Submission No. 29
11.1.19
16 May 2014

QELA
QUEENSLAND ENVIRONMENTAL LAW ASSOCIATION INC.

16 May 2014

The Research Director
State Development, Infrastructure and Industry Committee
Parliament House
George Street
BRISBANE QLD 4000

Email sdiic@parliament.qld.gov.au

Dear Director

Submission about the Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Bill 2014

Thank you for inviting the Queensland Environmental Law Association (**QELA**) to make a submission about the Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Bill 2014 (the **Bill**) to the State Development, Infrastructure and Industry Committee.

QELA is a non-profit, multi disciplinary organisation. Its members include lawyers, town planners and a broad range of consultants who represent and advise a miscellany of participants in the development industry.

Overall, QELA welcomes the intention of the Bill to establish an infrastructure charging framework that is equitable, certain, consistent and transparent.

This submission focuses more specifically on the following aspects of the Bill:

(a) The ability of the chief executive to excuse non-compliance (proposed new section 554A);

(b) When a charge may be levied and recovered (proposed new section 635);

(c) Suspension of the relevant appeal period (proposed new section 644);

(d) The offset or refund requirements (proposed new section 649);

(e) Content of an additional payment condition (proposed new section 651);

(f) Making and deciding conversion applications (proposed new sections 659 and 660);

(g) The obligation to negotiate an infrastructure agreement in good faith (new section 671);

(h) Transitional matters; and

Telephone: 07 3832 4865 • Fax: 07 3839 2239 • Level 5, 149 Wickham Terrace Spring Hill QLD 4000
Email: info@qela.com.au • www.qela.com.au

(i) Administrative matters, including the matters that are be detailed in guidelines.

The power to excuse non compliance

1. Pursuant to proposed new section 554A, the chief executive is given power to excuse non-compliance associated with commencing proceedings in the building and development committee outside the period stipulated under the Act or commencing a proceeding that does not otherwise comply with the requirements under the Act for validly starting a proceeding.

2. In considering whether to excuse any non-compliance for the purposes of this section, the chief executive must be satisfied that the non-compliance will not cause any "substantial injustice" to anyone who would be a party to the committee proceeding.

3. Notwithstanding potential issues with interpreting the phrase "substantial injustice", QELA is concerned that if the chief executive provides a notice stating that the document commencing the proceeding is of no effect because of the noncompliance (having satisfied itself that the non compliance would cause substantial injustice), there is no opportunity for the applicant to rectify the non-compliance.

4. Although the ability to lodge the document within time cannot be retrospectively remedied, if the non compliance is with respect to requirements for the document that are capable of being rectified, QELA notes that section 554A does not suspend time while the chief executive decides the noncompliance. Given the notifications required in section 554A, it is most likely that the time for lodging the document commencing a proceeding will have expired by the time any decision notice about noncompliance is issued.

5. QELA also notes that the application of this section in the event the proceedings are commenced outside the period stipulated is inconsistent with the existing section 557 of the *Sustainable Planning Act 2009* (**SPA**).

6. QELA recommends that consideration be given to an amendment of the Bill to allow an applicant the opportunity to rectify any rectifiable non-compliance associated with the failure to comply with the requirements under the Act for validly starting a proceeding.

7. QELA also recommends that the application of this section be considered in relation to the application of the existing section 557 of SPA and appropriate amendments be made.

When charge may be levied and recovered

8. QELA is concerned that some of the proposed amendments in the Bill fail to address circumstances when an approval, subject to conditions, is issued by the Planning and Environment Court. The Bill proposes to insert a new section 635 in the SPA and new section 99BRCI to the *South-East Queensland Water (Distribution and Retail Restructuring) 2009* (Qld) (**SEQ Water Act**). These sections apply if a local government has given a development approval. They do not provide for the situation in which the Planning and Environment Court approves the development. For example, the local government may have refused a development which then gets appealed to the Planning and Environment Court, where it is approved. The Bill does not make

provision for when an infrastructure charges notice can be issued by the local government in that circumstance.

9. Currently, the SPA at section 648F(3) provides the timing for the provision of an adopted infrastructure charges notice. This section is more broadly drafted than its equivalent provision in the Bill. Rather than limiting the section to applying if a local government has given a development approval, it applies if a notice is given as a result of a development approval and then gives a timeframe if the local government is the assessment manager or otherwise. Currently, development approvals in which the Planning and Environment Court grants the approval is an 'otherwise' situation.

10. QELA acknowledges the existing section 496(3) of the SPA but for clarity recommends that the Bill deal with the circumstances where the Planning and Environment Court grants the approval.

Suspension of relevant appeal period

11. The proposed section 644 enables the recipient of an infrastructure charges notice to suspend the relevant appeal period if more time is needed to make submissions and then withdraw the suspension if it wishes its appeal period to restart. QELA expects that the purpose of proposed section 644(4) is for the situation in which a recipient suspends its relevant appeal period, makes submissions and the local government does not make a decision on those submissions. Given there is no time requirement on the local government in which to consider the submissions, the circumstance may arise in which the recipient requires a withdrawal of the suspension notice in order to restart the relevant appeal period and appeal to the Planning and Environment Court.

12. QELA notes however, that the Bill does not address the situation in which submissions are made during the relevant appeal period and as such the appeal period is not suspended. It is therefore expected that the appeal period continues to run. This has the potential for problems if, for example, a recipient of an infrastructure charges notice makes submissions within the relevant appeal period and as such does not suspend the relevant appeal period. If the relevant appeal period continues to run and the local government does not make a decision about the submissions, but the recipient wishes to commence an appeal, the recipient may give the local government a notice withdrawing the suspension notice but its relevant appeal period has already expired.

13. The recipient may only have a right to appeal if it had suspended its relevant appeal period and can then give the local government a notice withdrawing the suspension notice, thus restarting the relevant appeal period.

14. QELA recommends that consideration be given to an amendment of the Bill to provide for either:

    (a) an automatic suspension the relevant appeal period upon receipt of submissions by the local government; or

    (b) a requirement that the recipient suspend the relevant appeal period if they wish to make submissions.

Offset and refund requirements

15. Proposed new section 649 of the SPA and new section 99BRCT of the SEQ Water Act, require local governments and distributor-retailers to provide offsets and refunds having regard to the cost of infrastructure required to be provided under conditions of approval and applying it to the adopted charge.

16. In practice, proposed new section 637 of the SPA and section 99BRCK of the SEQ Water Act will require local governments and distributer-retailers to state in infrastructure charges notices whether an offset or a refund applies and, if so, details of the offset or refund.

17. QELA has doubts about the ability for local governments or distributor-retailers to estimate the establishment cost for trunk infrastructure within the limited time available before an infrastructure charges notice is required to be given. In circumstances where there are no planned estimates for works the process to obtain estimates can take some time and may require parties to call for tenders or rely on pre-market estimates.

18. QELA has concerns that the requirement could result in:

    (a) doubts about the accuracy of an estimate of the establishment;

    (b) miscalculations of offsets and refunds in circumstances where there is no planned estimate for the works; or

    (c) local governments and distributer-retailers delaying decisions for development applications (the trigger for giving a charges notice) to allow estimates to be obtained.

19. Having regard to the Bill's creation of a new appeal right for an error relating to an offset or refund in an infrastructure charges notice, bringing forward the requirement to identify offsets and refunds in the infrastructure charges notice may burden local governments and distributer-retailers and may lead to delays in the assessment of development applications and additional appeals.

20. QELA recommends that as a minimum, the items to which the offset or refund will be applied are identified in the infrastructure charges notice. While it may be difficult to calculate a specific offset or refund at the time the infrastructure charges notice is issued, it could at least state what the offset or credit is available for, for example, certain open space areas, roads, etc.

Content of additional payment condition

21. The proposed section 651(2)(b) of the SPA is another example of the Bill failing to address circumstances when an approval, subject to conditions, is issued by the Planning and Environment Court. This provision triggers the payment date for an additional payment condition in an approval for a reconfiguration of a lot. The particular wording of this subsection relies on the local government being the entity "imposing the condition" approving the subdivision plan. Where the Planning and Environment Court grants the approval, the Court is the entity which imposes the relevant condition. In such circumstances the particular wording of this provision may not effectively trigger the payment obligation.

22. QELA again recommends for clarity that the Bill be reviewed and amended to provide detail as to what happens in circumstances where the Planning and Environment Court grants the approval.

Conversion Applications

23. According to proposed new section 659, an applicant for a development approval has the ability to apply to the relevant local government to convert non-trunk infrastructure that is the subject of a development condition to trunk infrastructure (a **Conversion Application**).

24. Other than stipulating that the Conversation Application is to be made in writing, the Bill does not provide any detail about what should be included in the Conversion Application, if there are any formal requirements and whether there is a fee for making a Conversion Application.

25. QELA anticipated that the Bill would introduce a provision similar to section 370 in the existing SPA (requirements for permissible change requests) dealing with the form of the application and the materials which must accompany the Conversion Application.

26. In QELA's opinion, the absence of any direction in the Bill in this regard may create doubts as to whether local governments and distributer-retailers can impose fees for Conversion Applications and whether applicants must adopt a standard approach or provide minimum information to support their application.

27. There should be some standardisation of Conversion Applications having regard to the proposed appeal rights which are to accrue under proposed section 478A of the SPA.

28. The uncertainty surrounding Conversion Applications is made more pronounced having regard to the absence of any proposed criteria for Conversion Applications in proposed section 660 of the SPA.

29. According to proposed new section 660(4), a local government may request information to decide the Conversion Application. QELA queries whether it would be more efficient and effective for guidance to be provided in proposed new section 659 with respect to the relevant information that should be provided with a Conversion Application. Further, notice of the decision making criteria for a Conversion Application would assist to guide applicants not only with respect to content requirements for the application, but also with respect to the utility of making a Conversion Application.

30. As any refusal of a Conversion Application is open to challenge by an applicant, QELA anticipates that the absence of the relevant decision criteria will likely be the subject of judicial consideration shortly after the Bill commences.

31. QELA notes that there is the ability for a regulation to prescribe criteria relevant to a decision about a Conversion Application. In QELA's opinion, it is imperative that a regulation does so, in the absence of any criteria in the legislation.

Good Faith Negotiations

32. Proposed new section 671 contains a requirement for the parties to act in good faith in negotiating an infrastructure agreement. It is noted that the SPA does not currently include an equivalent provision.

33. Three examples are provided for subsection (2). It appears that these examples relate to subsection (3), being examples of actions which demonstrate parties are acting in good faith, rather than to subsection (2). QELA suggests that this be reviewed and amended accordingly.

34. QELA notes that the examples contained in proposed new section 671 are not exhaustive and having regard to section 14D of the Acts Interpretation Act 1954, may extend the meaning of the provision.

35. QELA acknowledges that "*the intention of this* [new requirement] *is to encourage open, timely and cost effective negotiation of infrastructure agreements*"[1] however, the new requirement (and accompanying examples) may result in a negotiated infrastructure agreement being challenged due to non-compliance with the proposed obligation to act in good faith.

36. QELA notes the ability for parties to bring declaratory proceedings in the Planning and Environment Court in relation to a matter that should have been done under the SPA[2] which would include negotiating in good faith under the proposed new section. Declaratory proceedings can also be brought in relation to the construction of the SPA.[3] Such proceedings have the potential to result in delayed and more costly negotiations of infrastructure agreements, in contrast to the stated intention of the new section in the Explanatory Notes for the Bill.

Transitional Matters

37. Proposed new section 990 of the SPA and proposed new section 141 of the SEQ Water Act provide for a regulation to make a saving or transitional provision "*necessary…to allow or facilitate the change from the operation of the unamended Act to the operation of the amended Act*", with any such provision expiring one year after the date of commencement.

38. QELA notes that transitional provisions made under these new sections may have retrospective effect from the day of commencement and may therefore present a potential breach of the fundamental legislative principles.

39. QELA suggests any transitional provisions proposed to be made by regulation under these sections be subject to appropriate review prior to commencement to ensure any such provisions do not adversely affect rights and liberties, or impose obligations, retrospectively.

Administrative Matters

40. A number of important matters, such as the requirements for preparing a Local Government Infrastructure Plan and the method for working out the cost of infrastructure the subject of an offset or refund, are to be the subject of guidelines.

---

[1] Page 31 of the Explanatory Notes

[2] Section 456(1)(a) & (7)

[3] Section 456(1)(b) & (7)

41. QELA considers that before the respective guidelines are finalised, that the public be consulted and given the opportunity to make submissions.

42. Given the time constraints, QELA has not had an opportunity to consult with its members to the extent it would have wished and has limited its comments to key issues.

43. In particular, QELA has not had the time to properly consider the implications of the amendments proposed to the *State Development and Public Works Organisation Act 1971* in relation to the assessment and approval of particular coordinated projects under the bilateral agreement between the Queensland and Federal Governments. We note that a draft bilateral agreement was not released until 14 May 2014.

We thank you for the opportunity to make a submission about this Bill. Representatives of QELA would welcome the opportunity to discuss this submission in further detail as required.

Yours faithfully

Troy Webb
President
Queensland Environmental Law Association