

5 July 2013

Your ref: Nature Conservation (Protected Plants) and Other Legislation Amendment Bill 2013

Our ref: Planning and Environment Law Committee

Agriculture, Resources and Environment Committee
Parliament House
George Street
BRISBANE QLD 4000
arec@parliament.qld.gov.au

Dear Research Director

Nature Conservation (Protective Plants) & Other Legislation Amendment Bill 2013 (“the Bill”)

Thank you for providing the opportunity for the Queensland Law Society to provide comments on the Bill.

On 21 May 2013, the Bill was introduced into Parliament. The purpose of the Bill is to amend, inter alia, the *Nature Conservation Act 1992* (“the Act”).

This submission deals only with concerns in relation to s 9 of the Bill, which provides for an amendment to s 89 of the Act. It is not suggested that this submission represents an exhaustive review of the Bill given the time available to the Society and its committee members. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not commented upon.

The treatment of exemptions to offences

Section 89 of the Act is an offence creating provision. An extract of s 89 appears below:

- “1. Subject to section 93, a person, other than an authorised person, must not take a protected plant that is in the wild unless:
- (a) *it is necessary and reasonable to take the plant to avoid or reduce an imminent risk of death or serious injury to a person and the taking can not reasonably be avoided or minimised; or*
 - (b) *each of the following applies –*
 - (i) *it is necessary and reasonable to take the plant to avoid or reduce an imminent risk of serious damage to a building or other structure on land, or to personal property;*

- (ii) *if the damage is not prevented or controlled, the person may suffer significant economic loss;*
- (iii) *the taking can not reasonably be avoided or minimised; or*
- (c) *taking the plant is or is a necessary part of, a measure that is –*
 - (i) *authorised under the Fire and Rescue Service Act 1990, section 53(1) or section 68(1)(c); or*
 - (ii) *required under section 53(2)(j) or 69(1) of that Act; or*
- (d)-(g) ...
- (h) *the plant is taken under –*
 - (i) *a conservation plan applicable to the plant; or*
 - (ii) *a license, permit or other authority issued or given under the regulation; or*
 - (iii) *an exemption under a regulation.*

(emphasis added)

The amendment proposed will amend s 89(1)(a) to (h) by omitting the current provisions and including the following:

- “(a) *a conservation plan applicable to the plant; or*
- (b) *a license, permit or other authority issued or given under a regulation; or*
- (c) *an exemption under a regulation.*”

(emphasis added)

In the Explanatory Memorandum accompanying the Bill, the following is said:

“Section 89 will be amended to remove exemptions from the restrictions on taking protected plants. This raises the potential issue of whether the proposed amendment has sufficient regard to the institution of Parliament and authorises the amendment of an Act only by another Act. The amendment is a reasonable and appropriate way of handling this policy framework as the exemptions will be located in the regulations as part of the subordinate legislation subject to the parliamentary scrutiny as per the requirements for subordinate legislation in the Statutory Instruments Act 1992, sections 49 to 51. Further, the approach is consistent with how other exemptions are established and aligns with the structure of the legislative framework, therefore making it easier for the public to navigate.”

Concern is expressed about the prospect that a range of exemptions, amounting to defences to an offence – currently conveniently co-located with the offence creating provisions itself – will be relegated to a regulation. This concern needs to be understood in the context that s 89 is an offence punishable by imprisonment of up to 2 years.

It is respectfully suggested that the amendments embodied in s 89 are inconsistent with fundamental legislative principles contained within the *Legislative Standards Act 1992* ("LS Act") and in particular, regard for the institution of Parliament¹, and the requirement that rights and liberties is subject to appropriate review².

Whilst it is accepted that the regulation providing for the defences will be subject to parliamentary scrutiny³ and may be, by resolution, disallowed⁴, it needs to be acknowledged that the review processes undertaken by the Legislative Assembly of subordinate legislation may not be as exhaustive as those undertaken for an authorising law. This is a matter of genuine concern when provisions amounting to defences to a term of imprisonment may be amended by executive action. It is understood that a regulation may commence prior to tabling in Parliament and may be in operation for a period of time before a disallowance motion is effected. It is therefore possible that the benefit of certain exemptions may be denied to an accused person even if a piece of subordinate legislation is subsequently disallowed.

Secondly, whilst the Explanatory Memorandum says the approach is consistent with how other exemptions are established and aligns with the structure of the legislative framework, that statement is respectfully disagreed with having regard to both the Act⁵ and other legislation in Queensland. For example, in legislation which seeks to regulate related issues, like the *Sustainable Planning Act 2007* ("SPA"), and the *Environmental Protection Act* ("EPA"), defences are provided for in the authorising law⁶.

In addition, the suggestion made in the Explanatory Memorandum that as a consequence, the change will make the provisions easier to navigate, seems, with respect, to be without foundation and contrary to experience and common sense.

It is respectfully suggested that to the greatest extent practicable, all well recognised exemptions which amount to defences should be retained in the Act.

If you wish to discuss any aspect of 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

Annette Bradfield
President

¹ *LS Act*, s 4(2)(b)

² *LS Act*, s 4(3)(a)

³ *Statutory Instruments Act* ("SI Act"), s 49

⁴ *SI Act*, s 50

⁵ *LS Act*, s 88(2), (3) and (5), for example

⁶ SPA, ss 584(1), 585(1), 586(1); EPA, s 429(1), for example.