

Submission No. 007

11.1.16

4 April 2014



EDO Qld.

Environmental Defenders Office

*Using the law to protect
our environment.*

30 Hardgrave Rd WEST END, QLD 4101

tel +61 7 3211 4466 fax +61 7 3211 4655

edoqld@edo.org.au www.edo.org.au/edoqld

4 April 2014

The Research Director
State Development, Infrastructure and Industry Committee
Queensland Parliament
By email only: SDIIC@parliament.qld.gov.au

Dear Chair and Members of SDIIC,

EDO Qld's submission on the Land and Other Legislation Amendment Bill 2014

Thank you for the opportunity to make a submission on the Land and Other Legislation Amendment Bill 2014 (**the Bill**).

The Environmental Defenders Office (Qld) Inc (**EDO Qld**) is a non-profit community legal centre which helps Queenslanders living in coastal, rural and urban areas understand and access their legal rights to protect the environment. EDO Qld has over 20 years of experience in interpreting environmental laws to deliver community legal education and to inform law reform.

We note the short timeframe for this public consultation and that our request for an extension of one business day was refused. The amendments do not reflect an urgent public need to rush through the legislation and there has been no explanation as to why there are such short timeframes. As a result of Queensland's unicameral system, there is limited opportunity for scrutiny of bills as it is. Without allocating sufficient time for the Committee process, this effectively reduces the opportunity for public comment to a draft Bill during the legislative process and should only be adopted in rare, urgent circumstances, which have not been established in this case.

Water licences with questionable legal validity should be reassessed

The Explanatory Notes at page 3 suggest there are many administrative decisions made under the *Water Act 2000* (Qld) for water licences that are 'legally deficient' as the department failed to take into account the mandatory decision-making criteria, including advancing the act's purpose to promote the 'efficient use of water'. The Explanatory Notes say that the applications were not scrutinised by the Department of Natural Resources and Mines (**DNRM**) to the extent considered necessary. To remedy these legal deficiencies, the Bill retrospectively validates those decisions.

Any measure that dilutes a requirement to consider the mandatory criteria, including the 'efficient use of water' and then removes accountability of the chief-executive and department for failing to follow the law is contrary to best practice and inconsistent with the achievement of the objects of the Water Act.

The mandatory statutory criteria, including the requirement to advance the chapter's purpose when allocating water licences, serves an important function - to help ensure that decision-

makers make decisions that are consistent with the purposes of the Chapter; and to allow review of those decisions to ensure that standard is achieved. Retrospectively validating what appears to be a large number of errors significantly undermines the integrity of the water licencing scheme. The mandatory criteria should not be dispensed with so lightly.

We note that there been no consultation on the amendments to validate water licences.¹ Instead of openly and transparently responding to what is obviously a serious problem, minor amendments are being rushed through Parliament without consultation, with limited opportunity for public scrutiny or discussion. EDO Qld does not support rushed legislation to retrospectively validate the chief-executive's decisions.

The Explanatory notes acknowledge that the amendment breaches the fundamental legislative principles by adversely affect rights and liberties retrospectively.² EDO Qld submits that the policy underpinning the Bill, to provide proponent certainty, is not in the circumstances sufficient to overcome the longstanding and well-recognised concerns about retrospective changes in rights, obligations, powers, privileges or obligations.

The Explanatory Notes state that an alternative means of responding to this problem is to reassess all 24,000 applications and that this is 'not feasible'.³ EDO Qld submits that if the problem is so serious as to consider the reassessment of 24,000 water licences as an alternative response, then there must be a specific inquiry held to address what is clearly a major failure in the allocation of water licences.

Solution: In addition to an inquiry to fully investigate the departmental failures that allowed potentially thousands of water licences to be approved, EDO Qld submits that a transparent and accountable way of dealing with this problem is to reassess the applications that may be invalid, rather than retrospectively validating the licences. This would give certainty to Queensland's water resources and approvals could be conditioned appropriately and according to law. Furthermore, what measures is DNRM taking to ensure that the chief-executive will correctly and properly apply the law for current and future applications?

Amendments in response to *Lipovsek v BCC*

The Explanatory notes⁴ indicate that the amendments to the *Acquisition of Land Act 1967* (Qld) (ALA) are in response to the matter of *Lipovsek v Brisbane City Council*.⁵ In *Lipovsek*, the Court set aside the decision to take the land on the ground that due consideration was not given to objections. The Court did not decide with finality the issue of whether or not the Council had the power to take land for 'environmental purposes' although it certainly called that power into question by, inter alia, rejecting the argument that the heading "Purposes relating to the environment" was unconstrained by the following dot points in the text of the ALA.⁶

The Bill proposes to introduce a new, very broad environmental purpose into Schedule 1 Part 2 of the ALA: "the management, protection or control of the environmental values of areas or places". 'Environmental value' is not proposed to be defined with reference to section 9 of the

¹ Explanatory Notes, p.12.

² Explanatory Notes, p.11.

³ Explanatory Notes, p.10.

⁴ Explanatory Notes, p.5.

⁵ [2013] QSC 185.

⁶ Ibid at [45], [72] and [85].

Environmental Protection Act 1994 (Qld). This gives the State, local governments and other constructing authorities wide powers in respect of the environment.

Each of the current purposes in Schedule 1 Part 2 is ultimately for environmental protection and conservation (protected areas, koala and soil conservation, protection of seashore). Introducing a new category that allows for ‘control’ and ‘management’ of environmental values extends beyond environmental protection. The use of the word ‘control’ is unnecessary, as ‘protection’ would be sufficient enough for land acquisition purposes conducive to environmentally positive outcomes.

EDO Qld believes these clauses require further amendments to ensure they are an appropriate and proportionate response to *Lipovskek* and consistent with the existing categories of environmental purposes, be for the dominant purpose of environmental protection.

Solution: The amendments to increase the power of the State, local government and other constructing authorities should be for the purpose of environmental protection. Clause 6(1) of the Bill should be amended to “Protection of the environmental values of areas or places”. Omit clause 6(2) of the Bill.

Should you require any further information, please contact Rana Koroglu or Sean Ryan on (07) 3211 4466 or at edoqld@edo.org.au.

Yours faithfully
Environmental Defenders Office (Qld) Inc



Senior Solicitor
Senior Solicitor