

29 April 2016

Research Director
Agriculture and Environment Committee
Parliament House
BRISBANE QLD 4000
By post and by email: vminquiry@parliament.qld.gov.au

Our ref: P&E – 347-3

To the Honourable Members of the Agriculture and Environment Committee

Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016

Queensland Law Society ('the Society'), with the input of its Planning & Environmental Law Committee, would like to make a submission about the above Bill ('the Bill').

The Society wishes to comment in particular on the Bill's stated policy objective (by its Explanatory Note), to '*reinstate compliance provisions for the reverse onus of proof and remove the 'mistake of fact' defence for vegetation clearing offences*'; the achievement of which is stated to be likely to reduce compliance costs.¹

By omitting to comment on the full scope of provisions to the Bill, the Society does not express its endorsement of these.

In assessing whether this onus reversal is justified pursuant to s 4(3)(d) of the *Legislative Standards Act*, the Explanatory Note acknowledges that the provision '*potentially breaches FLPs*' (fundamental legal principles); however, goes on to set out that the provision finds rationale in the following (summarised) statements:

- The unavailability of evidence to government due to unlawful clearing's occurrence often remotely
- The unlikelihood of third parties clearing property *sans* consent, due to the expense involved.
- The landholder may still provide evidence to prove their innocence.
- The state is still responsible for proving the offence.
- Precedent, such as the *Forestry Act 1959* and for red light and speed camera offences.

The Society, in kind, would respond that:

¹ *Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016* Explanatory Notes, pages 2 - 3.

- The remote areas in which offences of this nature are likely to occur do not preclude the government's accessing evidence. Displacing the expense and other resources by shifting this burden does not accord with natural justice.
- Third parties' unlikelihood to clear property due to the expense involved seems speculative and does not align with establishing sound, evidence-based policy.
- A landholder's right 'still' to provide evidence establishing innocence does not detract from an evidentiary onus having been reversed; indeed, it would appear to diminish the landholder's right to provide evidence.
- The state can neither, by appearance nor actuality, uphold its status as a model litigant if it exacts responsibility for proving an offence on the subject thereof.
- The proposed retrospective application of the amendments, to 17 March 2016, have the potential to create significant complexity for determining clearing activities that are lawfully undertaken and landholder ability to defend any prosecution relating to the transition period.
- The reverse onus of proof principle is inconsistent with the approach taken to other environmental and development offences, which in many cases, can have more serious environmental or public interest impacts than the activities that are proposed to be regulated.

The Society also raises concern with the removal of defence of mistake of fact in s 67B prosecutions, noting that there are significant penalties for offences under the Act, many of which contain the element of intent and in this context mistake of fact is a relevant and apposite consideration. Removing this from the Bill does not pay sufficient regard to the rights and liberties of individuals under the *Legislative Standards Act's* upholding of natural justice that a relevant consideration should be denied contemplation before the Courts.

The Explanatory Note asserts that a justification for the removal of the s 24 Criminal Code defence is concern for lack of due diligence and wilful blindness in conducting land clearing. A concerted lack of due diligence with this intention would preclude employment of this defence because it is premised on *honest* and reasonable belief. Removal of the defence therefore does not achieve the Explanatory Note's stated objective as the defence is based solely on honest and reasonable belief of a fact.

The defence must be fairly and reasonably raised in all the circumstances of the case by the defence, and can be negated by the Crown with regard to all aspects, including issues of wilful blindness, a failure to undertake due diligence, and so forth.

Given the significant penalties and the standard of proof imposed, it is inappropriate to exclude the defence for the convenience of prosecution, as the defence only operates in circumstances of honest and reasonable mistaken belief of a fact.

The Society would be pleased to liaise with you further. Please contact Julia Connelly, Policy Solicitor, [REDACTED] should you wish to do so.

Yours faithfully

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Bill Potts
President