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State Development, Infrastructure and Industry Committee
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A submission on the *Sustainable Planning and Other Legislation Amendment Bill 2012* (Qld), with respect to Planning and Environment Court costs

I write to oppose the proposal under the *Sustainable Planning and Other Legislation Amendment Bill 2012* (Qld) to change the costs rule in the Planning and Environment Court. Removal of the 'own costs' rule is contrary to the public interest by effectively denying access to the Court for all but the wealthy and the less wealthy who are prepared to risk bankruptcy. The matters heard in the Planning and Environment Court are those that deeply affect the community, their health and wellbeing, the environment and the conservation and welfare of other species.

The Court has explained the value of the own costs rule:

> "to ensure that citizens are not discouraged from appealing or applying to the Planning and Environment because of fear that a crippling costs order might be made against them. The provision no doubt also recognises the public interest character of some applications to the Planning and Environment Court."[1]

I have read the submission of the Environmental Defenders Office of Queensland and the Environmental Defenders Office of Northern Queensland, and strongly endorse their arguments for maintaining the own costs rule.

I will briefly summarise here why I oppose the proposed change and add a case study to exemplify one type of likely adverse consequence of the change – undermining the capacity of the community to uphold environmental laws when the government fails to do so.

Is there a problem that the proposed change is addressing?

There is no problem with the current system that warrants the change proposed.

The P&E Court already has the capacity to award costs in cases brought for frivolous or vexatious purposes

[1] Court of Appeal in Mudie v Gainriver Pty Ltd (No 2) [2003] 2 Qd R 271

Very few cases go to trial. As outlined in the Queensland EDOs' submission, only about 3% of planning approvals are challenged, more than 90% of which are resolved by mediation. Third party appeals account for less than one-third of matters that make it to trial, ie less 0.1% of planning approvals.

The majority of appeals brought by third parties are successful or partly successful, so achieve a positive outcome for justice and planning in Queensland.

What will be the consequences of the proposed change?

Few members of the community or community groups or councils or state agencies with small budgets will be able to afford the financial risk of taking a case to the Planning and Environment Court. Thus, only the wealthy will be able to afford access.

It is already difficult and costly to take court action. People do not undertake it lightly, as is evident by the very small proportion judged to be vexatious or frivolous. Many have strong public interest grounds.

The proposed change will result in fewer unlawful or poor decisions being challenged and fewer Illegal activities being constrained.

Has the Government sought expert and community views on this change?

I am uncertain whether the Government has sought opinion from legal experts and practitioners and users of the Planning and Environment Court. It has mostly not sought views from the community and community group users of the Court. This is an important change that will have serious adverse consequences for the community. It warrants thorough consideration and consultation with those who will be affected.

A case study of likely adverse consequences

I have brought two successful cases in the Planning and Environment Court, both to constrain large-scale illegal killing of flying-foxes:

- Booth v Frippery Pty Ltd and Ors (won on appeal)[2]
- Booth vs Yardley & Anor[3]

[2] Booth v. Frippery Pty Ltd and Ors [2005] QPEC 95 , Booth v Frippery P/L & Ors [2006] QCA 42, Booth v Frippery P/L & Ors [2006] QCA 74, Booth v Frippery Pty Ltd & Ors [2007] QPEC 99, Frippery Pty Ltd & Ors v Booth (unreported, Queensland Court of Appeal No. 123/08, McMurdo P), Booth v. Frippery Pty Ltd & Ors [2008] QPEC 122, Frippery Pty Ltd v Booth [2008] FCA 514

[3] Booth v. Yardley [2006] QPEC 116, Booth v. Yardley & Anor [2006] QPEC 119, Booth v. Yardley & Anor [2008] QPEC 5, Booth v. Yardley & Anor [2008] QPEC 100

These cases were brought against two fruit-growing businesses on the basis of evidence that each had been using electric grids to harm or kill flying-foxes. Neither had a damage mitigation permit to do so. In each case, I took legal action only after the Environment Department refused to prosecute or seek an injunction to stop the growers unlawfully using their electric grids. In each case the Court accepted the evidence of illegal killing and ordered the growers to dismantle their electric grids.

In the first case, the grower admitted in court to electrocuting tens of thousands of black flying-foxes over many years without authorisation. In the second case, the grower admitted to killing more than 1000 spectacled flying-foxes after the use of electric grids had been banned.

I am far from being a wealthy person. These cases were costly in both time and money to undertake and involved substantial community donations and pro bono support by lawyers and expert witnesses.

Because I won both cases, under the changes proposed I would probably have therefore had my costs reimbursed by the losing parties. On that basis, you might expect that I would welcome a change to the rule. But the cases would not have proceeded at all if I had been at risk of costs because I could not afford it and would have risked losing all my assets and going bankrupt.

Therefore, without the own costs rule it is likely that illegal electrocution of flying-foxes would have continued on these two properties, resulting in the probable harm and death of hundreds of flying-foxes each year.

Protecting the environment and upholding our laws should be open to all Queenslanders not just those who are wealthy.

Carol Booth