Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

Your Ref: Environment Protection (Greentape Reduction) and Other Legislation Amendment Bill 2012

Quote in reply: Planning & Environmental Law Committee

5 June 2012

Mr Rob Hansen
Research Director
Agriculture, Resources and Environment Committee
Parliament House
George Street
BRISBANE QLD 4000

By e.mail to: robert.hansen@parliament.qld.gov.au

Dear Mr Hansen

SUBMISSION ON THE ENVIRONMENT PROTECTION (GREENTAPE REDUCTION) AND OTHER LEGISLATION AMENDMENT BILL 2012

Thank you for providing a short extension for the Queensland Law Society to make its submission. We note the very short timeframes for the Committee to undertake this inquiry.

The following submission on the *Environment Protection (Greentape Reduction) and Other Legislation Amendment Bill 2011* has been prepared by the Queensland Law Society's Planning and Environmental Law Committee. In 2011, the QLS lodged a submission with the legislative Committee about on the former Government's 2011 version of this Bill and we had also provided a submission to the Greentape Reduction Project team within the former Department of Environment and Resource Management. In each case, our submissions were broadly supportive of the stated objectives, while commenting on a series of unintended drafting consequences, including typographical errors. A copy of our last submission is **attached**, for ease of reference.

There was insufficient time available for a comprehensive review of the 2011 Bill. Given that it was very lengthy and complex, we were unable to provide a comprehensive review, but merely selected a few pages of the Bill as a sample. A thorough legal review by specialists in the area would be recommended.

Despite the time that has elapsed since our submission in 2011, all of the errors pointed out in our 2011 submission remain in the 2012 Bill, including even the typographical errors. In some other parts of the Bill, it is noted that some improvements have been made since the previous version, but clearly not enough.

The sample pages that we selected for review in 2011 finished at Section 120. Given that the QLS has been fortunate enough to have been given an opportunity to provide a supplementary submission, we have included a few further examples of errors below, continuing on after Section 120.

Section 125 Requirements for applications generally

Section 125(3) provides an exemption from setting out in the application the description of impacts of each activity on environmental values if '*the EIS process for an EIS for each relevant activity the subject of the application has been completed*'. The difficulty with this drafting is that, if there was an EIS for the project but then a relatively minor additional activity has been added for the application, the information requirement in relation to all of the activities would be triggered. Presumably, the EIS would need to be included in the application to avoid having it characterised as a 'not properly made application'.

Surely the intention should have been that for each relevant activity for which an EIS has been completed, the impacts requirements of the application would not apply but for any additional relevant activity for which an EIS has not been completed, the additional impacts relating to that activity should be set out in the application.

Sections 127-129 'properly made applications'

These sections have similar problems to the corresponding provisions of the *Sustainable Planning Act 2009* (in sharp contrast with the repealed *Integrated Planning Act 1997* as originally enacted, which is an interesting example of greentape increase, rather than reduction).

The new provisions rightly provide an opportunity for the administering authority to assess and advise if the application has not been 'properly made', but fails to specify what happens if, within the short timeframe allowed, the administering authority does not identify an error in the application and allows it to continue to be progressed all the way through. An error may later be noticed either by the administering authority at a later stage or by a third party. The likelihood of this happening fairly frequently is significantly increased because of the complexity and subjectivity of the mandatory requirements to be included in a 'properly made application'. Potentially, the approval may then be void.

Under the original version of the *Integrated Planning Act 1997* (repealed), this problem used to be managed better, first because the mandatory requirements used to be simple and objective (with all of the rest being 'supporting information', which could be expanded during the 'information and referral process') and secondly because, if the only alternative to being 'not properly made' was that the application was deemed from then on to have been 'properly made' (with very narrow exceptions). Under the old provisions of the *Integrated Planning Act 1997*, if there was important information that was missing from the supporting information, this did not invalidate the entire application process, but simply meant that the administering authority could request further information. If the information was still not provided, the application could be refused. In contrast, these new provisions leave open the possibility that an application process could be invalidated at any stage because of a relatively minor error.

There may be reasonable arguments for increasing the complexity of applications, but this would certainly not be 'greentape reduction'.

We also have concerns that 20 business days would not be enough time to avoid the lapsing of an application, if the administering authority is dissatisfied with the level of data about an issue such as the extent of impacts on environmental values. Some types of environmental values can take 4 seasons to monitor. Any extension to this period would be dependent on the generosity of the administering

authority officer; otherwise the application would lapse and there is no provision for refund of the costly application fees.

Section 132 Changing application

Section 132(4) provides:

'If the change to the application is, or includes, a change of applicant, the notice of the change—

*(a) **may** be given to the administering authority by the person proposing to become the applicant; and*

(b) must be accompanied by the written consent of the person who is the applicant immediately before the change.'

Surely there is an error in paragraph (a) in that 'may' should be 'must'. Otherwise, the new applicant could be left out of the loop, that is, a valid application could be lodged to change the identity of the applicant, without the new applicant's consent, which would be absurd.

Section 133 Effect on assessment process—minor changes and agreed changes

Section 133(1)(b) allows an applicant to avoid re-notification, even if a change is not a minor change and even if it would have major effects on third parties who might have lodged submissions against the change if they had the opportunity, just because the administering authority agrees to allow the applicant to side-step notification. This provision would obviously be open to abuse.

If this provision was instead drafted in similar terms to the corresponding provisions of the *Sustainable Planning Act 1997* about changing applications, it would achieve adequate flexibility while avoiding the risk of abuse.

Section 139 Information stage does not apply if EIS process complete

The drafting of this section (and subsequent sections) does not address the situation where an EIS has been carried out for a project but the application covers another (probably relatively minor) activity.

Presumably, the intention in that situation is that the information stage would only apply to the additional activity, but the Bill fails to say that.

Due to timeframe constraints, we have only reviewed up to Section 139. However, there appear to be drafting errors and unintended consequences throughout the balance of the Bill as well. A thorough legal review by legal specialists in the field would be recommended. Of course, the QLS would welcome the opportunity to provide further written comments or be involved in further consultation. However, we do not have availability for the public hearing on Wednesday 6 June 2012.

Yours faithfully

Dr John de Groot
President