QUEENSLAND resources COUNCIL

Working together for a **shared future**

9 November 2012

Dr Kathy Munro
Research Director
State Development, Infrastructure and Industry Committee
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Dear Dr Munro

Thank you for the opportunity to comment on the *Economic Development Bill 2012* ('the Bill'). The Queensland Resources Council ('the QRC') offers separate comments regarding the proposed amendments of the *Environmental Protection Act 1994* (EP Act) (see page 2) and the *State Development and Public Works Organisation Act 1971* (SDPWO Act) (see page 6).

The QRC is the peak representative organisation of the Queensland minerals and energy sector. QRC's membership encompasses exploration, production, and processing companies, energy production and associated service companies. The QRC works on behalf of members to ensure Queensland's resources are developed profitably and competitively, in a socially and environmentally sustainable way.

Thank you again for the opportunity to comment on the proposed amendments in the *Economic Development Bill 2012* and the opportunity to appear before the State Development, Infrastructure and Industry Committee, albeit within a very limited timeframe.

Please do not hesitate to contact QRC's Andrew Barger, Director of Resources Policy who can be contacted on 3316 2502 or alternatively via email at andrewb@qrc.org.au

Yours sincerely

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Economic Development Bill 2012

1. Amendment of *Environmental Protection Act 1994*

When introducing the *Economic Development Bill* to Parliament, the Deputy Premier explained that the amendments to the *Environmental Protection Act 1994* relating to temporary emissions licences and emergency directions are for the purpose of implementing specific recommendations from the Queensland Floods Commission of Inquiry report. QRC welcomes and supports the implementation of these recommendations.

Background – Flood Commission of Inquiry Recommendations and the Purpose of the Amendments

It is noted that before the last election, both the LNP and the ALP committed to implementation of the recommendations of the Commission. QRC is aware that there has been some recent commentary in the media which indicates misconstruing of the purpose of the amendments. In particular there have been some comments that the provisions go further than was recommended by the Commission or that the provisions are intended as a way of short-cutting normal procedural requirements in order to release legacy water from the Queensland Floods of 2010-12 which is still being held in mine pits in central Queensland. That commentary is completely mistaken. QRC is in a good position to know both the context for the Commission's recommendations and the fact that the provisions are not for the purpose of dealing with legacy water in mines.

Specifically, the relevant Flood Inquiry recommendations can be found in Chapter 13 of the Commission's report, which is the chapter on Mining. Although this does not mean that the Commission intended to restrict her recommendations on these statutory amendment issues to the mining industry, it does mean that the recommendations have a particularly direct link with evidence that was presented to the Commission by QRC and our members about the problems with existing statutory mechanisms for dealing with a natural disaster. The Commission accepted that evidence and at section 13.5.4 of her report she described the 2010-11 use of the existing transitional environmental program (TEP) to deal with temporary discharges as 'Gilbertian'. In her recommendations to fix that situation, she left open to the State Government whether it would amend the existing TEP provisions so as to cover temporary discharges during or in anticipation of a disaster, or whether to adopt some other regulatory mechanism. The current government has made a legitimate choice to adopt another regulatory mechanism in the form of temporary emissions licences (TEL).

In addition, some of the recent commentary in the media has been mistaken in suggesting that the purpose of the new TEL is to allow some kind of procedural short-cut to deal with the legacy water that is still being held in mine pits following the 2010-12 floods and rainfall events. There is still floodwater in mine pits and it is certainly not a sensible option just to leave it there to keep accumulating in time for the next flood. The State has long ago accepted QRC's recommendation that the way to deal with this water is through the normal environmental authority conditions process. In fact, the Department of Environment and Heritage Protection (DEHP) is already working with various individual mines on the practical options for dealing with accumulated flood water from 2010-12, depending on their individual circumstances, such as the quality of the water, whether it can be used for other purposes, location etc.

Detailed submissions
Notwithstanding QRC's support in principle for the new TEL, there are various drafting errors and unintended consequences within the TEL provisions of the Bill.

QRC was consulted by DEHP about the proposed provisions before the Bill went to Parliament and we raised those concerns then. Although we did not receive a response from DEHP before the Bill was introduced to Parliament, we have subsequently received a response, which has been very helpful with understanding how the various unintended consequences have arisen.

We have set out our concerns below in approximate order of priority, rather than the same order as the sections in the Bill.

The jurisdiction to grant TELs should not be linked to lack of foresight - Section 357A
Section 357A currently restricts the jurisdiction to grant TELs to events '*that were not foreseen'* when conditions were imposed. QRC has a serious concern that a definition which relies on an assumption that events such as natural disasters must have been not foreseen would have fairly obvious unintended consequences during the EIS process and conditioning process for projects, so as to avoid creating later evidentiary grounds for DEHP being prevented from having jurisdiction to grant TELs if a natural disaster occurs.

It is normal for the EIS process (for resources projects) and the development application process (for other projects) to include modelling and consider impacts in scenarios which are reasonably unlikely to occur during the life of the project but where, if the events occurred, there would be a moderate or high hazard for some reason. In practice, conditions for normal operations have not tended to be based on such unlikely but possible disaster scenarios, unless there is a particularly high hazard notwithstanding the low risk (eg, emergency management conditions for dangerous goods plants and the like). Similarly, we would be concerned if a definitional threshold of failure to foresee an event could lead businesses to avoid putting in place infrastructure, so as not to lose DEHP's jurisdiction to grant a TEL.

There would be numerous options for better definitions of the circumstances triggering a TEL jurisdiction. A good starting point would be to look at the circumstances mentioned by the Floods Commission of Inquiry in Chapter 13, which certainly did not encourage linking natural disasters to lack of foresight. Indeed, the overall thrust of the report was to encourage better planning and foresight. A drafting option that QRC suggested to DEHP during the consultation phase was to look at normal commercial definitions of a *force majeure* event (deleting those types of events which are not intended to be covered).

In passing, QRC also queried the peculiar terminology 'emergent event' and suggested that a more neutral term such as 'applicable event' would be simpler and less likely to create unintended questions of the validity of DEHP's jurisdiction to issue TELs.

Conditions and instruments that can be overridden by an emergency direction
QRC previously raised with DEHP that there is a major existing gap in the Environmental Protection Act 1994 in that there is no provision for emergency directions to override conditions of environmental authorities, development conditions, TEPs, EPOs or (with this Bill) TELs.
To our surprise, after the Bill was introduced, DEHP responded that they did not make this correction because they were under the impression that Section 493A already covers this. Section 493A does <u>not</u> include such a provision.

Section 493A(1) clearly restricts the section only to charges of 'serious or material environmental harm', contravention of a noise standard or a deposit of a contaminant or release of stormwater run-off under Section 440ZG. Section 493(1) does not cover the unrelated offences of non-compliance with a development condition, a condition of an environmental authority, TEP, TEL, site management plan, plan of operations or EPO.

Conditions and instruments that can be overridden by a TEL - Sections 357B and 357G

(a) Overriding environmental authority conditions or development conditions

Section 357B restricts the conditions that can be overridden by a TEL to those that '*relate to the release of a contaminant into the environment'.*

QRC previously raised with DEHP during consultation prior to the introduction of the Bill that QRC's understanding was that the intention was to allow all relevant conditions to be overridden and this might include locations of monitoring points (eg, for health and safety reasons), normal reporting requirements (e.g. if written communication is impossible during the emergency or certain data cannot physically be obtained). QRC asked DEHP which mechanism they would have in mind for a holder to seek if it is not proposed to release anything into the environment beyond normal standards and the only conditions proposed to be overridden temporarily relate to monitoring and reporting requirements (e.g. for health and safety reasons during an event which falls short of the 'emergency directions' provisions). It would obviously be an unintended consequence if the holder and the State have to pretend a need for an increased release of contaminants merely to override temporarily unsafe monitoring requirements.

The first draft of this section was actually slightly more restrictive than the current drafting because it referred to conditions allowing the release, contrasted with the current version which refers to conditions relating to the release. However, the current drafting is still reliant on conditions about release, rather than conditions about procedural requirements that cannot be complied with during an emergency. It is just illogical that the government should be happy to override conditions about release, but not conditions about procedural requirements that cannot be complied with in a disaster. The nature of the conditions overridden should be related to the event, not to whether or not they are about release.

A possible alternative would be for release conditions to be overridden by the TEL and procedural requirements to be overridden by emergency direction, but this would seem to be an overly complex and counter-intuitive way of achieving a simple outcome.

Section 357G(2)(a) and (b) look like it was the government's intent to achieve both of these outcomes under a TEL, but that interpretation is undermined by the more specific restriction remaining in Section 357B.

(b) Transitional environmental programs (TEPs)

QRC raised with DEHP during consultation that there may be situations where a proposed release is inconsistent not only with EA conditions but also with an existing TEP. DEHP responded by inserting Section 357G(2)(c) which includes the ability to override 'a condition of a transitional environmental program'. This does not go quite far enough. TEPs can be approved with or without conditions. Normally, most requirements are included in the TEP itself, rather than in conditions. Section 357G(2)(c) should cover both the TEP and the conditions.

Amendment, transfer or surrender of TELs– Sections 357H and 357J
It is acknowledged that TELs would normally only be for a short period, which is why this issue is a lower priority for QRC than the issues raised above, but the current drafting would still appear to have unintended consequences.

QRC previously raised with DEHP during the consultation period that the criteria for amendments in Section 357J(a) were too restrictive, for example, they do not deal with amendments to correct clerical errors, or where the effects of the release will actually be less than envisaged, or where a TEL is granted in anticipation of an event that does not end up occurring. DEHP responded by including subsection (b) which allows for amendment by agreement. QRC remains concerned that this prevents an application for amendment being made and a process for it to be required to be considered in a timely way, based on the same criteria applicable to an application for a TEL.

Similarly, Section 357H absolutely prohibits surrender or transfer. This just does not make sense. If a transfer of the mine or other business was coincidentally just about to occur at the time the TEL is issued, what approach does DEHP have in mind to deal with that situation? Why not allow transfers to be approved in that situation?

Compulsory amendment of conditions - Sections 73C, 292(2) and 312E(2)
These provisions allow DEHP to use a TEL as an excuse to amend the conditions of an environmental authority or development conditions.

The purpose of TELs is different from TEPs: TEPs involve a program of works to achieve a different environmental standard from the starting point; conversely, the whole purpose of creating TELs as a new instrument was to cover the gap in the legislation where a temporary emission does <u>not</u> involve a program of works and the standard at the end of the TEL is exactly the same as it was before. Accordingly, there is no logical reason why the existence of a TEL should be used as a justification for compulsory amendment of conditions.

The reason why we can be confident that this was the purpose of creating TELs is that the reasoning about the gap in the jurisdiction for TEPs that needed to be filled by either amendment of the TEP provisions or creation of a new regulatory mechanism was explained by the Commission at Section 13.5.4 of their final report.

The reason why QRC has listed this issue as a lower priority is that, given the purpose of TELs, it is illogical to imagine a scenario in which these compulsory amendment provisions could actually be used in practice, but if so, the amendments are simply an increase in greentape.

2. Amendment to the State Development and Public Works Organisation Act

Importance of consultation

QRC is strongly supportive of the broad direction of the reforms to the Coordinator General's regulations and assessment process. The Coordinator General (CG) deals with the largest and most complex project approvals in Queensland and as such the process needs to be both thorough and efficient. In recent years the process has erred on the side of being absolutely thorough at the cost of efficiency. This one-sided assessment has produced uncertainty, project delays and ballooning costs – none of which are in the best interest of Queensland.

The current Coordinator General is to be commended for the vigour with which he has thrown himself into reviewing the Coordinator General's processes in order to strip out redundant and unnecessary processes. However, it needs to be noted that the pace of these reforms has caused some consternation amongst QRC membership. As with all legislative change, many devils lurk in the detail and the risk of unintended consequences can be very high if the development of legislation is not informed by a clear understanding of the projects it will regulate and a careful consideration of all the different regulatory instruments and processes with which the legislation interacts.

QRC submits that given the importance of the *State Development and Public Works Organisation Act 1971* (SDPWO Act) that relying on a one-week review period by a Parliamentary Committee is simply inadequate to do justice to the complexity of the Act.

Further, the range of projects which may be assessed by the Coordinator General is very broad. Looking at the projects currently under assessment, the CG's processes need to be able to encompass coal mines, LNG plants, shipping developments, dams, power stations, wilderness resorts, marinas, water pipelines and coal terminals. QRC is concerned that in trying to avoid some of the mistakes of the past, the regulatory process may be being reformed to address shortcomings which were revealed by non-resource projects. In many cases, these changes may be consequential for resource projects, but in ways that may not immediately be apparent. Once again, the need for close engagement with stakeholders is paramount to avoid these unintended consequences from reforms which try to move too quickly.

QRC is disappointed with the level of consultation with stakeholders on this Bill. It seems that in trying to meet the ambitious target of having the legislation passed before Christmas 2012, consultation with QRC and other stakeholders has had to be jettisoned. This timeframe makes it extremely difficult to consult with our members in a comprehensive way and present the Committee with a detailed briefing and submission.

QRC strongly recommends a number of amendments to the current proposed SDPWO Act amendments, which are set out below (in priority order).

i. Pre-feasibility assessment

Section 285 of the Bill changes the matters the Coordinator General considers before making a declaration (i.e. before the Coordinator-General decides to coordinate an EIS process). If adopted, the new section 27(1)(d) will require the Coordinator General to consider an application from a project proponent which includes "*a pre-feasibility assessment of the project, including how it satisfies an identified need or demand*". The proposed new section 27AB(d) will require the application from the proponent to include "*a separate statement (pre-feasibility assessment) assessing the technical and commercial feasibility of the project."*

QRC understands that the intention of these provisions is to limit proponents with limited financial means or projects of a limited viability from seeking to obtain a declaration from the Coordinator General. It is understood that the intent is to not require detailed financial and commercial information; however, the Bill's drafting does not reflect this intent. QRC suggests that over time these provisions risk being interpreted in a manner which requires the submission of commercially sensitive information. It also seems likely that this information could be available for disclosure through Right to Information processes.

Further, QRC suggests that clarity demands a different label. Particularly in the resource sector, the terms "pre-feasibility assessment" and "commercial feasibility" have very specific technical meanings. This is because a pre-feasibility statement typically involves estimates and forecasts about construction costs, operating costs, future product prices, future revenues, costs of capital, internal rates of return, break-even price levels etc plus accompanying analysis.

It is unlikely that any listed company would be in a position to provide this level of detail to a Government agency as it is highly commercially sensitive. Furthermore, providing such information to Government may trigger disclosure requirements to shareholders and the ASX

Recommendation 1
QRC recommends that the terms "pre-feasibility assessment" and "commercial feasibility" be deleted and that a clear definition be inserted confirming that there will be no requirements to provide estimates and/or forecasts about construction costs, operating costs, future product prices, future revenues, costs of capital, internal rates of return, break-even price levels etc plus accompanying analysis.

If this amendment proceeds as currently drafted, it is reasonably foreseeable that major mining companies will not be able to continue to voluntarily elect or agree to undertake an EIS process under the SDPWO Act. To prevent this occurring, QRC suggests that the viability test needs to provide the Coordinator General with sufficient information to form an opinion as to the capacity of the proponent to complete the EIS process.

Recommendation Two
QRC understands the motivations behind the proposed amendments and QRC recommends that the Coordinator General be provided with the ability to determine whether or not specific information is required, having regard to publicly available information including:

- Whether the company have vested land or infrastructure (or signed take or pay agreements) in the project already
- Whether or not the company is a publicly listed company
- Whether the company is included in a benchmark market indices list in Australia (eg. S&P/ASX100)
- History of the company in terms of the construction and operation of similar projects
- Length of time that the company has been in operation

ii. Assessment of changes to project on CG's own initiative

Section 298 of the Bill inserts a new part 4, div 3A, subdivision 2 which sets out a new procedure for the Coordinator General to use if the Coordinator General wishes to assess a proposed change to the project on his or her own initiative. To date, the Coordinator General

has only been able to assess a project change, after the completion of the EIS process, if the proponent lodges a formal request for change.

The new approach to initiate a change assessment has the potential to cause difficulties in relation to its integration with other legislation. In relation to mining projects, for example, an environmental authority (EA) is typically issued after the EIS is completed. Environmental authorities' deal with ongoing changes to environmental management matters over many years. The proposed new approach could lead to the Coordinator General opening up a matter years after it has been addressed in the EA. Given the prospect of unexpected Coordinator General intervention at any time, proponents would be obliged to consult with the Coordinator General on an additional large number of small project adjustments over the many years of the typical project's life. Not only would this amendment unnecessarily increase regulatory burden on companies but also increase the administrative burden on the office of the Coordinator General and other regulating government agencies.

QRC understands that the intention may have been to have this provision apply to the EIS process. However, as drafted, it is clear that this provision only applies to the post EIS period. The provision refers to section 35 (5) as pre-condition for this new process. Section 35 (5) is the provision under which the Coordinator General issues the notice about the completion of the EIS process, as follows:

> *"35 (5) After completing the report, the Coordinator-General must— (a) give a copy of it to the proponent; and (b) publicly notify the report."*

Recommendation 3
This issue may be suitably resolved if this new procedure was limited to the period between the completion of the EIS process and the substantial start of the project. Sections 35AA and 35KA of the SDPWO Act could then be amended to enable condition changes by agreement after the substantial start (see QRC recommendation 6). Further, instead of referring to 35(5), the provision should refer to the finalisation of the Terms of Reference. This would then allow the Coordinator General to assess changes to the project during the EIS process.

iii. Private Infrastructure Facility Criteria

QRC is not convinced that requiring a sequential process (whereby a PIF would follow the EIS) will not add to the overall timeframe of a complex project. Without an understanding of the practicalities of the new sequential process, QRC is concerned that this may be a significant increase in time taken. However, QRC does support the streamlining of the Private Infrastructure Facility process, to allow the proponent to submit a single application for both the approval of the project and for the CG to compulsorily acquire the land for the facility.

Section 310 of the Bill inserts new criteria for private infrastructure facilities. This new criteria includes that

> *"the project has been declared a coordinated project for which an EIS is required under section 26(1)(a)*

As currently drafted, a Private Infrastructure Facility declaration can only be secured if the project has been assessed through the SDPWO Act EIS process, and not through other similar assessment processes. This seems unnecessarily limiting. QRC suggests there are recent examples of projects where the need for a Private Infrastructure Facility has emerged from an assessment process which was not the CG's EIS. For example, the Surat to Gladstone Pipeline

Project did not undergo a CG EIS process (EP Act approval pathway); however the Surat to Gladstone Gas Pipeline was declared an Infrastructure Facility of Significance (now to be called a Private Infrastructure Facility) in 2010.

Recommendation 4
QRC recommends that the new Private Infrastructure Facility criterion be amended to reflect that the project in question has been subject to an EIS process either under the SDPWO Act or another Act. As a minimum, it is recommended that these provisions be amended to apply to EISs under the *Environmental Protection Act 1994* and the *Sustainable Planning Act 2009*.

The approach taken to designations of land for Community Infrastructure under the *Sustainable Planning Act 2009* provides a potentially useful model that could be mirrored in the SDPWO ACT to give the recommended effect:

> ***207 Matters the Minister must consider before designating land***
> *(1) Before designating land, the Minister must be satisfied that, for the development the subject of the proposed designation— (a) adequate environmental assessment has been carried out; and*
> *(b) in carrying out environmental assessment under paragraph (a), there was adequate public consultation; and*
> *(c) adequate account has been taken of issues raised during the public consultation; and*
> *…*
> *(3) For subsection (1), there has been adequate environmental assessment and public consultation in carrying out environmental assessment if—*
> *(a) the assessment and consultation has been carried out as required by guidelines made by the chief executive under section 760 for assessing the impacts of the development; or*
> *(b) the processes under chapter 6, part 4 and part 5, division 2, have been completed for a development application for the community infrastructure to which the designation relates; or*
> *(c) the process under chapter 9, part 2, division 2, has been completed for an EIS for development for the community infrastructure;*
> *…*
> *(f) the coordinator-general has, under the State Development and Public Works Organisation Act 1971, section 35, prepared a report evaluating an EIS for, or including, development for the community infrastructure; or*
> *(g) the process under the Environmental Protection Act, chapter 3, part 1 has been completed for an EIS for development for the community infrastructure.*

iv. Prescribed Projects

It is understood that the Coordinator General intends to make more frequent use of the prescribed projects process, based on section 76(E) of the SDPWO Act, to enable better coordination and efficient delivery of post EIS approvals. Unfortunately this provision currently only relates to Sustainable Planning Act development approvals. As a result, it will have limited benefits for resources projects off tenure but will also not assist with other approvals including but not limited to:

- Environmental Authorities processed under the *Environmental Protection Act 1994*
- Water Licences and Riverine Protection Permits processed under the *Water Act 2000*

- Vegetation clearing approvals processed under the *Vegetation Management Act 1999*
- Fishery approvals (eg. Fishway barrier approvals) processed under the *Fisheries Act 1994*
- Strategic Cropping land approvals under the *Strategic Cropping Act 2011*
- Easements processed under the *Land Title Act 1994*
- Ancillary Work and Encroachment Approval processed under the *Transport Infrastructure Act 1994*

Recommendation 5
QRC recommends that these provisions be amended so that the provisions apply to all statutory approvals required.

Furthermore QRC would see great benefit for further amendment to the Bill to enable projects to be declared coordinated projects and prescribed projects at the same time. This would streamline processes by eliminating unnecessary double up.

Required amendments to section 35AA and section 35KA of the SDPWO Act
QRC requests a further two amendments to the SDPWO Act which are consistent with the streamlining ethos of the *Economic Development Bill.* The changes would improve the efficiency of post EIS activities and conditions compliance administration (for both the Coordinator General's office and proponents).

QRC's suggestions follows aspects of the relevant approach used in the *Environment Protection Act 1994* (refer to sections 292 and 300 of that Act) and uses concepts already in the SDPWO Act e.g. "substantial commencement" (although the term "substantial start" is currently used elsewhere) and "necessary or desirable" is used elsewhere in both the SDPWO Act and the *Environment Protection Act 1994*.

A reading of the 2005 explanatory notes that accompanied the introduction of the Change Report provisions into the SDPWO Act suggests that the intention of the new "project change" provisions back then was to deal with pre-construction scope changes. The above proposal would resolve a key missing element in the SDPWO Act in relation to the administration of post-construction start condition changes.

Recommendation 6
The proposal is specifically to amend sections 35 AA (1) and 35KA (1) of the SDPWO Act.

The subsections (Amendment of Coordinator General Report/ Change Report) are as follows:

- 35 AA (1): The Coordinator-General may amend the report for the EIS for the project if the amendment is to correct a clerical error.
- S35KA (1): The Coordinator-General may amend the Change Report if the amendment is to correct a clerical error.

Worthwhile amendments could be along the lines of the following.

- 35 AA (1): *The Coordinator-General may amend the report for the EIS for the project if the amendment is to:*

a) correct a clerical error, or
b) amend the conditions for the project by agreement with the proponent after the project has been substantially commenced and
i. at least one audit of compliance with conditions has been completed in accordance with conditions established by the report for the EIS or a Change Report and
i. the proponent submits a written request for amendments to conditions which also contains supporting reasons for the requested amendments
ii. in the Coordinator General's opinion, the proposed amendments are necessary or desirable having regard to the reasons contained in the written request and to the outcomes of one or more compliance audits

- 35 KA (1): *The Coordinator-General may amend a change report if the amendment is to:*

a) correct a clerical error, or
b) amend the conditions for the project by agreement with the proponent after the project has been substantially commenced and
i. at least one audit of compliance with conditions has been completed in accordance with conditions established by the report for the EIS or a Change Report and
ii. the proponent submits a written request for amendments to conditions which also contains supporting reasons for the requested amendments
iii. in the Coordinator General's opinion, the proposed amendments are necessary or desirable having regard to the reasons contained in the written request and to the outcomes of one or more compliance audits.

Queensland Resources Council
9 November 2012