitional provisions

There is a date error in Section 281(1)(b) which sets a deadline for applications of 23 August 2010, which should have been 23 August 2012, according to a factsheet. The same error appears in Section 279.

It is noted that exemptions for existing projects and tenures only apply until the project applies for renewal, amendment etc of any part of the tenure or environmental authority, which puts at risk existing

projects and involves an element of retrospectivity contrary to Section 4(2)(g) of the Legislative Standards Act 2011.

The QLS would welcome the opportunity to be consulted further on this Bill.

Yours faithfully

Bruce Doyle
President