Submission No. 015
17 January 2014
11.1.14

16 January 2014

The Research Director
State Development, Infrastructure and Industry Committee
Parliament House
George Street
BRISBANE QLD 4000
By email: sdiic@parliament.qld.gov.au

Dear committee and staff,

Re: Regional Planning Interests Bill 2013

I have some comments and concerns in relation to the Regional Planning Interests Bill 2013 (the Bill) that I wish to raise for your consideration. I have experience as a resident and farmer and grazier on the Darling Downs and also have experience in dealing with a resource company and the threats it has posed for us. Most of my comments below relate to matters relating to protecting agricultural land from incompatible resource developments. However, I also appreciate the need to protect both communities and environmental resources from adverse resource developments and support measures to achieve this.

Certainty and discretion

I am very concerned about repealing the Strategic Cropping Land Act when the Regional Planning Interests Bill 2013 doesn't seem to provide sufficient certainty about the protection of good agricultural land from mining and resource activities. This is particularly the case as the specific regulations the Bill refers to have not been made available to consider and it is not clear when they would be in force or what impact they would have. Clearly it is imperative that the regulations set strict criteria to ensure that good agricultural land, water resources, strategic cropping land and other regional priorities are protected from adverse impacts from resource activities. It would be very concerning to repeal the Strategic Cropping Land Act before stringent regulations are in place under the new Regional Planning Interests Act to ensure that the relevant land is sufficiently protected.

It is also concerning that the Bill seems to offer a lot of discretion as to whether resource activities could be granted authorities to adversely impact on regional interests or strategic cropping land. The criteria for the decision in s49, to the effect that the Chief Executive simply "must consider" "the extent of the expected impact… on the area of regional interest… (and) any criteria for the decision prescribed under a regulation…… (and submissions and assessing agencies advice and) any other matter the Chief Executive considers relevant", does not seem to provide adequate certainty or even ensure sufficient weight is given to regional interests. It is concerning that even if a resource proposal would adversely impact on regional interest and / or fail to meet the criteria prescribed under the regulation that it could still be approved.

General limitations to land protection

It is very concerning that Priority Agricultural Areas (PAAs) are only protected at all if they are used for a designated Priority Agricultural Land Use (PALU). This risks resource companies simply engaging in contracts and changing land uses to avoid this legislation. Clearly this would be adverse to regional interests. PAAs should be protected from adverse impacts from resource developments regardless of who owns the land or what sort of use (particularly rural or community use) it is currently used for.

The requirement for PAAs to be used for PALUs also offers no protection to land that has the capacity to be highly productive but for whatever reason might not currently be used for the narrowly defined PALU. This is particularly concerning as under the Darling Downs Regional Plan's definition ("a land use included in class 3.3, 3.4, 3.5, 4 or 5.1 under the Australian Land Use and Management Classification Version 7, May 2010 published by the Department of Agriculture, Fisheries and Forestry ABARES, Australian Government") it seems that even fodder crops and land rotated out of grain cropping would not seem to qualify. For example, according to 3.3 land used in rotation (e.g. cropping and grazing) is excluded if it is not in the cropping phase and land used for cropping is excluded if it is harvested by animals. It also excludes improved pastures, dairies, beef finishing and backgrounding operations and many other valuable enterprises that also exist on highly fertile land. Not only aren't these enterprises recognised and protected for their own merit but the highly fertile land they utilise (which might at other times be available for cropping) is not protected for future use. [1] This is contrary to the government's stated intentions of increasing agricultural production and of protecting agricultural resources for the future and to ensure sustainability.[2]

The retention of s8(1)b has merit and it is hoped that it is put to good use when appropriate. However, it alone does not have the capacity to overcome the deficiencies outlined above, particularly the requirement for land to be used for a PALU. This ought to be addressed.

---

[1] If the Australian Land Use and Management Classification Version 7, May 2010 published by the Department of Agriculture, Fisheries and Forestry ABARES, Australian Government is still considered the most appropriate means to classify land uses for this planning purpose, then as a minimum classification 3.2 should also be included, although I have concerns about its requirement for there to be more than 50% exotic species. Some native species are increasingly appreciated for their productivity in particular seasonal conditions and are a highly prized component of many pastures.
Also they are given some environmental protection in some situations (though this might not stop them being mined). Surely the valuable production should be protected regardless of the arbitrary and potentially out-dated preference for "exotic" species.

Unfortunately in the Australian Land Use and Management Classification Version 7, there seems to be a gap between 3.2 (>50% exotic) and 2.1 predominantly native but also "limited or no deliberate attempt at pasture modification". Surely there is an important place for the improved and highly productive pastures which utilise a high proportion of native pastures e.g. legumes pasture-cropped into pastures including a high portion of native bluegrass and other valuable natives.
As well as the fact that much of the highly productive land might not currently meet the PALU criteria (and yet is important for future production) for a range of reasons (e.g. management, markets, profitability, rotation, etc) it should be recognized that grazing can be more profitable and locally beneficial than cropping some times and also facilitates dairy and beef industries and allows co-existence with nature refuges etc.

Farmers should not be prohibited from moving between land uses. It is important that they retain this right to adapt as they deem appropriate or required. However, any policy requirement to actively crop land to protect it from mining might have some adverse consequences e.g. disruption to rotational management, further decline in the Queensland dairy industry etc.

[2] For example: "Only the LNP will stand up for locals and protect our very best farming land that can sustainably produce food and fibre for future generations. We will protect farm communities from being dug up for mining". Frecklington Press Release "Frecklington says no to Acland stage 3". Other members of the government also made similar statements. See for example Tim Nicholls statement headed "Only the LNP can restore balance on resource development".

The ‘co-existence’ idea in the regional plan is a further concern in relation to whether the Bill will actually succeed in protecting good agricultural land from resource developments and provide the certainty necessary to encourage investment in agricultural lands and businesses. It is essential that any regulations and / or criteria underpinning the Regional Planning Interests Act are sufficiently tight and wide reaching to protect the agricultural land from resource developments. To have PALUs in a PAA still required to ‘co-exist’ with something as destructive as an open cut coal mine would make an absolute mockery of the intent of the Act. Any ‘co-existence’ forced on landholders is of concern and it is imperative that if such things are required in some circumstances then the criteria must thoroughly protect the agricultural interests as well as people’s wellbeing. Farms aren’t just areas of agricultural production; they are also people’s homes, work places, passions, investments and heritage.

The opportunity for a broader definition of a PALUs under 8(3)b is also important in this regard. This allows the state to offer better consideration and protection of some rural land uses without having to amend each individual regional plan (given the timeframe and other restrictions to using this process to rapidly achieve State interests).

The specific inclusion of “Strategic Cropping Area” as an area of regional interest is important and appropriate, even in areas where Regional Plans have been developed. It is imperative that the specific protection of the “strategic cropping area” remains in this Act. Its definition is also appropriate in focusing on the suitability of the land rather than just land currently engaged in particular uses. It is hoped that this will remain and that the “criteria prescribed under a regulation” that it refers to will be broad enough and adequate to capture all the relevant land that has the capacity to be relatively highly productive for agriculture in the general sense of the word. It is also hoped that some of the loopholes and exemptions in the Strategic Cropping Land Act will not be carried on in the new regulations and that therefore the new Regional Planning Interests Act might provide better protection of good agricultural land then it had previously.

The inclusion of Priority Living Areas and Strategic Environmental Areas as Regional Interests that should be protected from resource developments is also appropriate.

Compatibility with the Darling Downs Regional Plan

The Darling Downs Regional Plan at least states in relation to State assessment provisions that “where a resource activity is proposed on land being used for a PALU in a mapped PAA then the PALU will be given priority through the application of coexistence criteria.” The Bill ought to at least state that all such regional interests have priority over resource activity. Although regulations and criteria underpinning the Bill might provide details of this in the future, it seems appropriate to this overarching principle to at least be clear in the Bill itself.

In order to achieve the desired regional outcome of the Darling Downs Regional Plan that “Agriculture and resources industries within the Darling Downs region continue to grow with certainty and investor confidence” it is important that the Regional Planning Interests Act goes further to protect good agricultural land. The reference to Strategic Cropping Land in addition to the PAAs is important in achieving this, particularly given the limitations of the PALU requirement and other exemptions, approvals and co-existence possibilities that the draft Bill affords.

Exemptions

The scope of exemptions is concerning and in my opinion, too large, particularly given the latitude for discretion the Bill provides and that the criteria might also allow exemptions and lenient assessment.

S22 relating to the exemption where there is landholder agreement may be well intentioned however I have found that even though people may sign conduct and compensatory agreements or other written agreements without a court order this may often not be 'voluntary' but for example when they feel they have no other choice or they want to avoid ending up in court and the costs and stress that that may involve or that they feel that they will be worse off if they don't sign for a whole range of reasons. Hence, I wonder whether it might be appropriate for landholders to have a new opportunity to sign away or otherwise their agreements to waive any rights to protection under this new Act, particularly where the Act wasn't available at the time when they signed other agreements.

It is unclear to me what the situation is when the resource company is also the landowner. Simply purchasing the land should not allow resource companies to avoid stringent assessment under this or any other acts. The regional priorities and other impacts need to be adequately considered regardless of land ownership particularly as the adverse impacts might last well beyond the land ownership.

The 12 month exemption (s23) must not be allowed to be exploited by reducing large projects to many smaller stages. This would be contrary to the intent of the Act and would fail to achieve appropriate outcomes. It is also unclear whether the small scale mining exemption is also necessary or appropriate and whether it might be abused (s25).

The exemption for "pre-existing resource activities" (s24) must not be used to allow expansions of operations that jeopardise any of the regional interests. The definition of an exempt resource activity in s24 does not seem to be adequately restrictive in this regard. The requirement simply of carrying out the activity "on land in the area and in accordance with a resource activity work plan" and having the work plan take effect prior to the land being an area of regional interest did not provide much comfort. I wondered - what date did / does the land become an area of regional interest? Has this date already passed or could resource companies still get their work plans in? Reference to the relevant sections in both the Environmental Protection Act (should this actually be s288 not 287?) and the Mineral Resources Act did not provide sufficient comfort, partly because it seemed that the requirements for the 'resource activity work plan' were quite vague, they could run for up to 5 years and they might even be able to proceed ahead of an Environmental Authority etc so perhaps resource companies could fast track them now. Surely the intent of this exemption was to be tighter than this and to certainly not allow expansion beyond any activities already fully approved.

Process and appeals

There seems to be considerable flexibility about how this process fits with other relevant processes such as the Environmental Impact Statement and assessment (EIS) process, Environmental Authorities (EA) and Mining Lease applications. I fear that this risks confusion and abuse. I fear that if a resource company gains an authority to adversely impact on regional impacts this might prejudice an overall EIS / EA / mining lease decision and lead to an approval where one might not otherwise have seemed merited had the regional interests not already been jeopardised prior to consideration of the EIS.

Such concerns are exacerbated by concerns about not being notified about such applications (as this seems unclear at this stage) and potentially not having appeal rights (because it is unclear how onerous it would be to prove that one is an "affected land owner") and that other people who might be concerned about the wider project may not have rights to join such an appeal. In general, I don't see that the limitations on who can appeal or join an appeal are either appropriate or necessary, particularly given the changes in the Planning and Environment court and the increased likelihood of bearing significant costs.

It is also unclear why submissions have to be published. I am concerned that this might intimidate people from submitting legitimate and worthy submissions. Should it not be similar to the provisions relating to other development applications? Perhaps the submissions should just be made available to the applicant as a matter of course and others through the usual Right to Information processes etc.

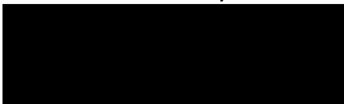
Mitigation
I am skeptical about the use of a mitigation option in these circumstances. The facilitation of a mitigation option must not be allowed to be utilized across the board to allow resource developments to adversely impact on areas of good agricultural land or on any regional interest. Mitigation must only be an option in very limited circumstances and this must only be when specific criteria are met, not just when the resource project proponent would like to offer mitigation to get around the legislation. Further, the actual mitigation proposals must be rigorously scrutinized. For example, using water to irrigate on a mining company's own land and thereby increase the productivity of their own land (whist detrimentally impacting others – through the water not being available to others) is not mitigating the detrimental impact of digging up the good agricultural land. Such things should not be considered a valid mitigation activity. The Bill itself doesn't seem to provide all the detail necessary to assess mitigation proposals. It is hoped that any regulation, criteria or guideline for these will be very stringent.

Penalties
It is essential that the penalties for breach of the Act are significant. This is the case not only due to the impacts but also to be an effective deterrent for large scales corporations who might otherwise make financial decisions to deliberately contravene the Act for financial gain. The capacity under the Bill for individuals to be fined and jailed is also important and appropriate in this regard to ensure accountability and responsibility.

Regulation and Criteria
It is unclear whether opportunities will be available to comment on the regulations and criteria which underpin this Bill in the future. Without wanting to delay the process or cause myself more work, I hope that there will be such opportunities. However, I made comment on the draft PAA co-existence criteria as were then publically available in the Draft Darling Downs Regional Plan in my submission on the draft Darling Downs Regional Plan. I have copied what I think might be the most relevant sections of this below in case they are of assistance to your committee.

Please do not hesitate to contact me if any more information or clarification would be of assistance. I can be contacted via the above contact details.

Yours sincerely



Dr Tanya Plant

Comments on PAA Co-existence criteria as circulated in the Draft Darling Downs Regional Plan Appendix 1

The PAA co-existence criteria are too lenient in several ways and have the capacity to be abused even on land that has a PALU. It is very important that this is clear and tight and exactly achieves the desired goals as this is where the plan will really be tested in terms of its capacity to protect valuable agricultural land.

Even on land having a PALU within PAA, it throws open numerous opportunities for resource companies to demonstrate that there are no "reasonable" alternatives. 'Reasonable' is subject to interpretation - by government officers, resource companies and the courts and may be impacted by legal precedents in different circumstances. I understand that this is an early draft however this loophole seems very lenient and as an absolute minimum should be tightened up to match that in the strategic cropping land legislation as currently in place (prior to any loosening that might occur there in the current review). It should be clear that financial impact on the resource company of not mining land particular lands should not be a factor in determining reasonableness. The wording that there is no reasonable alternative for "the resource activity" may risk actually being interpreted the other way i.e. that that specific mine is the resource activity going ahead and it has no 'reasonable' alternative but to mine that land or close, especially as it may have invested in that land on spec as leverage to encourage an approval.

There are similar definitional issues which provide little comfort elsewhere in the criteria. These include requirements only to ensure that impacts on the PALU is "minimised" (when a company could argue that everything they did was essential and therefore they had "minimised" impacts even though they were going about resource extraction as usual.

The requirement only to not result in a "material" loss of land used by the PALU (criteria 1) is also of concern. I note the footnote's (p59) reference to determining it relative to the specific PALU but I am concerned about how much land can a resource company might destroy without being considered a "material" loss. For example, does it mean that it shouldn't be a significant proportion of the land across Queensland used for that PALU, or does it mean that it shouldn't significantly impact on that particular PALU enterprise at that location?

Criteria 2 in relation to no threat to the continuation of the agricultural land use, sounds good in principle but the fine print doesn't sufficiently support that intent. For example, it still provides that if a resource company can demonstrate that they have "no reasonable alternative than for the resource activity to be located on land being used for a PALU" then they only need to meet some fairly rudimentary criteria. These draft criteria don't even include proving that they won't have a material impact on the continuation of the PALU. Surely the onus should be on the resource company to try to demonstrate this at least.

It is not entirely clear whether all dot points under the criteria have to be achieved or just some of them. Generally I have assumed that all must be achieved (otherwise it is even more lenient). In the case of criteria 2 this seems to allow the resource activity to go along the boundaries of the PALU (without consent) and also elsewhere in the PALU with the landowners consent. Does this mean that a mining company just needs to buy the central bit of a PALU (and thereby give itself consent) to proceed on a PALU area? There are also concerns about how big "along the boundaries" could be. Does it mean that a resource company just needs to include a boundary to get out of requiring consent? Surely consent should at least be required for all impacts on the PALU (as a minimum!) anyway.

One can easily agree that resource activities should not be allowed to impact adversely on overland flow (criteria 3). However, again the “reasonable” loophole may mean that this is not achieved. For example, this must not allow an open cut mine to significant change the watershed or the water flows or the impact on a watercourse or volume or speed of flow. The flooding in recent years has perhaps demonstrated that this issue should be treated much more carefully than it has in the past.

In relation to criteria 4, one can easily agree that there shouldn’t be any material impact on irrigation aquifers however it is not only irrigation aquifers or even aquifers in PALU areas in PAAs that are of concern. Households and livestock often rely on underground water sources too. Sometimes people rely on aquifer water when the supply is too precious and limited to even use for irrigation. I strongly believe that aquifers must be protected even if they are not used for irrigation.

Again, these criteria are generally so lenient that it would seem that they should generally be required as good practice even outside Priority Agricultural Areas as well as in PAAs more generally. More stringent criteria will be required to actually stop the degradation of highly valuable agricultural land.