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Using the law to protect our environment.

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

Dear Chair and members of the SDIIC,

Submission on the Regional Planning Interests Regulation 2014

Thank you for the opportunity to provide a supplementary submission on the Regional Planning Interests Regulation 2014 (**the Regulation**).

The Environmental Defenders Office (Qld) (**EDO Qld**) is a non-profit, non-government community legal centre with expertise in environmental and planning law. We assist Queenslanders who live in rural, coastal and urban areas to understand 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.

The SDIIC will be aware that EDO Qld has made significant submissions on the Regional Planning Interests Bill 2014.[1] Although we have concerns regarding a substantial number of issues in the Regulation, we have only had the resources to address four of the most concerning issues in the Regulation.

1. Lack of transparency in amending maps for Strategic Environmental Areas

The Regulation fails to set out a clear and transparent process for amending the maps for strategic environmental areas (**SEA**). The absence of a legislated or regulated process for changing SEA maps **is not the standard approach** taken in other pieces of legislation for amending maps which impact on people's rights.[2] If a map is in a regional plan then there are specific provisions concerning amendment of a regional plan. However if the maps are simply by way of reference to the Department's website and there are no legislative provisions available for a transparent process for changing the maps held by the Department,

[1] EDO Qld's first submission dated 17 January 2014; EDO Qld's second submission dated 25 February 2014; EDO Qld's oral evidence at the hearing on 12 February 2014.
[2] See for example, *Sustainable Planning Act 2009*, s.70.

then it does not provide a transparent process, contrary to s.3(2) of the Act and the Regulation's explanatory notes.[3]

The Department have said that they will be amended as follows:

> *"a process of considering the proposal, gathering evidence, consulting with our colleagues in the relevant agencies – being the environment agency and the natural resources agency – to consider the merits and then putting a recommendation to government about what the department considered. Then the government would make a decision."*[4]

This fails to provide an open, transparent and accountable decision making process. Changes to the SEA maps means changes to what activities are permissible within a region and this warrants public consultation on such alterations. Decision-making behind closed doors and without the opportunity for public comment and scrutiny invites corruption.

We are particularly concerned about the proposed process set out above when viewed in conjunction with the amendments to the *Electoral Act 1992 (Qld)* earlier in the year that raised the threshold to disclose donations from $1,000 to $12,400.[5] It is concerning that a company could make a substantial, undisclosed donation at the same time that these regulations allow for significant changes to be made to an SEA map with no requirement for public input and scrutiny. The commitment of the current Government to be an open and transparent Government[6] is undermined by regulatory gaps which would allow the Minister to make highly discretionary decisions on appropriate land use and zoning without public consultation.

Recommendation: insert a provision that requires all SEA maps referred to in the regulation to go through the same process for amendments as will be required for all maps in a finalised regional plan, including a public consultation period.

2. No requirement to publicly notify or allow the public to make submissions is not a transparent system

Part 5 s.13 of the Regulation provides that only an application for a Regional Interests Development Authority (**RIDA**) in a Priority Living Area (**PLA**) will require public notification under s.35 of the Act and thereby allowing for public submissions under s.37 of the Act. This means that **communities concerned about resource industries in Priority Agricultural Areas, SEAs and Strategic Cropping Land will have no opportunity to be notified or even to have their say** on the grant of a RIDA.

[3] Explanatory notes for Subordinate Legislation 2014 No. 88 (made under the Reg*ional Planning Interests Act 2014*, *Sustainable Planning Act 2009*), p.2.
[4] State Development, Infrastructure and Industry Committee. 3 July 2014. *Public Briefing – Inquiry into the Regional Planning Interests Regulation 2014*, p 10.
[5] *Electoral Reform Amendment Bill 2013, Clause 52*, amending s.261 of the *Electoral Act 1992*.
[6] Queensland Government, 'Open Government Reform' (accessed 14 August 2014): http://www.qld.gov.au/about/rights-accountability/open-transparent/review/

No added time period if there are concurrent notifications

No explanation is provided as to why Queenslanders should not be notified of resource activities in regional interest areas other than PLAs. In the absence of any clear policy intent, we assume that the Government considers notification under a resource act (e.g. the *Mineral Resources Act 1989* (Qld)) or the *Environmental Protection Act 1994* (Qld) is sufficient. If that is correct, then s.34(3) of the Act would have been available to grant an exemption from notification for an assessment application if there had been sufficient notification to the public under another Act or law of the resource activity or regulated activity.

The Act and Regulation is a new regulatory regime with a different purpose than the resource legislation. It is understandable the Government wishes to increase efficiency of the notification process, however the way to do this is to clearly stipulate in legislation that a proponent can give public notification under the resource legislation and the Act within the same notice.

No other public notification for some types of resource activities

We note that proposed changes currently before this Committee in the Mineral and Energy Resources (Common Provisions) Bill 2014 (Qld) which reduce public notification and objection rights, and the recent changes in the *State Development (Red Tape Reduction) Act 2014* (Qld), both have relevant interactions with the Regulation. The Common Provisions Bill seeks to limit public notification and objections to only 'site specific' mining activities (those that do not comply with the eligibility criteria in Schedule 3A s.1 Environmental Protection Regulation 2008 (Qld)).

It is unclear whether there will be a change to Schedule 3A s.1 Environmental Protection Regulation 2008 (Qld)) to omit references to wild river areas from the eligibility criteria, subsequent to the repeal of the *Wild Rivers Act 2005* (Qld) in the recent *State Development (Red Tape Reduction) Act 2014* (Qld). Even if the eligibility criteria references to wild rivers are replaced with SEAs, there are still a range of types of authorities which satisfy the eligibility criteria and therefore will have no public notification requirements if the Common Provisions Bill is enacted as drafted.

This highlights the importance of ensuring there is public notification of SEAs in the *Regional Planning Interests Act 2014* (Qld) rather than relying on provisions in the *Environmental Protection Act 1994* (Qld) to provide public notification.

Importance of third party submissions

The Independent Commission Against Corruption (**ICAC**) in NSW reported that one of the six Key Corruption Prevention Safeguards is, "*Meaningful community participation in planning decisions is essential to ensuring public confidence in the integrity of the system. Community involvement in planning outcomes includes the public exhibition of planning*

instruments and development proposals as well as planning authorities giving adequate weight to submissions received as part of this process."[7]

The ICAC also noted, "*Community participation and consultation requirements also act as a counter balance to corrupt influences. The erosion of these requirements in the planning system reduces scrutiny of planning decisions and makes it easier to facilitate a corrupt decision.*"[8]

Third party submitters and appellants play an important role as they seek to protect things other than their own pecuniary interest such as our national parks, threatened wildlife, rivers, lakes and underground aquifers as well as the quality of air on which we all rely.

By excluding the community from making submissions on RIDAs, by way of comparison would it also be right to say, that those Queenslanders who aren't 'affected landholders' living next to or on the Great Barrier Reef are not entitled to have their say on management of the Reef? Of course not. The environment belongs to everyone in Queensland and land use decisions should allow the community, particularly those community members seeking to protect the environment, to be actively involved with the decision making process. Likewise, regional interest areas are being identified ultimately for the benefit of the public and the public should not be excluded from being informed and making valuable contributions to the decision making process.

Importance of including detail in the Act, not the Regulation

The restriction of public notification and submissions of RIDAs in PAAs, SEAs and SCL was not in the Bill. This is a key element of the Act and yet completely missing from the Bill. We note the consultation on the Bill, Act and Regulations have been haphazard:

- There was no public consultation on the policy intent or the Bill before it was introduced into Parliament in November 2013;
- There was no Regulation available for public consultation during SDIIC's consideration of the Bill itself, meaning the public provided information in the absence of any knowledge of the detail in the Regulation.
- The Government said that the Regulation was not provided for public consultation on the basis that making a draft regulation presupposes the Bill would have been passed. Nonetheless, after the SDIIC's public consultation ended, a draft regulation was tabled – 1 day prior to the Bill being passed;
- The Regulation is now being considered by the SDIIC with the Act and Regulation already in effect.

[7] ICAC Report, February 2012, *Anti-Corruption Safeguards and the NSW Planning System*, available here: http://www.icac.nsw.gov.au/documents/doc_download/3867-anti-corruption-safeguards-and-the-nsw-planning-system-2012
[8] Ibid, p.19.

This highlights the importance of what EDO Qld repeatedly set out in our written submissions to this Committee in January and again in February 2014 and our oral evidence before the Committee:

1. Important details and criteria should be in the Act, not the regulation; and
2. If 'framework' legislation is to be introduced with scant detail, then a draft regulation should concurrently be made publically available, in order for stakeholders to be informed of how the framework will operate in practice and thereby provide informed submissions to the Committee.

Public interest notification, submission and appeal rights are absolutely necessary for SEAs, where the tenure may often be held by the State itself.

Recommendation: EDO Qld is opposed to the current Regulation that allows the Department to make decisions about RIDA applications without informing the Queensland public. All applications for RIDAs must be publically notified. The public should be given an opportunity to make submissions on s RIDA applications, including for PAAs and especially SEAs.

3. Important safeguards from corruption are missing with no public interest appeal rights

Public interest legal proceedings in land use planning cases – whereby community members bring proceedings to protect their communities – promotes good decision-making and increases the enforcement of planning laws. Failure to allow third party appeals means there is reduced government accountability and transparency.

The Queensland Government may be aware that in NSW, the ICAC has identified public appeals as of vital importance to a transparent and accountable planning system, and has recommended to the NSW government that the scope of merits appeals be extended as an anti-corruption measure. ICAC found, "The limited availability of third party appeal rights under the… [NSW legislation] means that an important check on executive government is absent… The absence of third party appeals creates an opportunity for corrupt conduct to occur, as an important disincentive for corrupt decision-making is absent from the planning system."[9] The importance of third party community appeal rights cannot be overstated.

Other reasons why public interest third party appeals in planning and development law are important, is that they:[10]

[9] ICAC Report, February 2012, *Anti-Corruption Safeguards and the NSW Planning System*, available here: http://www.icac.nsw.gov.au/documents/doc_download/3867-anti-corruption-safeguards-and-the-nsw-planning-system-2012

[10] Judge Christine Trenorden, 'Third-Party Appeal Rights: Past and Future' (Paper presented at Town Planning Law Conference, Western Australia, 16 November 2009)

- encourage greater public debate on planning issues;
- improve, encourage and aid public participation in land-use decision making;
- allow multiple views and concerns to be expressed and 'provide a forum where collective rights and concerns can be weighed against the rights and concerns of the individual';[11]
- 'recognise that third parties can bring detailed local knowledge, not necessarily held by the planning authority or developer, to the planning decision';[12] and
- improve planning decision-making and ensure greater transparency and accountability within the decision-making process.

All Queenslanders should have public interest appeal rights under the Act as managing land use conflicts inevitably involves weighing the public interest with private interests, even at a property scale. In reality, only a very small percentage of third party interest groups ever use the Court appeal process. The Planning and Environment Court already has clear rules and strong powers for dealing with 'vexatious litigants' seeking to delay or obstruct development without proper grounds.

Any suggestion that a broader category of appeal rights – such as those that exist under current environment and planning laws – will open the door for vexatious litigants is without an evidential basis:

- In the **Land Court**, objections concerning appeals regarding environmental authorities amounted to just **1.8%** of applications filed in 2012 to 2013. Objections to environmental authorities represented **2.9 %** of active applications as at 30 June 2013.[13]
- In the **Planning and Environment Court**, less than **0.1%** of development applications are taken to trial by third parties such as concerned individuals, community groups or commercial competitors.[14] The evidence indicates that the majority of the tiny number of appeals that proceed to trial are successful or partially successful in the Planning and Environment Court's judgement.[15] This level of success strongly suggests that there are not a large number of appeals run with little or no merit or for the primary purpose of delaying or obstructing development.

<http://www.sat.justice.wa.gov.au/_files/10_Hon_Judge_Christine_Trenorden_Presentation.pdf>; Stephen Willey, 'Planning Appeals: Are Third Party Rights Legitimate? The Case Study of Victoria, Australia' (September 2006) 24(3) *Urban Policy and Research* 369–389 <http://www.tandfonline.com.ezproxy.bond.edu.au/doi/pdf/10.1080/08111140600877032>.

[11] Judge Christine Trenorden, 'Third-Party Appeal Rights: Past and Future' (Paper presented at Town Planning Law Conference, Western Australia, 16 November 2009) <http://www.sat.justice.wa.gov.au/_files/10_Hon_Judge_Christine_Trenorden_Presentation.pdf>.

[12] Ibid.

[13] Land Court Annual Report 2012-2013, page 12.

[14] For example in 2009 there were approximately 66 merits judgments reported on the Queensland Courts website - 46 of which were applicant appeals and 20 of which were third party appeals. In 2010 there were approximately 39 merits judgments reported on the Queensland Courts website - 33 of which were applicant appeals and 6 of which were third party appeals.

[15] For example 17 of the 39 merits judgments dismissed appeals in 2010.

Past parliaments have long recognised that planning and environment matters that come before the Planning and Environment Court are markedly different from private disputes, and involve planning and environment decisions that affect the whole community in which the activity is located, not just a small number of affected parties.

Furthermore, the Planning and Environment Court (in which RIDA appeals will be heard) has been recently empowered with a wide discretion to order costs against a party, including a party there for an improper purpose (which includes vexatious litigants). These recent changes increase the costs risks for parties who are not objecting for a genuine purpose.[16]

The grant of an RIDA means that the government has made a decision that a resource activity can co-exist with an area of regional interest. Regional interest areas are only declared where there is a public interest in conserving the area for future use and it is therefore inconsistent to exclude the public from a merits review.

It has previously been questioned whether public interest appeals would provide certainty to industry.[17] However the Queensland public expects certainty that special areas of regional interest to be preserved for future use without being degraded by temporary resource activities. The certainty of the long term continuation of the regional interest area is paramount. The public is necessarily part of this process and should be granted appeal rights to ensure such an outcome is achieved.

Recommendation: We refer to our submissions to the SDIIC on 17 January 2014, which set out several options for providing third party appeals.

4. SEAs generally nor the designated precincts are not truly protected from 'unacceptable uses'

The drafting in Schedule 2 Part 5 s.15(2) that 'unacceptable uses' for 'designated precincts' including open cut mining, broadacre cropping, water storage, and (for the Cape York SEAs only) mining resource activities. It is of great concern that these unacceptable uses' are not extrapolated to the whole SEA. We note that the vast majority of SEAs are not designated precincts, which means this section clearly indicates there may be circumstances in which open cut mining, broadacre cropping, water storage and resource activities generally (including all mining and petroleum activities) are acceptable.

[16] We refer to the evidence of the Queensland Environmental Law Association's witness, a planning lawyer in private practice, which supports this. Source: State Development Infrastructure and Industry Committee, Public Hearing – Inquiry into the Regional Planning Interests Bill 2013, 12 February 2013, Evidence of Mrs Hausler, p.20.

[17] State Development Infrastructure and Industry Committee, Public Hearing – Inquiry into the Regional Planning Interests Bill 2013, 12 February 2013, Hon. Michael Hart, p. 20.

We note, for example, that page 21 of the draft Cape York Regional Plan has an indicative table of what are unacceptable uses for SEAs. This table does not distinguish between the small proportion of 'designated precincts' and the remainder (and majority) of the SEAs. A person looking at this indicative table might be led to believe that open cut or strip mining is an unacceptable use for SEAs. However the legislation reveals that in fact only the designated precincts obtain a form of protection through s.15(2) of the Regulation, not the whole SEA. To suggest the 'unacceptable uses' apply to the whole SEA is misleading.

Recommendation: Redraft s.15(1) and (2) to ensure that 'unacceptable uses' apply to the entire SEA and not just 'designated precincts'.

We request an opportunity to speak to the Committee to enlarge on this submission. Should you require any further clarification on issues raised in our submission, please contact Jo Bragg or Rana Koroglu of EDO Qld on (07) 3211 4466.

Yours faithfully,

Environmental Defenders Office (Qld)

Jo-Anne Bragg.

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