

26 June 2013

Chair
Agriculture, Resources and Environment Committee
Parliament House
Brisbane QLD 4000
Email: arec@parliament.qld.gov.au

Dear Sir

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

Thank you for the opportunity to provide a submission to the Agriculture, Resources and Environment Committee regarding the *Nature Conservation (Protected Plants) and Other Legislation Amendment Bill 2013*.

PART A – INTRODUCTION AND CONTEXT

About the Queensland Resources Council

QRC is the peak representative organisation of the Queensland minerals and energy sector. QRC's membership encompasses minerals and energy exploration, production and processing companies, and associated service companies. The QRC works on behalf of members to ensure Queensland's resources are developed profitably and competitively, in a socially and environmentally sustainable way.

The relationship of the Bill to proposed subordinate legislation

The *Explanatory Notes* mention a general intent to simplify the existing framework for protected plants. QRC obviously would support a simplification of the existing framework, as there are currently many layers of approvals required for the same vegetation clearing under a range of legislation at Commonwealth, State and local levels, depending on the type of project and tenure. However, we have a concern that the Bill does not in fact provide an adequate foundation for simplification.

The Explanatory Notes state that the Bill is intended as '*the first stage of amendments that are required to facilitate the implementation of a new legislative framework for protected plants*'. Changes are also proposed to subordinate legislation, vis a vis the Protected Plants Regulation, to commence at the same time.

Although QRC's concerns primarily relate to foreshadowed changes to the subordinate legislation, to a greater extent than the Bill itself, the starting point for these changes to the Regulations is to be found in the Bill.

Why is there a need for simplification?

By way of context, QRC **supports** the intent to achieve simplification, but this Bill does not actually go on to tackle the real issue of multiple layers of regulation dealing with much the same issue.

Threatened species are protected at Commonwealth level under the *Environment Protection and Biodiversity Conservation Act 1999*. There is an inconsistent list of species protected at State level. The State list is more extensive than the Commonwealth list.

The question as to whether a particular species or habitat is sufficiently threatened to be in need of protection ought to be a question of scientific analysis, not a question of competing jurisdictional oversight.

In discussions with an interdepartmental group working on the review of Queensland's biodiversity offsets policy, led by (a different part of) the Department of Environment and Heritage Protection (EHP), QRC was pleased that they acknowledged that, logically, there is no good scientific or legal reason why there should not be a single consolidated list and that the State Government would in future hope to work with the Commonwealth government to achieve that, as part of the work towards accreditation of State approvals (and the related offsets policy framework) under a bilateral agreement.

Realistically, it is acknowledged that this is unlikely to happen before the next Federal election, but once both the State and Commonwealth are ready to cooperate, it would not appear to be unrealistic to expect this to occur within a period of under 12 months. Hypothetically, there may be found to be scientific errors in the Commonwealth lists once they are compared with State and Territory lists and those errors may be corrected as part of a review. However, in the meantime, there is certainly not one species that is endangered or near extinct that is only protected by the State of Queensland and not by the Commonwealth. EHP has also advised QRC that it is proposed to extend the existing *Nature Conservation (Protected Plants) Management Plan* for 12 months, which was otherwise due to expire shortly. In that case, if the State does proceed with the proposed cooperative review with the Commonwealth during the same period, it does not appear that there is realistically likely to be any timeframe when there could be a gap in regulation.

Against this background, QRC does not follow the logic of EHP's conclusion in the Explanatory Notes to the Bill that: '*The RIS [released in February 2013 regarding the remake of the Protected Plants Regulation] also established that a non-regulatory approach to the management of protected plants would pose too high a risk to the environment...*' (p3 of the Explanatory Notes) - assuming that the somewhat misleading terminology 'non-regulatory approach' is intended to refer to an implied need for a special layer of State-level protected species under the *Nature Conservation Act 1992*, as opposed to trying to achieve a single consolidated list with the Commonwealth. Given the problem of multiple layers of regulation, both the RIS and the Explanatory Notes have over-stated the risk.

PART B – SPECIFIC COMMENTS ON THE BILL

1. Relocation of exemptions to subordinate legislation – Section 89 (Clause 9)

Section 89 of the existing *Nature Conservation Act 1992* sets out the serious offence of taking a protected plant that is ‘in the wild’ without the authorisation of either a protected plants permit or an exemption. For a class 1 offence, the maximum penalty is 3000 penalty units or 2 years imprisonment. This is really not a minor offence.

The Bill proposes to amend Section 89 by removing all the exemptions and relocating the exemptions to subordinate legislation. Exemptions may be located in either a conservation plan or a regulation.

In 2012, QRC had actually raised with the Minister for Environment and Heritage Protection that it would be a good idea to consolidate the location of the exemptions, for convenient reference. What we had in mind, given the seriousness of the offence provisions, was that exemptions and defences would be consolidated in the Act, not subordinate legislation.

The Explanatory Notes do acknowledge that: ‘*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.*’ QRC agrees that it certainly does raise that issue.

The Explanatory Notes do not adequately justify a departure from compliance with the Legislative Standards Act in this instance. The attempted justification is that:

‘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 process and subject to the parliamentary scrutiny as per the requirements for subordinate legislation in the Statutory Instruments Act 1992, sections 49 – 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.’

QRC fails to follow the logic why it would be easier for the public to navigate the exemptions in subordinate legislation (conservation plans and a regulation) than if consolidated in the Act. We also do not follow the logic why a supposed general trend towards relocating defences or exemptions for very serious indictable offences out of legislation and into subordinate legislation is either ‘appropriate’ or the kind of trend that is worth following. It is simply not true that subordinate legislation is subject to the same level of scrutiny as legislation. For example, we would question whether all members of the Committee would have been aware, before the lodgement of this submission, that part of EHP’s purpose in this regard was to remove a long-standing bipartisan exemption relating to one of the ‘four pillars’ of the economy.

2. ‘Special least concern plants’

There is a new concept of ‘special least concern plants’ in Sections 89 and 90. The definition of this term in the amendments to the Dictionary fails to give any certainty or clarity to the scope of this term. Clause 21 provides:

'special least concern plant means a least concern plant prescribed under section 88D.'

Contrary to what the Explanatory Notes suggest is the intent of the term, there is no scope or limit in either Section 88D or the Dictionary for which plants can be prescribed. The RIS said that these plants (but using different terminology) were supposed to be *'commercially valuable or are known to have sensitive reproductive biology'*, but the Act does not say so.

3. Regulation of the use or development of land - Section 175 (Clause 20)

Clause 20 proposes to insert the following provision as a head of power for the regulation:

Section 175(2)—

insert—

(ia) the use or development of land, and activities, in an area identified under the regulation as, or including, a critical habitat or an area of major interest'.

The explanatory notes suggest that the reason for this is as follows:

'This amendment is necessary because critical habitat and areas of major interest have previously been identified only under conservation plans, and the Conservation Plan for protected plants is being repealed, with the majority of protected plant provisions being transferred to the Wildlife Management Regulation. Therefore, where it is necessary or desirable to identify an area as a critical habitat or an area of major interest in the future due to its protected plant values, the area will be able to be identified as such in a regulation, including, for example, the Wildlife Management Regulation.'

However, if the Committee reviews the Conservation Plan for Protected Plants, members will find that this statement in the Explanatory Notes is incorrect. There is no such provision that currently exists in the Conservation Plan for Protected Plants. It is therefore questionable whether the head of power needs to be transferred, particularly bearing in mind the duplication of layers of regulation mentioned above.

QRC has previously raised with EHP directly that the Explanatory Note is misleading in this regard but they declined to acknowledge that any correction was necessary.

We also raised with EHP that the power is extremely broad. It is not restricted to the particular area the subject of the 'critical habitat' or 'area of major interest', but instead covers the entire parcel of land 'including' that area. In remote areas, where parcels of land may be very large, this would be a particular concern. EHP did not see a need to correct that issue, so we raise it again with the Committee.

PART C – OTHER MISCELLANEOUS ISSUES ASSOCIATED WITH THE BILL AND EXPLANATORY NOTES

QRC also has the following concerns about the draft Explanatory Notes:

1. Implications of the extension of the conservation plan

There are numerous references to the Conservation Plan being repealed, but not that it is being extended to 2014, as EHP has stated to QRC.

This is a fairly critical issue for QRC given that the Conservation Plan sets out the current exemptions for the resources sector. While we understand that the extension of the Conservation Plan is in progress, but sits outside the Bill, QRC believes that the extension timeframe should be made clear in the explanatory notes. Other matters that 'sit outside the Bill' eg comments on the RIS options are referenced in the Explanatory Notes.

The failure to mention the proposed extension of the Conservation Plan makes it appear more urgent or that there is a higher risk, in not rushing through the Bill, than is really the case.

2. 'In the wild'

The offence of taking a protected plant is not applicable unless the protected plant is 'in the wild' under Section 89(1). These words were inserted into Section 89 by Act no. 56 of 2007 (Section 36), having been relocated from the previous version of the *Nature Conservation (Protected Plants) Management Plan*.

The existing definition of 'in the wild' has always made no sense at all in relation to plants: '*means in an independent state of natural liberty*'.

For such a serious offence, it is a major concern that no-one knows what 'in the wild' means if the plants sprout up on different types of tenure, including brownfields industrial developments. Does it mean that the plants have voting rights? Similarly, if an animal wanders into an industrial plant, putting both itself and the operation at risk, was it originally intended that it should be treated as being 'in the wild', so it cannot be removed to safety without going through a tedious permit process?

QRC has previously asked EHP to take the opportunity of this Bill to consider whether this obvious anomaly should be corrected, rather than being perpetuated. We have not received a response to that question.

3. 'Wildlife Management Regulation'

QRC was interested to find that the new combined regulation to be produced following the passing of the Bill is to be called the 'Wildlife Management Regulation', covering plants and animals. Consultation has only occurred in relation to plants.

The ordinary meaning of the term 'wildlife', as defined in dictionaries such as the Macquarie Dictionary, refers only to animals, not plants. Surely, it is a misleading use of this term to define it as including plants and then to use this term as the name for a new regulation, on the foundation of a RIS that was only about plants, not animals.

Of course, QRC would support a comprehensive review about both animals and plants for the purpose of creating a consistent system, but we are just pointing out that there has been no consultation about animals for the purpose of producing a regulation about 'wildlife'.

Along these lines, the various mentions of 'critical habitat' in the Bill demonstrate that, although consultation only occurred about plants, the Bill has a wider purpose.

Thank you again for the opportunity to comment on the Bill. If you require any further information, the contact on this matter is QRC's Director, Environment Policy, Frances Hayter who can be contacted on (07) 3316 2517 or alternatively via email at francesh@qrc.org.au.

Yours sincerely



Michael Roche
Chief Executive