12 October 2012

The Research Director
State Development, Infrastructure & Industry Committee
Parliament House
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Dear Director

Sustainable Planning and Other Legislation Amendment Bill 2012

I am writing this submission on behalf of the Queensland Environmental Law Association (**QELA**) in relation to the proposed Sustainable Planning and Other Legislation Amendment Bill 2012 (**SPOLA Bill**) which has been referred to the State Development, Infrastructure & Industry Committee for further review.

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 both during and prior to involvement in the Planning and Environment Court litigation.

There are many features of the SPOLA Bill that will ultimately need to be considered following the publication of amendments to regulations, Court Rules and the *Queensland Planning Provisions*. This submission focuses on only one of the key proposed reforms, namely the proposed amendment regarding the court's costs powers under section 457 of the *Sustainable Planning Act 2009* (Qld) (**SPA**).

Overview

Whilst QELA supports changes to the current exceptions to the 'each party bears their own costs' rule, it is concerned that the measures most recently proposed have little to do with stimulating development or ensuring better planning outcomes but will instead have unintended adverse consequences.

QELA submits that the apparent objectives of the amendments would equally be achieved by an alternative amendment that replaces the 'frivolous and vexatious' hurdle with a broader discretion to award costs, particularly where a litigant's conduct is properly seen as 'unreasonable'.

The suggested amendments are outlined on page 7 of this submission.

The Current System

The 'each party bears their own costs' presumption is an established and well understood feature of the current system.

The presumption provides parity between all participants in a court proceeding, regardless of their economic circumstances.

Having been in force for some twenty years, it provides a level of certainty against which potential participants in a court proceeding can measure their risk before they elect to actively participate in litigation which ultimately involves, whatever the outcome, matters of local (and often regional and state) interest.

Proceedings about land use and development affect the broader community in ways that private commercial and tortious disputes do not.

The planning system necessarily affects the rights of individual landowners to the benefit of the broader community. In consequence, few proceedings in the Planning and Environment Court concern only matters of private interest or involve litigation seeking to correct a merely personal wrong or enforce a merely personal right. As the name of the legislation suggests, the object of the system is to achieve sustainable land use planning.

Difficulties in defining 'the event'

QELA is concerned that the proposed reform, as presently cast, will result in a significant period of great uncertainty as to how 'events' that might sound in costs orders will be determined.

Proceedings in the Planning and Environment Court often involve multiple parties. Such proceedings almost inevitably need to resolve competing approaches about the meaning of scheme provisions that are not drawn with the precision of statutes, or the existence of matters of public interest (i.e. grounds) that might justify a decision to approve that which on its face cuts across a planning instrument. These are not matters readily susceptible to advice as to absolute certainty of result. They inevitably involve matters about which reasonable minds will differ.

If the term 'event' equates merely to 'success', then working out who is entitled to costs and against whom those costs ought to be apportioned will not be an easy exercise. At the very least, it will be the subject of argument, most likely by way of a further (and costly) contested hearing.

For example, in one scenario, a concurrence agency may have approved a development. A submitter may subsequently appeal against a local government's approval of the development. The issue in the appeal does not relate to the concurrence agency's requirements. If the applicant is ultimately successful in the appeal, and that is the relevant 'event', does the submitter also have to pay the costs of the local government and the concurrence agency, both of whom are technically successful parties? What of the situation where the development proposal is modified during the course of the appeal in a way that is essential to the ability of the applicant to secure approval? What if the submitter is successful? Are its costs apportioned between the applicant, the local government and the concurrence agency (which may have played no active part).

The legal arguments that will be generated will have nothing to do with stimulating development or achieving good planning decisions and all participants will incur significant delays and costs just on this issue. The existing, efficient and well understood system will suffer as a result.

Court directions and mention hearings have recently been streamlined due to some excellent initiatives of the court. However, under the proposed reforms, these interlocutory proceedings have the very real prospect of becoming shambolic. They are likely to become protracted with arguments from the parties'

legal representatives about whether an 'event' is triggered and why a party should not be required to pay costs.

Procedural delays are also a likely product of a 'follow the event' costs regime. Where in the past participants may have been fairly described as relaxed when working out what might be provided in directions orders, the spectre of costs is likely to encourage parties to lengthen time frames for fear of running the costs gauntlet. Whereas parties currently are prepared to agree to more restrictive procedural timetables, they are unlikely to do so if a culture of costs sanctions is cultivated.

A standard court review list of fifteen to twenty matters will normally be completed in forty-five minutes but will likely take much longer following the proposed reforms. More court time will need to be allocated to interlocutory disputes. This would be a wasteful and regrettable situation that has absolutely no benefit in terms of either stimulating development or achieving better planning outcomes.

Stakeholders in the system

I now turn to some (but by no means all) of the examples of how a reform to the costs power as most recently proposed will impact on a number of stakeholders in the system, with some likely to be more disadvantaged than others.

Local Governments

Local governments have limited budgets and, in my experience, when defending a refusal typically only raise issues which are of legitimate public interest to their constituents.

Local governments have invested considerable resources in the development of a planning scheme to reflect the expectation of their communities. It is legitimate for the community to expect that a local government will uphold its planning scheme when assessing a development application and this may result in a refusal. Equally, they may have to acknowledge that a particular proposal warrants approval in the public interest despite its apparent conflict with the planning scheme.

QELA is particularly concerned that in many instances local government decision making will become focussed on, or unduly influenced by, cost avoidance rather than sound town planning and public interest. That concern is particularly heightened in the case of smaller local governments.

Local government assessing officers are accountable to the elected council. A local government is accountable for its decision to its constituents, and to the court on appeal. The local government's decision should be made in accordance with SPA, unfettered by any underlying concern about having to meet a cost sanction against it on appeal should it be unsuccessful. Decisions that are fettered by concerns about costs may result in undesirable outcomes for a local community.

The alternative amendment which QELA suggests would ensure that costs sanctions are, however, likely to follow if a local government acts in an unreasonable (e.g. unsupportable) manner.

Residents and Community Interest Groups

Typically, local residents or community interest groups have limited resources to fund appeals.

Often, legitimate concerns of such stakeholders, particularly immediate neighbours, are easily addressed by improvements to a proposal through negotiation. That is a desirable community and planning outcome.

As far as unmeritorious challenges are concerned, once again the alternative amendment suggested by QELA would ensure that such challenges lacking merit are rarely made, or if they are, that costs sanctions will follow.

State Government Agencies

Streamlining the referral agency trigger process and coordinating the state's concurrence agency roles as most recently proposed will assist in ensuring that only the meritorious issues are raised by State government agencies is with respect to proposals of primary interest to them.

Often a State Government Agency issue (such as a proposed condition) is not central to the ultimate outcome of an Appeal but will be decided against the interests of that agency. Which is the event that should trigger the payment of costs by the agency? What component of the costs should be met by the agency?

Again the alternative amendment suggested by QELA would ensure that only unreasonable conduct on the part of the State Government Agency should be sanctioned by costs.

Large Corporations

An obvious, and appropriate, target of the reform is the commercial competitor who is patently commercially motivated. It is likely that the proposed changes will make little difference to larger corporations falling within this cohort. That is particularly the case in circumstances where the projects of interest to those corporations may be of considerable strategic importance, but the prospect of paying costs (even substantial costs) to a successful party or party simply will not serve as a deterrent.

It should not be overlooked that many commercial competitors' concerns are well founded in the form that the particular planning scheme takes. They have made investment and other commercial decisions relying thereon. Why should they not be entitled to argue that the scheme says what it means and means what it says without risk of costs sanction? It is appropriate to here reiterate that in these kinds of proceedings, the Court is often called on to resolve competing approaches about the meaning of scheme provisions that are not drawn with the precision of statutes, or the existence of matters of public interest (i.e. grounds) that might justify a decision to approve that which on its face cuts across a planning instrument; matters which are not readily susceptible to divining absolute certainty of result and which inevitably involve matters about which reasonable minds differ.

The alternate amendment that QELA proposes would be at least equally effective in dissuading commercial competitor appeals.

Smaller Developers

We do not believe that the range of impacts of the proposed amendments on smaller developers has been adequately considered.

Of substantial concern is that the proposed change to the costs power is likely to dissuade proponents of smaller scale developments from litigating. That is because of the potential inequality in terms of the economic circumstances of the parties, which presently has less impact.

Proponents of smaller developments, whether retail or residential, face the very real (indeed likely) prospect of opposition from larger, better funded, commercial competitors. In such a situation, the potential for costs could affect the local government decision making in the first instance, and dissuade the development proponent from persisting with the development even if it is approved. This prospect will neither stimulate development nor achieve better planning outcomes.

Development proponents will necessarily measure prospective commercial return against the risk of paying not only the local government's costs but also the costs of every other party to the proceeding including a number of submitter appellants or co-respondents, and state government agencies.

It should be remembered that a proponent bears the onus of establishing that an approval should be given (and that is appropriate). However, in having to meet that onus, a proponent is at a disadvantage

to other parties in the proceeding. The proponent may have been wholly successful on all but one issue in the appeal. The consequence is that the proponent loses the case. If that is the 'event', the risk of exposure to costs on smaller developments is likely to prove unacceptable with the result that worthwhile developments may be stymied by considerations that have nothing to do with good planning.

These considerations also influence whether an applicant will take on a conditions appeal or appeal against refusal in the first place, keeping in mind that there is only a twenty business day appeal period.

In addition, an applicant is immediately a party to a submitter appeal and does not control the issues raised against the proposed development.

The applicant may have the potential to recover costs if successful, but to do so must first be prepared to assume the not insubstantial risk of an adverse costs order if unsuccessful. The outcome may be that it is all too difficult for an applicant and he or she chooses not to contest an appeal and the development proposal (which may satisfy a worthwhile community need) is lost.

In short, QELA is concerned that smaller to medium sized proposals will not be pursued as a consequence of the mere risk of substantial adverse costs orders in the event of a failure to convince the Court that approval is appropriate.

Another potential undesirable outcome is that there is a contraction in the number of development applications that trigger impact assessment being made in the first place, including applications that may attract community interest and generate economic activity. A legitimate question to ask is – why would a smaller scale developer proposing a development (such as a retail development) even bother making a development application if it is likely to not only generate opposition from national or multi-national corporations, but the prospect of that developer having to pay the costs of these well-resourced opponents? That outcome will have nothing to do with good planning let alone stimulate development.

Again, the amendment suggested by QELA would be at least as effective as the proposed amendments.

Summary

The participants in the system, which would be the most disadvantaged by any change to the cost rules, will be smaller scale applicants, local governments, residents and community interest groups. That would be regrettable.

The proposed reforms will make a difference at all levels of the system.

They are likely to restrict innovation and entrepreneurial investment due to uncertainties about costs as contingent liabilities for a project. A developer may be sophisticated enough to factor in feasibilities for their own costs if a project becomes contested, but it would be virtually impossible (and potentially a barrier from a lender's perspective) to work out a prospective cost liability to others.

The Role of the Planning and Environment Court and Management of Appeals

The Planning and Environment Court has a very high settlement rate. The court has, for a considerable time, carried out its functions efficiently. It is well known that the court is considered a benchmark, not only nationally, but also internationally.

An applicant, as a general rule, does not automatically proceed to a fully contested hearing without first exploring (either through a formal ADR process or otherwise) the prospect of addressing genuinely held concerns, whether from a Council, State agency or a submitter.

There is considerable potential for difficulties to arise from a legislative presumption that costs follow the event. It is common that proposals are improved on, sometimes substantially, during the appeal process. That involves a community benefit. To take a simple example, a proposal may have been refused by a

local government on the basis that traffic safety issues have not been adequately addressed. If the proposal is amended so as to overcome that concern, and the application is then supported by the local government, it would be inappropriate for the local government to be subjected to an order that costs follow the event.

In addition, under the current rules of the Planning and Environment Court, no party is able to contact an engaged expert after a joint expert meeting has started. There is already a risk to a litigant to the proceeding as a result of that (costly) process. However, this is heightened if a litigant is also potentially required to pay the costs of a proceeding arising out of a (practically) compromised position following an expert meeting process in which the litigant is not permitted to participate.

It is worth repeating that few proceedings in the Planning and Environment Court concern only matters of private interest or involve litigation seeking to correct a merely personal wrong or enforce a merely personal right.

The proposed reforms also do not seem to properly take into account the role the Court plays in the following respects:

(a) as the 'responsible entity' deciding 'permissible change' applications in accordance with Chapter 6, part 8, Division 2 of SPA and

(b) as a judicial body to excuse previous non-compliance with SPA.

A number of different entities can perform a 'responsible entity' role to decide applications which meet the requirements of being a 'permissible change' under section 367 (1) of SPA. The Planning and Environment Court is one of those entities. Invoking the Court's jurisdiction in this role is a fairly fundamental feature of the current system. The jurisdiction can be invoked for quite minor things such as changing a condition of approval to provide for an amended car parking layout or to extend a relevant period referred to in a condition of approval. The proposed reforms associated with costs do not recognise the role and function of the Court in this context. The prospect of any party paying costs for these types of requests would be absurd.

On occasions the declaratory jurisdiction of the court is invoked by a party seeking to rectify non-compliance with an aspect of SPA or to revive a 'lapsed' approval. The court's excusatory powers under section 440 of SPA are quite broad and in the circumstances noted above, a parties' only remedy to address non-compliance or revive a 'lapsed' approval is to make an application to the Court and seek appropriate orders. The proposed reforms will create uncertainty as to the question of costs for these necessary applications, particularly for an applicant.

In addition, providing for a default 'event' costs rule in SPA itself creates a potentially inconsistent application of the costs rule across different aspects of the court's jurisdiction. For example, the court has jurisdiction to hear appeals under other legislation such as the *Coastal Protection and Management Act 1995* (Qld) and the *Environmental Protection Act 1994* (Qld). The application of the costs rule by the Court for those matters may be quite different to proceedings commenced under SPA. That is undesirable.

Early Mediation

The reforms also propose to flip the 'event' presumption for the court's discretion back to the 'each party bears their own costs' presumption if the matter is resolved at an early alternative dispute resolution process (e.g. mediation) or soon after the finalisation of that process.

It seems apparent that linking a costs sanction to an early ADR process is intended to assist in overcoming the potential harshness of the 'event' presumption.

Whilst early resolution (or limitation of the issues in dispute) is to be encouraged, it is not always achievable.

Mediation at a later stage is also commendable and is more often effective.

As noted above, the current settlement rate in the Planning and Environment Court is quite high. Adding a potential costs sanction into the mix of later negotiations is considered to be counterproductive in that it adds an additional layer of complexity, and will unnecessarily hinder the parties from achieving negotiated outcomes.

Costs of Obtaining Costs

The realities of the cumbersome costs assessment process should not be ignored. The quantum of costs awarded may be in issue and the successful party may need to incur the expense of engaging a lawyer or costs assessor to enforce its costs.

QELA would be concerned that a change to the current costs provisions in SPA will give rise to a new 'cost consultant' industry not currently present in the jurisdiction in an active sense. Such an industry adds no tangible benefit to planning outcomes and would be a cost to the participants in the system, including both the successful and unsuccessful parties.

Additionally, applications for 'security for costs' may become a feature of the system which would be a regrettable outcome.

Frankly, legal arguments about costs and whether an 'event' has been triggered do not advance the purposes of SPA. The proposed reform adds to argument and complexity – it does not streamline and simplify. It will not stimulate development.

QELA's suggested amendments

In summary, QELA does not support the proposed change to the current cost provisions of SPA. Any change, which results in a general rule of 'costs follow the event', would be a retrograde move for the Queensland jurisdiction that is out of step with international environmental best practice.

QELA does however support the making of some reforms to the costs provisions to address the matters considered to be of concern to the Government about the 'high barrier' associated with the 'frivolous and vexatious' test.

QELA proposes that the current provisions remain but that a new subsection be inserted between the current section 457(2)(b) and (c) of SPA (without renumbering to the Bill) as follows:

> *section 457(2)(ba) - the court considers that the conduct of a party in instituting or continuing the proceeding, or part of a proceeding, is unreasonable.*

The intended Rules could elaborate upon or provide guidance with respect to 'unreasonable' conduct and may include, for example, circumstances where the court considers that an appeal has been solely for commercial benefit; or that a party has raised an issue in the proceeding which the party ought to have known was without merit or otherwise unsustainable, or has raised an issue of a technical nature in a proceeding requiring evidence from an expert witness to prove or disprove the issue, but the party has not led evidence from an expert witness to support the issue which is raised.

Reforms of the character noted above will assist in streamlining proceedings to ensure that only the substantive issues are litigated. However, the suggested changes do not have the adverse consequences that QELA has articulated in this submission in respect of the proposed reforms.

If, contrary to this submission, the Queensland parliament does not wish to retain the current provisions relating to costs with the suggested amendment noted above then, in the alternative, QELA proposes that the words '*but follow the event, unless the court orders otherwise*' be removed from the proposed amendments to section 457(1) of SPA.

That coupled with the proposed amendments to section 445(2) of SPA will leave it to the court as the appropriate judicial body exercising what is recognised as its specialist jurisdiction, to determine the circumstances in which a party may be ordered to pay costs. Such a change will not overcome the uncertainty and increased arguments noted above, but will likely result in fairer outcomes for participants in the system.

Representatives of QELA would welcome the opportunity to discuss this submission in further detail as required.

Yours faithfully

Troy Webb
President