

State Development and Public Works Organisation and Other Legislation Amendment Bill 2015

Explanatory Notes

Short title

The short title of the Bill is the State Development and Public Works Organisation and Other Legislation Amendment Bill 2015 (the Bill).

Policy objectives and the reasons for them

Section 47D repeal

The objective of the Bill is to restore community objection rights in relation to mining activities which was a key government election commitment in 2015.

The former government, through the *Mineral and Energy Resources (Common Provisions) Act 2014* (MERC Act), made changes to the notifications and objections process for mining projects in Queensland.

Amendments in the MERC Act inserted a new section 47D into the *State Development and Public Works Organisation Act 1971* (SDPWO Act), which prevents submitters from requesting their submission be taken to be an objection on an environmental authority (EA) application for certain mining proposals that have been evaluated by the Coordinator-General. To apply to a project, the Coordinator-General must include a statement in the Coordinator-General's evaluation report indicating that the Coordinator-General is satisfied that the environmental effects of the project are addressed by the stated conditions, which would substantially be the conditions in the draft EA. Section 47D of the SDPWO Act commenced on 24 October 2014.

The government made an election commitment during the 2015 State General Election to restore community objection rights removed by the MERC Act.

The proposed repeal of section 47D of the SDPWO Act will reinstate the rights of objectors to what was in place prior to the commencement of section 47D on 24 October 2014.

The remainder of the provisions in the MERC Act relating to notifications and objections have not yet commenced. The government is currently examining options available to restore other notification and objection rights that were removed in the MERC Act by the former government.

Land Court matters

The objective of the amendments to the *Land Court Act 2000* (LC Act) is to provide certainty to the Land Court in the exercise of its jurisdiction in a range of matters referred to the Land Court under various pieces of legislation (referral matters). This includes objections to mining lease applications and associated EAs which are referred to the Land Court under the *Mineral Resources Act 1989* (MR Act) and the *Environmental Protection Act 1994* (EP Act) for the purpose of the Land Court making recommendations to the responsible Ministers under those Acts.

The amendments will address issues arising from the recent decision in *BHP Mitsui Coal Pty Ltd v Isdale* [2015] QSC 107 (the BHP case) in which the Supreme Court found that matters that were referred to the Land Court under the MR Act and EP Act were not ‘proceedings’ within the meaning of the *Land Court Rules 2000* (LC Rules) and that the functions of the Land Court in the exercise of this jurisdiction were of an administrative nature.

Achievement of policy objectives

Section 47D repeal

To achieve its objective in relation to restoring community objection rights, the Bill will repeal section 47D of the SDPWO Act.

Land Court matters

The Bill will achieve its policy objectives in relation to Land Court matters by amending the LC Act to:

- provide clarity and certainty in relation to immunity for members of the Land Court while exercising all judicial powers and performing all administrative functions, reinstating the position members thought to have applied before the BHP case;
- ensure this protection extends to judicial registrars, lawyers and agents appearing and witnesses attending before the Land Court, a member or judicial registrar;
- provide for a transitional regulation-making power for the application of specific LC Act provisions to referral matters, with both the regulation-making power, and any transitional regulations made under the power, to expire one year after the day of the commencement; and
- extend the existing rule-making power in the LC Act to ensure it applies to all functions and powers conferred on the Land Court under the LC Act or another Act, including the making of rules for procedures where the Land Court, a member or judicial registrar is exercising or performing an administrative function.

Alternative ways of achieving policy objectives

Section 47D repeal

The SDPWO Act must be amended to give effect to this election commitment.

Land Court matters

There is no alternative way of achieving the policy objectives, other than amendment of the LC Act.

Estimated cost for government implementation

Section 47D repeal

No costs to government are currently envisaged for the proposed repeal of section 47D of the SDPWO Act. However, if any operational costs do arise they will be met from existing agency budget allocations.

Land Court matters

There are no costs to government associated with the amendments to the LC Act.

Consistency with fundamental legislative principles

Section 47D repeal

The Bill has been drafted with regard to the fundamental legislative principles as defined in section 4 of the *Legislative Standards Act 1992*.

Land Court matters

Immunity for members of the Land Court

The amendment of section 35 of the LC Act, to ensure the Land Court members have protection and immunity in exercising all judicial powers and administrative functions, raises an issue regarding consistency with the fundamental legislative principle that legislation should have sufficient regard for the rights and liberties of individuals.

The amendments will operate retrospectively and will provide protection from legal liability for a range of participants in referral matters. The amendments are justified in that they provide clarity and certainty regarding the scope of the statutory protection which was previously believed to have applied, and on which judicial officers and other participants in referral matters have relied in the past.

Judicial immunity is a cornerstone of judicial independence. Judicial immunity exists to protect the public interest and to ensure that judicial officers are able to carry out their functions free from interference and influence by governments, and retaliation by persons or interests aggrieved by their decisions. The same public policy considerations that underpin the provision of protection from liability for judicial officers in the exercise of their judicial powers apply equally to the exercise of administrative functions. There is a critical public interest in ensuring that the structures that support judicial independence are maintained, and the statutory regime affording immunity is clear, comprehensive and unambiguous.

Similarly, immunity for advocates and other participants in court proceedings is an established common law doctrine which exists to protect the public interest in the administration of justice. It is fundamental that these persons are able to carry out their roles without fear of potential personal legal liability, and it is appropriate that they are afforded the same protections and immunities regardless of whether the court's consideration of a matter is characterised as judicial or administrative in nature.

Transitional regulation-making power

The new section 97, which provides a transitional regulation-making power, raises an issue regarding consistency with the fundamental legislative principle that legislation have sufficient regard for the institution of Parliament. The transitional regulation-making power is justifiable as an urgent response to the issues that have arisen as a result of the BHP case. The amendment will enable the interim application to referral matters of specific provisions of the Act, which are currently expressed to apply to 'proceedings', pending the development of amendments to the Act.

The amendment is appropriately limited in the scope of its subject matter and does not allow the making of transitional regulations to apply generally. It is also subject to appropriate controls, in that, the transitional regulation-making power, and any transitional regulations made pursuant to the power, will expire one year after the day of the commencement.

Consultation

Community

Section 47D repeal

The Department of Natural Resources and Mines met with key stakeholder groups on 30 June 2015 to discuss proposed changes related to the MERC Act, including the repeal of section 47D of the SDPWO Act. Stakeholders included Lock the Gate, the Environmental Defenders Office, resource sector peak bodies, the Basin Sustainability Alliance, Friends of the Earth, AgForce Queensland and the Queensland Farmers' Federation.

The Office of Best Practice Regulation was consulted and confirmed that the repeal of section 47D of the SDPWO Act is excluded from further analysis under the Regulatory Impact Statement System.

Land Court matters

The Office of Best Practice Regulation has been consulted and has advised that the proposed amendments to the LC Act are excluded from further assessment under the Regulatory Impact Statement System as they relate to the administration of the courts.

The Land Court, the Queensland Resources Council, the Queensland Law Society and the Bar Association of Queensland have been consulted and their views have been taken into account in preparing the amendments.

Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland and amends existing Queensland legislation.

Notes on provisions

Part 1 Preliminary

Clause 1 Short title

Clause 1 states that, if enacted, the Bill may be cited as the *State Development and Public Works Organisation and Other Legislation Amendment Act 2015*.

Clause 2 Commencement

Clause 2 provides that section 10, to the extent that it inserts section 97, commences on a day to be fixed by proclamation.

Part 2 Amendment of State Development and Public Works Organisation Act 1971

Clause 3 Act amended

Clause 3 states that Part 2 of the Bill amends the *State Development and Public Works Organisation Act 1971* (SDPWO Act).

Clause 4 Amendment of s 47B (Application of sdiv 1)

Clause 4 is a technical amendment identified by the Office of the Queensland Parliamentary Counsel. Section 47B of the SDPWO Act is amended to correct an error in the heading and to the wording within the section where reference is made to a subdivision instead of a division.

Clause 5 Omission of s 47D (Restriction on giving of objection notice under the Environmental Protection Act, s 182)

Clause 5 omits section 47D of the SDPWO Act.

Section 47D prevents submitters to an environmental authority (EA) application requesting their submission be taken to be an objection, where the Coordinator-General is satisfied that all environmental impacts of the project are addressed by the conditions in the Coordinator-General's report, and the project has not changed. The provision was inserted into the SDPWO Act to put beyond doubt the legal status of a project the subject of a Coordinator-General's report in certain circumstances.

Prior to section 47D being inserted, submitters on the environmental impact statement could request their submission be taken to be an objection, even where substantially all conditions were Coordinator-General conditions, resulting in an increased caseload for the Land Court on matters that are potentially outside their jurisdiction.

Where the Coordinator-General states conditions for the EA, and makes a specific statement in the Coordinator-General's evaluation report to the effect that the Coordinator-General is satisfied that the conditions adequately address the environmental effects of the mining activity, and where the project has not changed in the EA assessment process, submitters

cannot lodge an objection to the EA for the purposes of the Land Court. In the circumstances where the provision is to apply to a project, the conditions stated by the Coordinator-General would be all, or substantially all, the conditions in the draft EA.

Omitting section 47D of the SDPWO Act will reinstate the previous objection rights, which were available to submitters to an EA application. It is not intended that the removal of section 47D will affect established practice so that the Land Court cannot make recommendations that change the Coordinator-General conditions, or recommend conditions that are inconsistent with conditions stated by the Coordinator-General. However, the Land Court will be able to recommend additional conditions, or recommend that additional conditions added by the administering authority under the *Environmental Protection Act 1994* (EP Act) be amended (provided that the additional or amended conditions are not inconsistent with any Coordinator-General conditions).

The government considers that retrospectivity is not an issue in relation to the repeal of section 47D of the SDPWO Act. This is because the right to make an objection does not accrue until a decision is made on the EA under chapter 5 of the EP Act. To date, there have been no EA decisions which were made after section 47D commenced, to which section 47D would apply. Consequently, no objection rights have been lost by submitters despite the operation of section 47D, and this Bill will repeal section 47D prior to any relevant EA decisions being made.

Consequently, an amendment to section 182 of the EP Act is not required to clarify that section 182 of the EP Act applies to applications for EAs made, but not decided, before the commencement of the Bill. This is because section 180 of the EP Act clearly states that the relevant division applies to an application for a mining activity relating to a mining lease, and section 182 clearly states that it applies if the application is approved. Regardless of when the application was made, if the decision is to approve the application, then section 182 of the EP Act only applies once the application is decided. Since section 47D of the SDPWO Act effectively operated to ‘turn off’ section 182 of the EP Act in particular circumstances, once section 47D of the SDPWO Act is repealed, section 182 of the EP Act becomes ‘active’ for any EA decision made after the repeal (regardless of when the application was made or when the submission period ended).

Therefore once repealed, section 47D will no longer operate for any EA applications.

Part 3 Amendment of Land Court Act 2000

Clause 6 Act amended

Clause 6 provides that Part 3 of the Bill amends the *Land Court Act 2000* (LC Act).

Clause 7 Amendment of s 21 (Rules of Land Court)

Clause 7 amends section 21 (Rules of Land Court) to ensure the rule-making power enables the making of rules in relation to all functions and powers conferred on the court under the LC Act or another Act. This includes rules for procedures when the court, a member or judicial registrar is exercising or performing an administrative function.

Clause 8 Omission of pt 2, div 6C, hdg (Additional power of Land Court when exercising particular jurisdiction)

Clause 8 is a technical amendment to remove an otiose heading.

Clause 9 Amendment of s 35 (Privileges, protection and immunity)

Clause 9 amends section 35 (Privileges, protection and immunity) to ensure the privileges, protection and immunity for the Land Court members extend to the exercise of all judicial powers and administrative functions. The extension of the existing privileges, protection and immunity also applies to judicial registrars, a lawyer or agent appearing, or a witness attending before the court, member, or judicial registrar.

Clause 10 Insertion of new pt 6, div 5

Clause 10 inserts a new Part 6, Division 5, which provides for transitional arrangements.

New section 96 (Privileges, protection and immunity for powers and functions before commencement) provides that the amendments to section 35 will apply to the exercise or performance of a judicial power or an administrative function by the Land Court, a member or a judicial registrar before the commencement as if the power or function were exercised or performed after the commencement.

New section 97 (Transitional regulation-making power) provides that a regulation may provide that the provisions of the LC Act, with necessary modifications provided in the regulation, apply to the Land Court in the exercise of a function or power conferred on the court under various specified statutes.

This new section further provides that a transitional regulation may have retrospective operation to a day not earlier than the day of the commencement, must declare that it is a transitional regulation and expires one year after the day of the commencement (as does this section itself).

Clause 11 Amendment of sch 2 (Dictionary)

Clause 11 amends Schedule 2 (Dictionary) to insert a definition of *administrative function*, which defines the term as an administrative function or power conferred under an Act.

Part 4 Amendment of Mineral and Energy Resources (Common Provisions) Act 2014

Clause 12 Act amended

Clause 12 states that Part 4 of the Bill amends the *Mineral and Energy Resources (Common Provisions) Act 2014* (MERCPC Act).

Clause 13 Amendment of s 271 (Amendment of s 182 (Submitter may give objection notice))

Clause 13 amends section 271, an uncommenced provision in the MERCPC Act, which inserts a new section 182(2) into the EP Act.

New section 182(2) contains a note with a reference to section 47D of the SDPWO Act. As section 47D of the SDPWO Act is repealed by the Bill, this note is no longer required and is omitted by clause 13.

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