

Your Ref:

Our Ref: Planning and Environment Law Committee

24 January 2014

Attention: Erin Pasley, Research Director

The Chair
State Development, Infrastructure and Industry Committee
Parliament House
Brisbane QLD 4000

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

Dear Sir

Submission on the Regional Planning Interests Bill 2013

Thank you for providing a short extension to the Queensland Law Society (QLS) on the timeframe for making a submission on the *Regional Planning Interests Bill 2013*.

The following submission has been prepared by our Planning and Environmental Law Committee with input from our Mining and Resources Committee. The role of these Committees, 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.

Summary

In principle, the QLS supports the explanation outlined by the Deputy Premier in his speech introducing the Bill to Parliament on 20 November 2013, that, given it is government policy to regulate the co-existence of resource activities with other land use purposes under regional plan mapping and criteria, it follows that an over-arching statute will be required *'to provide the necessary regulatory framework to implement the policies in regional plans to activities not regulated by the [Sustainable Planning Act 2009], as well as integrating regional interests contained in other legislation.'*

Also, in principle, the QLS supports the intent of integrating a series of issues which have previously been the subject of stand-alone statutes, such as strategic cropping and wild rivers. Logically, the integration of these issues within a combined statutory framework ought to reduce inconsistencies and complexity.

However, at this stage it is difficult to foresee how the broad principles explained by the Deputy Premier are proposed to be implemented until the detail of the draft Regulation is available. In particular, the Regulation will contain the criteria against which applications will be assessed, including Priority Agricultural Area (PAA) Coexistence Criteria. The QLS is

aware that the original draft criteria released in the Central Queensland and Darling Downs regional plans have been subject to ongoing refinement and that revised criteria are proposed to be included in the Regulation. It would be much appreciated if the QLS could be consulted on the revised draft criteria, given that it will obviously be critical to achieving the intent of the Bill, whether or not the drafting of the criteria turns out to be consistent with the Government's policy objectives. The QLS is often able to assist with comments on drafting anomalies and inconsistencies, if this opportunity is available.

This submission addresses a number of drafting gaps and anomalies that remain in the Bill, in particular:

- the need for transitional provisions to protect existing rights and uses and preferably also consider the situation of projects which have reached an advanced stage when they are impacted by the new regional interests, or alternatively provide for just compensation
- concerns about the relationship with other laws, including in the context of a proposed bilateral agreement to accredit State environmental approvals under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
- the gaps in the statutory framework for regional interest authority applications, particularly gaps in timeframes and criteria, including in relation to local governments
- there is a need for a process to address promptly and efficiently any inaccuracies in the new mapping
- the need for a more clear position in relation to amendments and renewals, particularly amendments of environmental authorities
- we suggest that human safety emergencies should be an exemption, rather than a defence to prosecution
- surely, it was not intended to create such a high magnitude of penalties for even quite limited impacts or transitory impacts (\$3.5 million), out of all proportion to lesser penalties for offences which the community is likely to regard as much more serious
- the term 'regulated activity' is inadequately defined, in breach of a fundamental legislative principle, and the Explanatory Notes have failed to justify the breach
- the Bill creates new strategic environmental areas to replace wild rivers declarations but it is unclear why it has done this without repealing the *Wild Rivers Act*
- overlapping appeals.

This is not intended to be a comprehensive submission that reviews each section of the Bill. Apart from anything else, the submissions period was over the Christmas/New Year period when many of our relevant members were away. Instead, we have highlighted a few topics on which our members are best-placed to assist with comments on legal drafting issues, and these are set out on a topic by topic basis, not section by section. That is, some topics cover several sections scattered throughout the Bill.

It is acknowledged that, with some of the drafting gaps or anomalies identified in this submission, there would often be more than one acceptable drafting option to address each

issue, depending on what was intended from a policy perspective. If the Committee has questions about solutions to the issues raised, our members would be happy to provide further input.

Comments on detailed issues

1. Need for transitional provisions, in particular protection for existing uses and existing approvals, or alternatively the need for just compensation – Sections 22, 24, 84

Section 84 provides that no compensation is payable because of activities being prohibited or restricted under the Act.

The very fact that Parliamentary Counsel or the Department perceived a need to insert such a provision amounts to an implied acknowledgement that the Bill is in fact intended to take away existing rights and liberties retrospectively and that the proposed set of exemptions for existing activities (eg, Section 24) is seen as inadequate to protect existing rights.

An example of the way that Section 24 could be inadequate to protect existing rights is the reliance in that section on existing 'work plans' such as plans of operations for mining leases. Taking the example of a mine, the relevant principal instruments granting existing rights are the mining tenement and the environmental authority, not the plan of operations. Plans of operations have a maximum duration of 5 years under the *Environmental Protection Act 1994* and are normally for 12 months or less. During an economic downturn, it is also relevant to be aware that resource activities that were previously operational and which would be capable of being opened again, may be in temporary 'care and maintenance' at which time a current 'work plan' may not be in place. It is unclear why this section needs to refer to the existence of a work plan in the first place.

Another example is that in Section 22, there is an exemption for resource activities with a landowner's agreement if the resource authority holder is not the landholder, but the section does not appear to contemplate the situation that the resource authority holder may often be the existing landholder. It appears to be an anomaly that a resource company should be in a better position working on land that it does not own in freehold, compared with the position if it is the freehold landowner. Of course, resource companies could deal with this anomaly by arranging for related companies within the same group to hold land tenure separately from holding the resource authorities over that land, and granting each other agreement, but it is unclear how this would be consistent with the Government's greentape reduction policies.

Similarly, unlike the current *Strategic Cropping Land Act 2011* that is now proposed to be repealed, the new Bill fails to make provision for projects that will have reached an advanced stage in the assessment process (ie, projects which have already been subject to significant financial investment at the time each new regional interest or area takes effect). For example, refer to Section 283 of the *Strategic Cropping Land Act 2011*.

The Bill proposes to repeal the *Strategic Cropping Land Act 2011*, but has failed to repeat the transitional provisions from Chapter 9 of that Act and this gap should be corrected before the Bill proceeds further.

Nothing in the Explanatory Notes justifies breaching the fundamental legislative principle that rights and liberties should not be taken away retrospectively, under Section 4 of the *Legislative Standards Act 1992*. For example, under planning legislation, Queensland has a long history of using planning instruments to impact on people's rights, but subject to a regime of compensation for injurious affection. Compensation for injurious affection would be an example of a reasonable justification.

2. Sections 5 and 56 – Relationship with resource Acts, Water Act and Environmental Protection Act

The QLS also has a concern about Section 5, which provides that the Bill overrides the *Environmental Protection Act 1994*, the *Sustainable Planning Act 2009*, the *Water Act 2000* and all resources Acts. The Explanatory Notes do not properly explain why such a broad over-riding provision is necessary in relation to such an important range of legislation.

Instead, there should be a thorough process whereby the Department and the Office of Queensland Parliamentary Counsel actually check for any potential inconsistencies between this Bill and the other Acts and resolve those inconsistencies, one by one, preferably by avoiding the inconsistencies.

Without that process, we would have a concern that the intended effect of the provision may be to overturn existing lawful use rights and existing approvals under each of those Acts, without actually disclosing that intention upfront. If so, this would then appear to be a breach of a fundamental legislative principle under Section 4 of the *Legislative Standards Act* that has not been justified.

We also have a concern about the approach of Section 56, which is that a condition of a regional interests authority prevails over any condition of another authority or permit to the extent of any inconsistency. Could we highlight that this approach is counter to this Government's stated intent in relation reforming Queensland's development approval system generally, which has been to try to coordinate conditions actively so as to avoid inconsistencies, for example, through the creation of SARA. Creating a framework whereby different government agencies are authorised to create inconsistent conditions and leave it to the courts to try to determine whether or not they are inconsistent and the extent of the inconsistency, would not be in accordance with the thrust of other planning reform work by this Government.

It is unclear how the Department proposes to resolve the Government's obligations to the Commonwealth under the *Environment Protection and Biodiversity Conservation Act 2000*, under a proposed bilateral agreement for the accreditation of the State approval processes, if environmental conditions for Commonwealth purposes can be overridden, even unintentionally, by inconsistent regional interests conditions.

It is also unclear what gap there is perceived to be in existing water laws that actually needs to be filled by including provisions about water resources in this Bill, other than creating a duplicate layer of regulation.

Contrast Section 5 with Section 280 of the *Strategic Cropping Land Act 2011*.

3. Gaps in providing a statutory timeframe framework for regional interest authority applications – Part 3, in particular Division 7

There is a procedural gap in the Bill in that there is no statutory framework for timeframes for deciding regional interest authority applications (and some of the processing steps such as an assessing agency's response under Section 42). That seems inconsistent with this Government's statutory and policy reform work in related areas, such as greentape reduction and planning reform. The push to create certainty in timeframes, for both business and the community, has in fact been a bipartisan issue. We would expect that the Commonwealth will also be looking for statutory timeframes as part of the work towards a bilateral agreement accrediting the State's approval processes.

It is noted that there seems likely to be a related administrative problem that, if the Bill provides insufficient protection for existing approvals and activities at the outset, but the true intent is to continue to protect those approvals and activities, there is likely to be a flood of regional interest authority applications as soon as the legislation takes effect, just to continue to operate.

Could we also draw to the Committee's attention that it takes more regulatory words (in total) to say that timeframes are being left to a future Regulation and then for the Regulation to refer to the provision in the Act and set out a timeframe, than if a simple timeframe was set out in each relevant provision of the Act in the first place. It is also more difficult for laypeople to try to work their way through a maze of cross-referring laws, than if such matters are specified upfront. (An example is the timeframe for closing dates for submissions under Section 35(4), which only creates uncertainty for the community.)

At this stage, in the absence of both the proposed criteria for decisions and statutory timeframes, we had difficulty understanding how the Bill was proposing to implement its admirable purpose of providing for a 'transparent and accountable process' under Section 3(2). Similarly, there do not appear to be criteria for an assessing agency, for example, in relation to conditions, under Section 42. For example, by way of comparison, there are requirements in relation to reasonableness or relevance of conditions under the *Sustainable Planning Act 2009*. In contrast, the reference to the agency's 'functions' under Section 43 is ambiguous.

4. Gaps in providing a process for correcting incorrect mapping

As a matter of experience, it is normal for any major new mapping to contain inaccuracies, particularly if it has been rushed. For example, our QLS Planning and Environment Committee had experience with drawing attention to examples of some amusing errors in vegetation regrowth mapping, when that mapping was introduced by a previous government.

It would be prudent to provide a quick and simple process enabling errors to be corrected, including for applicants (such as landowners) to initiate corrections to errors. An example of a reasonably successful procedure (although noting that it does still have some flaws) is the process for landowners to apply for property maps of assessable vegetation under the *Vegetation Management Act 1999*.

5. Amendments of environmental authorities and resource authorities – eg Section 17

It is unclear what the Bill is trying to achieve in relation to amendments and renewals of authorities for existing projects. The QLS made the point in 2010-11 in relation to the *Strategic Cropping Land Act 2011* (at the discussion paper and Bill stage), that these provisions would only create administrative delays and costs for existing developments.

If the intention had been to create a procedure to consider proposals for extensions of surface area or applications for the purpose of additional disturbance, the Act should have said so. As it was, the SCL Act ended up simply creating an additional layer of administration in relation to amendments that actually have no impact on the interest that was intended to be protected.

In the new version, the intent remains unclear, for example, Section 17(3) says: 'A reference to an application for an environmental authority includes a reference to an application for a major amendment to the environmental authority.' The term 'includes' means that the term is not restricted to major amendments, but also covers something else. Was the definition intended to exclude minor amendments or not? Leaving aside that issue, the term 'major amendment' under the *Environmental Protection Act 1994* is very extensive. An example might be the replacement of an existing water release point at one location with another location upstream or downstream in the same watercourse. Not all 'major amendments' have anything at all to do with the identified 'regional interests'.

6. Section 21 - Emergencies

It is unclear why the situation of emergencies involving the protection of human life or safety, or the structural safety of buildings, needs to be addressed by way of defence to a prosecution under Section 21, instead of simply being set out as an exemption? The risk of prosecution and having to gather evidence to prove a defence at the time of dealing with the emergency, does not appear to be a particularly helpful approach to assisting emergency personnel with their jobs.

7. Magnitude of Penalties

The Explanatory Notes acknowledge upfront (p5) that there is an issue with breach of fundamental legislative principles under the *Legislative Standards Act 1992* by creating 'extremely high penalties' and notes that the Bill does in fact create 'extremely high penalties'. The Explanatory Notes only mention the maximum penalty for an individual (\$687,500 or 5 years' imprisonment) and are silent about the penalty in the much more likely scenario that a company would be prosecuted (\$3,437,500), notwithstanding that the justification offered in the Explanatory Notes is solely in relation to deterring companies.

Penalties should be in proportion to an offence and also in proportion to the community's concern about the seriousness of such statutory offences compared with crimes under other legislation for which there are lesser penalties, for example, violent criminal offences affecting human safety. Even minor impacts or transitory impacts are addressed by these high magnitude penalties. The reference to deterrence is not an adequate justification for this lack of proportionality.

8. Inadequate definition for ‘regulated activity’ – Sections 16 and 18

Under Section 18, there are two types of activities that are prohibited within an ‘area of regional interest’ (unless either exempt or covered by a regional interests authority):

- (a) A resource activity; and
- (b) A ‘regulated activity’.

Regulated activities are presumably not resource activities; they are something else. Section 16 leaves the question entirely up to a future regulation about what these activities are going to be, with the sole exception that there is a requirement that they must be ‘likely to have an impact on the area of regional interest’. Any activity at all would be likely to have some kind of impact on the area, except perhaps flying over it.

The *Explanatory Notes* fail to give any guidance at all. They merely summarise Section 16.

Given that the penalties are so high, even for carrying out the activity inadvertently within the area, the Act ought to set some criteria for the types of activities which are able to be prescribed. The *Explanatory Notes* acknowledge upfront that this is a breach of a fundamental legislative principle (p5), but there is no justification given for such a flagrant breach. The only attempted justification is a summary of the section. A starting point for reasonable criteria would be to change ‘impact’ to ‘significant impact’ (similar to the approach under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)) and then to set some criteria which indicate the types of impacts which would be considered significant within each type of regional interest.

9. Wild Rivers Act

In the Deputy Premier’s speech introducing the Bill to Parliament, he explained that part of the purpose was to re-set the balance by ‘*repealing the emotive and arbitrary wild rivers declarations*’ and addressing the ‘*land use planning aspects through the regional planning process designed by local communities. Revoking these declarations will result in the removal of the current prohibitions, allowing proposals to be subject to merit based applications.*’

Given that this is the stated policy position, it is unclear why the declarations are proposed to be revoked without simply repealing the Wild Rivers Act as part of this Bill?

10. Overlapping appeals

Appeals in relation to most issues concerning resource activities are in the Land Court. The Bill creates an overlapping layer of appeal to the Planning and Environment Court (Section 68 – definition of ‘court’), potentially in relation to a small part of a larger project.

The QLS is supportive of both the Land Court and the Planning and Environment Court. We are also unable to comment on the Government’s policy position to create an extra layer of approvals and its policy decision to introduce a role for local governments in considering resource projects or parts of resource projects.

Submission on the Regional Planning Interests Bill 2013

However, we can comment that the creation of a situation where two courts have to consider the same resource project proposal, with overlapping of consideration of the same issues, has some obvious practical problems. The Government should make a decision one way or another whether the Land Court or the Planning and Environment Court should be considering resource project applications and stick with that decision. Currently, the Land Court is the Court that has specialist expertise and experience dealing with resources projects.

If you wish to discuss this submission, please contact our Principal Policy Solicitor, Mr Matt Dunn, on 3842 5889 or via email on m.dunn@qls.com.au.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Ian Brown', written in a cursive style.

Ian Brown
President