AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney
alhr@alhr.asn.au
www.alhr.asn.au

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Ms Erin Pasley
Acting Research Director
State Development, Infrastructure and Industry Committee
Queensland Parliament
Parliament House
Brisbane QLD 4000

VIA EMAIL (sdiic@parliament.qld.gov.au)

Dear Ms Pasley,

**Sustainable Planning and Other Legislation Amendment Bill 2012 (Qld) Planning Environment Court Costs**

1. Australian Lawyers for Human Rights (ALHR) thanks the State Development, Infrastructure and Industry Committee for the opportunity to comment on proposed amendments to the cost provisions in the Sustainable Planning Act 2009 (Qld) (SPA) by the abovementioned Bill.

2. ALHR was established in 1993. ALHR is a network of Australian law students and lawyers active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2000 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

**Summary of Recommendations**

3. In the interests of preserving the fundamental human right of equality before the law and non-discriminating access to justice, ALHR strongly recommends:

- Against proceeding with Bill insofar as it will dismantle the PEC Costs Rule;
- That the Queensland Government preserve Queensland citizens' access to justice in the PEC by amending the proposed Bill to ensure the PEC Costs Rule is preserved.

**The Queensland Planning and Environment Court Costs Rule**

4. Since the passage of the *Local Government (Planning & Environment) Act 1990* (**LGPEA**), the law has specifically provided that parties in the Queensland Planning and Environment Court (**PEC**) bear their own costs in proceedings unless the PEC orders otherwise.[1] That is, for the past 20 years all parties to proceedings in the PEC must pay for their own legal assistance or expert witnesses and volunteer their own time but, apart from limited exceptions, the parties do not currently have to pay the other side's costs if they lose (**the PEC Costs Rule**).

5. The reason for the PEC Costs Rule is that the PEC has, by virtue of higher order public policy principles, been recognised as a public interest court which often hears planning and environmental matters that affect the whole community and future generations of Queenslanders including, for example, heritage protection matters and endangered and threatened species protection matters. The PEC, thereby, as a public interest court, gives effect to those higher order public policy principles by providing access to justice for members of the Queensland community regarding the extremely important planning and environment matters.

6. The current costs regime in the PEC is testament to and a proud symbol of robust democracy in Queensland. Dismantling access to justice for Queenslanders in planning and environmental matters via the proposed Bill is not only unnecessary but also harms the State's reputation in the rest of Australia and the world. ALHR submits that Queensland should be a world leader in promoting and giving effect to effective democratic governance principles.

**A Reason for the Proposed Changes?**

7. The Deputy Premier raised the issue of the changing the cost rule when he introduced the *Sustainable Planning and Other Legislation Amendment Bill* (2012). He stated that there were 'shortcomings in the current cost provisions' namely because delays were introduced by competing commercial bodies, "meritless" claims were made to challenge developments and all these issues could be sorted with the costs being borne by the losing party and by granting the court discretion to decide otherwise.

8. These claims were based on figures presented over two months and limited consultation carried out during May and July 2012.

9. The changes hoped to target delays within the PEC structure. The explanatory notes submitted with the Bill suggested that the proposed changes encouraged the parties to resolve their disputes at or before mediation as the prospect of going to court would incur similar penalties to the District and Supreme courts where parties may incur costs.

[1] Section 7.6(1) of the LGPEA.

10. An immediate flaw in the justification proffered is that commercial entities will not be deterred by the proposed change. Such entities have the economic might to sustain adverse orders for costs to gain business advantage.

11. In any event, the existing rule is effective where obvious tactics of delay are used. Section 457(2)(a) of the *Sustainable Planning Bill 2009* (**the Bill**) now allows adverse costs orders to be made where those circumstances arise.

12. The types of turnover and profits involving commercial competitors make it clear that litigation costs would not hinder commercial entities from pursuing litigation. Commercial developments such as shopping centres have the ability to make 10 million dollars each year. Litigation costs of even several million dollars mark do not deter commercial competitors from pursuing litigation. The result is that the people who will be harmed and deterred by the proposal are the not-for-profit community organisations and individuals and families whose neighbourhoods are potentially affected by proposed developments.

13. Also, the volume of cases where objections to proposals have been partially or wholly successful in the PEC would suggest that delays and abuse of process are not significant problems in PEC litigation.

14. Further still, such fears appear illusory in that the PEC has been recognised internationally for its efficient and diligent case management.[2]

15. Therefore, the proposed amendment to the PEC Costs Rule is not, in the opinion of ALHR, justified by the existing evidence. The detrimental impacts of deterring important claims by concerned citizens far outweighs any perceived advantages, particularly, when one takes into account the effectiveness with which the current system works.

**Access to Justice**

16. The PEC was established by the *Local Government (Planning and Environment) Act 1990* (Qld) (**LGPEA**)[3]. The premise on which the court was founded was to act in the interest of the public. The fundamental principle behind the QPEC was to have the parties to a proceeding bear their own costs essentially ensuring that regardless of the depth of one's pockets, justice in environmental matters would be available to all Queenslanders.

17. The High Court held in *Oshlack v Richmond River Council*[4], that, even on common law costs principles, it was appropriate not to punish a losing party with an adverse costs order when the motivation for litigation is to protect the environment. This right is particularly important in a court whose core business is to protect the environment while approving sustainable development.

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[2] Development Assessment Monitoring and Performance Program (DAMPP) Annual Report for 2010-2011 available at http://www.dsdip.qld.gov.au/resources/policy/state-planning/dampp-annual-report-2010-2011.pdf

[3] *Local Government (Planning and Environment) Act 1990* (Qld) s 7.3(1).

[4] *Oshlack v Richmond River Council* (1998) 193 CLR 72.

18. Fear of the potential crippling costs associated with litigation may deter not-for-profit organisations and families and individuals with environmental concerns from litigating, increasing the likelihood that wealthy corporations and companies may be involved in developing Queensland land with little concern for the consequences.

19. Denying Queenslanders access to justice would be the eventual outcome of the proposed amendments to the *Sustainable Planning Act 2009* (Qld).

**Fundamental Human Rights Norms**

20. ALHR makes the submission that the proposed amendments are not consistent with fundamental human rights norms and Australia's international obligations to uphold such norms. That is, the amendments will inhibit the object of ensuring equal access to justice and non-discrimination before the courts.

21. It is a fundamental norm of human rights that all persons receive equality before the law and non-discriminatory access to the courts.

22. This is provided for by the *International Covenant on Civil and Political Rights 1966* **ICCPR**)[5] and the *United Nations Declaration of Human Rights 1948* (**UDHR**).[6]

23. Article 7 of the UDHR provides:

> *All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*

24. The right to a fair trial is captured in Article 14(1) of the lCCPR, which guarantees that everyone who faces trial shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal.

25. Article 26 of the ICCPR provides:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

26. Australia is bound by the terms of the ICCPR of which Article 2(1) provides:

> *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as*

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[5] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[6] It is important to remember Australia's leadership in founding the United Nations and playing a prominent role in both the negotiation of the UN Charter in 1945 and in being one of the eight nations involved in drafting the UDHR. ALHR submits that Australia should continue its leadership in the field of international human rights by striking the appropriate balance between protecting civil liberties and implementing national security safeguards.

*race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

27. There is a burden upon signatory States to intervene and ensure access to justice for their citizens including where, without intervention, ordinary people will be prevented from accessing the courts, including because of the disproportionate financial power wielded by their opponents and the threat of prohibitive costs burdens. ALHR submits that this is an appropriate circumstance for legislative intervention to attempt to ensure access to the courts. For the past 20 years, the PEC Costs Rule has acted to facilitate this.

28. Removing the PEC Costs Rule will reintroduce the threat of prohibitive costs burdens and effectively restrict access to justice and deny equality before the law for everyday Queenslanders interested in preserving their. The proposed changes runs counter to Australia's binding international legal obligations concerning access to justice and equality before the law.

**The Courts' Views**

29. The Queensland Court of Appeal has consistently recognised the validity of the overarching public interest of the rule that parties bear their own costs in the PEC. In *Tamborine Mountain Progress Association Inc v Beaudesert Shire Council* [1995] 2 Qd R 231 the Court of Appeal refused to make an order for costs against an unsuccessful objector/appellant on grounds that such an order would:

> *[B]e inconsistent with the purpose of the legislation unduly to discourage objector appeals, particularly where the objector is not merely acting in its own commercial interest, but rather (as here) in what it conceives to be the interest of the community affected by the proposal.*[7]

30. The Court of Appeal in *Mudie v Gainriver Pty Ltd (No 2)* [2003] 2Qd R 271 found that the general rule, that parties bear their own costs, was consistent with the LGPEA's objective:

> *[T]o ensure that citizens are not discouraged from appealing or applying to the Planning and Environment because of fear that a crippling costs order might be made against them. The provision no doubt also recognises the public interest character of some applications to the Planning and Environment Court.*[8]

31. And, as already mentioned, in the realm of public interest litigation, the High Court has held that it is appropriate not to order costs against a party whose primary motivation is to protect the environment in the public interest.[9]

32. While the Bill's proposed amendments leave the PEC with the ultimate discretion in awarding costs, the amendments shift the onus of proof onto the public interest party to prove why costs should not be awarded against them. ALHR submits that this imposes an onerous, unnecessary and prohibitive burden on environmentally

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[7] Tamborine Mountain Progress Association Inc v Beaudesert Shire Council [1995] 2 Qd R 231 at 232.
[8] Mudie v Gainriver Pty Ltd (No 2) [2003] 2Qd R 271 at 283.
9 *Oshlack v Richmond River Council* (1998) 193 CLR 72.

motivated parties acting in the public interest. The effect, in a great many cases, will be to intimidate such litigants from attempting to access the courts to air their grievances regarding proposed developments.

33. The principles discussed in the cases support the proposition that the the proposed amendments are not consistent with Australia's international obligations to ensure equal access to justice and non-discrimination before the courts.

**Adequate Consultation – A Minimum Requirement**

34. ALHR is concerned at the apparent lack of widespread consultation on this important issue.

35. Everyday Queenslanders cherish the natural environment. Aspects of that environment generate the awe of millions of visitors from around the world.

36. The participation of ordinary citizens in environmental litigation helps ensure that planning decisions are made according to law. Clearly, the PEC Costs Rule helps ensure that this objective is achieved.

37. Because of its ongoing importance on many levels, any change to the PEC Costs Rule requires, as a very minimum, that the wider Queensland community must be substantively consulted.

**Conclusion**

38. The PEC Costs' Rule serves a significantly important public interest principle: it assists ordinary citizens, and groups of concerned citizens, to dispute environment and planning decisions by the State government and local authorities, and allows the legality of actions by land users to be tested. However, without the PEC Costs Rule and the threat of burdensome costs orders, ordinary citizens will be intimidated and from pursuing redress for their concerns.

39. Many commercial users of land have disproportionate financial resources to pursue their agenda. In those circumstances, as has been recognised by governments of all persuasion, State intervention is required to ensure access to justice for non-commercial interests. This has been achieved until now by the PEC Costs Rule.

40. The PEC provides a forum in which citizens who are concerned about the deleterious effects a particular planning decision might have on the environment, for example, an endangered or threatened species of flora or fauna, can pursue redress in a court of law to ensure that such decision was lawful.

41. Such access epitomizes the strengths of a robust democracy and allows a process of democratic engagement and due diligence by the citizenry via the courts.

42. Abandonment of the Bills would enhance Australia's ongoing compliance with Articles 14 and 26 of the *ICCPR*.

**Recommendations**

43. ALHR recommends against proceeding with Bill insofar as it will dismantle the PEC

Costs Rule.

44. ALHR recommends preserving Queensland citizens' access to justice in the PEC by amending the proposed Bill to ensure the PEC Costs Rule is preserved.

45. If you would like to discuss any aspect of this submission, please free to contact Stephen Keim, President on 0433 846 518 or email: s.keim@higginschambers.com.au

Best regards,

**Stephen Keim SC**
**President**
**Australian Lawyers for Human Rights**
**Email: s.keim@higginschambers.com.au**
**Mobile: 0433 846 518**

**Contributors: Rosella William, Benedict Coyne**