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25 February 2014
State Development, Infrastructure and Industry Committee
Queensland Parliament
By email only: sdiic@parliament.qld.gov.au

Dear Committee members,

Supplementary submission on the Regional Planning Interests Bill 2013

Thank you for the opportunity to provide a supplementary submission on the Regional Planning Interests Bill 2013 (**RPI Bill**).

Following on from the public hearings the Committee has already held and the issues and comments raised in those hearings, we are still concerned that:

1. The drafting of the sections of the Bill concerning the Regional Interest Authority (**RIA**) overriding an Environmental Authority (**EA**) has a very real potential for inconsistent and unintended policy consequences;
2. All Queenslanders **must have** public interest appeal rights under the Bill as managing land use conflicts inevitably involves weighing the public interest with private interests, even at a property scale. In reality, only a very small percentage of third party interest groups ever use the Court appeal process. The Courts already have very good rules and strong powers for dealing with 'vexatious litigants' seeking to delay or obstruct development without proper grounds;
3. The Bill should not be passed until proper public consultation has occurred on the details of the proposed regulations;
4. The Bill does not consider impacts of resource activities on regional interest areas, where those resource activities do not occur within a regional interest area;
5. Several other concerns have not been raised at the public hearings yet, for example:
    - The purposes of the Bill are ambiguous and conflict with other legislation (e.g. the *Sustainable Planning Act 2009*, under which regional plans are actually made);
    - Unfettered discretion is given to the Chief Executive of the Department of State Development, Infrastructure and Planning (**DSDIP**) to grant an RIA. This is contrary to fundamental legislative principles;

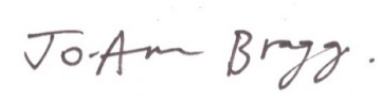
- The State Government has an obligation to give effect to the Intergovernmental Agreement on the Environment and include the principles of the Ecologically Sustainable Development (**ESD**) in the RPI framework;
- The exemptions for not requiring an RIA will likely open the door for numerous activities to be exempted without consideration of the long term, cumulative impacts of the exempted activities to the region and its environment;
- There must be stronger provisions for public access to information (open government) such as the availability of authority information on a public register;
- Application and notification requirements are vague and there should be public notification for RIA applications.

We do not support the passage of the Bill without amendments to address these concerns.

Should you require any further clarification on issues raised in our submission, please contact Rana Koroglu or Evan Hamman of EDO Qld on (07) 3211 4466.

Yours faithfully,

Environmental Defenders Office (Qld)



Jo-Anne Bragg
Principal Solicitor

Environmental Defenders Office (NQ)

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Unintended consequences of the wording of the Bill

We are very concerned following on from public hearings that the Drafting of clause 5 and Part 9 of the RPI Bill will have unintended and inconsistent policy outcomes. Allowing a RIA to override an EA will place the regional planning framework over the Environmental Protection framework and may result in an unforseen and unintended environmental outcome.

At the public hearing in Brisbane, the Deputy Premier's response was that this was not what was intended and the RIA process was intended to add additional level of protection for landholders to protect their land at the property scale.

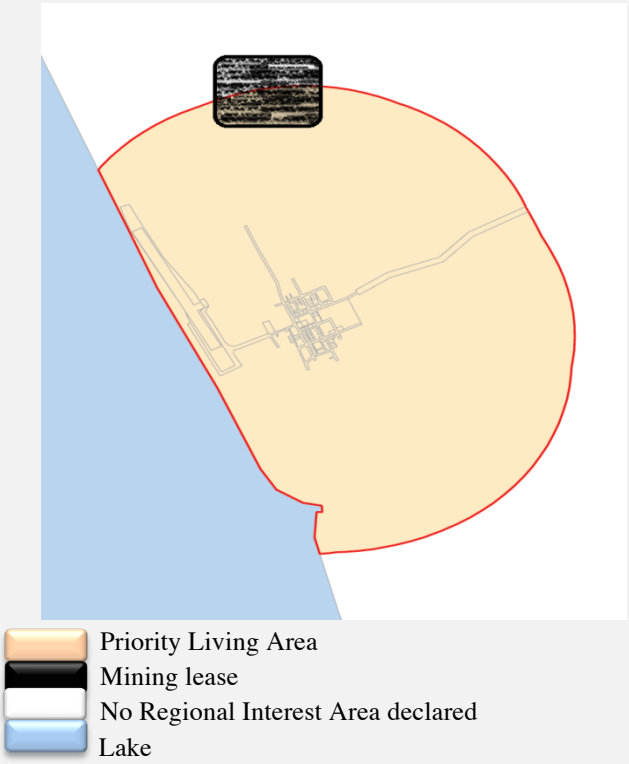
At the hearing, the Deputy Premier stated (at page 51):

> *Mr MULHERIN:*
>
> *Some concerns raised by the environmental groups are that this will undermine the whole legal procedures and protections afforded by the Environmental Protection Act 1994.*
>
> *Mr SEENEY:*
>
> *No. It is actually the other way around. It is actually there to ensure that, if an environmental authority, for example, is granted by the Department of Environment and Heritage Protection but it offends the principles of the regional plan—it impacts on priority agricultural land or on priority agricultural land uses, which are not something the DEHP involves itself with—that environmental authority or some other approval under some other act does not negate the need to ensure that the proposed activity conforms with the regional plan and the legislation that supports it.*

Notwithstanding the Deputy Premier's words, this is not what is reflected in the wording of the Bill. This oversight needs to be rectified to ensure those who participate in objection or appeal processes under the *Sustainable Planning Act 2009* (**SPA**) or the *Environmental Protection Act 1994* (**EP Act**) can have confidence that any conditions or outcomes will remain protected and not undermined by a later authority process.

We have provided the below **example** to illustrate how this might operate.

Example: An RIA will override the EA and reduce environmental protections



An Environmental Authority (EA) application is publically notified for a mine in a Priority Living Area by Tawny Resources Ltd. As objectors to the Land Court application concerning the EA, a Natural Resource Management Group (constituted by 100 members of the local government area), have succeeded in having a new condition added to the EA, which prohibits the operations from impacting directly or indirectly on a nearby lake ('EA Condition').

Concurrent with the EA application process, Tawny Resources Pty Ltd applies for a RIA in the Priority Living Area. The local government assesses the application (cl. 27) and despite strong opposition, recommends its approval with a condition requiring associated infrastructure for the mine water management (cl.51(1)(b)). This infrastructure will impact on the nearby lake.

The chief executive of DSDIP must give effect to the local government's recommendations and does so (cl.50). The recommended condition for new infrastructure - which will impact on the lake and is therefore inconsistent with the EA Condition - is placed on the newly issued RIA and it is issued to Tawny Resources Pty Ltd.

Clause 56(1) RPI Bill requires the RIA condition to prevail to the extent of any inconsistency. Therefore the infrastructure must be built in the sensitive area near the lake without any community objection rights and the EA is amended to remove the EA Condition.

The strong EA Condition has now been overridden.

There must be public interest appeal rights in the Bill

We note references by Committee members[1] and some witnesses to concerns regarding whether broadening the category of appeal rights would introduce vexatious appeals and provide no certainty to industry.

Any suggestion that a broader category of appeal rights – such as those that exist under current environment and planning laws – will open the door for vexatious litigants is without an evidential basis:

- In the **Land Court**, objections concerning appeals regarding environmental authorities amounted to just **1.8%** of applications filed in 2012 to 2013. Objections to environmental authorities represented **2.9 %** of active applications as at 30 June 2013.[2]
- In the **Planning and Environment Court**, less than **0.1%** of development applications are taken to trial by third parties such as concerned individuals, community groups or commercial competitors.[3] The evidence indicates that the majority of the tiny number of appeals that proceed to trial are successful or partially successful in the Planning and Environment Court's judgement.[4] This level of success strongly suggests that there are not a large number of appeals run with little or no merit or for the primary purpose of delaying or obstructing development.

Past parliaments have long recognised that planning and environment matters that come before the Planning and Environment Court are markedly different from private disputes, and involve planning and environment decisions that affect the whole community in which the activity is located, not just a small number of affected parties.

Furthermore, the Planning and Environment Court (in which RIA appeals will be heard) has been recently empowered with a wide discretion to order costs against a party, including a party there for an improper purpose (which includes vexatious litigants). These recent changes increase the costs risks for parties who are not objecting for a genuine purpose. We refer to the evidence of the Queensland Environmental Law Association's witness, a planning lawyer in private practice, which supports this.[5]

[1] For example, State Development Infrastructure and Industry Committee, Public Hearing – Inquiry into the Regional Planning Interests Bill 2013, 12 February 2013, Hon Seath Holswich MP at pages 20 and 37.
[2] Land Court Annual Report 2012-2013, page 12.
[3] For example in 2009 there were approximately 66 merits judgments reported on the Queensland Courts website - 46 of which were applicant appeals and 20 of which were third party appeals. In 2010 there were approximately 39 merits judgments reported on the Queensland Courts website - 33 of which were applicant appeals and 6 of which were third party appeals.
[4] For example 17 of the 39 merits judgments dismissed appeals in 2010.
[5] State Development Infrastructure and Industry Committee, Public Hearing – Inquiry into the Regional Planning Interests Bill 2013, 12 February 2013, Evidence of Mrs Hausler, p.20.

The grant of an RIA means that the government has made a decision that a resource activity can co-exist with an area of regional interest. Regional interest areas are only declared where there is a public interest in conserving the area for future use and it is therefore inconsistent to exclude the public from a merits review.

Public interest legal proceedings in land use planning cases – whereby community members bring proceedings to protect their communities – promotes good decision-making and increases the enforcement of planning laws. It is often the only means available to citizens in challenging the powerful interests the private sector.

Community groups based in regional or urban locations provide support to individuals and landowners in planning and environment appeals. Collective action through a single group is often the only way a rural landowner or concerned community members may engage in the legal processes. We refer to the letter we tabled at the public hearing, which demonstrates how community groups who object to an EA (in that example, Coast and Country) assisted graziers who were often unable to attend Court in Brisbane. Without public appeal provisions, this would not be possible.

Example: Biloela community group

A foreign owned corporation is granted an RIA for an open cut coal mine over a Priority Agricultural Area and strategic cropping land close to Biloela.
The owner of the land has not consented to the land use but cannot afford to challenge the RIA decision or risk a costs order in the P&E Court and chooses not to appeal.

A local community group made up of community members including graziers and cotton farmers believe the risk to the future integrity of the groundwater in those regional interest areas outweighs the economic benefits of the mine. Under the current Bill, the community group would have no standing to appeal the RIA decision.

The Banana Shire Council, who also opposes the mine, also has no standing under the Bill as it is not an assessment manager as the activity is not in a PLA.
The RIA is unchallenged and proceeds to be developed.

If, as the Deputy Premier expressed, there were concerns about "somebody from Melbourne or California"[6] appealing a decision, then this could be remedied through a restriction on appeals to residents or community groups in Queensland or in the relevant Regional Plan. We refer to page 7 of our earlier submissions dated 17 January 2014 for practical options to address this.

[6] State Development Infrastructure and Industry Committee, Public Hearing – Inquiry into the Regional Planning Interests Bill 2013, 12 February 2013, Evidence of the Hon Jeff Seeney, p. 52.

We refer to the question of whether public interest appeals would provide certainty to industry.[7] With respect, this question is misplaced. The Queensland public expects certainty that special areas of regional interest to be preserved for future use without being degraded by temporary resource activities. The certainty of the continuation of the regional interest area is paramount. The public is necessarily part of this process and should be granted appeal rights to ensure such an outcome is achieved.

We reiterate that public interest appeal rights are absolutely necessary for Strategic Environmental Areas, where the tenure may often be the State itself.

Framework legislation needs a publically available policy or draft regulations

All submitters and witnesses agreed that too much important detail is in the regulations, which are not publically available. The Committee noted that releasing draft regulations is traditionally seen to be presumptuous that the Bill would pass. This is correct for 'normal' legislation, which has administrative detail in the regulations and important detail in the Bill (e.g., decision making criteria), however this Bill is 'framework' legislation lacking the requisite detail.

One of the aims of the RPI Bill mentioned by the Deputy Premier is to provide certainty, in particular to those with resource and agricultural interests.[8] However, at this stage the RPI Bill lacks that capacity because for all interest groups, because of its lack of detail and the intent to place that detail in regulations.

Not only does this form of legislation not provide certainty, but it is likely to cause questioning of government decision making if the criteria in the regulations are as broad as the Deputy Premier has indicated they will be.[9] It fails to inform resource companies and landholders in Priority Agricultural Areas of clear co-existence criteria, it also fails to inform of the co-existence criteria for Strategic Environmental Areas, which are of particular importance not only to landholders, but also to traditional owners and the general public.

This information has also been lacking in the Regional Plans, despite the Deputy Premier suggesting that other than people agreeing themselves as to what co-existence is, the outcomes in Regional Plans are not "very clear."[10] This is greatly concerning, as it indicates that the detail may also not find its way into the regulations.

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[7] State Development Infrastructure and Industry Committee, Public Hearing – Inquiry into the Regional Planning Interests Bill 2013, 12 February 2013, Hon. Michael Hart, p. 20.

[8] State Development Infrastructure and Industry Committee, Public Hearing – Inquiry into the Regional Planning Interests Bill 2013, 12 February 2013, Hon. Jeff Seeney, pp. 47-49.

[9] State Development Infrastructure and Industry Committee, Public Hearing – Inquiry into the Regional Planning Interests Bill 2013, 12 February 2013, Hon. Jeff Seeney, pp. 47-49.

[10] State Development Infrastructure and Industry Committee, Public Hearing – Inquiry into the Regional Planning Interests Bill 2013, 12 February 2013, Hon. Jeff Seeney, p. 49.

If there is a perception that releasing draft regulations would be too presumptuous (even for framework legislation), then at the very least the Department ought to publically release a policy that sets out what they intend to be in the regulations, should the Bill pass.

Impacts on Regional Interest Areas not captured by the Bill

We refer to the question[11] regarding how impacts from resource activities occurring outside the regional interest area, but which have significant impacts on the regional interest area, will not be captured by the Bill. A convenient way of demonstrating this concern is by using a hypothetical example with a map.

Figure 1: Resource activity outside a regional interest area impacting on a regional interest area

No Regional Interest Area declared
Regional Interest Area in Regional Plan
Mining lease in Regional Interest Area
Mining lease outside Regional Interest Area

The above figure provides a hypothetical example of the problem. It shows two types of areas: orange is a regional interest area, the dark green is not a regional interest area. There are two mining leases: the red mining lease is not in a regional interest area and the blue mining lease is within a regional interest area. Both leases are expected to have significant impacts on the regional interest area including on the river.

The blue mining lease will require a RIA under the Bill as it is a resource activity in a regional interest area. Even though the mining activity in the red lease area will have significant impacts on the water sources of the regional interest area, the proponent will not

[11] State Development Infrastructure and Industry Committee, Public Hearing – Inquiry into the Regional Planning Interests Bill 2013, 12 February 2013, Hon. Michael Hart, p. 24.

need to apply for a RIA. DSDIP will not be managing the impacts on the regional interest area.

We refer to our concerns on this issue raised in our earlier submissions, namely that the Bill does not do what the objects state: to manage impacts on regional interest areas. Our written submissions of 17 January 2014 at page 12 set out proposed amendments which would address this problem.