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12 October 2012

Erin Pasley
Acting Research Director
State Development, Infrastructure and Industry Committee
Queensland Parliament
Parliament House
Brisbane QLD 4000

By email to sdiic@parliament.qld.gov.au

Dear Ms Pasley,

Re: Amendment of the own costs rule in the Planning and Environment Court by the Sustainable Planning and Other Legislation Amendment Bill 2012

We write in response to the request from the Committee for written submissions by 12 October 2012 on the *Sustainable Planning and Other Legislation Amendment Bill 2012* (the Bill).[1] We thank the Committee for the opportunity to comment on the Bill.

As legal academics we are highly concerned by the proposal in the Bill to amend section 457 of the *Sustainable Planning Act 2009* (SPA) to alter the existing own costs rule in the Planning and Environment Court (the P&E Court).

The proposed amendment of section 457 will alter the own costs rule to provide that costs of a proceeding in the P&E Court are in the discretion of the Court but follow the event unless the Court orders otherwise. If enacted, this amendment will mean that the losing party in a proceeding in the P&E Court will typically pay the winning party's or parties' costs of the proceeding.

In our opinion this proposed amendment will be counter-productive and is unnecessary for the efficient planning and administration of the State. We urge that the own costs rule should remain for proceedings in the P&E Court as currently exists in similar jurisdictions such as the Queensland Civil and Administrative Appeals Tribunal (QCAT).[2]

[1] Available at http://www.parliament.qld.gov.au/en/work-of-committees/committees/SDIIC/inquiries/current-inquiries/05-Sustainable-Planning
[2] Under section 100 of the *Queensland Civil and Administrative Appeals Tribunal Act 2009*.

Counter-productive to change the own costs rule

We support the Government's aims, as expressed by another Committee, for best practice regulation with reference to the principles agreed by COAG in 2007 and as recognized international best practice by the OECD.[3] These principles stated by COAG include "adopting the [regulatory] option that generates the greatest net benefit for the community."[4] The OECD Council's recommendations included "adherence to principles of open government which includes transparency and participation in the regulatory process."[5]

Gunningham, Grabosky and Sinclair's leading text on designing regulatory frameworks identified five core principles for best practice of environmental regulatory design. Of these, the most relevant, principle 4 refers to empowering "participants which are in the best position to act as surrogate regulators".[6] One reason for this principle is to "reduce the drain on scarce regulatory resources and provide greater ownership of environmental issues by industry and the wider community."[7]

The core of SPA and the development assessment system it creates requires balancing private interests to develop land and the wider public interest, ensuring adequate protection of amenity, social values and heritage. Whether or not the parties themselves seek to advance the public interest, proceedings in the P&E Court inherently have a public interest component in promoting better planning and development.

For local governments, community groups, and other individuals concerned about a proposed development, there is often no direct commercial or private benefit conferred by the outcome of proceedings in the P&E Court, only the protection of the public interest in promoting better planning and development. Neighbours have their own private property rights to protect, but there is often a compelling public interest issue at stake. There is strong evidence that the threat of costs being awarded should proceedings be lost is a critical deterrent on such organizations and individuals.[8] The Court of Appeal (per McMurdo P and Atkinson J) recognised this in the context of the own costs rule in the P&E Court in *Mudie v Gainriver Pty Ltd (No 2)* [2003] 2 Qd R 2271 at [34]:

> "It seems likely that one purpose [of] the general rule that each of parties bear their own costs, consistent with the objectives of the Act, is to ensure that citizens are not discouraged from appealing or applying to the Planning and Environment Court because of fear that a crippling costs order might be made against them. The provision no doubt also recognizes the public interest character of some applications in the Planning and Environment Court."

A recent example showing how crippling the costs orders may be against community members if the own costs rule in the P&E Court is removed is *Barnes & Anor v Southern Downs Regional Council*

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[3] Noting the Agriculture, Resources and Environment Committee, *Reducing regulatory burdens for Queensland's agriculture and resource industries – Paper No. 1*, July 2012, available at http://www.parliament.qld.gov.au/documents/committees/AREC/2012/QldARIndustries/IP-120713.pdf

[4] Council of Australian Governments (COAG), *Best Practice Regulation – A Guide for Ministerial Councils and National Standard Setting Bodies* (Department of Finance, Canberra, 2007), pp 4-5, available at http://www.finance.gov.au/obpr/docs/COAG_best_practice_guide_2007.pdf

[5] OECD Council on Regulatory Policy and Governance, *Recommendation of the Council on Regulatory Policy and Governance* (OECD, Paris, 2012), available at http://www.oecd.org/gov/regulatorypolicy/49990817.pdf

[6] Gunningham N, Grabosky P and Sinclair D, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, Oxford, 1998), p 408.

[7] Gunningham, Grabosky and Sinclair, n 6, p 411.

[8] See Boer B, "Legal Aid in Environmental Disputes" (1986) 3 EPLJ 22; McGrath C, "Flying foxes, dams and whales: using federal environmental law in the public interest" (2008) 25 EPLJ 324.

& Ors (No 2) [2011] QPEC 119. In that case two submitters appealed the decision of the Council to approve demolition of heritage buildings built in the 1860s and 1870s in Warwick. Both buildings were listed on the Queensland Heritage Register. The two submitters had no personal or commercial interest in the outcome and merely sought to protect the heritage values of Warwick. They were successful in proceedings in the P&E Court involving three days of preliminary argument and a five-day trial. In the proceedings they were opposed by three parties: the Council, DERM, and the proponent, all of whom were legally represented at trial and all of whom called expert witnesses.

Based on a conservative estimate[9] the costs in the *Barnes* case that would have been awarded against the two community litigants had they been unsuccessful, and had they been ordered to pay the costs of the other parties would have been approximately $240,000.[10] For community litigants who do not have a commercial interest to protect, had the costs rule proposed in the Bill been in force such that costs followed the event, it would have been highly unlikely that the submitters would have appealed to the P&E Court at all and, consequently, the Court would not have upheld the protection of the heritage buildings in question.[11] When assessing the likely effect of a change in the costs rule in the P&E Court, it would be wrong to look at a case like this with hindsight and say, "the submitters won so they would have benefited from a costs follow the event rule". All litigation carries a risk of loss, even strong cases.

In our opinion, changing the costs rule in the P&E Court will have exactly the negative outcome that the Court of Appeal recognised in *Mudie v Gainriver*. It will decrease participation in the regulatory process by neighbours, who have their own private property rights to protect, and others who are concerned about negative public interest outcomes of proposed development. That will be counter-productive for the efficient planning and administration of the State.

Unnecessary to change the own costs rule

Additionally, the proposed amendment of the costs rule in the P&E Court is unnecessary because the existing system is operating efficiently and the Court already has the discretion under the existing section 457 of SPA to award costs where a proceeding has not been legitimately brought.[12]

An indicator that the existing system is already operating efficiently is that the percentage of development applications that lead to proceedings in the P&E Court is very low. Only around 0.5% of the approximately 23,609 development applications a year in Queensland lead to a contested decision in the P&E Court under the current own costs rule (based on 2008-2009, which has the only comprehensive data that is publicly available).[13] The P&E Court is a very efficient court with internationally recognized alternative dispute resolution procedures. This results in around 90% of

[9] On a party and party basis, including preparation.
[10] Based on eight days of preliminary hearings and trial with three opposing parties with costs of $10,000 each per day.
[11] One of the writers, Dr McGrath, acted on a pro bono basis as counsel for the submitters in the proceedings.
[12] E.g. *Walls Quarries Pty Ltd v Warwick Shire Council* [2004] QCA 457.
[13] Based on the figures for development applications in Queensland reported by the Local Government and Planning Ministers' Council, *First National Report on Development Assessment Performance 2008/09* (Prepared by the South Australian Government, Adelaide, 2010), http://www.lgpmcouncil.gov.au/publications/. This report indicated that 2.3% of development applications in Queensland were subject to review but this figure did not take account of the 90% of cases that are settled by consent. The Queensland Development Assessment Monitoring and Performance Program reports that there were approximately 17,000 development applications lodged each year in the 19 high-growth councils: see http://www.dsdip.qld.gov.au/about-planning/development-assessment-monitoring-and-performance-program.html

cases filed in the P&E Court being resolved by consent of the parties even under the current own costs rule.[14]

There are no doubt cases where unmeritorious proceedings are commenced in the P&E Court but the evidence suggests that these are quite rare. Changing the costs rule is likely to deter very legitimate proceedings such as *Barnes & Anor v Southern Downs Regional Council & Ors (No 2)* [2011] QPEC 119. The loss of such legitimate proceedings will be a very real loss to Queensland's planning system that would be contrary to best practice in this area.

We would welcome the opportunity to speak to the Committee if requested.[15]

Yours faithfully

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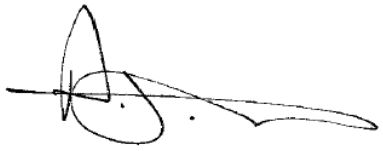

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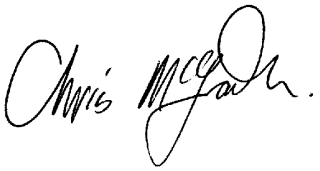

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[14] Around 670-780 cases are filed each year in the P&E Court of which only 100-150 lead to a contested hearing. Most of the 100-150 decisions of the P&E Court each year are interlocutory in nature and only around 50 cases each year proceed to determination after a full trial. Including cases that were decided by consent and otherwise, in 2008 there were 782 cases filed and 772 decided; in 2009 there were 760 cases filed and 677 decided; in 2010 there were 679 cases filed and 680 cases decided in the P&E Court. Thanks to John Taylor, P&E Court ADR Registrar, for this data.

[15] Email address for correspondence: p.tan@griffith.edu.au