



12 December 2016

Our ref (VK/M&R Committee)

Infrastructure, Planning and Natural Resources Committee
Parliament House
George Street
Brisbane QLD 4000

Attention: Ms Mary Westcott

By Email: ipnrc@parliament.qld.gov.au and mary.westcott@parliament.qld.gov.au

Dear Infrastructure, Planning and Natural Resources Committee members

Strong and Sustainable Resource Communities Bill 2016

I refer to the Infrastructure, Planning and Natural Resources Committee's (the **Committee**) call for submissions on 11 November 2016 in respect of the Strong and Sustainable Resource Communities Bill 2016 (the **SSRC Bill**).

Thank you for the opportunity to comment on the draft.

As you no doubt know, the Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We lead a profession of more than 9,500 members throughout Queensland. The QLS is comprised of several specialist committees who provide policy advice to the QLS Council on law reform and areas of concern to the profession.

Our members have reviewed the SSRC Bill and make the following comments for the Committee's consideration.

A. Retrospective operation of Legislation

The insertion of a new section 131C into the *Anti-Discrimination Act 1991* (Qld) (**AD Act**) creates an obligation on owners of large resource projects approved after 30 June 2009 not to discriminate against residents of nearby regional communities when recruiting workers. The provision applies even where those large resource projects were previously approved as 100% fly-in fly-out (**FIFO**) operations (thereby creating an inconsistency).

The proposed retrospective application of the SSRC Bill undermines the investment made on the basis of existing approvals granted after 30 June 2009 and introduced uncertainty which the Society submits is not justified (for example: the Caval Ridge and Daunia mines and associated infrastructure developed and operated by the BHP Billiton Mitsubishi Alliance).

Retrospective laws imposing obligations and creating offences (particularly when these are also on a strict liability basis) make the law less reliable and less certain and increase

investment risk. This is a breach of the fundamental legislative principle in section 4(3)(g) of the *Legislative Standards Act 1992*, which provides that legislation should not adversely affect rights and liberties, or impose obligations, retrospectively.

The Society also notes that the SSRC Bill does not include an interim period to enable any transition measures to be implemented in a reasonable and lawful way.

B. Residence as a ground of “discrimination”

From a policy perspective, the SSRC Bill confuses two significantly different issues: (1) community protection, and (2) protection and preservation of an individual’s human rights. The latter is dealt with in anti-discrimination legislation including the AD Act.

The language of “discrimination” in the context of the proposed section 131C to be inserted in the AD Act is not appropriate because the other kinds of conduct dealt with in the AD Act are concerned with discrimination by reason of characteristics of a person which are immutable, or as to which they have a fundamental right (e.g. race, gender, age or religious belief).

Given that the driving considerations behind the use of 100% FIFO are largely commercial, and considering the fact that a person has a choice about where they reside, it is difficult to treat the new provisions as being concerned with discrimination in the same sense. By confusing these two issues, the SSRC Bill has inherent difficulties in how it is to be interpreted and applied by Government and industry alike.

C. Coordinator-General’s power to state conditions is too broad

Section 11 of the SSRC Bill contemplates that the Coordinator-General may state conditions to “*manage the social impact of large resource projects generally*”. This conditioning power is not subject to any specific limitation and the Society is of the view that a power which is not constrained by guideline will be too broad and impossible for Government and industry alike to appropriately manage and comply with. The Society also notes that the existing powers of the Coordinator-General in administering the *State Development and Public Works Organisation Act 1971* are wide-ranging, and relate to the planning, delivery and coordination of large-scale infrastructure projects. Section 11(4) of the SSRC Bill also appears to remove the ordinary appeals process.

The objects of the SSRC Bill do not provide any guidance on this issue given that they do not only relate to encouraging employment of people from nearby regional communities, rather ensuring that residents “benefit from the operation of the projects”.¹

This framework is uncertain and has the potential to significantly impact investment opportunities for the State. If the broad Coordinator-General power is to remain, the Society suggests that Government and industry will benefit from further conversation to gain clarity for stakeholders, and potentially also preparing a statutory guideline.

D. Joint and Several Liability

The SSRC Bill introduces the concept of joint and several liability for the owner and principal contractor in relation to discrimination offences under the SSRC Bill (the proposed new

¹ Part 1, clause 3 of the ‘Strong and Sustainable Resource Communities Bill 2016’, Explanatory Notes, page 7

section 131C(6) of the AD Act). It is not appropriate for joint and several liability to be imposed through legislation and stands to unsettle existing contractual relationships between commercial counterparties.

E. Reverse onus in relation to discrimination in proposed section 131F of the AD Act

The addition of a reverse onus of proof in relation to discrimination in proposed section 131F of the AD Act is unworkable.

The Society considers that removing the presumption of innocence is unjust. It is a departure from well-established rule of law principles and must be thoroughly and rigorously justified, if used. That has not occurred here.

The Society has a fundamental objection to the reversal of the onus of proof in prosecution and processes that can lead to punitive outcomes. The Society has made this point clearly in our submission relating to the proposed Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016, which we note were subsequently not passed by Parliament.

The coupling of joint and several liability with respect to the actions of principal contractors, owner's liability in respect of agents and a reverse onus of proof interferes with the practicalities and necessities of commercial and contractual relationships.

The proposed section 131F(1)(a) as currently drafted is particularly wide and the Society is concerned may lead to frivolous and unsubstantiated claims. The Society is also concerned at the wide scope of the proposed section 131F(2), which states that *'it is presumed the action in subsection (1)(a) or (b) was taken for the alleged reason, unless the respondent proves otherwise'* - but offers insufficient guidance as to the degree of proof that is required.

Further, respondents to an action will not be in a position to discharge the reverse onus when it is not the party making the relevant decision. The respondent in this situation will not be privy to the knowledge or intent of relevant decision makers. The Society suggests additional consultation in respect developing a thorough and rigorous guideline as to what reasonable steps a respondent is expected to take, including in relation to monitoring and compliance, to ensure that they will not be exposed.

F. Absence of a reasonable steps defence in the discrimination provisions

Further to our comments in E above, the absence of a reasonable steps defence is another element that makes the SSRC Bill unworkable in its current form. The SSRC Bill will require an operating company to have and strictly enforce strong controls with its principal contractors and agents to ensure against the introduction of an unlawful reason into decisions to terminate the employment of an existing worker who ceases to be a FIFO worker, or not to offer work to a candidate who resides in the nearby regional community, and to ensure that the principal contractor or agent keeps detailed and comprehensive records so as to record the reasons for any such decision.

This is unworkable because, under the SSRC Bill, if a principal contractor or agent was to breach the provisions, the owner would still be found liable regardless of having exhausted all possible steps to prevent the breach, and despite the fact that such a breach may be completely outside the owner's control. It would be prudent and consistent with the remainder of the AD Act provisions to introduce a reasonable steps defence to prevent any absurd outcomes.

The Society would welcome further consultation on the issues raised in this letter and on the SSRC Bill more generally. Thank you again for the opportunity to comment on the draft, and for the Committee's consideration of the Society's feedback.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Vanessa Krulin [REDACTED]

Yours faithfully

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Mr Bill Potts
President