Environmental Defenders Office

Submission to the Economics and Governance Committee: Inquiry into the Queensland Government's economic response to COVID-19

30 June 2020

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

Queensland Parliament Economic and Governance Committee
egc@parliament.qld.gov.au

For further information on this submission, please contact:

Deborah Brennan
Senior lawyer, Policy and Law Reform (Brisbane)
T: [redacted]
E: [redacted]

Contents

Introduction

The Environmental Defenders Office (**EDO**) welcomes the opportunity to make a submission to this inquiry into the Queensland Government's response to COVID-19.

We should start by congratulating the Queensland government on its timely and evidence-based response to COVID-19 which has seen Queensland avoid the scale of tragedy that is still unfolding in some other countries. We also commend its efforts to, in cooperation with other states/territories and the Commonwealth through National Cabinet, cushion individuals and small businesses from the economic impact of the "lockdown" and other restrictions put in place under Part 7A of the *Public Health Act 2005 (Qld)*.

We **recommend** that the following principles be used to inform Queensland's approach to its post-COVID economic recovery:

> **Principle 1: Laws passed for economic and social recovery must put us on a path to a safe and healthy climate and restore the natural environment.**
>
> **Principle 2: Ensure environmental protection, transparency and accountability standards are maintained or improved in economic stimulus measures, including access to justice.**

We also make the following, more detailed, **recommendations**:

- Short-term changes to environmental and planning laws during the COVID lockdown must end as currently scheduled.[1]
- The lack of transparency and lack of consultation which occurred before changes were made to environmental and planning laws during the peak of the crisis should not be extended to the recovery phase. Proactive consultation should occur in relation to any future changes to the law and any new laws should contain obligations to ensure that the new powers are used in a transparent and accountable manner.
- The need for economic stimulus should be used as an opportunity to hasten Queensland's transition to a low carbon economy, create jobs in low emission industries and solve existing problems created by past regulatory failure (such as our legacy of abandoned mines).
- Decisions about the third stage of Queensland's economic stimulus, following on from the first two stages under the current stimulus plan, should be future-focused, reflect input from a broad range appropriate expertise and be made transparently.
- The Queensland government should resist suggestions that the economy can be stimulated through the removal of protections for the environment and the community and should instead focus on alternative ways of ensuring that major projects are assessed efficiently, such as through ensuring that the relevant government agencies are appropriately staffed and resourced.

[1] We note that the applicable event period during which the powers under the Planning Act 2016 and Economic Development Act 2012 was recently extended to 31 October 2020: https://www.statedevelopment.qld.gov.au/resources/policy/applicable-event-extension-notice.pdf

The response so far to COVID-19

COVID-related changes to environmental protections

The notable changes to environmental protections that have been put in place by the Queensland government as part of the response to the COVID crisis were contained in:

- The *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (**Public Health Amendment Act**) (which contained amendments to the *Planning Act 2016* and the *Economic Development Act 2012*); and
- The *Justice and Other Legislation (COVID-19 Emergency Response) Amendment Act 2020* (**Justice Amendment Act**) (which contained amendments to the *Environmental Protection Act 1994* (**EP Act**)).

The Public Health Amendment Act contained amendments largely directed to allowing business hours or similar restrictions to be changed on a short-term basis to address shortages and similar effects of the COVID crisis. This was an early and timely response to issues such as shortages in supermarkets. However, the new powers do lack some of the protections we would ordinarily expect, such as transparency requirements, to ensure that the powers are used in an accountable way.

The Justice Amendment Act, by contrast, was passed in late May 2020 – past the peak of the crisis – and includes powers such as the power to exempt polluting activities from obligations to comply with conditions of approval or to temporarily increases in scale or intensity without a thorough assessment. Such powers have the potential to result in unnecessary environmental harm and, while these powers are temporary in nature, the environmental harm that could result from their use may not be so short term. Further, some of the powers are excessively broad in nature (eg. the power to allow increases in scale or intensity unnecessarily extends to the resources sector which has not needed to change in response to COVID in the same way as, for example, distilleries that switched from beverage to hand-sanitiser production). Considerable improvements, to minimise the risks of long-term damage, could have been made through consultation with all stakeholders.[2]

These changes to law have been characterised by:

- Lack of consultation with stakeholders, or consultation with a limited range of stakeholders, before the laws were made;
- The creation of truncated processes or exemption processes that (temporarily) remove protections for the community or the environment, which could have longer term consequences; and
- Lack of transparency in how some of these powers are being used (for example, decisions made under the new powers contained in the EP Act need not be placed on the public register)

While there may be some justification for this approach at the peak of the crisis, there is no justification for such approaches to be taken in the recovery phase.

[2] The explanatory notes to the Bill indicated that consultation occurred with industry. There was no consultation with the EDO.

It is also important that these measures remain time-limited and are not extended beyond the end of the current crisis. While it may be reasonable to, for example, allow supermarket deliveries outside of normal hours for the limited duration of the crisis, such conditions are generally imposed for reasons such as traffic safety or the acoustic amenity of nearby residences – neither of which should be compromised by ill-advised extensions to emergency laws. It may have been reasonable to ask the residents of such locations to tolerate additional noise during an emergency situation, but it is quite a different thing to ask them to accept such noise on an ongoing basis.[3]

Current stimulus package

The Queensland Government's current stimulus package is outlined in the document *Unite and Recovery for Queensland Jobs – An overview of Queensland's economic recovery strategy*[4] and its supporting reports.[5]

This strategy is expressed to outline the first and second stages of Queensland's economic stimulus, with stage one containing the initial response to the crisis and stage two focused on building back traditional industries. The content of the **third stage** of the stimulus package has not yet been released.

While the strategy identifies Queensland's emerging strengths as including new economy industries such as renewable energy, non-fossil fuel minerals, hydrogen and advanced manufacturing, the stimulus announced to date includes very little spending aimed at these industries,[6] with such spend being dwarfed by the amounts being made available for other industries.

Recommendations:

- **Short-term changes to environmental and planning laws during the COVID lockdown must end as currently scheduled.**

- **The lack of transparency and consultation which occurred before changes were made to environmental and planning laws during the peak of the crisis should not be extended to the recovery phase. Proactive consultation should occur in relation to any future changes to the law and any new laws should contain obligations to ensure that the new powers are used in a transparent and accountable manner.**

---

[3] The Prime Minister's comment that *"the sun came up the next day"* despite such relaxation of conditions trivialises protections that can have a real impact on people's lives and ability to enjoy their homes (https://www.pm.gov.au/media/address-%E2%80%93-ceda%E2%80%99s-state-nation-conference).
[4] Found here: https://www.covid19.qld.gov.au/__data/assets/pdf_file/0027/128358/Economic-Recovery-Strategy.PDF
[5] Found here: https://www.covid19.qld.gov.au/government-actions/our-economic-recovery-strategy
[6] A $50 million industry attraction fund for advanced manufacturing, $14.8 million to investigate the feasibility of the Copperstring project (which would join the North West Minerals province to the NEM), the $10 million new economy minerals initiative and the $23 million dollar renewable energy.

Principle 1: Laws passed for economic and social recovery must put us on a path to a safe and healthy climate and restore the natural environment.

The need to stimulate Queensland's economy following the COVID-19 crisis should be used as an opportunity to recover from the other, less visible, crises currently in progress – the climate crisis and the biodiversity crisis – and to rapidly up-scale our response to those challenges.

The unprecedented bushfire season of 2019/2020 demonstrated just one of the ways in which climate change will affect the economy, as well as livelihoods and lives. The ongoing loss of Queensland's biodiversity through drivers including land use change and climate change[7] will continue to affect our quality of life and the tourism and other industries that rely on our natural environment.

The science tells us that the next 10 years are critical to ensure we have a safe climate and an environment that will provide for future generations. It is imperative that any laws passed to stimulate the economy seize that opportunity.

The pathway to economic recovery is an opportunity to shift our economy toward a safe climate and better environmental future through well-designed regulation. Governments must resist the temptation to pass laws with adverse long-term implications, or to entrench our economic recovery in industries without a long-term sustainable future. Government should also resist the suggestion that deregulation (ie. the removal of protections for the community and the environment) is the path to economic recovery.

What does this mean for Queensland?

Queensland should use this opportunity to hasten the shift to a low carbon economy and to remedy defects in past regulation. This should be done without making the mistake of withdrawing funding for existing environmental programs.

The third stage of stimulus should be future-focused and address the need for Queensland's economic transition to a low carbon economy to address the risks and embrace the opportunities of our export markets changing in response to the need reduce greenhouse gas emissions in accordance with the Paris Agreement.[8] This transition would ideally occur through long-term planning under the structure of a Climate Change Act in terms similar to those in effect in Victoria, New Zealand and the United Kingdom, however, there are certainly immediate steps that could be taken in advance of such a

[7] For example, the loss of the Bramble Cay Melomys and the successive bleaching events on the Great Barrier Reef

[8] The *Paris Agreement* is an agreement, to which Australia is a party, made under the *United Nations Framework Convention on Climate Change*. The *Paris Agreement*, among other things, commits parties to the goal of holding the increase in global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels (see Article 2.1(a)).

framework through existing programs, new programs based on existing expert advice[9] or the use of existing statutory levers.[10]

There may also be stimulus potential for regional areas in solving existing problems, created by past regulatory failures, such as the need to rehabilitate some of Queensland's 120 medium to large-scale abandoned mines.[11]

Recommendations:

- **The need for economic stimulus should be used as an opportunity to hasten Queensland's transition to a low carbon economy, create jobs in low emission industries and solve existing problems created by past regulatory failure (such as our legacy of abandoned mines).**

Principle 2: Ensure environment protection, transparency and accountability standards are maintained or improved in economic stimulus measures, including access to justice.

A key risk of short-term economic stimulus measures is that governments will introduce laws to facilitate development that will weaken environmental protections, lock in long term environmental damage and weaken public rights to participate in environmental decision-making.

Another key risk is that decision-making in relation to stimulus funds will be occur behind closed doors, without adequate input from the diversity of views and experience in the community.

A deregulation agenda has long-term risks

The Federal Government (including in the Prime Minister's recent speech[12]) has flagged that a deregulation agenda, including an increased role for the 'Deregulation Taskforce',[13] will form part of its approach to economic recovery. It has also flagged that changes to Commonwealth Environmental protections may be made even in advance of the current inquiries relevant to such laws.[14]

---

[9] The opportunity to build new industries (including hydrogen and steel production) based on our abundant renewable resources is reflected in the Queensland Government's existing Hydrogen Industry Strategy (http://dsdmip.qld.gov.au/resources/strategy/queensland-hydrogen-strategy.pdf) and has been considered in such analysis as CSIRO's Hydrogen Roadmap and the Grattan Institutes 'Start with Steel' Report (Grattan Institute Report No. 2020-06, May 2020, found at: https://grattan.edu.au/wp-content/uploads/2020/05/2020-06-Start-with-steel.pdf)

[10] The Queensland Government's ownership of electricity generation, transmission and distribution companies would allow it to use powers under the *Government Owned Corporations Act 1993 (Qld)* to, for example, change the investment mandate of such companies to hasten the transition to renewable generation.

[11] See, for example, Queensland Treasury's Discussion Paper on Achieving improved rehabilitation for Queensland: addressing the state's abandoned mines legacy (found here: https://s3.treasury.qld.gov.au/files/8243_Abandoned-Mines-Discussion-Paper_v61.pdf), which includes discussion of the employment benefits for the local community that can be generated from mined land rehabilitation.

[12] https://www.pm.gov.au/media/address-%E2%80%93-ceda%E2%80%99s-state-nation-conference

[13] https://treasury.gov.au/review/deregulation-taskforce/TOR

[14] The *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* is currently undergoing a statutory review (https://epbcactreview.environment.gov.au/), and the Commonwealth Productivity Commission is currently undertaking a review of resource sector regulation (https://www.pc.gov.au/inquiries/current/resources#draft) which was placed on hold following the release of the draft report. While these reviews are not without their flaws, they are at least public processes with some degree of transparency.

Such an approach not only has the potential to decrease protections for the environment, natural resources (such as land and water) and the community while the need for stimulus remains, but creates the risk that such protections will be permanently weakened without the benefit of even a transparent policy process or a thorough evaluation of the benefits created by such regulations. Any decision to make changes to environmental laws should be informed by a thorough evaluation of the performance of the regulation against the objectives set by Parliament in the legislation itself.

Such appropriate evaluations may not be feasible within timeframes necessary for stimulus, with the result that it may be necessary to look to other options for ensuring that major projects undergo assessment in an efficient manner, without compromising environmental and community standards, such as through ensuring environment and natural resource focused Departments are appropriately staffed and resourced.

Deployment of stimulus should be transparent

Decisions made now to deploy stimulus funds will have long term implications, both for the public purse and for the direction our economy will take in the next critical decade. In that regard, the decision-making process should involve input from diverse expertise relevant to the challenge, be made transparently and be made within a process explicitly directed to leveraging this opportunity to solve other problems.

The National COVID-19 Coordination Commission (**NCCC**) established by the Federal government may unfortunately serve as an object lesson for the many ways in which this principle is important. There have been concerns expressed from the outset that the NCCC lacks transparency both in appointments to the Commission and in its decision-making processes. Serious concerns have also been raised about potential conflicts of interest between the business interests of the Commissioners and their role on the NCCC. The leaked report[15] of the NCCC also raises questions about the lack of diversity in experience and expertise represented on the Commission and the lack of ambition inherent in its terms of reference, in that:

- the report focuses on gas as the key to cheaper energy in Australia, without any real analysis of other options for firming variable renewable generation, such as pumped hydro or battery storage, and apparently without input from experts in renewable energy;
- the report fails to have regard to the land use, climate and biodiversity impacts of gas extraction, which are likely to have negative impacts in the long term including for our economy;
- the report creates the impression in the community that a group largely comprising gas executives wrote about what they knew, instead of considering the full range of potentially available options; and

[15] https://www.theguardian.com/environment/2020/may/21/leaked-covid-19-commission-report-calls-for-australian-taxpayers-to-underwrite-gas-industry-expansion

- the report may reflect that the Commission wasn't asked, in its terms of reference,[16] to be innovative and to use this opportunity to solve other problems (such as the urgent need to transition away from fossil fuels).

What does this mean for Queensland?

Decisions about the third stage of Queensland's economic stimulus should be future-focused, reflect input from a broad range of appropriate expertise and be made transparently.

Queensland should resist calls to 'fast-track' approvals for major projects with changes to the law and should instead ensure that agencies responsible for assessing applications for environmental and land use approvals and applications for allocations of resources (such as water and minerals) have the resources and staff they need to make decisions efficiently without compromising environmental standards. This has the co-benefit of continuing the Queensland government's role as a direct creator of jobs.

Recommendations:

- **Decisions about the third stage of Queensland's economic stimulus should be future-focused, reflect input from a broad range of appropriate expertise and be made transparently.**

- **The Queensland government should resist suggestions that the economy can be stimulated through the removal of protections for the environment and the community and should instead focus on alternative ways of ensuring that major projects are assessed efficiently, such as through ensuring that the relevant government agencies are appropriately staffed and resourced.**

[16] https://pmc.gov.au/nccc/terms-reference

Environmental Defenders Office

8/205 Montague Rd WEST END, QLD 4101
tel +61 7 3211 4466
edoqld@edoqld.org.au www.edoqld.org.au

19 August 2020

Economic and Governance Committee
Queensland Parliament
Sent via email only: egc@parliament.qld.gov.au

Dear Chair and Committee Members,

Supplementary submission - Inquiry into the Queensland Government's economic response to COVID-19

Thank you again for inviting EDO to present to your inquiry into the Queensland Government's economic response to COVID-19.

We write to provide supplementary submissions to address two matters arising out of the hearing on 10 August 2020.

1. Good governance relies on awaiting the High Court's determination in the New Acland Stage 3 expansion matter.

2. Opportunities for accountability and transparency measures to be introduced into Queensland's amended planning and environment law reforms responding to COVID-19.

3. The risks of accepting devolution of federal environmental approval powers.

Please find our further submissions on these two important points below.

1. Good governance relies on awaiting the High Court's determination in the New Acland Stage 3 expansion matter

The Committee has heard submissions seeking that the Queensland Government hastily approve the New Acland Stage 3 expansion, prior to the High Court's decision.

We strongly support the Queensland Government's decision to allow justice to be seen through prior to making any further decisions on this expansion application.

Experts paid by the mining company accept that the land around Acland is among the best 1.5% of agricultural land in Queensland.[1]

The mining company first sought a mining approval to expand into this agricultural land (called Stage 3) in 2007[2] but this was rejected in 2012 when then Premier Newman stated "it was inappropriate to expand the mine in the State's southern food bowl".[3] The mining company then later lodged a revised application for a smaller expansion.

Farmers and landholders had their objection heard on this revised application by the Land Court, using their legal objection rights, which recommended refusal in 2017 on groundwater, noise and intergenerational equity grounds.[4] EDO represents one of the objectors, the Oakey Coal Action Alliance (**OCAA**).

The mining company applied to the Supreme Court for judicial review of the Land Court decision and, in the lead up to the 2017 election the Palaszczuk government rightly committed to allowing the court processes to be finalised prior to making any decisions on this application.

The Supreme Court judicial review decision removed the Land Court's jurisdiction on groundwater and ordered a retrial in the Land Court in 2018, largely bound by the findings in the 2017 Land Court decision, except in relation to noise and groundwater. Both the mining company and OCAA appealed the Supreme Court decision and, in 2019, the Court of Appeal held that the Land Court had "failed to observe the requirements of procedural fairness" due to an apprehension of bias.

Ordinarily a finding of apprehended bias would result in a retrial however the Court of Appeal did not order a retrial.

This throws into question the 2018 Land Court rehearing decision, which was largely based on the 2017 Land Court decision, and casts a shadow over any issue of a mining lease as the Minister must consider the Land Court recommendation in making the final decision.

OCAA sought special leave to appeal the Court of Appeal decision to the High Court so that they can have clarity around the decision, which has profound impacts on their homes and livelihoods, and to ensure they can have a fair hearing that's not overshadowed by claims of bias and unfairness. Special leave to be heard in the High Court was granted in June 2020 and the appeal is expected to be heard in October 2020.

---

[1] *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24, [1299].
[2] The application for environmental authority was made on 13 April 2015, the application for the water their water licence was made on 3 October 2017 and regional planning development approval was made on 18 November 2019.
[3] The Australian, 29 March 2012, Campbell Newman Slams Farm Gate Shut on Miners.
[4] *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24

The High Court will address the question of whether OCAA, and the other objectors, should be granted a fresh Land Court hearing.

The questions being determined by the High Court are essential to ensuring justice is seen through for our client and the other landholders objecting to this expansion. The very fact that the High Court has granted leave for our clients to be heard signifies the great importance of the legal questions being considered by the Court.

The Acland farmers deserve decisions unclouded by questions of fairness, and OCAA is asking the High Court whether the correct law has been followed in this instance.

The Queensland Government is right to wait for the outcome of this High Court process to clarify whether the existing recommendation is valid.

It is fundamental to the administration of justice that courts and their decisions are fair and impartial – that is why it is so important for the questions around this case to be resolved in the High Court without interference.

The impacts of coronavirus and decisions around stimulus are not appropriate justification for compromising the right to a fair hearing.

2. Opportunities for accountability and transparency measures to be introduced into planning and environment laws.

During my presentation, the Deputy Chair requested suggestions as to how accountability and transparency should be introduced into the reforms to Queensland's planning and environmental laws that have been passed since lock down. In addition to the response provided during the hearing, we provide a summary of recommendations below, and **enclose** our submissions on these laws which provide our concerns and our suggestions for improvements for these laws:

(a) 1 April 2020, Letter to the Premier on *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (Qld).
(b) 25 May 2020, Letter EDO to the Premier on *Justice and Other Legislation (COVID-19 Emergency Response) Amendment Act 2020* – changes to the *Environmental Protection Act 1994*.
(c) 21 July 2020, EDO Submission on proposed amendments to the Planning Act 2016 (Qld) framework associated with the economic recovery from COVID 19.

In summary, the keys to greater accountability and transparency in development laws are:

- limited discretion for decision-makers, by providing clear criteria to guide how decisions are made with limited subjective interpretation in their application;
- opportunities for public scrutiny of decisions to ensure that they are the best decision being made in the public interest, including through:

- legislative requirements for decisions and the reasons for decisions to be published with sufficient information for the public to understand why the decision was made and why it was suitable under the criteria required to be applied;
- legal opportunities to provide concerns and to have those decisions taken into account in the decision-making process; and
- legal opportunities to appeal decisions to an independent arbiter free of political influence, such as a court or tribunal, to help ensure decisions are made in the public interest. This is a well-recognised element of 'vital importance to a transparent and accountable planning system' which assists in removing risks of corruption in decision making, as stated by the NSW Independent Commission Against Corruption;[5] and

- proper consultation on draft proposed laws with key stakeholders across all sectors – to feed in the varying perspectives of the potential impact of the laws as proposed such that laws can be of the best quality possible in meeting the policy objective while avoiding unintended consequences and providing for the protections of good governance measures.

We would gladly provide more information or explanation if required.

3. The risks of accepting devolution of federal environmental approval powers.

We also write to express our strong concerns around the rapid moves to devolve the federal approval powers for impacts to Australia's matters of national environmental significance under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act)** to state and territory governments. We ask that all Queensland politicians consider the serious risks associated with this initiative and to prevent this devolution in order to ensure Australia's most precious environmental values are adequately protected.

With the release of the EPBC Act Review Interim Report (**Interim Report)** in late July, the Federal Government announced various reforms it is intending to fast track prior to the finalisation of the review process. This included these two commitments:

- to develop Commonwealth-led national environmental standards which will underpin new bilateral agreements with State Governments; and

- to commence discussions with willing states to enter agreements for 'single touch' approvals (that is, accrediting states and territories to carry out environmental assessments and approvals on the Commonwealth's behalf).

Both commitments refer to the devolution of federal government responsibilities to your government via a bilateral agreement. We understand that the Federal Government is

[5] NSW Independent Commission Against Corruption Report, *Anti-Corruption Safeguards and the NSW Planning System*, February 2012, available here: http://www.icac nsw.gov.au/documents/doc_download/3867-anti-corruption-safeguards-and-the-nsw-planning-system-2012.

intending to introduce legislation in the August sitting of parliament to quickly facilitate new bilateral assessment and approval agreements. This proposal has been previously known as the 'one stop shop' policy, and has been proposed on and off since at least 2014, when the then Federal Government was first unable to pass the necessary amendments through Parliament to provide for the devolution process.

The significant reasons the devolution amendments needed to enact the 'one stop shop' policy have never successfully passed parliament still exist. This is a flawed and legally risky policy, which also may cause more confusion in our environmental regulatory processes by creating eight different jurisdictional 'shops' due to Australia's federal structure.

Why devolution of federal environmental approval powers to the Queensland Government should not be accepted

Given that previous attempts to introduce the 'one stop shop' stalled due to the complexity and a serious underestimation of the technical work involved in amending state standards, this proposal to fast track devolution is high risk and set to an impossible timeframe. The Interim Report has highlighted that our laws are already too weak, and interim amendments risk weakening them further.

Devolution of the federal government's environmental protection role to the state and territory governments is a highly risky and inappropriate initiative:

- only the Australian Government can provide national leadership on national environmental issues, strategic priorities and increased consistency;
- the Australian Government is responsible for our international obligations to protect the environment, which the EPBC Act implements;
- State and Territory environmental laws and enforcement processes do not consider the cross-border, cumulative impacts of state-based decisions and are often not up to national standards, and
- States and Territories governments are not mandated to act (and do not act) in the national interest;
- State and Territory governments often have conflicting interests – as a proponent, sponsor or beneficiary of the projects they assess;
- There is a chance each jurisdiction may be seeking for nuances to the application of the devolved powers, which would create a more complex regulatory framework which differs between state and territory governments, rather than simplifying Australia's environmental laws; and
- State and Territory governments would need significant resourcing assistance to take over the job (and potentially the liability) of federal government in assessing impacts to matters of national environmental significance, but no resourcing has

been committed to by the federal government to take on this extra, important work.

The Interim Report confirms the current laws are failing and recommends strong improvements to standards under the EPBC Act, which will take time to complete. In the absence of the full suite of detailed environmental and assurance standards needed to deliver environmental outcomes under a reformed framework, a set of "interim standards" will be used to fast track the proposed devolution of powers to States and Territories under the existing inadequate framework. These are two different and potentially conflicting purposes – interim standards hurriedly made and cemented in agreements now for the purpose of fast-tracking development could undermine the development of future comprehensive standards designed for environmental protection and outcomes.

Australia is facing an extinction crisis. Our environment is still reeling from the bushfires exacerbating already threatened wildlife. Rushed, ill-considered decisions now in the name of a few more development jobs are not worth the long term, potentially irreversible impacts to our precious, unique animals and land, and our sustainable recovery pathway.

We ask all politicians to please ensure that Queensland does not allow for the abrogation of Commonwealth responsibility through the devolution of federal environmental approval powers.

Please do not hesitate to contact us if you have any questions or require further information on any of the matters raised in our collective submissions to the Committee.

Yours faithfully

Revel Pointon
Special Counsel

Environmental Defenders Office

1 April 2020

The Honourable Annastacia Palaszczuk
Premier and Minister for Trade

By email only: [redacted]

Dear Premier,

Good governance, environment and community protections must be upheld during COVID-19

We first acknowledge the significant challenge your government is currently facing in responding to the Coronavirus threat upon us. We congratulate you for your adaptable and strong leadership during this unprecedented and unpredictable time.

We write to seek your confirmation that the Queensland Government will remain committed to proper accountable and transparent processes in decision making and enforcing of our laws that protect community and environmental health.

We are aware that some representatives of the development sector have already sought relaxations from the government in application fees and assessment timeframes due to the ramifications of COVID-19 on their business. Application fees and assessment timeframes, including public notification requirements, are essential in ensuring the development process can be undertaken with sufficient resources and time for a good decision to be made.

The development industry is no doubt suffering, as is every sector and individual during these times. However, this is not sufficient reason to allow short cuts in decision making processes that risk reducing the quality of decision making, remove community rights to meaningfully be involved in decision making processes and which may increase risk to the environment or community health. It would also be inappropriate to relax compliance and enforcement activities that protect our environmental values and communities.

We note with concern that the Department of State Development, Manufacturing, Infrastructure and Planning is currently undertaking a 'review of the pipeline of infrastructure projects, both public and private, to identify opportunities to accelerate projects into the construction phase', including :

- 'consideration of the powers available to the Coordinator-General
- Economic Development Queensland's role in prioritising assessment of shovel-ready development applications within Priority Development Areas
- use of appropriate planning instruments under the Planning Act 2016.'

T +61 7 3211 4466
E edoqld@edoqld.org.au W edo.org.au
8/205 Montague Rd, West End Qld 4101
ABN: 72002 880 864

We further note the amendments made by the Queensland Government in the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* , introduced and passed on 18 March 2020, providing powers to change development approvals (under the *Planning Act 2016* (Planning Act) or the *Economic Development Act 2014* e.g. for priority development areas) to increase the intensity or scale or add or change a use, or to allow non-compliance with use restrictions for designated premises, if satisfied there are reasonable grounds for these changes during an 'applicable event' (such as the current pandemic). A power has also been granted to extend or suspend periods for doing things under the Planning Act, for example to extend public notification periods or extend the time an application for development approval has for taking a step.

These new powers seem generally reasonable given the current circumstances and the need for flexibility in operations, particularly since they are time bound. We note that the power to extend or suspend periods for taking actions under the Planning Act could be used for the benefit of either the public or the project proponent, depending on the purpose for which these powers are exercised.

We ask that the Queensland Government ensure that these powers and any decisions to 'accelerate projects' are undertaken only in a way that protects the public interest and does not curtail public rights and proper decision-making processes outside of what is necessary to ensure public safety.

The public needs to retain trust and confidence in their government during this time. While there is a deep understanding that urgent emergency action is needed to protect the health of all, there is also strong scrutiny upon your government to ensure the powers granted to the government during this time are not flaunted unnecessarily in a way that does not serve the public interest.

We look forward to your response, which we propose to publicise to keep the community informed on your position.

Yours sincerely,
Environmental Defenders Office

Jo-Anne Bragg.

Jo-Anne Bragg
Executive Director, Brisbane

Copy to:

The Honourable Jacklyn Trad MP
Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships
[redacted]

The Honourable Leeanne Enoch MP
Minister for Environment and the Great Barrier Reef, Minister for Science and Minister for the Arts
[redacted]

The Honourable Dr Anthony Lynham MP
Minister for Natural Resources, Mines and Energy
[redacted]

The Honourable Cameron Dick MP
Minister for State Development, Manufacturing, Infrastructure and Planning
[redacted]

Environmental Defenders Office

25 May 2020

The Honourable Annastacia Palaszczuk MP
Premier and Minister for Trade

By email: [redacted]

Dear Premier

Justice and Other Legislation (COVID-19 Emergency Response) Amendment Bill 2020 – changes to the Environmental Protection Act 1994

We write to express our concerns about changes to environmental protections that have proceeded as part of the COVID-19 emergency response and about the way in which environmental legislation is being administered more broadly during this, admittedly difficult, time. We also write to seek assurance that protections for the environment and the community will not be reduced under the cover of 'stimulus'.

We note that we raised similar concerns with you in relation to changes to planning law in our letter of 1 April 2020, to which we have not yet received a response.

The *Environmental Protection Act 1994* (**EP Act**) contains important protections for human health, as well as protections for our natural environment and the environmental services (such as clean water) that we all rely on. It would be unfortunate if this public health emergency was used as justification for diminishing those protections.

Justice and Other Legislation (COVID-19 Emergency Response) Amendment Act 2020
This Bill was introduced by the Minister for Health on 19 May 2020 and was passed with amendments on the 21 May 2020, proceeding as an urgent Bill without being referred to a Committee for scrutiny or an opportunity for input from the community sector.

The Bill contains the following changes to the EP Act:

- A power to grant 'Temporary Authorities' to authorise environmentally relevant activities (**ERAs**) have increased in intensity or scale as a result of the COVID emergency such that they require a new or amended environmental authority (**EA**); and
- A power for the Minister to grant exemptions from compliance with conditions of EAs and other approvals under the Act.

T +61 7 3211 4466
E edoqld@edoqld.org.au W edo.org.au

8/205 Montague Rd, West End Qld 4101
ABN: 72002 880 864

The Bill, which contains these significant amendments to the EP Act, was introduced without any of the usual prior consultation with the experienced lawyers at Environmental Defenders Office. We understand (from the explanatory notes) that, by contrast, there had been some consultation with industry about these amendments. This type of one-sided consultation is both disappointing and likely to produce poor outcomes.

We have concerns with both the unnecessarily broad scope of these powers which could benefit activities with a high risk of contamination (such as the resources industry) and the way in which they will be implemented in practice. **Annexure A** to this letter outlines some concerns we would have raised about these new powers, had we been consulted. Overall, we believe that the policy intent of these new powers could have been achieved, with much less potential for misuse, with some minor amendments.

We request amendments to deal with the concerns outlined in **Annexure A.**

While we appreciate that these powers will remain in effect only on a temporary basis, any environmental harm resulting from their use may not be so short term.

We would also question why these powers needed to be included in a Bill being passed on an urgent basis. While we appreciate that urgent measures have been necessary to deal with some aspects of the COVID emergency, that does not appear to be the case for these measures given that we have passed the peak and that restrictions are beginning to lift, without unmanageable demands having been placed on our health or other systems.

We would appreciate advice on the measures that will be put in place in the administration of these new powers to ensure that they are not misused and that any resulting harm is avoided or minimised. This should include publication of those measures and specific instances of applications for, and use of, those powers on the relevant Departmental website.

Administration of the EP Act more generally

The compliance and enforcement activities carried out by the Department of Environment and Science play a critical role in ensuring that the community is protected and that voluntary compliance is incentivised.

We are concerned that restrictions associated with the COVID emergency may have prevented some critical parts of this compliance work (such as site inspections) from taking place. We say that if construction is regarded as an essential activity, equally should be environmental compliance. We are also concerned that certain businesses may be using the COVID emergency as an excuse for non-compliance with statutory obligations, without appropriate levels of scrutiny from the Department as to the reasonableness of such claims.

We seek assurances that compliance and enforcement activities will return to normal as soon as possible and that appropriate action will be taken to address any breaches that have occurred during the COVID emergency.

Way forward: Environmental standards and community involvement must not be reduced
There have already been predictable, yet ill-informed, calls made in the media to reduce environmental protections as a stimulus measure. We would urge the government to resist any such suggestions.

We would also suggest that the best thing the government could do to ensure that projects can proceed expeditiously is to ensure that the Department of Environment and Science is adequately staffed and resourced to process applications. In that regard, we note that the current hiring freeze on public servants is likely to be counterproductive.

We would also urge the government to use the opportunity presented by the need for economic stimulus to direct spending towards addressing environmental problems such as the climate transition, the rehabilitation of legacy abandoned mines and upgrades of state or local government owned infrastructure (such as sewage treatment plants discharging to the Great Barrier Reef lagoon). The Government's recent announcement of CleanCo's involvement in the proposed Western Downs Green Power Hub is an excellent example of the type of stimulus Queensland needs by providing construction jobs in the short term, low cost power to stimulate other industries and emissions reduction benefits.

Finally, we trust that the lack of consultation that has occurred during the COVID emergency will not be extended to legislation and other measures relating to stimulus.

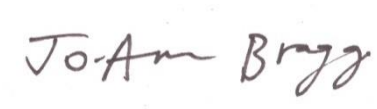
We seek assurances that the Queensland Government will:

- not use the need for economic stimulus as an excuse to reduce environmental protections, rights of community participation or its commitment to open and transparent decision-making; and
- undertake appropriate consultation in relation to any stimulus measures or any proposed legislative or administrative changes relating to COVID 19 with all stakeholders, including the Environmental Defenders Office and other representatives of the community sector.

As mentioned, we note that we raised similar concerns with you in relation to changes to planning law in our letter of 1 April 2020, to which we have not yet received a response.

We look forward to receiving your response.

Yours sincerely,
Environmental Defenders Office



Jo-Anne Bragg
Executive Director, Brisbane

Copy to:

The Honourable Steven Miles MP
Deputy Premier, Minister for Health and Minister for Ambulance Services
By email: [redacted]

The Honourable Leeanne Enoch MP
Minister for Environment and the Great Barrier Reef, Minister for Science and Minister for the Arts
By email: [redacted]

Annexure A: Comments on new provisions of *Environmental Protection Act 1994*

1. Lack of environmental risk criteria
Neither new power contains an express requirement for the decision-maker to have regard the risks to the environment or the community of the proposed decision, beyond the general obligation in the existing section 4 of the Act. This is a surprising omission.

2. Temporary Authorities should be limited to essential products and services
The power to issue a Temporary Authority arises where an activity has increased in intensity or scale such that it either becomes an ERA regulated under the Act or requires an amendment to an existing environmental authority (EA).

The fact that a business has increased in intensity or scale as a result of the COVID emergency could be the result of either the business stepping up to provide a product necessary for community safety (such as the production of ethanol for hand sanitiser or medical protective equipment) or may simply be the result of a business taking up a commercial opportunity created by the emergency.

In the former case there may be some justification for a temporary relaxation of environmental standards, in the latter case there is not. The language of the new provisions would seem to allow this power to be exercised in either case. We trust that the decision-maker will exercise their discretion in a way that, in practice, limits the use of the power to essential activities.

3. Temporary Authorities should be limited to prescribed ERAs
The power to grant a Temporary Authority is available in respect of all activities regulated under the Act – both resource activities such as mining and petroleum production and prescribed ERAs (including industrial activities such as food processing, alcohol production and chemical manufacture).

The types of activities that may have genuinely needed to increase their scale or intensity as a consequence of the COVID emergency are surely activities, such as food processing, alcohol production, chemical manufacturing, that are prescribed ERAs. We can see no justification for, and considerable environmental risk in, this power being exercised for the benefit of resource activities.

In that regard, we think that the policy intent of the legislation could have been achieved, with much lower potential for misuse or waste of assessing officers' time, if the power was limited to prescribed ERAs.

4. Conditional exemptions
There is no power available for the Minister to create a conditional exemption from compliance with conditions. Such conditional exemption could, for example, take the form of an obligation to make-good any harm when the crisis is over or to substitute alternative monitoring arrangements.

While strict compliance may not be possible in some cases due to COVID-related restrictions, the power created by the new legislation only allows the Minister to switch conditions off and does not permit the Minister to, for example, allow for measures that achieve substantial compliance.

5. Evidence of COVID impacts

We would also query what evidence will be required to substantiate claims that a business has either increased in scale or intensity or become unable to comply with conditions as a result of the COVID emergency and what steps the Department will be taking to verify such claims.

This information would provide important certainty for business and confidence in the community that these emergency powers will not be open to misuse.

Environmental Defenders Office

Planning initiatives to support economic recovery

21 July 2020

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:
Planning Group, Queensland Treasury
By email: [redacted]

For further information on this submission, please contact:

Deborah Brennan
Senior Solicitor (Brisbane)
[redacted]
Ph: [redacted]

Alternatively, please contact Revel Pointon ([redacted]).

Table of Contents

Introduction

The Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on proposed changes to the *Planning Act 2016 (Qld)* associated with the economic recovery from COVID-19.

While we support the need for appropriate economic stimulus, a number of the proposed changes do not accord with the principles we have proposed as guidance for any economic recovery measures[1] in particular where they remove environmental protections and community participation rights.

We make the following general comments about the proposals:

- **Accountability to communities is being reduced by these reforms**: Each of these proposals either reduces the scrutiny of development proposals or the opportunity for the community to have its views considered. Any consequential poor decision-making now could have consequences that the community will be living with in the long term through inappropriate changes to the built environment or the introduction of inappropriate uses.

- **Infrastructure designations will be subject to weaker environmental assessment**: The changes to the process for infrastructure designations will significantly reduce the necessary level of environmental assessment for potentially large-scale public and private infrastructure. The current proposal for these changes does not have a sunset date, with the result that they will remain in effect unless and until they are amended or repealed.

- **Draft amendments must be released public comment:** There is inadequate detail available in relation to the proposed changes to the *Planning Regulation 2017* to enable a comprehensive analysis of their risks. A further round of consultation should occur once draft amendments are available for review.

- **Flow on effects of reforms need better consideration:** There has been inadequate analysis of any flow-on effects of the proposals, such as whether there are adequate enforcement powers available and the effects the proposals may have on the ability of local governments to levy infrastructure contributions (or whether local governments will need to find alternative means of funding infrastructure, such as through rate revenue).

Our specific comments are as follows:

The proposed changes include amendments to the **public notification requirements** contained in the DA rules, which we acknowledge to be timely given the changes in the local media market. In order to ensure that the whole of the affected community for a development receive notification, we recommend that the Department:

- maintain the proposal to require that notice be given to occupiers (as well as owners) of adjacent land;
- include a requirement that all notifiable development applications be listed on the website of the relevant local government (regardless of who the assessment manager is), in addition to the other notification requirements; and
- be amended to provide guidance on how the 'identified area' should be chosen;

[1] https://www.edo.org.au/2020/05/29/edo-watchdog-legal-principles-for-covid-19/

- be amended to correct drafting and typographical errors.

The proposed amendments to the Minister's rules in relation to **infrastructure designations inappropriately remove the need for a comprehensive environmental assessment of projects**. This is of significant concern because of the range of infrastructure that can proceed under such designations and the fact that such infrastructure may not otherwise be subject to environmental assessment or community consultation. Any changes in relation to infrastructure designations should, at most, be temporary changes with an explicit expiry date, that are limited in their application to infrastructure proposed by government agencies on brownfield sites.

The proposed amendments to the rules for infrastructure designations should also amended to:

- correct the typographical error in paragraph 1.2 of both Chapter 7 and Chapter 8; and
- change paragraph 4.6 of Chapter 7 to provide that the 20 day consultation period is a minimum, which may be extended in appropriate cases in the consultation strategy (the current drafting would allow the consultation period to be reduced through the consultation strategy).

Proposal 1 of the proposed changes to the *Planning Regulation 2017* involved allowing certain **changes in use in tenancies within existing buildings to proceed as accepted development** (without a development application) in certain zones. This proposal has the potential to affect the amenity and safety of the surrounding area, including in ways that could be easily avoided. We would recommend that, instead of simply allowing uses to establish without any assessment or enforceable limits on the permissible level of impact adjoining land, the Minister:

- draft model temporary local planning instruments (**TLPIs**) with basic controls on off-site impacts for each use in each zone intended to be covered by this proposal; and
- amend the Minister's rules to create an abbreviated process for local governments to adopt a TLPI that accords with the model TLPI.

Proposal 2 involves **reducing the level of assessment** that applies to applications for certain uses in certain zones. The consultation documents do not contain any adequate justification for this proposal and it should not proceed.

Proposal 3 involves allowing building works to **increase the gross floor area of buildings without the need for a development permit**. We think that there is inadequate information available to properly consider the risks of such a proposal and whether, for example, the same result could be achieve with less risk through the use of a tool such as a TLPI. Further consultation should be undertaken if and when draft amendments to the *Planning Regulation 2017* have been prepared.

Proposal 4 involves **lowering the level of assessment** that will apply to certain uses in certain zones. While the consultation document appears to suggest that this proposal will be limited to **ancillary uses**, the detailed description of the proposal is not so limited. We recommend that any uses which become subject to a lower level of assessment under this proposal should be limited to ancillary uses and should be limited in scale to uses which have no, or limited, offsite impacts.

Proposal 5 states that it is intended to clarify that **temporary events (or possibly temporary uses) do not require development approval**. This proposal has not been adequately explained or justified in the consultation documents and does not appear to have a purpose related to economic stimulus. This proposal should be the subject of further consultation when it has been fully scoped and defined (including in relation to the types of uses it will apply to and the meaning of 'temporary').

Development assessment rules: public notification

This proposal involves changes to rules for public notification that apply where a development application is impact assessable or involves a variation request.[2]

The purpose of public notification is to:

- give the community potentially affected by the proposed development notice that the application has been made; and
- provide them with the opportunity to have any concerns considered by the assessment manager in deciding whether to grant a development permit and on what conditions.

The current rules require a notice to be published in a **newspaper** circulating in the locality of the proposed development, that **notices be placed on the premises**, and that notices be given to the **owners of adjoining land**.

The proposed new notification rules are as follows (using the formatting from the consultation document):

> "17.1 The applicant, or the assessment manager acting under section 53(10) of the Act, must give public notice by—
> (a) placing **notice on the premises** the subject of the application that must remain on the premises for the period of time up to and including the stated day; and
> (b) giving **notice to the adjoining owners and the adjoining occupiers** of all lots adjoining the premises the subject of the application; and
> (c) Where there is a **hard copy local newspaper** for the locality of the premises the subject of the application, publishing a notice at least once in a hard copy local newspaper circulating generally in the locality of the premises the subject of the application;
> (d) Where there is **no hard copy local newspaper** for the locality of the premises the subject of the application—
> (i) if there is an **online local newspaper** for the locality, publish a notice at least once in an online local newspaper for the locality of the premise the subject of the application; **or**
> (ii) Otherwise—
> (a) by publishing, at least once in a **hard copy State or national newspaper**, a notice that complies with the relevant public notice requirements for the application;
> (b) by publishing, at least once in an **online State or national newspaper**, a notice that includes the relevant information for the application;
> (c) by giving a notice that complies with the relevant public notice requirements for the application to the **occupier of each lot in the identified area** for the application;
> (d) if the **assessment manager** for the application publishes development applications and change applications on its website under the Planning Regulation 2017, schedule 22, section 7—by publishing on the **website** a notice that includes the relevant information for the application.

The following are the relevant definitions:

> "**Identified area** means an area identified by the assessment manager for the application as having occupiers that are likely to be interested in the application.
>
> "**State or national newspaper** means a newspaper that:
> (a) is published in Australia;
> (b) primarily publishes news in relation to the State or Australia; and
> (c) is intended for a State-wide or nation-wide readership."

[2] *Planning Act 2016*, s53

We **support** the proposal to require that notice be given to adjoining owners and occupiers (instead of just owners). This is a timely change that supports the intent of these rules.

We also acknowledge that there have been significant changes in the availability of local newspapers, with some closing and others changing to online only.[3] As a consequence, we acknowledge that there is a need for a changed approach to public notification to some degree. Any such changes should be aimed at ensuring that the development application is brought to the attention of as much of the affected community as possible. In that regard, we have concerns with:

- Drafting errors in the provision, in particular subparagraph (d)(ii), which makes it unclear whether the listed options are cumulative requirements or alternatives;
- The amount of discretion given to the assessment manager to specify what the 'identified area' should be;
- The fact that there is unlikely to be a single state or national newspaper read by the majority of the affected community for a development; and
- The failure to impose a logical requirement, that meets the intent of the legislation, to provide the community with a single point of reference (such as the local Council's website) that lists all development applications on public notification within their local area.

Subparagraph (d)(ii) above specifies the notification requirements that apply if there is neither a hard copy nor an online newspaper circulating in the area. Given that the list is not linked by an 'and' or an 'or', a reasonable reader may be in some confusion as to whether these items are alternatives (ie. allowing the proponent to select one) or cumulative requirements (ie. requiring the proponent to give notice in all four ways). The associated consultation document indicates that this subparagraph is intended to be a list of alternatives and that the proponent of the development can choose to comply with any one. **This drafting should be clarified in the statutory document itself to provide certainty as to the requirements around notification for all stakeholders.**

We also note that paragraph 15(a) of Schedule 3 appears to contain an error. That paragraph describes how to give notice to the occupiers of adjoining lots, but refers to all adjoining lots as 'residences'. **We recommend that the reference to 'residences' in this paragraph be changed to 'premises'.**

One of the proposed options available in the event there is not a local newspaper is to give notice to owners and occupiers within an 'identified area', the scope of which will be determined by the assessment manager exercising an unguided discretion. This is too important a step to be left to an unguided discretion and may be intentionally or unintentionally misused. Further, this option requires the assessment manager to identify the potentially affected area without having undertaken any real assessment of the proposal or impacts, which may result in parts of the affected areas remaining uninformed of the proposal.

Another proposed option is publishing a notice in a hard copy or online state or national newspaper. We are concerned that this option is **very likely result in the notice being seen by only one segment of the community**. Any of The Australian, Guardian Australia, the Financial Review or The Saturday Paper would qualify as a 'state or national newspaper' for these purposes – three of these publications must be purchased in hard copy or through online subscription (and are otherwise behind a paywall) and each attracts a quite different readership. As a consequence, this option is very unlikely to reach a significant proportion of the potentially affected community for any development.

[3] https://www.afr.com/companies/media-and-marketing/news-corp-print-closures-leave-regional-media-on-life-support-20200528-p54x7m#:~:text=News%20Corp%20will%20cease%20printing,the%20history%20of%20Australian%20media.

In our view, the most appropriate approach is to create a **single website** which the community can view at any time, **to identify all of the development applications currently on public notification in their area**. This should apply **in addition to** notices on the land, in any hardcopy or online local newspaper and notices to adjoining owners and occupiers. The current rules for giving public notification are derived from (and almost identical to) rules that were in effect before the internet was in common use and certainly before smartphones became such a ubiquitous part of everyday life for most people.[4] Instead of incremental changes which are likely to result in public notice being given in different and unpredictable ways, we recommend that the government consider the intent of public notification and the desirability to give the community a single point of reference for all public notification – which would apply in addition to the traditional ways of bringing the proposal to the attention of the local community.

It would seem to us to be relatively straightforward for notice of all development applications within a local government area to be notified in a single location on the website of the relevant council (regardless of which agency is the assessment manager).

Proposed solution:

In order to ensure that the whole of the affected community for a development receive notification, we recommend that the amended DA rules:

- maintain the proposed amendment which requires notice to be given to occupiers of adjacent land;
- be amended to require that all notifiable development applications be listed on the website of the relevant local government, in addition to the other notification requirements; and
- be amended to provide guidance for how the 'identified area' should be chosen;
- be amended to correct the drafting and typographical errors.

Minister's guidelines and rules

The 'Minister's Guidelines and Rules' are made under s17 of the *Planning Act 2016*. They set out rules for making and amending local government planning instruments, including planning schemes. The proposed changes are to the rules for making infrastructure designation by both the Minister and local governments.

The rules for making infrastructure designations, in particular the rules in relation to consultation and the environmental assessment, are important because development undertaken under a designation is 'accepted development' (see s44(6)(b) of the *Planning Act 2016*) which does not require development approval. As a consequence, **the process of making the designation may be the only significant environmental assessment such infrastructure undergoes** and may be the only opportunity the community has to ensure that environmental assessment is adequate and that its views are heard in relation to whether the infrastructure is appropriate or should be subject to certain requirements under s35(2) to ensure that its impacts are acceptable.

If the Minister is making the designation, they must be satisfied that adequate environmental assessment (including adequate consultation) has been undertaken.[5] The Act allows the Minister to be so satisfied simply by following the process prescribed guidelines (but may be satisfied that

[4] See, for example, section 4.3(4) of the *Local Government (Planning and Environment) Act 1990*, which was in effect from 1991 to 1998 (prior to the now repealed *Integrated Planning Act 1997* and *Sustainable Planning Act 2009*) and contained very similar requirements to the current DA rules.
[5] *Planning Act 2016*, s36(2)

environmental assessment has been adequate in another way. If a local government is making a designation, then it must follow the prescribed 'designation process rules'. Both of these processes are proposed to be amended.

The types of infrastructure that may be the subject of a designation include a variety of infrastructure of the type typically provided by local government (eg. roads, parks and recreational facilities, waste management, water cycle management), state government (eg. ports, electricity infrastructure, schools/universities/TAFEs, hospitals, correctional facilities and community residences) and other infrastructure that may be provided by the private sector (eg. communications infrastructure, oil and gas pipelines, crematoriums and other sporting facilities).

While the Ministerial designation process in the amended Guidelines is quite different from that in the current guidelines, the concerning element is the almost complete **removal of the requirement for a thorough environmental assessment**. The current version of the guidelines includes a requirement for a draft environmental assessment that is subject to public notification and then finalised by including the results of consultation. By contrast, the proposed new process required consultation to occur with material that merely 'acknowledges' certain impacts and how they will be managed. While it is not at all clear what such 'acknowledgement' will involve, it certainly seems to fall considerably short of the comprehensive assessment of environmental impacts, and how they may be avoided, mitigated and offset, that is required under the current process.

Given that the designation process may be the only assessment such infrastructure will undergo (with the exception of the technical assessment of building works), it is very important that the assessment be comprehensive and that it thoroughly consider whether such impacts are acceptable and how they can be avoided, minimised or offset. Such impacts will include not only environmental impacts (such as on habitat for native species and water quality in our water courses) but also impacts on homes, schools and businesses in the surrounding area (including traffic impacts and noise impacts).

We would also suggest that the overview document published by the department[6] understates the scale of the proposed changes in ways that might reasonably be called misleading.

Two issues should also be noted about the timeframes associated with the proposed changes.

Firstly, infrastructure designations remain in effect for an initial 6 years[7] and may be extended for up to another 6 years.[8] As a consequence, poor decision-making now as a result of inadequate assessment of impacts on the environment and the community, could permit inappropriate development to commence up to 12 years into the future. Any infrastructure constructed in this period, without appropriate controls, may of course remain in place for decades.

Secondly, the proposed amendments to the guidelines do not have a sunset date. They will remain in place until amended or repealed. It is therefore misleading of the government to undertake consultation on these changes in a way that creates the impression that these are short-term stimulus measures.

Finally, the proposed amendments to the rules for infrastructure designations should also amended to:

- correct the typographical error in paragraph 1.2 of both Chapter 7 and Chapter 8; and

[6] https://haveyoursay.dsdmip.qld.gov.au/58908/widgets/299847/documents/173540/download
[7] *Planning Act 2016*, s39(1)
[8] *Planning Act 2016*, s39(2)

- change paragraph 4.6 of Chapter 7 to provide that the 20 day consultation period is a minimum, which may be extended in appropriate cases in the consultation strategy (the current drafting would allow the consultation period to be reduced through the consultation strategy).

Proposed solution:

- The proposed amendments to the DA rules in relation to infrastructure designations inappropriately remove the need for a comprehensive environmental assessment of projects that may not otherwise be subject to environmental assessment. Any amendments made to the DA rules in relation to infrastructure designations should, at most, be temporary changes with an explicit expiry date, that are limited in their application to infrastructure proposed by government agencies on brownfield sites.

Planning Regulation 2017

The consultation material indicates that the proposed changes are to facilitate new and expanded uses which *"are aligned to where a particular type of development is reasonably anticipated and compatible with the zone intent."*

The fact that a use is compatible with the intent of a zone, doesn't mean that it will be appropriate in every part of the zone, or in any part of the zone without controls in the form of conditions to ensure that the use can exist harmoniously with residences or businesses in the surrounding area. This might be considered particularly important in zones, such as mixed use zones and centre zones, where a variety of different types of uses are expected to co-exist side by side and often to co-exist with residential development.

It should also be kept in mind that new uses, once established, may remain in place for many years and may create existing lawful use rights. As a consequence, the residents and businesses in the surrounding area may have to live with any poor decisions for years or decades into the future.

Further, the rules that will apply to new or expanded uses established under these provisions must be clear, certain and enforceable.

Finally, the consultation document does not contain any analysis of what the proposed changes will mean for the capacity of Councils to levy infrastructure charges. An infrastructure charges notice can be given only where a development approval is granted,[9] with the result that development which becomes accepted development under the proposed changes will not be required to contribute to the costs of infrastructure. If a Council cannot obtain an infrastructure contribution from the entity which generates the need for infrastructure capacity, it will need to find those funds from other sources, such as from the rates paid by the existing community.

Proposal 1: Changes in tenancy without development approval

This proposal involves allowing changes in tenancies within existing buildings to occur without the need for a development permit if the business is expected in the zone and only minor building work is involved.

Changes to the nature of business operating within a tenancy may be relatively low risk, if the previous and the new business have similar impacts, but will be higher risk in other circumstances. Changing from a shop to a hairdresser with similar business hours may be relatively benign, however, changing from a shop to a bar will result in a considerable change in the offsite impacts experienced by surrounding businesses and residents in terms of noise, operating hours and other impacts.

[9] *Planning Act 2016*, s119(1)(a)

The consultation document describes the proposal as being that *"development approval will not be required for a changing tenancy in the following circumstances:*

- *the new tenancy is consistent with expected uses in the area;*
- *the new tenancy involves the reuse of an existing building and only minor building work is required, or*
- ***any impacts on neighbouring sensitive uses and residential uses can be effectively mitigated."***

The test for whether *"impacts on sensitive and residential uses can be effectively mitigated"* is set out, using some rather confusing drafting (which appears to contain formatting and typographical errors), in the consultation document as follows:

> "• operational hours are:
> • within the range of hours of other lawful uses in the mixed use zone or centre or industry zones; or
> ‣ if not **within the range of hours of other lawful uses** in the mixed use zone or centre or industry zones:
> ‣ activity or patronage is **not expected to peak outside the hours of other lawful uses** in the centre or industry zone; and
> ‣ use of on street car parking or dedicated parking in the centre or industry zone is **not expected to peak outside the hours of other lawful uses** in the mixed use zone, centre or industry zones; and
> ‣ in a neighbourhood centre or local centre **heavy vehicle movements** and emissions do not occur outside the range of hours in a neighbourhood centre zone or local centre zone."

The final bullet point of the above excerpt appears to contain a typographical error, however, we assume it to mean that heavy vehicle movements will not occur outside the range of hours 'of other lawful uses' in the relevant zone. The bullet pointing used in the above excerpt also appears to contain formatting errors, which make the provisions somewhat unclear.

The considerations listed as relevant to mitigating impacts on surrounding uses appear to be limited to the hours of operation of the business. Even the criteria about parking and heavy vehicle movements are limited to the hours in which there will be heavy vehicle movements or demand for parking, and by not the likely number of heavy vehicle movements or number of parking spaces needed by the business (for example, a shop and a restaurant may both have (different) operating hours consistent with expectations of the relevant zone, but their hours of operation will be quite different, peak customer generation will occur at different times and the numbers of people present in the business – and hence the parking demand – may be quite different).

The consultation document doesn't contain any information about whether uses established under these rules would be required to comply with the conditions of any existing development approval applying to the land or whether such uses will be permitted to establish without any enforceable controls on the impacts they may have on the surrounding area (eg. impacts such as late-night noise in residences, unsafe numbers of heavy vehicle movements or heavy vehicle movements occurring at times likely to cause sleep disturbance in surrounding residences).

We also note that the uses proposed to have the benefit of the new provisions includes Home-based businesses,[10] which can include a broad range of activities beyond the home office that would come to mind for most people. For example, in the case *Quinn v Beaudesert Shire Council* [2004] QPEC 033 the applicant was operating a business repairing forklifts from his home, which was causing considerable noise impacts for adjacent residences.

Proposed solution:
The *Planning Act 2016* allows local governments to make temporary local planning instruments (**TLPIs**) which can suspend or otherwise affect the operation of other local planning instruments, such as planning schemes.[11] The process for making a TLPI is established in the 'Minister's rule's' (which is a statutory instrument made under s17 of the Act). A TLPI could be made to establish at least basic controls on such uses to ensure that they do not harm the surrounding area or create unacceptable amenity impacts that will prevent people from enjoying their homes.

We would recommend that, instead of simply allowing uses to establish without any assessment or enforceable limits on the permissible level of impact adjoining land, that the government:

- Draft model TLPIs with basic controls on off-site impacts for each use in each zone; and
- Amend the Minister's rules to create an abbreviated process for local governments to adopt a TLPI that accords with the model TLPI.

Proposal 2: Reduced level of assessment

The second proposal involves reducing the level of assessment that applies to development applications for certain uses in certain zones, in particular by reducing the level of assessment to a level below impact assessment (being the only level at which public notification and a right for community comment is available).

Rights of community participation in planning decisions are not only a key element of a functional democracy, they also result in better and more accountable decision-making. The community has a right to be heard on proposals for development that they may need to live with for years or even decades. Community participation also provides decision-makers with valuable insights that would not otherwise be available to them and result in better decision-making.

There has, over recent years, been a reduction in the number and type of development applications that are subject to impacts assessment and allow the community a right to be heard. A further reduction simply to reduce the time required for a development application does not appear to be warranted.

The consultation document justifies the need for this proposal with the following statement, which we believe to be unsubstantiated and incorrect:

> *"A planning scheme expects and supports certain land uses (e.g. businesses) to occur in appropriate areas set aside for those uses, particularly certain centre, industry and mixed use development zones. These types of businesses are reasonably considered when allocating land to a zone, centre uses in centre zones and industry uses in industry zones for example.* ***However, this is not always reflected in the levels of assessment for these uses in the planning scheme****."*

[10] Defined in schedule 24 of the *Planning Regulation 2017* as: ***home-based business*** means the use of a dwelling or domestic outbuilding on premises for a business activity that is subordinate to the residential use of the premises.
[11] *Planning Act 2016*, s23

Planning schemes were made through the process under the *Planning Act 2016* (or its predecessor) which includes detailed consideration of the balance of zones in the local area, the types of uses that should be able to proceed without the need for development approval, the types of uses which can proceed if they can achieve appropriate outcomes and the types of uses in respect of which more detailed consideration is required. **To suggest that planning schemes have not given detailed consideration to the appropriate level of assessment for all types of uses is, we think, misleading and incorrect and is certainly not supported by any evidence cited in the consultation document.**

Proposed solution:
This proposal should not proceeded. There are good planning reasons for identifying uses as requiring impact assessment and those reasons should be respected.

Proposal 3: Expansion in GFA without development approval

The precise scope of what is proposed here is unclear, however, it appears to be proposed that building works which expand the floor area of an existing building will not require development approval for either existing or new uses if:

- The expansion is a minor expansion (being less than 100m^2 or 10% of the existing building (whichever is lesser));
- The building work is for a use 'expected in the zone'; and
- The building work is not undertaken on, or adjacent to, heritage premises.

The justification for this proposed change appears to be that businesses will now require greater floor area to accommodate social distancing. This may provide some justification for relaxing some requirements such as parking spaces which are often calculated on the basis of GFA. However, it does not appear to justify relaxing other requirements such as boundary set-backs and landscaping. There are also other matters which remain unclear about this proposal, including:

- How existing development permits will apply to businesses wanting to take up this opportunity;
- Whether the test for a minor expansion is intended, as the consultation document suggests, to be based on the GFA of the whole of the building or to the individual tenancies within the building.

We do not believe that there is sufficient information available to properly consider the implications of this proposal, or the potential for mischief.

Proposed solution:

- There is inadequate information to properly consider the proposal in relation to allowing expansions of gross floor area to occur without planning controls and whether any risks could be more appropriately managed through the use of other tools such as TLPIs. Further consultation should be undertaken if and when draft amendments to the *Planning Regulation 2017* have been prepared.

Proposal 4: Ancillary uses

The consultation document for this proposal creates the impression that this proposal is limited to establishing ancillary uses on the same sites as already operating uses (eg. home-based businesses or farm-stays on existing farms). However, the detail of the proposal instead suggests that a list of uses will be subject to the identified (reduced) level of assessment in the specified zones, regardless of whether the use is ancillary to an existing use, an entirely new use or an expanded use.

As discussed above, some of the proposed uses that would become accepted development (for which development approval is not required) under this proposal, have significant potential to create

unacceptable offsite impacts – including some types of home-based business, which would become accepted development in all residential zones under this proposal.

Proposed solution:
Any uses which become subject to a lower level of assessment under this proposal should be limited to ancillary uses and should be limited in scale to uses which have no, or limited, offsite impacts.

Proposal 5: Temporary uses/events

This proposal is to amend the *Planning Regulation 2017* to confirm that temporary uses do not require development approval.

The consultation paper uses the terms 'temporary use' and 'temporary event' interchangeably, which creates uncertainty about the scope of the proposed change. A proposal limited to 'temporary events' may be limited uses similar to school fetes, concerts and markets, while a proposal including all temporary uses may include such uses as borrow pits (see below) or temporary outdoor storage of construction materials or waste.

While it may be appropriate to clarify that the planning regulation does not apply to such events as school fetes, such an approach may not be appropriate for other temporary uses. For example:

- Premises used regularly for markets may create regular traffic and parking problems if improperly located or otherwise not properly regulated. Further, 'market' is a defined use term in the *Planning Regulation 2017* with the result that the regulation of such use will have been considered in the preparation of most planning schemes; and
- Premises used for events such as outdoor concerts with amplified music may create unacceptable impacts even if only used occasionally for such events. The same is true for borrow pits used for occasional extraction of gravel for construction works.

The consultation paper is also silent as to whether the term 'temporary' is intended to encompass uses in effect for a few days, a few weeks or a few months and whether it is intended to apply to one-off events or to regularly recurring events/uses of limited duration.

It is not clear to us what problem this proposal is attempting to solve or why this proposal has been included with measures apparently intended for economic stimulus.

In that regard, we recommend that the Department undertake a thorough policy process to determine whether temporary uses are adequately addressed, at the appropriate local government level, through planning schemes, local laws or in another way.

Proposed solution:

- The proposal in relation to 'temporary uses' has not been adequately explained or justified in the consultation documents and does not appear to have a purpose related to economic stimulus. This proposal should be the subject of further consultation when it has been fully scoped and defined (including in relation to the types of uses it will apply to and the meaning of 'temporary').