Parliamentary Committees



Vegetation Management (Clearing for Relevant Purposes) Amendment Bill 2018

Report No. 14, 56th Parliament
State Development, Natural Resources and Agricultural Industry Development Committee
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State Development, Natural Resources and Agricultural Industry Development Committee

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Acknowledgements

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Abbreviations

Act/VMA	*Vegetation Management Act 1999*
Bill	Vegetation Management (Clearing for Relevant Purposes) Amendment Bill 2018
LSA	*Legislative Standards Act 1992*
DNRME/ department	Department of Natural Resources, Mines and Energy
LGAQ	Local Government Association of Queensland
HVA/IHVA	High Value Agriculture/Irrigated High Value Agriculture
DNRM	former Department of Natural Resources and Mines
DILGP	former Department of Infrastructure, Local Government and Planning
QCAT	Queensland Civil and Administrative Appeals Tribunal
VMOLA	*Vegetation Management and Other Legislation Amendment Act 2018*

Chair's foreword

This report presents a summary of the State Development, Natural Resources and Agricultural Industry Development Committee's examination of the Vegetation Management (Clearing for Relevant Purposes) Amendment Bill 2018.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the committee, I thank those organisations who made written submissions on the Bill. I also thank the Department of Natural Resources, Mines and Energy for its assistance with this Inquiry and the Parliamentary Service staff.

I commend this report to the House.

Chris Whiting MP

Chair

Recommendations

1 Introduction

1.1 Role of the committee

The State Development, Natural Resources and Agricultural Industry Development Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's areas of portfolio responsibility are:

- State Development, Manufacturing, Infrastructure and Planning
- Natural Resources, Mines and Energy, and
- Agricultural Industry Development and Fisheries.

Section 93(1) of the *Parliament of Queensland Act 2001* provided that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

1.2 Inquiry referral

The Vegetation Management (Clearing for Relevant Purposes) Amendment Bill 2018 (Bill) was introduced into the Legislative Assembly by Mr Robert Katter MP, Member for Traeger, as a Private Member's Bill.

The Bill was referred to the committee on 21 March 2018. The committee is to report to the Legislative Assembly by 24 September 2018.[2]

On 17 May 2018, the Speaker of the Legislative Assembly ruled that clause 4 of the Bill was out of order as it offended the same question rule under Standing Order 87(1).[3] This report contains the committee's examination of the remaining clause of the Bill (clause 3).

1.3 Inquiry process

The committee sought a written briefing on the Bill from the Department of Natural Resources, Mines and Energy (DNRME/department), as the agency responsible for administering the *Vegetation Management Act 1999* ('the Act'). A copy of this advice is published on the committee's web page.[4]

The committee called for public submissions on clause 3 of the Bill and received two submissions (see **Appendix A** for list of submitters). The department provided the committee with a response to these submissions, a copy of which is published on the committee's web page.[5]

1.4 Policy objectives of the Bill

The explanatory notes state that the objectives of the Bill are to amend the Act to:

- create an obligation on the chief executive to issue an information notice where an application for clearing, as assessed under section 22A of the Act, has been rejected; and

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1 *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

2 Standing Order 136(1).

3 Record of Proceedings, Brisbane, 17 May 2018, p 1283.

4 http://www.parliament.qld.gov.au/work-of-committees/committees/SDNRAIDC

5 http://www.parliament.qld.gov.au/work-of-committees/committees/SDNRAIDC

- remove 'grazing activities' from the definition of high value agriculture clearing to ensure that it is considered a relevant purpose in the chief executive's consideration of an application to clear under the Act.[6]

The first policy objective was developed to enable access to a reasonable appeals process.[7] The explanatory notes state that, under the current legislative framework, 'there is no right of appeal or review for a person who has made an application under section 22A of the Act, where that application has been rejected.'[8] Specifically, the explanatory notes provide:

> *The only basis for appeal or review pursuant to the Vegetation Management Act 1999 is if the section of the Act dealing with the decision requires an information notice be given with the decision.*
>
> *Section 63 (1) of the Act states "A person who is given, or is entitled to be given, an information notice about a decision made under this Act may apply for an internal review of the decision."*
>
> *Creating an obligation for the chief executive to issue an information notice where an application has been rejected on the basis of section 22A, therefore creates a mechanism for an internal review.*[9]

When introducing the Bill to Parliament, Mr Katter MP stated:

> *In many cases it seems terribly unfair that when people are trying to achieve the outcome that everyone wants in terms of sustainable development, a judgement is made that people disagree with and there is no right to appeal.*[10]

The second policy objective relates to clause 4 of the Bill (removing grazing activities from the definition of high value agricultural clearing) which was ruled out of order by the Speaker of the Legislative Assembly and will not be addressed in this report.[11]

1.5 Consultation on the Bill

As set out in the explanatory notes, consultation was conducted with 'stakeholders including agricultural industry peak bodies and legal experts in developing and assessing clearing applications.'[12]

1.6 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

After its examination of the Bill and consideration of the information provided, the committee recommends the Vegetation Management (Clearing for Relevant Purposes) Amendment Bill 2018 not be passed.

Recommendation 1

The committee recommends the Vegetation Management (Clearing for Relevant Purposes) Amendment Bill 2018 not be passed.

6 Explanatory notes, p 1.

7 Explanatory notes, p 1.

8 Explanatory notes, p 1.

9 Explanatory notes, p 1.

10 Record of Proceedings, Brisbane, 21 March 2018, p 590.

11 See above 1.2 and Record of Proceedings, Brisbane, 17 May 2018, p 1283.

12 Explanatory notes, p 2.

2 Examination of the Bill

This section discusses issues raised during the committee's examination of the Bill.

2.1 Information notice

Clause 3 proposes to insert a new sub-section into section 22A of the Act which would state:

> *If the chief executive decides the development applied for is not development mentioned in subsection 2(a) to (l), the chief executive must give the applicant an information notice about the decision.*

Section 22A of the Act deals with situations where applicants can apply for a development approval to clear vegetation on land. Before applying for a development approval, the chief executive of DNRME must be satisfied that the development is for a relevant purpose. Section 22A(2) sets out a list of relevant purposes:

(a) a project declared to be a coordinated project under the State Development and Public Works Organisation Act 1971 , section 26 ; or

(b) necessary to control non-native plants or declared pests; or

(c) to ensure public safety; or

(d) for relevant infrastructure activities and clearing for the development can not reasonably be avoided or minimised; or

(e) a natural and ordinary consequence of other assessable development for which a development approval was given under the repealed Integrated Planning Act 1997 , or a development application was made under that Act, before 16 May 2003; or

(f) for fodder harvesting; or

(g) for managing thickened vegetation; or

(h) for clearing of encroachment; or

(i) for an extractive industry; or

(j) for necessary environmental clearing.

Currently, there is no provision that states the chief executive must give an applicant an information notice about a decision made under section 22A of the Act. Information notices are, however, required under other sections of the Act.[13]

An 'information notice' is defined under the Act to mean a notice stating each of the following:

(a) the decision, and the reasons for it;

(b) the rights of review under this Act;

(c) the period in which any review under this Act must be started;

(d) how rights of review under this Act are to be exercised.[14]

The provision of an information notice is significant under this Act, as it triggers the internal and external review processes available to applicants.

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13 See, for example, decisions regarding Property Maps of Assessable Vegetation (PMAVs) under sections 20C and 20CA and decisions regarding stop work notices (section 54A) and restoration notices (section 54B).

14 *Vegetation Management Act 1999*, Schedule.

2.2 Relationship to review process

The provision of an information notice triggers the internal and external review process under Part 4, Division 1 and 1A of the Act. Section 63(1) states:

> *A person who is given, or is entitled to be given, an information notice about a decision made under this Act may apply for an internal review of the decision.*

Section 63B sets out who may apply for external review. This section states:

> *A person who is dissatisfied with a review decision may apply, as provided under the QCAT Act, to QCAT for a review of the review decision.*

Effectively, this means that applicants whose applications are considered not to be for a relevant purpose under section 22A of the Act as determined by the chief executive, have no recourse to internal review of the decision under the Act or external review of the decision to the Queensland Civil and Administrative Appeals Tribunal (QCAT).

2.3 Written advice from the department

Given the potential impact of the Bill on the vegetation management legislative framework, the committee sought written advice from the department on:

- the impact of clause 3, and
- the practical implications of the Bill in relation to the process of review.

The department provided the committee with a brief history of section 22A of the Act and the level of assessment required to determine a 'relevant purpose':

> *Section 22A was first introduced into the VMA in 2004, as part of delivering the then Government's election commitment to phase out broadscale clearing. At that time, the relevant purposes were identified by a simple checklist completed by the applicant, and this did not require assessment by the department. There was little need for review or appeal rights, as it was anticipated that proposals would only be accepted or refused by the chief executive on the basis of the identification by the applicant.*
>
> *In 2013, the then Government amended s22A to include HVA and IHVA as relevant purposes. It introduced a new s22B which defined detailed and technical assessment criteria for determining whether an application qualified as HVA or IHVA. This required substantial assessment by the department. Review and appeal rights arguably, could have been provided at this point, to provide transparency and ensure the proper use of the administrative power.*
>
> *In May 2018, the VMOLA* [Vegetation Management and Other Legislation Amendment Act 2018] *removed HVA and IHVA from s22A and also removed the previous s22B addressing criteria for assessing HVA and IHVA. At the same time, VMOLA introduced a new s22B, which sets out detailed and technical assessment criteria for determining whether proposed clearing qualifies as managing thickened vegetation. This will require substantial assessment by the department.*

The department advised the committee that, in principle, clause 3 of the Bill would 'improve the transparency and accountability associated with decision making under the VMA'.[15] In terms of the impact of clause 3 and practical implications for the vegetation management framework, DNRME stated:

> *Requiring an information notice to be issued would align with existing mechanisms within the VMA in relation to internal review and appeal of other decisions under the Act.*

[15] Department of Natural Resources, Mines and Energy (DNRME), correspondence dated 13 July 2018, p 6.

DNRME has an approved form for requesting an internal review which is provided with relevant notices, and available on its website…

If the Bill is passed, DNRME would update this form to include requests for internal review of decisions under s22A and update its existing internal procedures to include these reviews.[16]

However, the department also drew the committee's attention to potential resourcing implications if the Bill were to be passed. DNRME advised the committee that:

The resourcing impacts on DNRME would include both resourcing of the internal review; resourcing for the department to provide evidence at QCAT hearings; and additional costs through its responsibility for providing appropriate funding to QCAT under a Memorandum of Understanding.

The requirement to provide resourcing for these functions would potentially divert existing departmental resources from existing monitoring, extension and compliance functions.[17]

The department noted that such resourcing implications had not been quantified in the explanatory notes, nor had any alternative options been examined.[18] As noted in section 2.2 above, the provision of an information notice triggers both internal and external review processes available under the Act. The committee notes that implementing such a review mechanism requires consideration of the appropriate body for review, in particular in light of the changes to the vegetation management legislation as a result of VMOLA and the nature of the decisions made under s22A of the Act. On this issue, the department highlighted that further analysis and consultation should be undertaken:

Consideration should be given to the implications of alternative approaches and alternative bodies in relation to the appeal process. This should include an analysis of the implications of each option in terms of the accessibility for landholders; costs to landholders; costs to the State; impacts on the workload and waiting times for potential appeal bodies; and the relevant expertise and experience of the potential appeal bodies. Consultation should occur with the Department of Justice and Attorney General as well as Department of Natural Resources Mines and Energy, and with the potential appeal bodies, including both QCAT and the Planning and Environment Court.[19]

2.4 Issues raised in submissions

The submissions to this Inquiry supported the Bill and highlighted that clause 3 would provide greater accountability and transparency around decision-making for landholders. For example, LGAQ stated in its submission:

The Bill (clause 3) creates an obligation on the chief executive to issue an information notice where an application for clearing, as assessed under section 22A of the Act, has been rejected. The inclusion of this clause provides greater accountability and transparency around decision making for landholders and councils. The LGAQ therefore supports Vegetation Management (Clearing for Relevant Purposes) Amendment Bill 2018.[20]

AgForce Queensland expressed similar views with respect to the operation of the former HVA/IHVA provisions under s 22A of the Act:

16 DNRME, correspondence dated 13 July 2018, p 6.

17 DNRME, correspondence dated 13 July 2018, p 6.

18 DNRME, correspondence dated 13 July 2018, pp 6-7.

19 DNRME, correspondence dated 13 July 2018, p 7.

20 Submission 01, p 1.

> *There appeared to be no legislative or regulatory trigger requiring DNRM to provide a formal s22A response to the applicant. The result of this was applicant lack of clarity as to whether the HVA/IHVA permit approval process was going ahead or not.*[21]

In its submission, AgForce Queensland also highlighted the significance of a section 22A determination for landholders with respect to further development assessment provisions under the state planning legislation:

> *Without the s22A VMA approval, DILGP do not consider the application to be properly made and the approval process can go no further. Also, the VMA does not require an information notice to be given with the s22A decision therefore no right of appeal or review exists for the applicant to review the decision against the VMA. Despite following all criteria in the HVA/IHVA guidelines, some members have been refused a positive s22A determination and not been provided with an information notice, leaving them with no recourse to an internal review. Some members have communicated that they have had to go to extraordinary lengths with Queensland Government in order to receive s22A approval from DNRM and then have their HVA/IHVA application assessed by DILGP. In some instances, this has involved inordinate costs and extended timeframes with the engagement of lawyers in cases before the Planning ad* [sic] *Environment Court and/or QCAT. A greater degree of transparency on s22A assessment and approval would have provided landholder applicants with a far better understanding of the prospects of their application being successful and most certainly would have reduced their need to resort to expensive court costs and legal proceedings simply to receive an answer from Queensland Government.*[22]

Whilst DNRME acknowledged that clause 3 of the Bill may improve transparency and accountability in relation to decisions made under section 22A of the Act, it also noted that 'there are alternative jurisdictions, such as the Planning and Environment Court, which may be better suited to dealing with appeals relating to this section.'[23]

> *DNRME recommends that further analysis be undertaken, including consultation with the Department of Justice and Attorney General and the potential appeal bodies (QCAT and the Planning and Environment Court) to determine the most appropriate jurisdiction. This analysis should address a comparison of:-*
>
> - *Accessibility for landholders;*
> - *Costs to landholders and the State:*
> - *The prospective workload/timelines of the two jurisdictions;*
> - *The relevant expertise and experience with the matters involved in appeals against decisions made under section 22A.*[24]

A further issue raised by AgForce Queensland in its submission was compliance with the *Legislative Standards Act 1992* (LSA) and principles of natural justice:

> *…it is arguable that the long-term refusal of DNRM to provide an information notice to applicants to inform them of the s22A decision and rationale for the result, breaches the Legislative Standards Act 1992. AgForce has case examples where members have communicated their frustration with the difficulties involved in receiving a timely response on s22A approval… In particular, s22A currently does not deliver "fundamental legislative principles" [which] are the*

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21 Submission 02, p 3.

22 Submission 02, p 3.

23 DNRME, correspondence dated 17 August 2018, p 1.

24 DNRME, correspondence dated 17 August 2018, p 1.

principles relating to legislation that underlie a parliamentary democracy based on the rule of law… requiring that legislation has sufficient regard to—

(a) rights and liberties of individuals; and

(b) the institution of Parliament.[25]

The fact that applicants have had to spend hundreds of thousands of dollars through the courts to force the Queensland Government to administer legislation and regulations in a fair and equitable manner has adversely affected rights and is certainly not consistent with the principles of natural justice.[26]

In response, DNRME noted that decision making by the department under section 22A of the Act is compliant with requirements under the *Public Sector Ethics Act 1994* and *Judicial Review Act 1991* and that:

…landholders are afforded natural justice during the assessment process to allow them to supply further information to support their application where required; and any landholder whose application is refused under this section is provided with a reason for the decision.[27]

The committee notes that clause 3 of the Bill concerns administrative decision making and that the application of fundamental legislative principles will be particularly relevant - these issues are addressed in section 3.1 below.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill and considered that the Bill raises no issues of fundamental legislative principle.

On the contrary, insofar as the Bill aims to create a mechanism for review of decisions by the chief executive, the Bill can be seen as enhancing the principal Act in relation to one aspect of the fundamental legislative principles – which require that legislation has sufficient regard to the rights and liberties of individuals.

Section 4(3) of the LSA states, in part, that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation:

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review

Thus, legislation should make rights dependent on administrative power only if subject to appropriate review (noting that such a removal of rights might be justified by the overriding significance of the objectives of the legislation). The OQPC Notebook states:

Depending on the seriousness of a decision and its consequences, it is generally inappropriate to provide for administrative decision-making in legislation without providing for a review process.

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25 Submission 02, p 4.

26 Submission 02, p 5.

27 DNRME, correspondence dated 17 August 2018, p 2.

If individual rights and liberties are in jeopardy, a merits-based review is the most appropriate type of review.[28]

Committee comment

The committee acknowledges the points raised by submitters and considers that there is merit in investigating some further development of accountability and transparency measures for administrative decision-making.

The committee notes, and as stated by the department, that there was no consultation with the Planning and Environment Court, QCAT and other stakeholders in the development of the Bill which creates uncertainty in regard to its practical application.

Additionally, the committee acknowledges the advice received from the department on the practical implications of implementing clause 3 of the Bill. In light of the department's advice, the committee considers that further analysis is required in relation to the provision of an information notice under section 22A of the *Vegetation Management Act 1999*.

Recommendation 2

The committee recommends that the Minister for Natural Resources, Mines and Energy examine the merits of providing an information notice to applicants under section 22A of the *Vegetation Management Act 1999*.

3.2 Explanatory notes

Part 4 of the LSA sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes contain the information required by Part 4. They are sufficiently detailed with a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

[28] Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 18.

Appendix A – Submitters

Sub #	Submitter
001	Local Government Association of Queensland
002	AgForce Queensland