Tabled 21/5/14

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20 May 2014

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

Dear Chair and Committee Members

EDO Qld submission on the Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Bill 2014 ('Bill') – further detail

We refer to the summary of our submission dated 16 May 2014 on amendments to the *State Development and Public Works Organisation Act 1971* (Qld) ('SDPWOA'). We also refer in this submission to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('Cth legislation' or 'EPBC Act').

Who we are

The Environmental Defenders Office Qld Inc (EDO Qld) is a non-profit community legal centre which helps disadvantaged people 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 - including Commonwealth laws and Queensland laws - to deliver community legal education and to inform law reform.

Consultation on the Bill and exposure regulation

We are a key Queensland conservation and legal organisation that was not consulted at all by the Office of the Coordinator General. If we had been consulted, then a number of the below criticisms might have been cooperatively addressed prior to the Bill coming to Parliament. See Schedule 1 for our concerns regarding the lack of consultation.

Summary

Our seven main points of concern are:

1. This Bill, according to the draft Qld Approval Bilateral, would apply to all matters of national environmental significance, including the Great Barrier Reef Marine Park and World Heritage. The Bill does not even meet the standards of the Cth regime.
2. The Coordinator General, responsible for promoting development, is proposed as decision-maker yet has an insolvable conflict of interest, whereas under the Cth legislation the Federal Environment Minister makes decisions. See Four Corners example below.
3. The Bill includes inferior public access to information compared to the Cth legislation and falls below standards for transparency.

4. The Bill includes inferior accountability provisions as less people qualify to go to Court to remedy illegality compared to the Cth legislation, and the declarations power is too narrow. The Bill falls below basic standards of accountability for public interest environmental legislation. For example in 2003 and 2004, the Nathan Dam Federal Court case was successful in correcting serious legal errors that impacted on the Great Barrier Reef but the applicants would not have qualified to go to Court under the inferior proposed rules in the Bill.
5. Weakened rules apply in the Bill as to if an action must undergo assessment and approval as a 'bilateral project declaration' compared to a 'controlled action' decision by the Cth. Nathan Dam again is an example of the existing Cth legislation working.
6. The existing SDPWOA includes inferior provisions to outlaw supply of false and misleading documents compared to Cth legislation. For an example of Cth legislation working, see the current Abbot Point T3 EPBC 2008/4468 investigation.
7. The Bill lacks any power to reject clearly unacceptable project whereas such efficient powers exist under Cth legislation. This risks wasting public time and money. For example of how this works, see the 'clearly unacceptable' decision in GKI Resort EPBC 2009/5095.

We also note these changes will introduce complexity and confusion, the exact opposite of what was proposed to be achieved, for example:

- Replacing Cth terms that are understood with new terminology. For example 'controlled action' replaced with 'bilateral project declaration' and 'Environmental Impact Statement' with 'Protected Matters Report';
- The proposed amendments add an additional process and around 30 pages of legislation to the SDPWO Act without any reduction in legislation at a Commonwealth level.

Please contact Rana Koroglu or Jo Bragg on (07) 3211 4466 or at edoqld@edo.org.au.

Yours faithfully
Environmental Defenders Office (Qld) Inc

Jo-Anne Bragg.

Jo-Anne Bragg
Principal Solicitor

EDO Qld's Supplementary Submissions on the Bill

1. The Bill applies to all matters of national environmental significance ('MNES') but does not meet the standards of the Cth regime on assessment criteria.

The below points set out several examples of how various amendments (or lack thereof) fail to meet the standards under the EPBC Act.

- **There is no requirement for the Coordinator General to consider principles of Ecologically Sustainable Development ('ESD')** contrary to the *Standards for Accreditation of Environmental Approvals under the EPBC Act*,[1] specifically contrary to the *Standards* at paragraph [92].
    - **Solution: Ensure that the principles of ESD are a mandatory consideration in decision-making in the SDPWOA.**

- The proposed **amendments to the SDPWOA do not clearly require or ensure that decisions are consistent with Australia's international obligations**:
    - Whilst the draft approval bilateral agreement clearly sets out what Qld should do – ensure that decision making "is not inconsistent" with EPBC requirements regarding international obligations (cl.6.3 approval bilateral agreement) – it is unclear whether this term of the approval bilateral agreement is enforceable.
    - The only linkage is in the Bill's criteria for decision-making which simply says ensure the approval and conditions are "not inconsistent" with the bilateral agreement at s.54W(2)(b) SDPWOA.
    - **Solution: Add mandatory prohibitions to the Bill that reflects what is in s137-140 *EPBC Act* e.g. s137 (a) the decision must not be inconsistent with Australia's obligations under the World Heritage Convention.**

- **There is a watered down requirement to take into account the applicant's 'environmental record' when making a decision on whether to allow the approval**, compared with the EPBC Act requirements
    - s.136(4) EPBC extends to considering:
        - the applicant's 'history' in relation to environmental matters. 'History' not defined and could potentially include number of complaints resulting in investigations, warnings, fines – all without 'legal proceedings' necessarily being filed.
        - the history of the executive officers of the company – this is important/relevant if directors had a history of major breaches – they can't just incorporate a new company with a clean history
        - history of the parent company and executive officers of the parent company
    - Compared to new s.54W 'Criteria for decision', including that the CG may consider "the proponent's environmental record"

[1] Available here: http://www.environment.gov.au/resource/standards-accreditation-environmental-approvals-under-environment-protection-and

        - S.54 definition of 'environmental record' has an extremely limited definition, confined to legal proceedings and policies/planning framework if a company.
        - Not extended to executive officers (contrary to and reduction in standards from s.136(4)(b) EPBC Act). Means that executive officers can just incorporate a new clean company
        - Not extended to parent company or executive officers of parent company (contrary to and reduction in standards from s.136(4)(c) EPBC Act)
    - Same problem for considering whether to approve the transfer of an approval (s.145B EPBC), suspension/revocation of an approval (s.144/145 EPBC), or vary conditions of an approval (s.143 EPBC Act).
    - This represents a weakening of standards in the SDPWOA compared with the EPBC Act
    - **Solution: ensure that the stronger EPBC provisions relating to the proponent's environmental history (including executive officers and parent companies) is included in the SDPWOA. Amend definition of 'environmental record' to reflect what is relevant under EPBC provisions.**

- **Criteria for decision making in EPBC Act limited to only the matters set out in the EPBC Act** at s.136(5), and the decision maker cannot take other matters into account.
    - Compare this with the proposed s.54W(3)(b) conferring huge discretion onto the CG to take any other matter into account if it's relevant in the opinion of the CG.
    - It is a breach of fundamental legislative principles to have discretionary decision-making criteria. The power given to the Coordinator General in this instance does not have sufficient limits attached and is therefore contrary to fundamental legislative principles in the LSA section 4(3)(a), which requires that where legislation makes the rights and liberties of individuals dependant on an administrative power, that power must be 'sufficiently defined'.
    - **Solution: Ensure an equivalent s.136(5) EPBC Act appears in the SDPWOA amendments and remove proposed s.54W(3)(b).**

2. Problems in allowing the Coordinator General to be the decision maker

- The Coordinator-General will assess and approve major projects in Queensland for the purposes of the EPBC Act (following a "bilateral project declaration"). This will shift the approval process from a person responsible for protecting the environment (the Commonwealth Environment Minister) to a person clearly biased for promoting development.

Case example: Traveston Dam

After an EPBC Act referral on the impacts of threatened species for the Traveston Dam (where the proponent was a government-owned corporation), Queensland undertook an EIS process under the assessment bilateral agreement (SDPWOA EIS process). The Queensland Government approved the project with a number of conditions. The Commonwealth requested information which was lacking in Queensland's EIS, regarding necessary information on the various threatened species. Queensland's failure to supply the information caused considerable delays

and the Commonwealth commissioned its own experts due to the poor quality information provided in Queensland's EIS on threatened species. After the Commonwealth obtained the further information necessary to make a decision, the Commonwealth Minister determined that the impacts on nationally protected species like the Australian lungfish, Mary River Turtle and Mary River Cod were unacceptable and could not be mitigated.

- The logical and appropriate person for supervision of assessment of impacts would be the Queensland Minister for Environment and Heritage Protection. Only the Queensland Environment Minister has protection of the environment as his or her objective.
- The SDPWOA is a conglomeration of devices for enabling the coordination and expedition of major projects. Unlike both the EPA and the SPA, the SDPWOA contains no object or purpose statement that commits the operation of the Act to the end of ecological sustainability.[2]
- Under the SDPWOA amendments, the CG will make a decision whether to approve the impacts on matters of national environmental significance after he has made a decision that the project should be awarded 'coordinated project' status. Therefore the Coordinator General has already made a determination under the existing provisions of the SDPWOA that the project has significance to Qld, including potentially strategic significance to the locality, region or state, including for the infrastructure, economic and social benefits, capital investment or employment opportunities it may provide.
- The CG has an insolvable conflict of interest, in which he is required to advance a program of works for economic development yet is now required to consider whether to approve projects on the basis of environmental considerations, where a refusal may inhibit short-term economic development. See Four Corners example below.
- **Solution: EDO Qld is opposed to the delegation of Federal approval powers to Queensland. If the approval bilateral agreement is entered into, the SDPWOA should not be accredited under the agreement, rather the Environment Minister should be responsible and accountable for decisions made pursuant to an approval bilateral agreement.**

Case example:
Four Corners Investigation on CSG assessment by the Coordinator General

In April 2013, a whistle blower from the Queensland Coordinator-General's Department of Infrastructure and Planning, came forward and revealed that preliminary approval had been given to huge coal seam gas (CSG) projects despite the Coordinator-General not having all the relevant information on the potential impacts on groundwater. ABC's Four Corners program investigated and reported that the companies didn't supply enough basic information for an informed decision to be made about the environmental impacts. Despite this, various government agencies [including the Coordinator General] permitted the developments to go ahead, allowing the companies to submit key information at a later date.

[2] See sections 3 and 4 *Environmental Protection Act 1994* (Qld) and sections 3, 4 and 5 *Sustainable Planning Act 2009* (Qld). We note however, that there are plans to repeal the *Sustainable Planning Act 2009* (Qld) and replace it with a new act, *Planning and Development Act 2014*. The Queensland Government indicates the new purpose will be prosperity, the common meaning of prosperity emphasizes financial wealth.

The whistle blower said of the assessment process for a $20 billion project by Queensland Gas Corporation, "*We were only given a matter of days to prepare conditions for that report. We were actually not given any time to do any reading or assessment of the material. We were just instructed to write conditions for QGC, which is, again, unbelievably bad.*" This case example casts light on Queensland's Coordinator General's preparedness what has occurred in not only the approval process of coordinated projects, but also the assessment process being cut short.

3. The Bill includes inferior public access to information compared to the Cth legislation and falls below standards for transparency

- EDO Qld is still examining the interaction of the proposed amendments to the SDPWO Regulations and the draft approval bilateral agreement concerning public access to information.
- With no equivalent provisions to Part 7 EPBC Act regarding the referral mechanism, the public loses an existing opportunity to comment on a referral and whether the action needs assessment. Also, the amendments to the SDPWOA do not require similar documentation to be made available to the public regarding the referral as currently available under the Cth system.
- Whilst there is some mention of public information in the draft approval bilateral agreement,[3] there is no certainty and no enforceability of ensuring that proponents and the State Government provide appropriate and equivalent access to information.
- **Solution: include opportunity for public comment on any proposed bilateral project declaration to match existing rights under the EPBC Act. All the bilateral agreement provisions referring to public rights or access to information should be securely contained in the SDPWOA itself, not just the draft approval bilateral agreement.**

Case example: Carmichael coal mine failed to provide public information

Under the *Environmental Protection Act 1994* (Qld) ('EP Act') and *Mineral Resources Act 1989* (Qld), public notification of the application of the Carmichael coal mining lease and EA was required to be published in April 2014. It had been at the discretion of the Qld Department of Environment and Heritage Protection to publish such applications online: as a matter of practice this has occurred since early 2012. Unusually, the Carmichael mining lease and application was not published online until weeks after public notification officially started. Without strong legislative provisions requiring online publication, publication can be inconsistent and haphazard. The public notification provisions must be in the SDPWOA and require online publication as well as by other methods, rather than only appearing in the draft approval bilateral agreement.

[3] Under the proposed SDPWOA regulations the required public notification is to be by newspaper only and there is no requirement for notification on the internet (see s36B of the proposed regulations). This is contrary to paragraph 103(a) of the Standards for Accreditation for approval bilaterals released by the Commonwealth, which require publication on the internet. Whilst the draft approval bilateral agreement may provide for publication on the internet, this should be in the legislation (at least the SDPWO regulations if not the SDPWOA) themselves, not left up to the approval bilateral agreement.

4. Inferior accountability provisions disrespect the law and would wipe out essential public interest cases

No extended standing for Judicial Review contrary to the Standards

- The proposed Part 4A SDPWO Act (Qld) for approvals by the Coordinator General does not extend the standing of the meaning of a 'person aggrieved' under the *Judicial Review Act 1991* (Qld). This means that a person would need to establish they are a 'person aggrieved' under the *Judicial Review Act* 1991 (Qld), which is a much higher/onerous test than the extended standing granted under the EPBC Act s.487 (which can be generally described as the party bringing the action has a demonstrated interest in the environmental matter for the 2 years prior).
- This is contrary to Standard [111] of ensuring there is extended standing akin to that under the EPBC Act.
- It is also unclear whether **representative proceedings** under s.488 EPBC Act will be replicated in the Qld framework, whereby individual can bring an application on behalf of an unincorporated association
- **Solution: ensure that s.487 EPBC Act extended standing provisions are included in the SDPWOA amendments.**

Case example: Nathan Dam

In 2003 and 2004, the Nathan Dam Federal Court case was successful in correcting serious legal errors that impacted on the Great Barrier Reef. However it is unlikely the applicants would not have qualified to go to Court under the inferior proposed rules in the Bill. The current definition of 'person aggrieved' is "to a person whose interests are adversely affected by the decision". The parties in these cases – the Queensland Conservation Council and the Worldwide Fund for Nature (Australia) – would not have qualified for standing without the s.487 EPBC Act extension.

Standing for declarations and enforcement excludes public interest groups

- s.54ZL and 54ZM excludes third party standing for enforcement and declarations. This is contrary to the Standards for Accreditation.
- There is no justification as to why s.54ZL and s.54ZM incorporates most of the standing provisions under s.505 EP Act --but excludes third parties acting in the public interest s.54ZL(4).
- We are unsure why the *Environmental Protection Act 1994* (Qld) is not proposed to apply to s54ZK, enforcement of conditions.
- **Solution: Enforcement rights for the public need to be equivalent to those under the EPBC Act, so the public may act as a watch dog in the case of official inaction as per the EPBC Act.**

5. Weakened decision rules for a decision to make a 'bilateral project declaration' versus 'controlled action' decision

- S.75 and 76 EPBC Act currently provide a mechanism for requesting information from the applicant and the public about whether the project is a controlled action or not.

- There is no equivalent mechanism in the SDPWO amendments allowing for public submissions and input at an early stage as to whether the project should be a bilateral project declaration.
- See for example, recently the proponent for the Cairns Aquis Resort asserted that the project was not a controlled action, despite being adjacent to the GBR WHA. Public submissions were invited which informed the decision that it was a controlled action. Where is the equivalent in SDPWO? – Now just up to the CG.
- **Solution: ensure that a Referral mechanism akin to EPBC Part 7 is included in Part 4A Division 2 regarding the 'bilateral project declaration' decision.**

6. The existing SDPWOA includes inferior provisions to outlaw supply of false and misleading documents compared to Cth legislation

- Under the EPBC Act, it is an offence to provide information in response to a requirement or request under Parts 7, 8, 9, 13 or 13A, which can be reckless[4] or negligent.[5] Recklessness in this section includes intention and knowledge.[6] Although not explicitly stated in the legislation, it is probable that omitting information would also fall within this definition.[7]
- The provision against giving false and misleading information under the SDPWOA is narrower than the EPBC as it prohibits giving the Coordinator-General 'a document' – rather than the EPBC Act's broader 'information' - containing information that the person knows is false or misleading in a material particular.[8] The SDPWOA provisions require actual knowledge that a document is false or misleading, whereas the broader provision in the EPBC Act encompasses recklessness or negligence.
- The Abbot Point T3 and Gladstone examples below illustrate the need for the SDPWOA to confer standing on the public to enforce false and misleading provisions. See above at 4 regarding standing for bringing enforcement proceedings.
- **Solution: include false and misleading provisions in the SDPWOA equivalent to those in the EPBC Act, to encompass false and misleading 'information' (not a 'document') and that encompasses recklessness or negligence not needing actual knowledge.**

Case example of false and misleading information – Abbot Point T3

The current Abbot Point T3 EPBC 2008/4468 investigation set out below is an example of how the EPBC provisions currently work regarding false and misleading information. The below example contains publically available information.

In early 2013 Greenpeace raised concerns with the Federal Environment Minister about some of the information provided for the EPBC Act assessment of the Abbot

[4] *EPBC Act* s 489(1).
[5] *EPBC Act* s 489(2A).
[6] See *Criminal Code* (Cth) s 5.4(4), and the note under s 489(1)(b) of the *EPBC Act*.
[7] This is because information that omits important details, such as an EIS that omits major impacts of the project, is misleading; in the context of environmental assessment, it creates the false impression that there are no other important impacts to be considered. There is relevant case law under the EPBC Act, trade practices legislation and corporations law to support this view.
[8] SDPWOA, section 157O.

Point Terminal 3 expansion project (T3) proposed by Hancock Coal Infrastructure Pty Ltd (Hancock).

Around the time Hancock was preparing information to provide to the then Department of Sustainability Environment Water Population and Communities (Department) for assessment of T3 under the EPBC Act, a parallel assessment was being undertaken as part of the Abbot Point Cumulative Impact Assessment (CIA). A survey study released as part of the CIA indicated that there were larger and more diverse populations of listed threatened species and migratory bird species in the wetlands adjacent T3 than had been previously recorded.

It was alleged that Hancock knew of this study but provided conflicting information to the Department, such that Hancock had recklessly or negligently provided false or misleading information in contravention of the EPBC Act. We note that although these allegations were investigated by the Department, this alleged contravention of the EPBC Act might also have been pursued as a third party enforcement action.

The offences of recklessly or negligently providing false or misleading information under s489 of the EPBC Act are broader than the similar offence in s157O of the SDPWO Act, which applies only to "a document containing information the person ***knows*** is false or misleading in a material particular."

Where a proponent is entirely responsible for the quality of the information provided for assessment, as is the case under the EPBC Act, it is appropriate that offences such as these extend to recklessness and negligence. This distinction is particularly important where offences are the basis of third party enforcement rights, where a narrowing of such an offence provision would only increase the risks of taking enforcement action and act as a further barrier.

Case example: Alleged false and misleading EIS

The Gladstone Ports Corporation (GPC) is a Queensland Government owned corporation in charge of the port expansion and dredging projects in Gladstone Harbour. A 2009 study, co-funded by the GPC and CQ University, confirmed rising effects of chemical contamination in molluscs in key areas of the harbour which were later earmarked for dredging.[9] However, GPC's 2011 environmental impact statement (EIS) for the project did not address the study; instead, it relied on previous studies and its own monitoring and testing data. GPC has asserted that "the release of the study to the public or Government departments is the responsibility of the commissioning body, which in this case was CQ University." [10]
The omissions meant the chemical was ignored in toxicology tests on marine samples by the state government and prevented Commonwealth regulators from having the latest information before approving the dredging project.[11]

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[9] Burdon, D. (2013, December 2). GPC-funded study on toxic chemical kept from authorities. The Morning Bulletin/Sunshine Coast Daily. Retrieved from http://www.sunshinecoastdaily.com.au/news/gpc-funded-study-toxic-chemical-kept-authorities/2078594/

[10] http://www.gpcl.com.au/Portals/0/2013%20media%20releases/15_November_2013_Fact_Sheet_-_No_Creative_Writing_Just_the_Facts.pdf

[11] Burdon, D. (2013, December 2). GPC-funded study on toxic chemical kept from authorities. The Morning Bulletin/Sunshine Coast Daily. Retrieved from http://www.sunshinecoastdaily.com.au/news/gpc-funded-study-toxic-chemical-kept-authorities/2078594/

7. The Bill lacks any power to reject clearly unacceptable project whereas such efficient powers exist under Cth legislation

- There is no equivalent s.74B to allow a refusal on the basis that it is clear that the action would have unacceptable impacts on a protected matter. This risks wasting public time and money.
- For example of how this works, see the 'clearly unacceptable' decision in GKI Resort EPBC 2009/5095.
- Although the Coordinator General might be able to refuse to grant a 'bilateral project declaration' under s.54L(4), there is no criteria for determining whether there are clearly unacceptable impacts for a bilateral project declaration decision
- The CG can make a bilateral project declaration just after or at the same time he makes a decision on whether a project should be declared a coordinated project.
    - This requires a completely different set of criteria: basically the CG makes a decision on criteria in s.27 for e.g. the project has significant infrastructure requirements requiring a huge investment and short-term wealth for the Government, then the next step is for a bilateral project declaration.
    - On one hand, the CG determines an application for a coordinated project declaration on the basis that it will bring economic benefits, then on the other hand he has no means to really consider whether the project is clearly unacceptable for protected environmental matter.
- **Solution: Include amendments in the Bill to ensure there is a basis for rejecting an application on the basis of clearly unacceptable impacts on the protected matters.**

Schedule 1 – No consultation with key conservation legal organisation.

EDO Qld has over 20 years of legal expertise that spans both Queensland and Commonwealth environment and planning laws. By any definition EDO Qld is a key stakeholder in relation to laws affecting environmental regulation. EDO Qld prepared a 42-page, detailed submission on the Qld Draft Assessment Bilateral Agreement in December 2014.[12] Our standing as a key stakeholder in planning and environmental laws is not only recognised by the Department of Environment and Heritage Protection (DEHP) and the Department of Natural Resources and Mines, but it is also recognised by DSDIP in their recent invitation to EDO Qld to make comments on an exposure draft of proposed new planning legislation.

We would expect that in order to find out who would be appropriate to consult with, that the Office of the Coordinator General would either ask DEHP or the Environment Minister, or look to who made submissions on the Qld Draft Assessment Bilateral Agreement (given the amendments also include an assessment process) or look to what groups have made submissions on major law reforms affecting the environment,[13] rather than using the EIS contact database which is clearly for a vastly different purpose than law and policy reform.

Yet we were not contacted by the Office of the Coordinator General regarding the amendments, even though the amendments at Part 3 Division 2 of the Bill represent major changes to the approval of impacts on matters of national environmental significance under a new approval bilateral process. This is despite our written request to Premier Newman on 8 November 2013 seeking a meeting with the Premier to discuss our concerns regarding the approval bilateral agreement.

Failure to consult with EDO Qld on the proposals is therefore a failure to consult with key conservation groups, contrary to page 3 of the explanatory notes to the draft regulation tabled on 8 May 2014.

We further note that at the Departmental hearing on 15 May 2014, representatives from DSDIP and the Office of the Coordinator General could not provide an appropriate explanation or justification for such rushed legislation. Even if the Federal Environment Minister has indicated to DSDIP that the State legislation should be enacted prior to July 2014, how is this justification for rushing through legislation without sufficient time for the public – nor the Committee – to allow for proper scrutiny of the proposed amendments? If this was the case, why has it taken so long to introduce new legislation to the Queensland Parliament?

With the Committee allowing only 1 week for public submissions and a failure to consult, means the Queensland Parliamentary Committee system simply is not an effective means for scrutiny of legislation.

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[12] Available here: http://www.environment.gov.au/submissions/bilateral-agreements/qld/queensland-environmental-defenders-office.pdf

[13] For example, it is public knowledge that the EDO Qld has made detailed submissions on amendments to the Bills and appeared before Committees to give oral evidence, we have done such law reform for the past 20 years. Recent examples of our work and contributions to amendments are publically available on the SDIIC's website here http://www.parliament.qld.gov.au/work-of-committees/committees/SDIIC: Sustainable Planning and Other Legislation Amendment Bill 2012, Regional Planning Interests Bill 2013, Economic Development Bill 2012 and the Vegetation Management Framework Amendment Bill 2013.