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The Research Director
Agriculture, Resources and Environment Committee
Parliament House
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Submission about the Environmental Offsets Bill 2014

Thank you for inviting the Queensland Environmental Law Association (**QELA**) to make a submission about the Environmental Offsets Bill 2014 (**Offsets Bill**) to the Agriculture, Resources and Environment Committee.

QELA is a non-profit, multi-disciplinary organisation. Its members include lawyers, town planners and a broad range of consultants who represent and advise a miscellany of participants in the development industry.

Overall, QELA welcomes the intention of the Offsets Bill to streamline the environmental offsets framework in Queensland.

This submission focuses more specifically on the following aspects of the Offsets Bill:

- (a) The new definition of "environmental offset";
- (b) The restriction on the imposition of offset conditions;
- (c) The "deemed conditions", including:
 - (i) penalties; and
 - (ii) reaching agreement about delivery of an offset;
- (d) Transitional matters; and
- (e) Administrative matters, including:
 - (i) The matters that are to be covered by the regulation; and
 - (ii) The new Offsets policy.

The new definition of "Environmental Offset"

- 1 "Environmental Offset" is defined in Clause 7(2) of the Offsets Bill. This definition differs to the definitions of "environmental offset" contained in other Acts, such as the *Sustainable Planning Act 2009* (**SPA**) and the *Environmental Protection Act 1994* (**EP Act**). The Offsets Bill proposes amendments to the SPA and EP Act to replace the definition of "environmental offset" contained in those Acts with the Offsets Bill's definition.

- 2 The Offsets Bill's definition of "environmental offset" increases the current threshold for imposing an environmental offset from counterbalancing "an impact" to counterbalancing a "significant residual impact".
- 3 "Significant residual impact" is defined in Clause 8 of the Offsets Bill, however what constitutes an adverse impact that "is, or will or is likely to be significant" for the purposes of Clause 8(1)(b) remains unclear.
- 4 It is noted that the Commonwealth has developed a series of "Significant Impact Guidelines" to provide guidance on determining whether an action is likely to have a significant impact on a matter of national environmental significance under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).
- 5 QELA recommends that the State Government consider endorsing or preparing its own guidelines with respect to interpreting Clause 8(1)(b) of the Offsets Bill.

Restriction on Imposition of Offset Condition

- 6 QELA supports the inclusion of Clause 15 of the Offsets Bill which seeks to reduce duplication of offset conditions.
- 7 QELA however holds concerns that the efficacy of Clause 15 is reduced because it does not currently operate to avoid potential duplication of offset conditions in circumstances where offset conditions are first imposed by local government (before there is an existing State condition) or State government (before there is an existing Commonwealth condition).
- 8 To complement this Clause, QELA suggests that a provision be included to cover the scenario where an existing offset condition imposed by a lower level of government falls away/ yields to a subsequent offset condition imposed by a higher level of government with respect to the same prescribed environmental matter for the same, or substantially the same, impact and area.
- 9 The list of prescribed environmental matters has yet to be prescribed by regulation. Depending on how that list is framed and the various interests categorised, QELA sees the potential for Clause 15 to be frustrated by the imposition of separate offset requirements for different, yet similar, prescribed environmental matters. For instance, the Commonwealth Government may impose an offset condition for impact on the koala species and the Local Government may contend that its offset condition is for impact on areas to be rehabilitated for the koala species. The list of prescribed environmental matters to be prescribed by regulation should be crafted so as to avoid this.

The "deemed conditions"

Penalties

- 10 According to Clause 16 of the Offsets Bill, if an offset condition is imposed on an approval or authority granted under another Act for a prescribed activity for a prescribed environmental matter, a number of additional conditions contained in the Offsets Bill are "deemed" to also be imposed on that authority.
- 11 Clause 17 of the Offsets Bill makes it an offence to contravene a deemed condition and the person who contravenes a deemed condition is to be dealt with under the Act under which the authority was granted as if the person had contravened an offset condition imposed under that Act.

- 12 Clause 121 of the Offsets Bill proposes to amend section 49(b) of the *Marine Parks Act 2004* relating to noncompliance with conditions of a marine park authority, to establish a maximum penalty of 3000 penalty units for noncompliance with a deemed condition imposed under the Offsets Bill.
- 13 In QELA's view, clause 121 imposes an unnecessarily excessive penalty. It is considerably higher than the maximum penalty of 295 penalty units that applies to a contravention of another condition of a marine park authority. It is also considerably higher than the maximum penalty of 1665 penalty units that may apply to a contravention of a condition under section 580 of the SPA.
- 14 Page 30 of the explanatory notes to the Offsets Bill explains that the high penalty is justified on the basis that an environmental offset condition is imposed to counterbalance significant impacts of matters of environmental significance.
- 15 QELA supports the objective of offsetting significant impacts on matters of environmental significance, but considers that penalties commensurate with the penalties imposed under the EP Act and the SPA are a sufficient deterrent.
- 16 It may be noted that the equivalent offence provisions under section 430 of the EP Act attracts a maximum of 2000 penalty units (\$1,100,000 for a corporation) for a wilful breach and 1665 penalty units (\$915,750 for a corporation) for a non-wilful breach.
- 17 Further, having regard to the significant penalties that attach to the offences of contravening a condition of an authority, QELA are also concerned that the "deemed conditions" attract equivalent penalties for the purposes of the EP Act and the SPA as those which apply to noncompliance with conditions of an approval/authority in circumstances where the deemed conditions may not be apparent on the face of the development approval or environmental authority itself.

Reaching agreement about delivery

- 18 The "deemed conditions" set out in the Offsets Bill include requirements for the authority holder to:
- (a) elect, prior to commencing the prescribed activity, how the offset condition will be delivered; and
 - (b) agree with the administering agency about delivery of the offset condition by entering into an agreed delivery arrangement, before starting any part of the prescribed activity to which an offset condition relates.
- 19 Clause 19 of the Offsets Bill establishes a process for reaching agreement about delivery of an offsets condition after the administering authority receives a notice of election. The Offsets Bill does not contain any timeframes for the administering agency to make a decision after it receives a notice of election.
- 20 Further, the Offsets Bill requires the administering agency and the authority holder to enter into an agreed delivery arrangement within a "stated reasonable time". QELA anticipates that this will be defined in the regulation.
- 21 QELA considers it to be important that reasonable and certain timeframes are imposed on these actions to provide authority holders with certainty about the process and to avoid potential project delays.

- 22 It is noted that the regulation will provide for what happens if the authority holder and the administering agency can not reach agreement on an offset delivery arrangement within a stated reasonable time.

Transitional Matters

- 23 Part 13 of the Offsets Bill outlines when the Bill will apply.
- 24 The Offsets Bill does not allow applicants with applications that are undecided at the time the new Offsets Act commences to opt-in to the Offsets Bill regime.
- 25 However by virtue of transitional provisions inserted into the EP Act, SPA, *Marine Parks Act 2004* and *Nature Conservation Act 1992*, the Offsets Bill proposes to have some limited effect on applications made for authorities under those Acts, but not decided at the time of commencement of the new Offsets Act. Specifically, in circumstances where an authority is issued pursuant to those Acts containing an environmental offset condition and that offset condition is inconsistent with a deemed condition of the Offsets Bill, the deemed condition will prevail.
- 26 Clause 139 of the Offsets Bill inserts new section 971 in the SPA. New section 971 provides that to the extent that local planning instruments in force immediately before the commencement of the Offsets Bill are inconsistent with parts 3, 5, 6, 8 and 11 of the Offsets Bill, the local planning instrument, scheme or plan prevails to the extent of the inconsistency.
- 27 The effect of new section 971 is that the requirements of the new offset framework, including the new definition of "environmental offset", the restriction on the duplication of offset conditions and the "deemed conditions", to the extent that they are inconsistent with a local planning instrument, local planning scheme or development control plan, will not apply until such time that the planning scheme, instrument or plan is amended or replaced.
- 28 QELA is concerned that there will be a disconnect between the new offsets regime and those planning schemes which come into force or are amended immediately prior to the Offsets Bill coming into effect. This disconnect has the potential to cause issues in respect of planning schemes which contain an Environmental Offsets Planning Scheme Policy and where the amendment or replacement of a local planning scheme is not contemplated in the near future.

Administrative matters

Public consultation of the regulation

- 29 Important matters such as:
- (a) the list of "prescribed activities" for the purposes of Clause 9 of the Offsets Bill;
 - (b) the list of national, State and local matters of environmental significance to be "prescribed environmental matters" for the purposes of the Offsets Bill;
 - (c) the requirements for an offset delivery plan;
 - (d) the meaning of a "stated reasonable time" for the purpose of Clause 19 of the Offsets Bill;

- (e) the process to be activated when an authority holder and the administering agency can not reach agreement with respect to an offset delivery arrangement, including review of the decision and dispute resolution processes;
 - (f) the requirements for an environmental offset agreement;
 - (g) the list of prescribed local government offset policies; and
 - (h) calculating the amount to be required as a financial settlement offset,
- will be included in the regulation to the Offsets Bill.

30 QELA is of the view that the Government should consult on the entire regulation.

Policy

31 It is unclear when the new Offsets Policy will apply.

32 QELA notes that a draft "Queensland Environmental Offsets Policy (not in effect)" has been made available on the Department of Environment and Heritage Protection's website in recent days. Due to the recent release of the draft Policy, QELA has not had an opportunity to review its contents.

Ongoing Consultation

QELA is of the view that various aspects of the Offsets Bill require amendment and clarification and we look forward to further opportunities to provide feedback particularly once the regulations are made available.

We thank you for the opportunity to make a submission about the Offsets Bill. Representatives of QELA would welcome the opportunity to discuss the submission in further detail as required.

Yours faithfully



Troy Webb
President
Queensland Environmental Law Association