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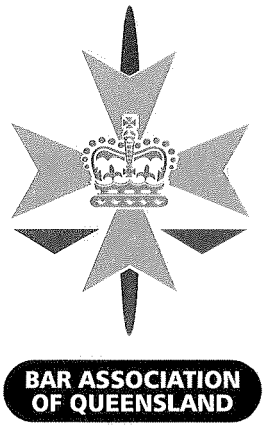

18 October 2012

The Research Director
State Development, Infrastructure
and Industry Committee
Parliament House
George Street
Brisbane Qld 4000

By Email: sdiic@parliament.qld.gov.au

Dear Sir

Re: Submission to an inquiry into the Sustainable Planning and other Legislation Amendment Bill 2012

I write concerning the inter-related amendments to the *Sustainable Planning Act 2009* proposed by Clauses 59 and 61 of the *Sustainable Planning and Other Legislation Amendment Bill 2012*, being those amendments relevant to the costs of proceedings in the Planning and Environment Court.

From the commencement of the *Local Government (Planning And Environment) Act 1990* in April 1991, through the life of the *Integrated Planning Act 1997*, and under the current *Sustainable Planning Act 2009,* the general rule with respect to proceedings in the Planning and Environment Court has been that each of the parties to a proceeding in that Court bear their own costs. To that general rule there have been a number of exceptions which confer discretion to order costs when the Court considered appropriate. While acknowledging that there may be specific instances where parties were disgruntled, it is a system that appears to have generally served litigants in that Court well. The effect of those provisions is well understood.

Prior to April 1991, the former Local Government Court was authorised to "*make such order as it thinks fit as to the costs of any proceedings before it ....*". There was a jurisprudence that developed around that provision.

Relevant for present purposes, Clause 61 of the Bill proposes the repeal of the current section 457 and replacement with, *inter alia*, the following:

> *"Costs of a proceeding, including an application in the proceeding, are in the discretion of the Court but follow the event, unless the Court orders otherwise."*

It is this provision on which this correspondence primarily focusses. It is acknowledged that the further provisions within Clause 61 of the Bill, which encourage early resolution of proceedings and provide for recovery of investigation costs, have merit.

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In association with Clause 61, Clause 59 of the Bill proposes to confer on the Court a specific power to make rules as to "*how the Court exercises a discretion as to costs under s. 457*".

Clause 61 is the analogue of the general rule as to costs found within r. 681(1) of the *Uniform Civil Procedure Rules* 1999. Rule 681(2) recognises that it is not appropriate for that rule to universally operate, even in ordinary civil proceedings, and makes provision for contrary rules. If the proposed amendment is to proceed, there should be (at the very least) similar recognition that matters of court procedure may dictate that it is not appropriate that costs follow the event.

The Bar Association questions the appropriateness of introducing a regime of costs that has its genesis in litigation which calls for adjudication about personal rights (or wrongs).

Unlike ordinary civil litigation, proceedings in the Planning and Environment Court primarily deal with issues of land use and development which necessarily involve matters of broader community concern. The purpose of the *Sustainable Planning Act 2009* reflects a desire to achieve sustainable land use planning. This involves subjugation of the rights of individual landowners to the benefit of the broader community. In context, proceedings in the Planning and Environment Court are not principally concerned with matters of private interest.

Indeed, a pervading feature of the rules relating to decisions under the *Sustainable Planning Act 2009* is the requirement that those decisions must not conflict with planning instruments unless there are sufficient matters of public interest (i.e. grounds) to justify the decision despite that conflict.

A significant feature of proceedings in the Planning and Environment Court is the need to resolve competing approaches to the construction of planning scheme provisions that are increasingly confused, contradictory and complex, and are consistently recognised by the Courts as not being drawn with the precision of Acts of Parliament.

In addition to resolving those questions of construction, the Planning and Environment Court is required to consider the existence and weight of matters of public interest (i.e. grounds) that might justify a decision to approve despite conflict with those planning instruments.

Each of these features inevitably involves considerations about which reasonable minds will differ.

It is noteworthy that no other Australian jurisdiction equivalent to the Planning and Environment Court has embraced a costs *"follow the event"* approach, although some have the benefit of a general discretion.

Experience suggests that there will be considerable difficulty in identifying the "*event*" which costs should follow.

The Bar Association foreshadows that arguments about the triggering "*event*" will occupy considerable amounts of Court time for no particular community benefit.

By way of one example only, it is a feature of appeals relating to development applications, that developments are modified during the course of proceedings in the Court in ways which are essential to the ability to secure approval. This is a feature of the existing system which promotes efficiency in the decision making process. It is however a feature that will trigger many debates about the relative merits of the cases advanced by parties and the relevant "event" from which costs will be said to follow.

Acknowledging the policy position against continuing the existing regime, the Bar Association supports a return to a general discretion of the kind conferred on the former Local Government Court (prior to 1991) by section 31 of the *City of Brisbane Town Planning Act 1964* (i.e. to "*make such order as it thinks fit as to the costs of any proceedings before it ....*"). That approach would afford the Court power to award costs in the circumstances referenced by the Honourable Minister when presenting the Bill and those circumstances referenced in the Explanatory Notes for the Bill. The referenced circumstances appear to reflect conduct that might be fairly described as unreasonable.

There is inherent tension between a proposal that would enshrine a presumption as to costs in legislation, yet make provision within the Rules of Court as to how a discretion to otherwise order might be exercised.

It is desirable that any general discretion to award costs be provided within the Rules of Court to avoid debate about inconsistency between statutory provisions and the Rules of Court (and consequent invalidity of those rules), and that those rules contain recognition that unreasonable conduct should found an award of costs and that matters of court procedure may dictate that it is not appropriate that costs follow the event.

Summary

The policy position against continuing the existing regime is acknowledged.

However, it should be recognised that proceedings in the Planning and Environment Court necessarily involve matters of public and community interest. They are not simply about personal rights (or wrongs). The decision rules under the *Sustainable Planning Act 2009* require consideration as to the construction of often less than straight forward planning instruments, together with the circumstances in which matters of public interest might warrant approval despite conflict with those planning instruments.

Introduction of a provision requiring that costs *"follow the event"* should <u>not</u> be preferred to the introduction of a general discretion to award costs.

Yours faithfully

Roger N Traves S.C.
President

cc *Mr Ian Walker MP*