PROPERTY COUNCIL of Australia

PROSPERITY | JOBS | STRONG COMMUNITIES

Submission on the Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016

21 April 2016

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1. Executive summary

Thank you for the opportunity to provide a submission on the *Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016* (Bill).

The Property Council has significant concerns with the legislation, both in terms of its impact on fundamental legislative principles and property rights, as well as the significant additional requirements and costs it places on urban development throughout Queensland.

The primary policy objective of the Bill is to '…deliver on the government's commitments and contribute to reducing clearing rates and associated carbon emissions that threaten the health of the Great Barrier Reef'.

While the Explanatory Notes and public commentary from the Government focus on the Bill's intended impact on the activities of the agricultural sector, what has not been acknowledged is the severe consequences of the legislation on urban development in urban areas.

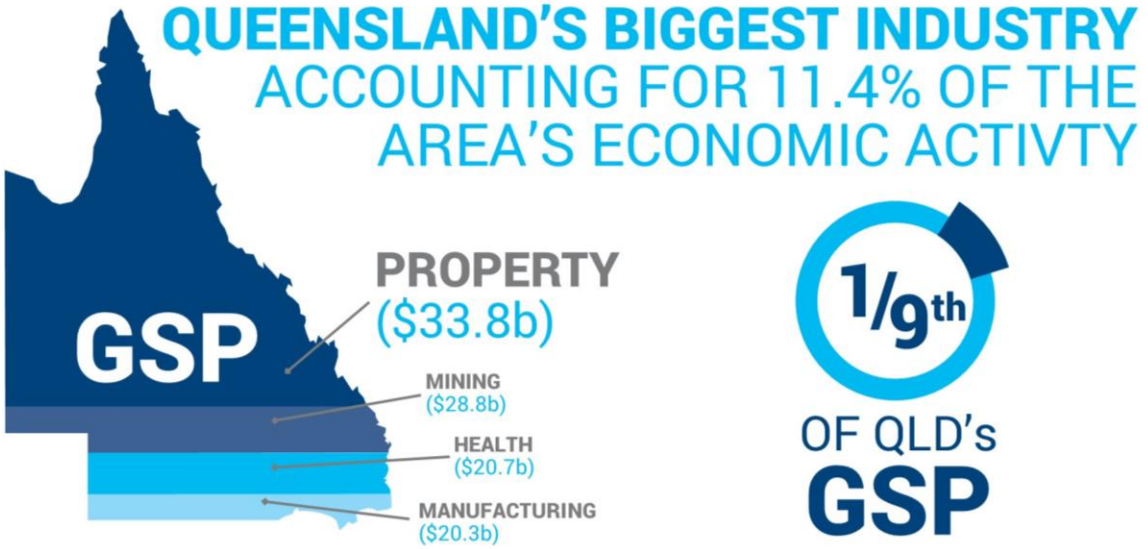
Contrary to the Bill's title, it does not reinstate the previous vegetation management framework. It goes considerably beyond reinstatement to introduce new requirements and prohibitions on landowners that will have a significant impact on the viability of development in urban areas.

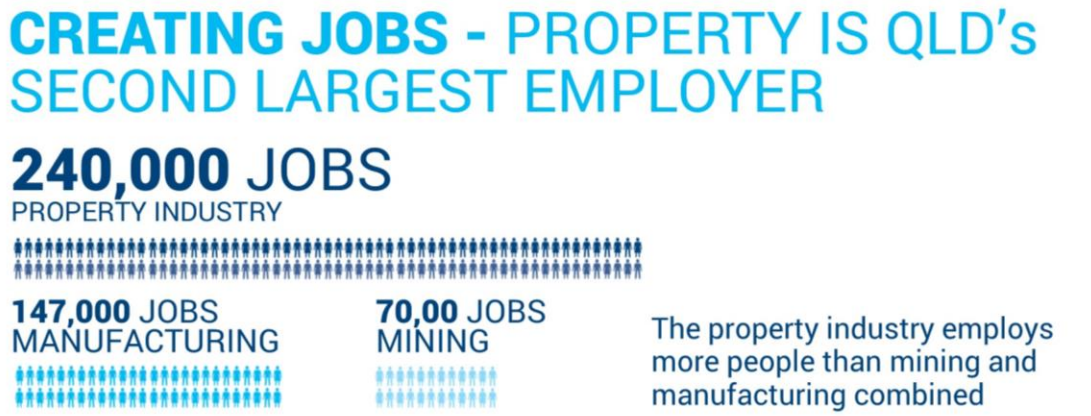
Most frustratingly, given the Government's commitment to consultation and despite repeated requests, the Property Council was not consulted on the development of the legislation.

The Bill seeks to amend four pieces of legislation - *Vegetation Management Act 1999*, *Sustainable Planning Act 2009*, *Water Act 2000* and *Environmental Offsets Act 2014*- each one of which impacts on the development industry.

The following submission provides an indication of the current and future impacts of these amendments, particularly noting the impact of the Bill's retrospectivity.

2. Property industry's contribution to the Queensland economy





3. Vegetation Management Act 1999

As noted, the Bill proposes to make significant changes to the operation and applicability of the *Vegetation Management Act*, which will impact on the property industry both immediately through its retrospectivity, and in the longer term through its impact on property rights.

The Property Council is particularly concerned about the proposed changes to category C and category R areas.

These have far-reaching implications for urban development, as the 'proposed regulated vegetation management map' shows considerable areas of urban land are proposed to be moved from category X to category C.

The ongoing effect of a change to the categorisation of vegetation is that in many instances clearing of native vegetation will now be prohibited, while in many others, approval from the State Government will now be required. This means that many developments will not be able to proceed, and a considerable number of additional applications will be referred to the Government as more vegetation clearing triggers the referral process.

This presents additional time, cost and resourcing implications for the property industry and the Government. It also impacts on fundamental property rights where such changes to land use rights can be made without consultation or compensation.

Division 12 of the Bill presents a range of challenges for the property industry, both during the interim period and following.

In the immediate term, issues arise with the retrospectivity and penalties introduced in the Bill.

Take for example vegetation in an area identified as category X up until 17 March, which is then proposed to be category C under the proposed regulated vegetation management map.

From 17 March until commencement, the vegetation is treated as category X. Then, when the legislation takes effect, it is moved to category C, retrospectively from 17 March.

This situation leaves landowners in a holding pattern until certainty can be provided. In particular, it has the effect of precluding the lodgement of development applications involving vegetation clearing during the interim period where a change to the vegetation category is indicated in the proposed regulated vegetation management maps. Further, the duration of the 'interim period' is unknown, with suggestions from the officers of the Department of Natural Resources and Mines (Department) that the Bill may not commence until September 2016.

Should the landowner seek confirmation of category X status from the State Government during the interim period in the form of a PMAV, **127(c)** provides that any decision made by the chief executive in respect of the category X vegetation 'is taken to have no effect'. The chief executive has no discretion in this regard, even if the vegetation is, in fact, category X. Landowners are therefore unable to act on the current categorisation as category X, as they are unable to get a PMAV that confirms the categorisation.

Should a landowner choose to proceed with clearing the land as category X, that is, exempt from Government approval, they would be subject to the significant new restoration provisions introduced through **section 131**.

Due to the retrospectivity of the legislation, if the land is confirmed as category C at the end of the interim period, the clearing without approval would have been unlawful from 17 March.

The other apparent option would be for the landowner to seek approval to clear the vegetation during the interim period based on the likelihood of it being moved into category C when the legislation takes effect. However, the reality of this situation is that potential applicants will find they are unable to proceed with the application.

When an applicant refers a matter to the State Government, there must be a trigger for that referral. As the current categorisation of the vegetation is category X (or exempt), there is no trigger by which an application can be accepted by the Government, and therefore an applicant is unable to seek approval.

This leaves landowners in the unenviable 'catch 22' situation of either doing nothing or clearing the vegetation with the threat of significant restoration requirements.

As noted above, **section 131** introduces new restoration requirements for unlawful clearing.

131(2) requires that the chief executive 'must give the person a restoration notice'. This provision does not provide any discretion for the chief executive to determine whether or not restoration *should* be required.

In addition, **sections 131(3) and 131(4)** provide that the chief executive may include 'additional requirements', and that 'may require the person to restore land in addition to the land the subject of the unlawful clearing.' Unlike the current section in the legislation dealing with restoration notices, there is no requirement that the additional requirements be 'reasonable'.

There are no limitations on what these additional requirements could be, and as per the proposed **section 131(4),** a person may be required '…to restore land in addition to the land the subject of the unlawful clearing.'

This is particularly significant given **67B** proposes to remove 'mistake of fact' as a defence for unlawful clearing, which is a highly probable reason, given the confusion regarding the Bill's interim provisions and retrospective application. Further, removing the 'mistake of fact' defence is unjustified given the complex legislative framework surrounding vegetation clearing. This framework comprises two pieces of legislation, the regulations made under each piece of legislation (including various difficult to comprehend exemptions) and various other supporting documents. In addition, this framework has, since its inception, been subject to constant change.

Section 67A also proposes to reverse the onus of proof, with clearing 'taken to have been done by an occupier of the land in the absence of evidence to the contrary'. The explanation given in the Explanatory Notes, and by the Department in public consultation meetings, is that most unlawful clearing occurs in remote rural areas where it is unlikely that landowners do not know what is going on, and hence should take prima facie responsibility. This ignores other common situations in urban areas in Queensland,

where a landowner could become responsible for the acts or omissions of a trespasser, a neighbour, a tenant or a development partner and be required to prove their innocence.

The Bill's provisions leave landowners with little legal defence for any activity that may have been undertaken during the interim period. The lack of recourse is just one of the serious and far-reaching implications for urban development that have not yet, and must be, taken into immediate consideration.

Not only does the Bill threaten to delay development and impose significant additional costs on end users, it also erodes fundamental legislative principles and property rights- a fact acknowledged in the Explanatory Notes.

With this in mind, it is therefore concerning that **section 132** provides that no compensation is payable by the State, despite the lack of consultation prior to the legislation taking retrospective effect.

4. Sustainable Planning Act 2009

Like the changes to the VMA, the proposed new **section 1005** of the SPA provides that no compensation is payable as a result of the amendments. Again, this is despite there being no consultation with landowners whose property rights have been impacted by this retrospective legislation.

Clause 11 introduces a new prohibition for clearing under the SPA. The amendments include the clearing of native vegetation for a material change of use (other than prescribed development) as prohibited development. Previously, this provision applied only to operational works.

As the majority of material change of use approvals, other than for infill, will require some clearing of native vegetation, this new prohibition will have wide-reaching ramifications for urban development.

5. Water Act 2000

The Bill's amendments to the *Water Act 2000* introduce significant new red tape for both development proponents and the State Government.

The Bill introduces 'destroying vegetation' as an action for which a permit is required. Proponents undertaking to destroy vegetation in a watercourse, lake or spring are most likely to have already received operational works and other relevant approvals where impacts on the environment will have already been assessed.

The inclusion of 'destroying vegetation' in the Water Act provides no additional environmental benefit, however it adds significant duplication and cost to the proponent, and to Government, which will have to provide the resources to administer the assessment and granting of permits.

In addition, this process for issuing approvals under the Water Act sits outside of the Government's Integrated Development Assessment System, furthering confusion for stakeholders.

The Queensland Government has a publicly-stated commitment to ensuring a whole-of-government approach to planning and development assessment, which the changes to the Water Act seek to undermine.

Finally, **clause 16** of the Bill expands the matters for which the Government has the power to enter land to monitor compliance. This will also require additional Government resources to effectively administer.

6. Environmental Offsets Act 2014

The Property Council worked closely with the Government's planning and environment departments to achieve an environmental offsets framework for Queensland that was by no means fair, but was at least workable for all parties. The 'significant impact' test, while not perfect, is at least understood and used in different environmental legislation.

The Bill now proposes to remove the 'materiality' test through removing the term 'significant' from the legislation. This means that *every* action and *every* impact will need to be offset, which will not only affect the development industry and housing affordability, but will require considerable additional Government resources in order to deal with the increase in applications, as acknowledged in the Explanatory Notes.

Practically, there needs to be some level of materiality established in order for the framework to be implemented. The two sets of significant impact guidelines developed to support the Environmental Offsets Act (EO Act) provide the basis for proponents to determine whether or not an impact is 'significant' and allows for a common interpretation of the Act's requirements.

This is particularly important for urban projects where there may only be a very minor impact, for example the removal of a single tree, which would now trigger a requirement for the provision of offsets. The legislation fails to recognise that land identified for urban development has already been through comprehensive planning processes (often by two or more levels of government), with urban development ultimately identified as the highest and best use of the land.

Additionally, removing the term 'significant' will not provide better environmental outcomes, as through capturing additional, smaller projects, it perpetuates the provision of small, piecemeal offsets that do not deliver a meaningful environmental outcome.

As repeatedly identified by the Property Council, the option to pay into the State Government's offset account rather than providing land-based offsets does not work for urban development. This is due to the comparably high cost of urban land and its use as a multiplier within the offsets calculator.

This then means that the benefits potentially gained through pooling offset payments from the additional projects captured via changes to the legislation will not eventuate, as it is too expensive for urban developers to utilise the State's offsets account.

Developers will continue to source their own land-based offsets to meet the additional requirements, the cost of which will ultimately be borne by the end user (home buyer).

From discussions with the Department, the Property Council understands that Departmental officers appreciate that the removal of any materiality threshold is a problem, and that it is proposed to introduce new regulations and guidelines which will limit the scope of the proposed changes, perhaps by defining what is a 'residual impact'. However, it is difficult to understand how subordinate legislation and instruments will be able to qualify the express and clear wording of the Act, so this approach is not supported by the Property Council.

The piecemeal and uncertain approach to offsets perpetuated by the Bill furthers the argument for a strategic assessment of environmental values to be undertaken in South East Queensland.

The new **Part 11A** proposes altering how the EO Act applies to Commonwealth offset conditions. As the Commonwealth and State Government processes do not work neatly together, the proposed amendments raise further questions than they answer, particularly given the significant ramifications for persons who do not fulfil their legislative requirements under each jurisdiction.

Following discussion with Department, the Property Council understands that the purpose of this part of the legislation is to ensure that Commonwealth offset payments can be made into the State fund, under certain conditions, and to allow the State's 'environmental protection areas' under the EO Act to be established to satisfy Commonwealth conditions. These two aims are acceptable, but the current drafting does not restrict the operation of **section 89D** to these two aims, instead apparently attempting to deem Commonwealth conditions to be included as part of State conditions, causing potentially unintended consequences for compliance and interpretation.

The explanation of **89D(1)(a)** in the Explanatory Notes does not align with the legislation- does this mean where offsets are required for similar matters by both levels of government, the higher cost/requirement applies?

The Property Council understands that these changes will require significant further liaison and engagement with the Commonwealth and supporting regulations. The Property Council suggests that no changes should be made to legislation until the full package of materials – demonstrating how the proposed changes will actually work in practice – is available.

7. Recommendations to solve immediate issues

As outlined above, there are significant, immediate issues that require resolution to allow development to continue in urban areas. The policy intent of the legislation does not appear to be intending to stop urban development, however that is the unintended and inevitable consequence that landowners are immediately faced with.

The Property Council provides the following recommendations:

- To break the deadlock of urban development, the Queensland Government should immediately amend the proposed regulated vegetation management map so that all vegetation within the urban footprint in SEQ- or within an urban zone outside of SEQ- that was category X prior to 17 March reverts to category X.

- In the final regulated vegetation management map, all vegetation within the urban footprint in SEQ- or within an urban zone outside of SEQ- that was category X prior to 17 March should be confirmed as category X.

- In finalising the Bill, an amendment should be introduced that would provide an exemption for land designated for urban purposes, and not just land zoned as urban, such that the provisions of the VMA and EO Act are not applicable. This would acknowledge the significant planning work and triple bottom line considerations that have been undertaken in identifying urban development as the highest and best use for a given site.

- A commitment to undertake a strategic assessment of environmental values within SEQ under the EPBC Act would assist in providing all stakeholders with long-term certainty and a holistic approach to environmental protection.

- Finally, the term 'significant' should be retained in the offsets framework, to allow a test of materiality of impacts on native vegetation. The term 'significant' is well understood, and helpful guidance material has been developed in consultation with industry to support its interpretation.

  Without a test of materiality, there is a real and present risk that every impact, regardless of its significance, would be subject to the administrative and cost burden of providing offsets, with no demonstrable environmental benefit in return.

8. Conclusion

The Property Council would like to again thank the Committee for the opportunity to provide a submission on the *Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016* (Bill).

If you have any further questions about the Property Council or the detail included in this submission, please contact Chris Mountford on 07 3225 3000, or cmountford@propertycouncil.com.au.

Yours sincerely

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