



Strong and Sustainable Resource Communities Bill 2016

Anti-Discrimination Commission Queensland

**Submission to the Queensland Parliament
Infrastructure, Planning and Natural Resources Committee**

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Introduction

1. The Anti-Discrimination Commission Queensland is an independent statutory authority established under the Queensland *Anti-Discrimination Act 1991*.
2. The functions of the Commission include promoting an understanding, acceptance, and public discussion of human rights in Queensland, and dealing with complaints alleging contraventions of the *Anti-Discrimination Act 1991* and of reprisal under the *Public Interest Disclosure Act 2010*. Complaints that are not resolved through conciliation can be referred to the Queensland Civil and Administrative Tribunal for hearing and determination.
3. This submission on the Strong and Sustainable Resource Bill 2016 focuses on the proposed amendments to the *Anti-Discrimination Act 1991*.

Background

4. The Strong and Sustainable Resource Communities Bill 2016 is part of a broader policy framework for the management of social impacts of resource projects. The Bill follows the inquiry by the Infrastructure, Planning and Natural Resources Committee (Committee) into fly-in, fly-out and other long distance commuting work practices in regional Queensland. The Committee's report was tabled on 9 October 2016, and contains 19 recommendations.
5. A fundamental recommendation of the Committee's inquiry was for the government to consider amending the *Anti-Discrimination Act 1991* to include location as a prohibited ground of discrimination. The Committee considered that this was one of the ways to facilitate choice

for local people without making retrospective amendments and creating sovereign risk.¹ Recommendation 16 provides:

The committee recommends the government amend the *Anti-Discrimination Act 1991* to include location as a prohibited ground for discrimination with the intent of ensuring all workers are provided a choice of where they live for work.

6. The recommendation was the focus of the Committee's media release about its report, stating that it recommended changes to the anti-discrimination legislation to stop local workers being discriminated against on the basis of where they live for work, and noting it was concerned about some resource companies only sourcing workers from Brisbane or Cairns and was determined to find a solution to manage the impacts of non-resident workforces.
7. Following release of the report, the Commission was consulted about the impact of the recommendation, and how the policy objective might best be achieved. The Commission was also consulted throughout the process of developing and drafting the Bill. Feedback provided by the Commission was considered respectfully, and suggestions were discussed in a productive and collegiate manner. The comprehensive and collaborative consultation process has produced a Bill that the Commission considers reflects the policy objectives of the government, while being workable for the Commission to administer. The Commission commends the Office of the Coordinator-General and the Department of Justice and Attorney-General on this achievement and on the way the consultation was conducted.

About the Commission's complaint process

8. The Queensland *Anti-Discrimination Act 1991* was enacted in recognition of international human rights instruments, and to extend Commonwealth human rights legislation. One of the purposes of the Act is to promote equality of opportunity for everyone and protect them from

¹ Infrastructure, Planning and Natural Resources Committee, Queensland Parliament, *Inquiry into fly-in, fly-out and other long distance work practices in regional Queensland* (2015) iii.

unlawful discrimination and other objectionable conduct. The Act provides a mechanism for seeking redress and adjudication of alleged breaches of the human rights that are protected by the legislation.

9. The first step in remedying a breach of the Act² is for a complaint to be made to the Commission. The complaint must be in writing, but need not be a formal document like a court document. If a complaint is accepted, the Commission's function is to try to resolve the complaint through conciliation. The parties will, in most cases, be directed to participate in a conciliation conference, where a conciliator will facilitate a discussion of the dispute and provide information about the law and possible outcomes. If a complaint is not resolved through conciliation, it may be referred to a tribunal to be heard and decided.

Discrimination of local residents

10. The provisions of the Bill amending the *Anti-Discrimination Act 1991* apply to large resource projects that have received, since 30 June 2009, an environmental impact statement evaluation report under either the *State Development and Public Works Organisation Act 1971* or the *Environmental Protection Act 1994*. The object of the provisions is to protect residents of nearby regional communities from being excluded from working on the project, and to enable fly-in fly-out workers to move into the local community if they choose, without losing their job on the project.
11. The Bill would introduce three new types of unlawful discrimination:
 - (a) disadvantaging a local resident in a recruitment process;
 - (b) not offering work to a person because the person is a local resident; and
 - (c) dismissing a worker because the worker is or becomes a local resident and chooses to travel to the project other than as a fly-in fly-out worker.

² Including reprisals under the *Public Interest Disclosure Act 2010*.

12. It is expected that 'disadvantaged' in relation to a recruitment process, will take its ordinary meaning. The expression 'disadvantage' or 'disadvantaging' is used in some Australian jurisdictions in the definition of indirect discrimination, as an alternative to the proportionality test.³
13. The Macquarie dictionary meaning of 'disadvantage' is:
- noun* 1. absence or deprivation of advantage; any unfavourable circumstance or condition.
 - 2. injury to interest, reputation, credit, profit, etc.; loss. –*verb* (t) (**disadvantaged, disadvantaging**)
 - 3. to subject to disadvantage
14. The three new types of unlawful discrimination are different to the types of discrimination currently prohibited under the *Anti-Discrimination Act*, and to the scheme and framework of discrimination under the *Anti-Discrimination Act*. The scheme and framework of discrimination under the *Anti-Discrimination Act* is to prescribe specific grounds (attributes) upon which discrimination is prohibited in specified areas of activity, with some exemptions for most of those areas, and general exemptions that apply to all areas.⁴ The *Anti-Discrimination Act* prohibits both direct discrimination and indirect discrimination, which are defined in sections 10 and 11 respectively.
15. As the discrimination against local residents provided for in the Bill is unique, it will be provided for in a separate chapter of the *Anti-Discrimination Act* – chapter 5B. To avoid confusion, sections 10 and 11 are expressly excluded.
16. The prohibition on asking for information upon which discrimination might be based⁵ will also be expressly excluded from chapter 5B. This is because an owner, or its agents, may need to enquire where a worker

³ *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination Act 1988* (Tas); *Discrimination Act 1991* (ACT); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

⁴ There are 16 grounds and 10 areas of activity. See the Commission's fact sheet *Discrimination: attributes and areas* available at www.adcq.qld.gov.au/resources/brochures-and-guides/fact-sheets/discrimination-attributes-and-areas.

⁵ *Anti-Discrimination Act 1991*, section 124.

or job applicant resides, in order to comply with the requirement in clause 6 of the Bill not to employ a workforce for the operational phase of the project that comprises 100% fly-in fly-out workers, and the offence provision in clause 8 of the Bill.

Liability

17. The prohibitions in chapter 5B will apply to owners of large resource projects, and if there is a principal contractor for the project, to the principal contractor. The owner is responsible for discrimination by a related body corporate or an agent of either of them, and a principal contractor is responsible for discrimination by a related body corporate or an agent of either of them. Where a principal contractor is taken to have discriminated, the owner and principal contractor are jointly and severally liable. This means that a complaint can be made against an owner, and/or a principal contractor, including where a related body corporate or agent does the discrimination.
18. The definition of 'agent' in the *Anti-Discrimination Act* will apply to the provisions for liability in the proposed new section 131C. 'Agent' is defined as follows:

agent means a person who has actual, implied or ostensible authority to act on behalf of another.
19. As the liability provisions are different to the vicarious liability provided for in section 133 of the *Anti-Discrimination Act*, section 133 is expressly excluded from applying to chapter 5B.

Presumed reason

20. The three types of discrimination provided for in the Bill all arise **because** the person is a local resident, or in the case of a worker, becoming a local resident. This goes to the reason for the disadvantage or conduct.
21. For a claim of disadvantage in a recruitment process because of being a local resident, the nexus between the disadvantage and being a local

resident should be apparent on the facts. For example: an advertisement that limits applications to residents of a nominated city, or a requirement to travel at the applicant's expense for interview to nominated city. If applications have to be uploaded to a website, and the area doesn't have adequate internet coverage, that might be a disadvantage. If interviews are conducted by videoconference and there are no videoconference facilities in the area, that might be a disadvantage.

22. However, it is more difficult to demonstrate a nexus between not being offered work and being a local resident, and between being dismissed because of being or becoming a local resident and not wanting to fly-in and fly-out. The reason for not offering work or dismissing a worker is in the mind of the person making the decision. Unless there is some evidence to link the conduct to the person's residency, the claim will fail.
23. For the Commission to accept a complaint of discrimination, it must set out sufficient details to indicate an alleged contravention.⁶ This means the facts, on their face, must contain the elements of the alleged contravention. In the case of direct discrimination, this involves being able to point to some link between the conduct and the relevant attribute. A mere suspicion or belief is insufficient for the Commission to accept the complaint.
24. In a complaint of direct discrimination in the pre-work area (for example, not being offered a job because of an attribute) the link can sometimes be evidenced by a question asked during recruitment about the attribute, when asking for the information is prohibited under section 124 of the *Anti-Discrimination Act*. This will not assist a job applicant or dismissed worker, because it will not be unlawful to ask where they live.
25. The presumed reason provision in proposed section 131F should have a twofold effect. It will enable the Commission to accept a complaint by a

⁶ *Anti-Discrimination Act 1991*, section 136.

dismissed worker and by an applicant who was not offered work. The parties then have the opportunity to resolve the dispute through the Commission's specialised conciliation process.⁷ The provision should also encourage owners and principal contractors to ensure that their recruitment processes are transparent, and that communication with applicants and dismissed workers is clear in terms of the reasons for the relevant decisions.

26. The Explanatory Notes for the Bill state that the presumed reason provision is justified because employees cannot be in a position to discover the intent of their employer or decision-maker, and the reason why the action is taken is within the knowledge of the person who took the action.
27. The Commission considers the presumed reason provision is appropriate also because of the hybrid nature of the discrimination. It is akin to the general protections discrimination in the *Fair Work Act 2009* (Cth) and in the *Industrial Relations Act 2016*, passed by the Queensland Parliament on 30 November 2016. The presumed reason provision in the Bill is modelled on presumed reason provisions in the *Fair Work Act* and *Industrial Relations Act* for general protections and adverse action.
28. As corporations, owners and principal contractors will be subject to the *Fair Work Act*, and they will be familiar with the general protections and presumed reason provisions.
29. In terms of an owner or principal contractor proving that action was not taken because the applicant or worker is or becomes a local resident, the High Court has clarified that direct testimony of a decision-maker that is accepted as reliable, is capable of discharging the onus.⁸

⁷ Approximately 60% of accepted complaints are resolved through conciliation, with only approximately 25% being referred to the tribunal.

⁸ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32.

Evidentiary aids

30. Proposed section 131G provides that certain matters required to be published by the Coordinator-General are evidence of those matters. The matters relate to the large resource projects that are subject to the prohibitions against discrimination. Those matters are:
- (a) the name of each regional community for the project;
 - (b) the name of the project and the date the operational phase of the project started;
 - (c) the name of the owner of the project;
 - (d) if ownership of the project changes, the name of the new owner, the previous owner and the date of change; and
 - (e) projects nominated by the Coordinator-General to which the prohibitions will apply in the construction phase.
31. The publication of these matters would provide clarity for the public by identifying the projects and communities affected by the requirements and prohibitions in the Bill. This includes people and entities undertaking recruitment for projects, workers, and local residents.
32. It would also assist the Commission in assessing whether a complaint is within the jurisdiction under chapter 5B, and would also streamline processes at the hearing stage in the event a complaint is referred to the tribunal.

Conclusion

33. The Commission's objective has been to ensure the discrimination provisions of the Bill will operate effectively within the statutory scheme of the *Anti-Discrimination Act*, and give effect to the policy objectives of the Bill. The Commission considers the Bill achieves this outcome.