

Your Ref:

Our Ref: Planning and Environment Law Committee

12 October 2012

The Research Director
State Development, Infrastructure and Industry Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Director

Submission on the *Sustainable Planning and Other Legislation Amendment Bill 2012 (the Bill)*

The Queensland Law Society (QLS) appreciated the opportunity to be involved in the formal consultation process which took place before the introduction of this Bill. This submission has been prepared by our Planning and Environment Law Committee.

For timeframe reasons, our Committee has not reviewed the whole of the Bill, but rather, the Committee has focussed on the particular key issues that were highlighted in the Deputy Premier's speech when introducing the Bill to Parliament. The issues highlighted by the Deputy Premier have provided an indication of the Government's intentions (taken together with the briefings received by the QLS as part of the formal consultation process). For the most part, the stated intentions of the planning reforms are consistent with many previous submissions from the QLS relating to red-tape reduction in planning law. Where we have highlighted concerns with drafting issues in this submission, this is essentially because the drafting does not entirely appear to achieve the stated intentions, particularly in the costs provision (the new s 457). Where relevant, we have also drawn attention to potential consequences of the drafting which appear to have been unintended.

In addition to this written submission, the QLS would be pleased to make available a representative to be heard by the Parliamentary Committee during the public hearings.

The Deputy Premier outlined seven key proposals, intended to be implemented by the Bill, for the purpose of reducing red tape and removing 'the inefficiencies which are strangling economic growth in Queensland'. We will address these in the approximate order they are set out in the Bill. The key amendments, together with QLS's comments on those amendments, are as follows:

1. Removal of master planning and structure planning provisions

While the QLS has not previously lodged any submissions on this issue, we were consulted about it during the formal consultation process. Generally, the experience of some of our members who have been

involved in master planning and structure planning processes is that the Deputy Premier is correct in identifying that these processes have not tended to add value and that the purposes of the processes could be more efficiently addressed through other planning instruments (including local area plans under planning schemes and more focussed regional planning). This change is **supported**.

2. Low-risk operational works

In principle, there is obvious merit in establishing a framework for ensuring that identified low-risk operational works do not require development applications, but rather are addressed through compliance assessment, self-assessment or being made exempt. Therefore, in principle, this change is **supported**, but at this stage it is unknown which types of operational works will be categorised in this way. Certain types of operational works do involve an element of professional discretion, and this can be particularly important where human safety and the protection of property is involved (eg, retaining walls). The QLS would appreciate an opportunity to be involved in further consultation in the implementation of this provision.

3. Decoupling of State resource allocation or entitlement requirements from the development application process

The State resource allocation and entitlement provisions have been unnecessarily complex and, to a large extent, they have tended to duplicate the State information and referral process. Under this Amendment Bill, if the land is Crown land, the State will still have the opportunity to consider whether or not to consent to lodgement of the application like any other landowner. The allocation of State resources which are not Crown land (such as water) can be determined through relevant processes under other legislation (such as the *Water Act 2000*), either contemporaneously with a development application or after the development application, at the risk of the applicant, reducing delays.

The QLS has been seeking a reduction in the complexity of the State resource allocation provisions for many years and accordingly **supports** this change. We also welcome the priority that has been given to making this change.

4. Acceptance of applications as 'properly made'

The QLS has previously recommended that there should be an ability for local governments (or other assessment managers) to accept applications as having been 'properly made', provided that they are supported by the consent of the owner of the land, even if not all details of the complex development application material have been completed at that stage, on the basis that, if further information is required, this can be submitted during information and referral or in response to submissions.

Accordingly, this change is **supported**.

5. A 'single State referral agency'

The QLS has, over many years repeatedly submitted that the current system of State referrals is unnecessarily complex and ambiguous. We remain of the view that the critical path to overcoming these problems will be through a reduction in the number of referral triggers and through reform of the ambiguous drafting of the remaining triggers. The QLS has been assured by the Assistant Minister for Planning Reform that this review is underway.

We have **some reservations** about whether the proposed ‘single State referral agency’ change in this Bill is likely to achieve the stated objectives of avoiding conflicting requirements or reducing red tape and we are concerned that it may have the reverse effect. Historically, there was a provision in the (repealed) *Integrated Planning Act 1997* (Qld), known as ‘referral coordination’, which was stated to be intended to achieve precisely those objectives. In the experience of our members, it failed to do so. Referral coordination actually increased delays and meant that applicants had to negotiate both with the coordinator and with the relevant line agencies about the same issue, rather than being able to resolve issues simply and directly with the line agencies. The QLS supported the deletion of referral coordination.

Similarly, the former Government expected that when various jurisdictions were brought together in the former ‘mega-departments’, this would create greater coordination and reduce inconsistencies. However, in the experience of our members, there were examples of conflicting decisions being made about the same issue by different parts of the same department.

While it is understood that many of these practical problems have been about implementation, we would just like to put on the record that the amendments in this Bill appear unlikely, in themselves, to achieve the stated purpose. The more detailed task of simplifying and clarifying the long list of State referral triggers in the *Sustainable Planning Regulation 2009* and the instruments against which development is assessed will be much more critical to achieving that purpose. (For example, the Department of Environment and Heritage Protection still has ‘*Draft Guidelines for the Assessment and Management of Contaminated Sites in Queensland*’ dated May 1998, referring to the repealed *Contaminated Land Act 1991* – and the guidelines are expressed to be in ‘draft’.)

6. Costs

6.1 *The intention of the changes*

The Bill’s proposed changes to the Planning and Environment Court’s costs jurisdiction are explained in the Deputy Premier’s speech when introducing the Bill to Parliament on 13 September (at p1944 *Hansard*) as being intended to ‘improve dispute resolution’ and to give the court an ‘expanded discretion’. The Deputy Premier went on to explain that, during the consultation process, ‘many stakeholders’ identified shortcomings in the current costs provisions. He singled out the following particular situations:

- ‘instances where a development has been approved but disputed for reasons not based on sound town planning principles, for example, competing commercial interests’;
- ‘appeals lodged by third parties for reasons other than those based on sound town planning principles’; and
- ‘situations where small scale developers wish to challenge conditions imposed by local governments but it is not cost effective for them to do so because they would have to pay their own costs even if successful’.

Since 1999, the QLS has suggested on various occasions that the Planning and Environment Court should have a broader discretion as to costs. However, we have serious concerns that the current drafting of the new costs provision in s 457, *Sustainable Planning Act 2009* (SPA), would have unintended consequences, based on the intentions outlined by the Deputy Premier.

6.2 *Relevant extract from the Bill*

For ease of reference, the Bill proposes s 457(1) and (2) as follows:

- “(1) costs of a proceeding, including an application in a proceeding, are in the discretion of the Court but follow the event, unless the Court orders otherwise.
- (2) *however, without limiting the discretion of the Court under subsection (1), the Court may order each party to a proceeding to bear the parties own cost for the proceeding if:*
- (a) *earlier in the proceeding the parties participated in a dispute resolution process under the ADR provisions or the Planning and Environment Court Rules 2010; and*
 - (b) *the proceeding is resolved during the dispute resolution process or soon after it has been finalised.”*

(underlining added)

The Bill also provides¹ that the existing Planning and Environment Court Rules can be amended to provide for “*how the court exercises a discretion as to costs under section 457*”.

6.3 History and interstate comparison

The approach of Parliament over the years to the ability of the Planning and Environment Court (and its predecessor) to award costs has been mixed. Initially, previous legislation² empowered the then Local Government Court to make such orders as it thought fit as to the costs of any proceedings determined by it. Subsequently, that costs provision was amended to remove the power of the court to award costs where appeals related to decisions or failures to decide applications involving the Brisbane City Council.

Eventually, following further amendment in 1980, the court’s power to award costs was made uniform across the state and was limited to circumstances in which an appeal was withdrawn before determination, the court considered the appeal was frivolous and vexatious³ and when a party sought an adjournment in a case where they had not given reasonable notice.

Further reform followed in January 1986 and the original costs rule was restored in a large part⁴.

In 1991 the *Local Government (Planning and Environment) Act 1990* introduced the current general rule that each party bears its own cost. This principle has been adopted in both the *Integrated Planning Act 1997* and SPA with relatively minor amendments.

An examination of other similar specialist courts and tribunals across Australia reveals that none of them has a costs provision similar to that contained in the Bill. In Queensland, the normal principle is that each party bears its own costs in the Land Court and the Queensland Civil and Administrative Appeals Tribunal.

6.4 Comparison with the UCPR

The proposed amendment to s 457(1) inserts a provision which is copied from the *Uniform Civil Procedure Rules*⁵ (UCPR).

¹ Clause 59 proposed amendment to s 445(2) SPA

² *City of Brisbane Town Planning Act 1964*, s 31

³ *City of Brisbane Town Planning Act*, s 31(2)(a)

⁴ *Local Government and City of Brisbane Town Planning Acts Amendments Act 1985*

There is substantial jurisprudence about rule 681⁶ of the UCPR and its component parts and much of it would become directly applicable to the proposed new s 457(1). For example, it is well accepted that a court's ability to award costs is grounded in notions of fairness and the principle that costs are not awarded to punish an unsuccessful party.

However, there are some obvious major differences between normal commercial disputes addressed by the UCPR, compared with dispute resolution which has a strong element of public interest such as in the Planning and Environment Court. Apart from public interest, differences include:

- The roles of State and local government, which can find themselves as 'piggies in the middle' in disputes which are primarily between applicants and submitters; and
- The fact that many disputes in the Planning and Environment Court are resolved without a clear 'winner' and 'loser', but rather on the basis of a closely intertwined mixture of outcomes, even where the parties themselves have not necessarily agreed to those compromises. For example, a submitter appeal against an approval could lead to the appeal being dismissed, but subject to improved conditions (and the submitter is not necessarily a 'loser' in that situation, but rather, has done the community a service by ensuring that impacts unknown to the government agencies at the time of the original approval were addressed by the court. Similarly, in an appeal against conditions, the applicant may win some, lose some and end up with compromise amendments to other conditions.

Due to these major differences, it would be inappropriate simply to copy the UCPR rule. While the court should have a wider discretion, this should not be undermined by the unduly prescriptive qualification on that discretion 'but follow the event, unless the court orders otherwise'.

It might initially appear that this presumption would not have to be applied as stringently as it does. Unfortunately, the existing precedents which have considered the UCPR rule would inappropriately become relevant and the court's ability to overcome the presumption through court rules would not be as broad as may appear. Court rules about the exercise of the discretion can not be inconsistent or cut across the statutory discretion in the Bill. The most that court rules can be expected to achieve is to provide an alternative process to that contained in the UCPR about offers and the like.

6.5 Reasons why the current drafting would fail to achieve the intentions expressed by the Deputy Premier

Turning again to the particular situations mentioned by the Deputy Premier and considering each of these in turn:

(a) Commercial competitors

The Deputy Premier hoped that the new costs rule would discourage '*instances where a development has been approved but disputed for reasons not based on sound town planning principles, for example, competing commercial interests*'.

⁵ Rule 681(1)

⁶ For example, see *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97

Unfortunately, a presumption that costs follow the event would not help in that situation because:

- For the major commercial competitor players, in our members' experience, court costs would be a 'drop in the bucket' compared with the potential commercial gains of pursuing the litigation. Conversely, a question arises about the costs position of the local government simply defending its statutory decision in this situation, if the commercial competitor submitter wins (either on legal grounds or on the basis of impacts that the local government was not aware of at the time of the original approval); and
- Not all commercial competitors are equal players. A small business that has been granted an approval may find itself defending an appeal or declaration proceedings by better-funded major players (sometimes, multiple major players), who leave no stone left unturned to find both legal and planning reasons to overturn the approval. The major player submitters may then win and the small player would be left with their costs as well as no approval. This may include not only the costs of litigating the winning argument but also costs of running numerous less meritorious arguments.

(b) Submitter appeals generally

The second scenario mentioned by the Deputy Premier was: *'appeals lodged by third parties for reasons other than those based on sound town planning principles'*.

If submitter appeals are frivolous or vexatious, the existing s 457 allows for costs to be awarded against the submitter. Examples of costs having been awarded against a frivolous or vexatious appellant include, for example: *Krajniw v Brisbane City Council* [2010] QPEC 128; *Juniper Development Corp Pty Ltd v Jewry* [2006] QPELR 202; *Towers v Building and Dispute Resolution Committee & Ors* [2012] QPEC 028 (11/0049) *Brisb Searles DCJ 18/04/2012* and *Copley v Logan City Council & Anor (No 2)* [2012] QPEC 043 (11/1788) *Brisb Jones DCJ 21/06/2012*.

Many submitter appeals are successful for meritorious reasons other than town planning reasons. Examples of other good reasons include legal reasons or environmental reasons. There are numerous examples of legal reasons for approvals being overturned (such as: the approval was for a fundamentally different development than what was applied for, the approval was on conditions which deferred for later consideration an issue that was fundamental to the approval and the approval missed a mandatory step such as the landowner's consent). The applicant would find itself paying the submitter's costs in this situation, which may well be fair and appropriate, but would be the opposite of what the Deputy Premier had in mind.

As mentioned above, even if an approval is upheld upon a submitter appeal, it is not unusual that this is on the basis of changes to the conditions, which may better protect the community from impacts that the local government had not considered or alternatively which improves the clarity of the conditions. In this situation, a presumption that costs follow the event would fail to recognise the public interest that has been served by the improved approval.

(c) Conditions appeals

The third situation mentioned by the Deputy Premier was conditions appeals: *'situations where small scale developers wish to challenge conditions imposed by local governments but it is not cost effective for them to do so because they would have to pay their own costs even if successful'*.

QLS members have considerable sympathy for this point. However, finding a 'winner' and a 'loser' in conditions appeals tends to be more challenging in practice than in appeals against approvals or refusals. In a conditions appeal, the applicant may win some, lose some and find itself with compromise amendments to other conditions (not necessarily agreed compromises). In practice, appeals against conditions are often 'ambit claims' covering numerous conditions, on the basis of arguments with varying degrees of merit, in the hope that at least some of the arguments will stick.

6.6 The position of local governments and State government

We have touched on the difficult position of local governments above. Superficially, it may seem attractive for local governments, if they are confident of the planning merit of their decisions, that they could have their costs paid for by unmeritorious appellants. However, an assumption that local governments (and their ratepayers) would overall benefit from a presumption that costs follow the event would be naïve, for reasons including the following:

- Local governments may find themselves on the losing side of court appeals, even in circumstances where an approved development has planning merit, for example, it may fail for legal reasons.
- Most local governments are highly conscious of trying to avoid wasting ratepayers' money unnecessarily on court costs, particularly during difficult economic times. The risk of having to pay even a part of a successful submitter's costs would be a powerful disincentive for a local government to grant approvals which are opposed by commercial competitors or other well-funded submitters. Local governments would be in a particularly difficult situation dealing with applications which are unforeseen by their existing planning instruments but which they believe would bring major community benefits, notwithstanding well-funded opposition. It is not uncommon for major industrial developments or utilities proposed in remote rural areas to be completely unforeseen by existing planning instruments and accordingly to be in 'conflict' with those planning instruments.
- Conversely, faced with a well-funded developer, there would be a more powerful financial disincentive than there is at present for a local government to refuse an application or impose stringent conditions. This is the case even if the local government has reasonable concerns about the proposed development, for fear that the developer's legal team may be successful in finding a loophole in the approval or conditions.
- The majority of appeals that proceed to a hearing involve genuine disputes about factual or legal matters which involve reasonable contests and most of which may hang in the balance. It seems unlikely that the State Government intended in those circumstances to expose the ratepayers of a local government area to the burden of additional costs because a court ultimately prefers one view over another on balance.

The above concerns also apply to State government, both in its capacity as assessment manager for some types of applications and in its capacity as concurrence agency. However, over time, the State could expect its position to 'balance out', whereas the impact of a single major appeal loss on a small or medium sized local government, in circumstances of having to pay or share in paying the costs of the winners, could be financially devastating.

Another impact on State government is that it could find itself having to deal with increased numbers of Ministerial call-ins or declared projects under the *State Development and Public Works Organisation Act 1971*, merely to help local governments avoid the risk of appeal costs.

6.7 Consultation background

In the Deputy Premier's speech introducing the Bill, he mentioned that 'many stakeholders' had raised concerns about shortcomings with the current costs provisions. The QLS has two concerns about this:

- Firstly, various members of our Planning and Environment Committee have links with the other peak industry organisations that were formally involved in the public consultation process and were not aware of any peak industry organisation that had lodged a submission advocating that costs should be presumed to follow the event. The Committee does not have links to all peak industry organisations, but we would be surprised if there were 'many'.
- Second, over the years, a number of peak industry organisations, including the QLS, have expressed the view that the court should be given a wider discretion as to costs, but that is not the same thing as a presumption that costs should follow the event. In other words, it is true that there are shortcomings with the current provisions, but that does not necessarily mean that copying the UCPR rule is the way to fix those shortcomings.

6.8 How should these concerns be addressed?

The QLS hesitates to suggest drafting corrections to s 457, because to some extent we are speculating about which consequences of the current drafting are unintended consequences and which consequences are intended.

Assuming that we have correctly identified the consequences we have outlined above as unintended, our first preference would be for the presumption in subsection (1) to be deleted completely, on the basis that subsection (2) is then expanded to outline a list of some of the issues that Parliament would like the court to have regard to (without limiting that list). A less preferred option would be for the presumption to be retained but qualified using words such as 'generally'.

Surprisingly, the specific circumstances mentioned by the Deputy Premier as the ones intended to be addressed by the new costs provision are not mentioned at all as factors for the court to have regard to. For example, if Parliament wants the court to have regard to whether or not the losing party was a commercial competitor running an unmeritorious appeal, the section should say so. Conversely, the State may want to consider what it intends to happen with costs if the commercial competitor wins. Does Parliament then want the developer and the local government to bear the costs of the commercial competitor?

If the court is given a broad discretion not limited by a presumption, subsection (2) could then go on to list some of the relevant matters that Parliament would like the court to have regard to (on the basis that the court could also create a list of additional matters), including:

- (a) The existing item in the new s 457(2) – '*early in the proceeding, the parties participate in a dispute resolution process under the ADR provisions or the Planning Environment Court Rules 2010, and the proceeding is resolved during the dispute resolution process or soon after it has been finalised*';

- (b) The matters currently listed in s 457(2) of the unamended Act (frivolous and vexatious etc);
- (c) Whether the proceeding involves the consideration of matters of genuine public interest or important matters of legal interpretation;
- (d) Whether the proceeding involves a genuine contest about disputed issues and the parties have acted reasonably;
- (e) Other circumstances provided for in the Planning and Environment Court rule.

7. Increased role for the ADR Registrar

The QLS is supportive of the role that the ADR Registrar takes in the appeal process. Indeed, since the appointment of a dedicated ADR Registrar to the court, there has been a significant number of appeals that have been resolved through the court-facilitated alternative dispute resolution process, thereby saving court time and the parties' costs.

The proposed increased role of the ADR Registrar is seen by the QLS as a positive step towards increasing the efficiency of the court process, particularly for matters of a minor nature and is **generally supported**. However, the QLS has some concern about proposed s 491B(4)(b) which allows the ADR Registrar to *"inform himself or herself in the way the ADR registrar considers appropriate"*.

It is noted that this appears to be copied from a similar power for the existing Building Committee, but the type of jurisdiction which is proposed to be delegated to the ADR Registrar is different.

Such a provision provides an extremely broad power for the ADR Registrar to decide proceedings in their entirety, in circumstances where evidentiary matters may not be tested as they are in a usual hearing. For example, referral of a proceeding to the ADR Registrar for a decision may involve a self-represented party making submissions to the ADR Registrar based on mixed fact and law, in circumstances where there would be no opportunity for another party to cross-examine or test those submissions. Members of the QLS have discussed this with colleagues practising in Victoria where we understand that such inappropriate and frustrating situations often occur in VCAT hearings.

In the circumstances, the QLS proposes that s 491B(4)(b) be removed. Section 491B(4) would then read: *"In exercising a power of the court under this division, the ADR registrar must act as quickly, and with as little formality and technicality, as is consistent with a fair and appropriate consideration of the issues"*.

Proposed subsection (1) already allows the Chief Judge of the District Court to issue directions about how the ADR registrar may exercise his or her powers under that section. The QLS submits that this would provide the most effective way of ensuring that proceedings referred to the ADR registrar for determination are done so in a bounded manner, following consultation between the Chief Judge of the District Court and the ADR registrar.

The QLS normally notes the likely need for increased resources, whenever a jurisdiction is increased. At present, the economic downturn probably means that there would not be an urgent need for increased resources, but when the economy recovers, the ADR Registrar is likely to require increased resources.

Thank you for providing the Society with the opportunity to comment on this Bill. Please contact our Principal Policy Solicitor, Mr Matt Dunn, on [REDACTED] for further information.

Yours faithfully

[REDACTED]
Dr John de Groot
President