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Office of the President

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Committee Secretary
State Development, Natural Resources and Agricultural Industry Development Committee
Parliament House
George Street
Brisbane Qld 4000

By email: sdnraidc@parliament.qld.gov.au

Dear Committee Secretary

Vegetation Management and Other Legislation Amendment Bill 2018

Thank you for the opportunity to provide comments on the Vegetation Management and Other Legislation Amendment Bill 2018 (**Bill**). The Queensland Law Society appreciates the opportunity to comment on this important legislation.

This response has been compiled with the assistance of the Planning & Environmental Law Committee who have substantial expertise in this area.

The Queensland Law Society (**QLS**) is the peak professional body for the State's legal practitioners. We represent and promote nearly 12,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise government on improvements to laws affecting Queenslanders and working to improve their access to the law.

Our policy committees and working groups are the engine rooms for the QLS's policy and advocacy to government. QLS, in carrying out its central ethos of advocating for good law and good lawyers, endeavours to ensure that its committees comprise members across a range of professional backgrounds and expertise. This ensures QLS proffers which are truly representative of the legal profession on key issues affecting Queensland practitioners and the industries in which they practise. This furthers the Society's profile as an honest, independent broker delivering balanced, evidence-based comment on matters which impact not only our members, but also the broader Queensland community.

QLS makes the following comments on specific provisions below. QLS makes no comment on the policy decisions relating to changes about determining high value regrowth vegetation or removing the ability to apply for development approval for clearing for high value agriculture and irrigated high value agriculture. QLS has focused on concerns in relation to breaches of fundamental legislative principles and the rule of law and other technical issues.

By omitting to comment on the full scope of provisions in the Bill, QLS does not express its endorsement of these.

Reverse onus and mistake of fact defence provisions

QLS commends the Government on its decision not to reinstate the reverse onus of proof provision and not to remove application of the mistake of fact defence provisions under the *Criminal Code 1899* from the *Vegetation Management Act 1999*, as proposed in the Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016.

QLS advocated strongly against both of these features of the 2016 Bill as being unfair and QLS is pleased that these provisions are not proposed to be re-introduced in the 2018 Bill.

Lack of consultation

However, QLS is disappointed to note the statement at page 9 of the Explanatory Notes that stakeholders have not been consulted specifically on the Bill. Given the sensitive nature of this legislation and the significant public debate on the issues during 2016, further consultation would have been welcomed by all affected stakeholders including QLS.

Retrospective legislation – breach of fundamental legislative principles

A number of the provisions in the Bill are specifically intended to affect rights and liberties, or impose obligations, retrospectively. These provisions are highlighted on pages 7 and 8 of the Explanatory Notes.

This is inconsistent with section 4(3)(g) of the *Legislative Standards Act 1992* which provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.

The relevant provisions are proposed to have retrospective commencement from the date the Bill was introduced in Parliament (8 March 2018). Essentially, these provisions relate to the right to clear particular vegetation between 8 March 2018 and the date of assent, and the right to have certain applications considered or amended.

The justification for the proposed retrospective effect is that the "*retrospectivity is necessary to ensure pre-emptive clearing and increases in certain applications do not render the reforms less effective*" (page 7, Explanatory Notes).

As noted in the Legislation Handbook, strong argument is required to justify an adverse effect on rights and liberties, or the imposition of obligations, retrospectively.[1]

The Fundamental Legislative Principles Notebook on retrospectivity also notes that the former Scrutiny Committee did not support retrospectivity merely because the government had announced its intentions to retrospectively legislate, a practice referred to as "legislation by press release".[2]

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[1] https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/fund-principles/rights-and-freedoms.aspx#_edn34 accessed on 19 March 2018
[2] https://www.legislation.qld.gov.au/file/Leg_Info_publications_FLP_Retrospectivity.pdf at paragraph [116], accessed on 19 March 2018

The rule of law requires that laws are certain and are capable of being known in advance. Laws that create offences or change legal rights and obligations with retrospective application undermine the rule of law and significantly disadvantage those affected by the legislation. Retrospective legislation makes laws less certain and reliable and can cause damaging practical difficulties to individuals and organisations involved.[3]

QLS supports laws which are arise from evidence-based policy.[4]

The Explanatory Notes suggest that "*An increase in certain development applications and requests for maps has already been recorded since media articles alerted the public to potential changes to the vegetation management laws*" (page 7). However, this statement contains no detail about the level of increase or whether this stated increase will actually have a measurable adverse effect on the ecological health of the State in the relatively short period of time between introducing legislation and the date of assent.

Evidence of this nature should be documented if a government is proposing retrospective legislation contrary to fundamental legislative principles.

The risk of retrospective legislation is that it creates uncertainty in the community about the state of the law:

- As at 8 March 2018, certain types of clearing are permitted, because the Bill has not been passed by the Parliament, notwithstanding the proposed retrospectivity
- If the Bill is passed, a person could be prosecuted for this clearing because of the retrospective amendments
- If the Bill is not passed (which is always a possibility) then those members of the community who are aware of the proposed retrospectivity are "in limbo" whilst Parliament considers the Bill, as they are unable to undertake this clearing until there is certainty about the state of the law.

The effect of these provisions is that a person could commit an offence today, between 8 March 2018 and the date of assent, because a person is unaware of a proposed law which is yet to be passed.

If the Government intends to proceed with the retrospective legislation, QLS urges the Government to take immediate steps to ensure that potentially affected stakeholders are made aware of these changes and that departmental officers are also notified so that they can urgently inform their local communities.

Uncertainty created by proposed section 19S – When notice given under code ends

Proposed section 19S creates ongoing uncertainty about rights to clear. If a code can be revoked or replaced and immediately remove entitlements under a pre-existing code, this provides very little certainty as to a right to clear and the associated constraints on that clearing that are ordinarily contained in the codes.

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[3] Australian Law Reform Commission, *Interim Report: Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, July 2015 (ALRC Report 127 (Interim) available at https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_127_interim_report.pdf. In particular, see discussion at pages 249-250

[4] http://www.qls.com.au/For_the_profession/Resources_publications/Advocacy/Policy_position

New section 22B – Requirements for vegetation clearing application for managing thickened vegetation

It is noted that the scope of the definition of "*prescribed regional ecosystems and restrictions*" will depend on drafting to be included in regulations under the *Planning Act 2016*. Until the regulations are made, the operation of this section is uncertain and potentially, the provision improperly leaves significant detail to be defined by a regulation rather than by primary legislation.

The reference to section 55(2) of the *Planning Act 2016* is queried as this is the section authorising the making of regulations that the prescribe matters against which a referral agency assesses a development application and matters which the referral agency may or must have regard to for that assessment.

Amendment to section 30 of the current *Vegetation Management Act 1999* and new section 30A

The proposed section 30A provides for entry without a warrant only when 24 hours' notice is given and the section also prescribes the Information which must be given in the notice.

QLS commends the inclusion of a notice requirement and the prescription of specific information to be included in the notice; these requirements are lacking from similar provisions in other legislation. Providing for a reasonable period of notice is a matter of natural justice to owners and occupiers and is also a safety issue, given that many rural properties are operational workplaces and exercising broad powers of entry could give rise to genuine operational concerns about security of livestock or disruption of harvesting.

However, it is noted that the "trigger" to exercise the power to enter a place is that "*an authorised officer believes on reasonable grounds that a vegetation clearing offence is happening, or has happened, at a place.*"

QLS queries whether in many or most cases, the "*reasonable grounds*" belief would be sufficient grounds for a magistrate to issue a warrant. For example, the officer may have access to satellite imagery indicating clearing is occurring without approval. The use of satellite imagery to monitor clearing activities is referenced on the Queensland Government's website in relation to "Vegetation clearing: Monitoring and compliance". It is clearly stated that this is used to address "potentially unlawful clearing events rapidly."[5] Further information about using satellite images to monitor compliance is also provided on the related Government website "Assessing land clearing using satellite technology."[6]

In these circumstances, QLS considers the most appropriate course is to obtain a warrant, given that it is a fundamental legislative principle that legislation confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.[7]

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[5] https://www.qld.gov.au/environment/land/vegetation/monitoring - accessed 21 March 2018
[6] https://www.qld.gov.au/environment/land/vegetation/mapping/land-clearing - accessed 21 March 2018
[7] Section 4(3)(e) of the *Legislative Standards Act 1992*

QLS also recommends that formal guidelines be prepared for the purposes of training authorised officers about what meets the requirement of "reasonable belief".

Section 54A – Stop work notice

The amendment proposes to insert examples of what a "*stop work*" notice may require. QLS objects to the second example under which a notice may require a person to "*demolish or remove development*".

The purpose of a stop work notice ordinarily is to stop any further work or damage being done at a particular place, pending a fulsome investigation or prosecution. The example provided goes beyond maintaining the "status quo" of the worksite and would permit an official (including an authorised officer) exercising administrative power to impose a positive obligation on a person to undertake work to demolish or remove development, even though no judicial determination has been made about whether the initial work was not permitted or not approved. This power impermissibly blurs the lines between administrative and judicial authority.

Restoration notices

In a similar vein, QLS draws the attention of the committee to the scope of the "restoration notice" regime in the legislation, which facilitates an official exercising quasi-judicial power by:

- determining that the official believes a person has committed an offence; and
- imposing positive obligations on the person to rectify a matter.

The Bill proposes to increase the penalty for breaching such a notice from 1665 penalty units ($210,039.75) to 4500 penalty units ($567,675) which is significant given the primarily administrative, rather than judicial, power which is being exercised when these notices are first issued.

If a recipient of a stop work notice or a restoration notice disagrees with the notice, the person is required, in the first instance, to seek internal review of the decision before then being able to apply to the Queensland Civil and Administrative Tribunal.[8]

The increase in penalties is concerning given that an application for internal review of a decision to issue a stop work notice or a restoration notice does not stay the decision.[9] A person should be entitled to seek a stay of the decision whilst this process is completed.

A restoration notice can require a person to undertake significant work by way of rectification. It is preferable that such a notice should only be issued by a judicial body and after a guilty finding or conviction of the offence by a judicial officer.

The offences under section 54A(5) and 54B(5) of the *Vegetation Management Act 1999* are infringement notice offences for the purposes of the *State Penalties Enforcement Regulation 2014*.

[8] Section 62 of the *Vegetation Management Act 1999*
[9] Section 63(5) of the *Vegetation Management Act 1999*

Whilst this process means that a person issued with an infringement notice is ultimately able to elect to have the offence determined by the Magistrates Court, QLS suggests that the *Vegetation Management Act 1999* should make it clear that:

- a person who is seeking internal review of a decision to issue a restoration notice should be entitled to seek a stay of the decision whilst this process is completed. A person may suffer significant economic loss and/or business interruption as a result of restoration notice requirements imposing positive obligations to undertake work;
- the obligation to seek internal review under section 62 of the *Vegetation Management Act 1999* does not preclude a person immediately relying on the process in the *State Penalties Enforcement Act 1999* and accompanying Regulation to seek to have the offence determined by a magistrate; and
- Departmental officers should be provided clear guidance on the trigger for issuing an infringement notice, as the issue of the infringement notice provides the alleged offender with clear information about their rights to have a magistrate determine whether or not the offence has occurred.

Proposed new section 134 – Restoration and other requirements after unlawful clearing (transitional provision)

Proposed new section 134 (clause 37 of the Bill) in the transition provisions is also of concern.

This provision appears to apply only if a person undertakes unlawful clearing **during the interim period** of 8 March 2018 to the date of assent.[10] If this occurs, the chief executive may issue a restoration notice and, **in addition to other restoration notice matters**, also:

- include additional requirements to those in the existing section 54B(3) of the Act; and
- require the person to restore land **in addition to the land the subject of the unlawful clearing**.

This seems to be an extraordinarily punitive provision which requires someone to undertake additional work, at additional cost, beyond rectifying unlawful clearing and only applies for a limited time.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Acting Principal Policy Solicitor, Wendy Devine, by phone on [redacted] or by email to [redacted].

Yours faithfully

Ken Taylor
President

[10] Clause 45 of the Bill, inserting new section 329 "Definitions for part" (Transitional provisions)