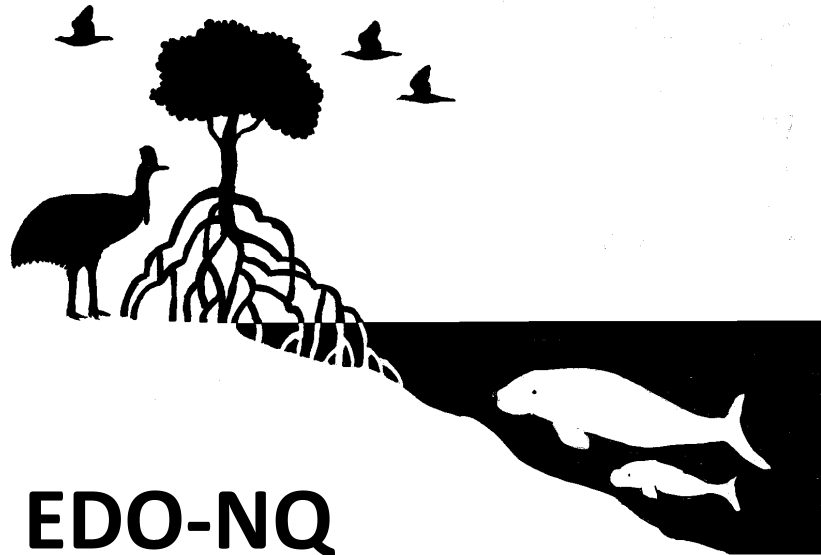

EDO-NQ
FACTSHEET SERIES

The State Development and Public Works Organisation Act 1971 (Qld) and the Environment

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The State Development and Public Works Organisation Act 1971 (Qld) and the Environment

This factsheet is intended as a plain English guide to a particular area of law. It is not legal advice and is not intended as a comprehensive examination of the legislation. Whilst all care has been taken in its preparation, it is not a substitute for legal advice as legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your particular circumstances you should contact the EDO or your solicitor.

1. What is the *State Development and Public Works Organisation Act 1971 (Qld)?*

The *State Development and Public Works Organisation Act 1971* (Qld) ("SDPWOA" or "the Act") is not particularly well-known by the community, however it does a number of things which are important to note in relation to environmental protection and conservation, and assessment of environmental impacts.

Whilst not a declared purpose of the SDPWOA, the Act often seems to be used to fast track large or critical projects in order to progress Queensland's economic development. To support that purpose the SDPWOA does a number of things, including the following:

1. it creates the office of the Coordinator-General ("CG"), and providing the CG with notable powers in order to administer the SDPWOA;
2. it allows for the declaration of "significant projects"; and
3. it allows for the creation of "State development areas" (areas which have been set aside for large scale economic development).

The SDPWOA is not focused on environmental conservation, however it does have significant implications in environmental law. The SDPWOA is often used to facilitate large developments which typically have the biggest individual environmental impacts. An example of a significant projects facilitated under the SDPWOA which have been of concern to environmental conservation groups in Northern Queensland are the Chalco Alumina Refinery at Abbot Point north of Bowen, and the proposed Integrated Master Planned Community at Ella Bay east of Innisfail.

In this factsheet we will provide an overview of the implications of the SDPWOA for environmental law, and what opportunities the public has to be involved in writing submissions on environmental impact statements ("EIS") prepared under the SDPWOA.[1]

[1] For simplicity and ease of reference, references in this factsheet are to the SDPWOA unless otherwise stated.

2. The office of the Coordinator-General – what is it and what does it do?

The CG is a separate legal entity to the Queensland Government,[2] but does represent the Government.[3] In practice, it is an office attached to a Queensland Government Department; currently (as at October 2009) it is attached to the Department of Infrastructure and Planning ("DIP").

The broad duty of the CG is to "secure the proper planning, preparation, execution, coordination, control and enforcement of a program of works, planned developments, and environmental coordination" for Queensland.[4]

The SDPWOA gives the CG a wide range of powers to exercise as the CG "thinks necessary or desirable" to carry out that duty.[5]

The SDPWOA also gives the CG some specific powers including:

1. planning a program of works;[6]
2. holding inquiries into matters which concern the performance of the CG's functions;[7]
3. declaring projects to be "significant projects" and coordinating environmental impact statements ("EIS") in relation to them;[8]
4. entering into voluntary environmental agreements;[9]
5. creating "State development areas" and compulsorily acquiring land in them;[10]
6. intervening where other decision makers fail to make a decision on "prescribed projects";[11]
7. constructing certain works;[12] and
8. creating infrastructure easements to fast track critical projects.[13]

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[2] s.8
[3] s.9
[4] s.10(2)
[5] s.10(2)
[6] Part 3
[7] s.12
[8] Part 4, Division 2
[9] Part 5A, Division 4
[10] Part 6
[11] Part 5A, Division 3
[12] s.136
[13] Part 6, Division 8

These powers, and others, are designed to allow the CG to ensure large developments progress to completion instead of becoming slowed down by bureaucratic processes.

3. Types of developments under the SDPWOA which may affect the environment

There are four types of development declarations which the SDPWOA deals with, and which may concern the environment:

1. "Significant projects" (Part 4)
2. "Prescribed developments" (Part 5);
3. "Prescribed projects" (Part 5A); and
4. "State development areas" (Part 6).

Each of these types of development declaration involves separate processes, and it is easier for us to deal with them each separately in turn.

4. Significant projects *(Part 4)*

a. What is a "significant project" and how is one declared?

A significant project is a project which the CG declares to be a "significant project"[14].

The CG can only make a "significant project" declaration after having regard to one or more of the following:[15]

1. detailed project information given by the proponent in an initial advice statement;
2. relevant planning schemes or policy frameworks, including those of a relevant local government or of the State or the Commonwealth;
3. the project's potential effect on relevant infrastructure;
4. employment opportunities that will be provided by the project;
5. the potential environmental impacts of the project;

[14] Sched.2 Dictionary and s.26
[15] s.27

6. the complexity of local, State and Commonwealth requirements for the project;

7. the level of investment necessary for the proponent to carry out the project;

8. the strategic significance of the project to the locality, region or the State.

Any declaration of a significant project must be advertised in the Government Gazette.[16]

The CG may declare a project to be a significant project on their own initiative, or a developer wanting to pursue a project may apply to the CG to have their project declared a "significant project";[17] in either case the considerations are the same.

In most cases, "significant projects" are large, multi-million dollar budget projects. Examples of projects which have been declared to be "significant projects" are:

- Chalco Alumina Refinery at Abbot Point
- Ella Bay Integrated Master Planned Resort
- Story Bridge
- Wivenhoe Dam
- South East Freeway
- South East Queensland Water Grid

At the time a significant project is declared, the CG must also decide whether or not an environmental impact statement ("EIS") is required for the project.[18] There are two important points to note in relation to that decision:

1. The only time that the CG can decide that an EIS is not required under the SDPWOA is if the CG is satisfied that another Act requires that "appropriate environmental assessments" will be carried out in relation to the project.[19]

2. An EIS must *always* be conducted under the SDPWOA if the significant project would involve broadscale clearing for agricultural purposes.[20]

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[16] s.26(4)
[17] s.27AA
[18] s.26(1)
[19] s.26(2)(a)
[20] s.26(2)(b)

b. How is an Environmental Impact Study prepared and considered?

Preparing Terms of Reference

If the CG determines that an EIS is required for the project they must notify the public:

1. that an EIS is required for the project;
2. where copies of the draft terms of reference ("ToR") may be obtained; and
3. that comments are invited within a notified time.[21]

These notifications are made available from DIP's website at http://www.dip.qld.gov.au/news-media-and-events/index.php. Alternatively, you can join EDO-NQ and be kept up to date about any such notifications; EDO-NQ stays current with draft EIS terms of reference which are released by the CG and makes this information available to EDO-NQ members.

After the public comment period is over the CG must finalise the EIS ToR, and in doing so must have regard to any comments received during the public comment period.[22]

The EIS – preparation and public submissions

The EIS for the project must address the terms of reference to the CG's satisfaction, and generally must be prepared and delivered to the CG within two (2) years after the EIS ToR are finalised (although there is some scope for that period to be extended).[23]

During the period set for preparation of the EIS, the CG may seek external comment and information that may help in the preparation of the EIS.[24]

Once the EIS is complete it must be made available for public inspection and comment during a notified submission period[25]. Any person may make a submission and the Coordinator General is obliged to accept properly made submissions made during the specified submission period.[26] The CG also has discretion to accept written submissions which do not satisfy all of the requirements of a "properly made submissions", including submissions which are made after the end of the submission period.[27] If a submission has

[21] s.29
[22] s.30
[23] s.33
[24] s.31
[25] s.33(1)
[26] ss.24 & 34(1) to (2)
[27] ss.24 & 34(3)

been accepted it can be amended by written notice to the CG if done so within the submission period.[28]

CG's report on the EIS

At the end of the submission period the Coordinator General must prepare a report which evaluates the EIS.[29]

Before preparing the EIS report, the CG:

1. *Must* consider the EIS, all properly made submissions and other submissions accepted by the CG and any other material which the CG considers is relevant to the project;[30]

2. *May* ask the project proponent for additional information about the EIS and the project.[31]

When evaluating the EIS, the CG *may*, but is not bound to, do the following:[32]

1. Evaluate the environmental effects of the projects and any other related matters;

2. Impose conditions or make recommendations in certain circumstances.

The CG's final report must be made given to the project proponent and be publicly available.[33]

Changing the project after the EIS report

There is scope for a proponent to change the project after the CG has prepared the EIS report,[34] and if changes are proposed the CG must assess them and decide whether or not to approve them.

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[28] s.34
[29] s.35(3)
[30] s.35(1)
[31] s.35(2)
[32] s.35(4)
[33] s.35
[34] Part 4, Division 3A

In evaluating any proposed changes, the CG *must* consider the following:[35]

1. the nature of the proposed change and its effects on the project;

2. the project as currently evaluated under the Coordinator-General's report for the EIS for the project;

3. the environmental effects of the proposed change and its effects on the project;

   Note: *The CG has a discretion, and is not bound, to consider the environmental effects of the project as originally proposed – see s.35(4)(a)*

4. if public notification was required - all properly made submissions about the proposed change and its effects on the project;

5. if the CG considers them relevant – the original EIS, all properly made submissions (and other accepted submissions) in relation to the EIS, and any other material;

After evaluating the proposed changes and their effect, the CG must prepare a report which details the evaluation.[36]

c. How do I comment on an EIS prepared under the SDPWOA?

The CG is only bound to accept "properly made submissions", but may accept submissions which are not "properly made" including submissions which are made after any submission period.[37]

A "properly made submission" for an EIS or a proposed change to a project, means a submission which:

1. is made to the Coordinator-General in writing;

2. is received on or before the last day of the submission period;

3. is signed by each person who made the submission;

4. states the name and address of each person who made the submission; and

5. states the grounds of the submission and the facts and circumstances relied on in support of the grounds.[38]

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[35] s.35H
[36] s.35I
[37] ss.24 & 34
[38] s.24

There are usually no guidelines on what the content of the submission should include; usually, submitters are free to include what they wish in the submissions, as long as it is relevant to the EIS or project.

d. What should I put in my comments?

Whilst the CG is bound to consider any properly made submissions (and any other accepted submissions) on either the EIS or any proposed changes to the project after the CG's EIS report:

1. the CG is not bound by any submissions;
2. there is no format which will guarantee that any submission will have an impact on the decision; and
3. it is at the CG's discretion whether or not a significant project is approved.

If you are considering making a submission, as a rough guide we would suggest to you to follow a process similar to the following:

1. Read and annotate the EIS or Terms of Reference
2. Mark all the sections that you agree with and those that you disagree with
3. Write a list of points that you need to follow up, such as where further research is needed. If you need advice on any of these points, we may be able to help.
4. Prepare a structure for the submission, comprising an introduction, and sections for each point you agreed with, and each point you disagreed with. It is usually a good idea to state what you agree with before you state what you disagree with.
5. In the introduction, briefly introduce yourself, and how the proposed significant project and its issues affect you and/or your group. If your submission is on behalf of a group of people, state how many others you are writing on behalf of.
6. Include evidence or case studies about how the issue(s) has affected you, will affect you or is relevant to you. If you can, collect stories on how the issue is affecting others that support your position.
7. Consider the government's position and try to make workable recommendations if possible.

If you do have concerns about an EIS, or would like help with a submission, then our office may be able to help. We have extensive experience in commenting on projects assessed under the SDPWOA.

e. What are my appeal rights?

It appears from the Act that in certain circumstances people can appeal the merits of certain decisions on certain significant projects declared under Part 4 of the SDPWOA. Knowing when there exists a right to appeal the merits of a decision about a significant project can be difficult.

Following are some important notes about those appeals and when they appear to be available:

- Decisions about significant projects can only be appealed if the significant project involves an application for development approval (whether for an MCU or otherwise) which requires impact assessment under the *Integrated Planning Act 1997* (Qld) ("IPA").[39]

- The decisions which may be appealed are the decisions on those applications (i.e. decisions whether to approve, with or without conditions, the relevant impact assessable application).

- The only people who can appeal these decisions are those who lodged a properly made submission in relation to an EIS which the CG has declared is required for the significant project under the SDPWOA (it appears from the Act that if the CG decides that an EIS is not needed under the SDPWOA then there are no rights to appeal the merits of any decision to approve the relevant impact assessable application).[40]

- Appeals against the merits of any of these decisions are conducted in the same manner as appeals under IPA.

Whilst there are theoretically rights to appeal the decisions described above, we are not aware that any such appeal has actually been commenced; we are certainly not aware of any reported decisions on any such appeal.

[39] ss.37(1)(c) and 37(2)
[40] s.37(1)(c)

5. Prescribed developments *(Part 5)*

Part 5 of the SDPWOA provides for a number of things to take place with respect to certain development proposals, including the following:

1. The CG (on direction from the Minister) may investigate certain proposed developments involving the mineral or energy resources of Queensland which:

    a. are of major economic significance to Queensland;

    b. would involve the provision of infrastructure which would place an excessive financial burden on Queensland's resources or residents, or would significantly affect the priorities of the Queensland government or any relevant local government for providing services or facilities.[41]

2. The Government may make regulations declaring a proposed development the subject of such an investigation to be a "prescribed development".[42]

3. The CG must develop an infrastructure coordination plan for each prescribed development for consideration and approval by the Treasurer, the Minister and the Governor in Council.[43]

    Note: The term "Governor in Council" means the Governor acting with the advice of the Executive Council.[44]

4. Local governments are given increased powers to, for the purpose of financing and providing infrastructure for a prescribed development, enter into and perform agreements, or do anything else that is necessary in order to comply with a relevant infrastructure coordination plan.

    Note: The SDPWOA specifically provides that such power is not restricted by any provision in any other Act which:
    - *restricts the power of relevant local governments to enter into or perform any such agreements; or*
    - *makes it unlawful for relevant local governments to do any act related to the rezoning of land, use of land, or the approval, consent or permission to use the land or to use or erect any building or any other structure.*

5. Any application to a local government which relates to a prescribed development must be referred to the CG[45], and the Governor in Council must then choose whether or not the CG will be responsible for assessing that application.[46]

[41] s.56
[42] ss.57 and 58
[43] Part 5, Division 2.
[44] s.27 of the *Constitution of Queensland 2001*

Notes:

- *If the application is sent back to the local government for assessment, it is to be assessed by the local government:*
  - *as if the development to which it relates had not been declared a prescribed development; and*
  - *subject to the approved infrastructure plan for the development.*[47]
- *If the application is to be assessed by the CG:*
  - *the CG replaces the local government in the assessment process;*
  - *any law or constraint which would have affected the local government dealing with and determining the application shall be deemed not to exist;*
  - *the CG must invite submissions on the application by the public, and consider any submissions made before making a decision on the application; and*
  - *no appeal against the merits of that decision is allowed.*[48]

Part 5 of the SDPWOA does not introduce any additional safeguards for the environment, or any measures for greater protection or conservation of the environment in relation to any proposed developments which are declared to be “prescribed developments”.

Indeed, this Part 5 seems to largely remove any of those safeguards and protection or conservation measures that may exist in State law, and introduces a number of measures which facilitate “prescribed developments” and which may likely result in adverse environmental impacts; this is particularly so given that “prescribed developments” are concerned with developments involving the mineral or energy resources of Queensland, which are traditionally (at least to date) usually environmental harmful developments.

[45] s.67
[46] s.68(1)
[47] s.68(2)
[48] ss.68(2), 69, 70, 71 and 72(1)

6. Prescribed projects *(Part 5A)*

This Part of the SDPWOA:

1. Allows for projects of significance (particularly economic and social significance) to Queensland or a region of Queensland to be identified and declared as "prescribed projects";

2. Assists "prescribed projects" to be facilitated and decided upon in a timely manner, by giving the CG power to issue "notices to decide", "progression notices" and "step in notices";

3. Gives the CG power to impose conditions on "prescribed projects" (which may include conditions to properly manage any environmental effects of the project); and

4. Promotes the use of "voluntary environmental agreements" to encourage the conservation, maintenance, rehabilitation or enhancement of the environment.[49]

The Minister may declare a variety of projects to be a "prescribed project", including a project in a State development area, an infrastructure facility, a project declared to be a "significant project" or any other project which the Minister considers is either of economic or social significance to the State or a region, or affects an environmental interest of the State or a region.[50] The Minister may also declare a project to be a "critical infrastructure project" if the Minister considers that the project is critical or essential for Queensland for economic, environmental or social reasons.[51]

Any such declaration must be made by a notice in the Government Gazette.[52]

In deciding to make a declaration of a "prescribed project" the Minister can have regard to any matter which the Minister considers relevant, including the public interest or general welfare of the people in the region where the project is to be undertaken and whether or not a voluntary environmental agreement is likely to be entered into in relation to the undertaking of the project.[53]

Voluntary environmental agreements & prescribed projects

The CG has power to enter into "voluntary environmental agreements" ("VEAs") in relation to prescribed projects.[54]

[49] ss.76A & 76B
[50] s.76E(1)
[51] s.76E(4)
[52] ss.76E(3) & (4)
[53] s.76E(2)
[54] Part 5A, Division 4

Important notes about VEAs:

1. VEAs may be entered into between the CG, an applicant for any decision required for the prescribed project (other than a decision to be made by the Governor in Council or the Minister) and any other relevant person.[55]

2. Any registered owner, lessee or other interest holder of the land subject to the VEA must give their consent to the VEA if their interests will be materially affected by it.[56]

3. Terms in any VEA may be expressed to be binding on the registered owner of the land, any successors in title of the owner (e.g. someone who buys the land) or any other person who has an interest in the land.[57]

4. Terms in any VEA may cover a variety of matters, and may include terms which:

    a. require the applicant to provide technical advice, or financial or other assistance to anyone, or financial assurances to the State;

    b. state how any monies provided by the applicant under the VEA must be used by the State or the applicant;

    c. require the applicant to permit or restrict access to the land by certain people;

    d. require the applicant to refrain from or not to permit certain activities;

    e. prohibit or restrict certain uses of the land, or restrict management of the land;

    f. provide for any other matters relating to preserving, controlling or mitigating detrimental environmental effects of the prescribed project, or conserving, maintaining, rehabilitating or enhancing aspects of the environment.[58]

    Note: these categories do not restrict what the terms of VEAs may cover.[59]

[55] s.76S(1)
[56] s.76S(2)
[57] s.76T(1)
[58] ss.76T(1) & (2)
[59] s.76T(3)

7. State development areas *(Part 6)*

In addition to the range of other powers that the State Government has under the SDPWOA (whether exercised through the Governor in Council, the Minister or the CG) the Governor in Council is also able to declare any part of the State to be a "State development area" ("SDA") if satisfied that such a declaration is required by the public interest or any person resident in any part of Queensland.[60] When considering whether the "public interest or general welfare" of people requires the declaration of a SDA, the Governor in Council may have regard to any matter they consider to be relevant.[61] A current example of a SDA is the Abbot Point State Development Area; declared on 19 June 2008, it covers 16,320 hectares and includes provision for heavy industry, shipping facilities and associated infrastructure.

As can be seen, the power to make a SDA application is very broad.

The powers given to the CG over a SDA are also very broad, and quite far-reaching.

As soon as practicable after a SDA is declared, the CG must prepare a development scheme for the SDA which is to outline the objectives for the SDA, identify land use precincts within the SDA and outline appropriate land use activities for each precinct.[62] SDA development schemes will generally override any local planning scheme in force,[63] although compensation may be payable for any restriction on land use which results.[64]

Other powers which the CG has over a SDA include:

1. the power to take land in the SDA for a range of broad purposes including:

    a. to deal with conditions of natural disaster or hazard, acts of war or civil strife, or bad layout or obsolete development;

    b. to provide for the establishment or relocation of population, industry or essential services, the establishment of an infrastructure corridor or for the replacement of open space in the course of the development of any other part of the State; and

    c. any purpose incidental to those purposes.[65]

[60] s.77
[61] s.77(3)
[62] ss.79 & 82 to 84
[63] Part 6, Division 1
[64] Part 6, Division 2
[65] s.82

2. the power to grant or otherwise deal with land (including selling or leasing) in the SDA to secure the implementation of the SDA development scheme, and to impose conditions on those dealings.[66]

Declaration of a SDA in itself does not guarantee or introduce any measures to protect or conserve the environment, however:

1. SDAs are one type of development which may be declared to be a "prescribed project" under Part 5A;[67] and

2. The CG may enter into VEAs in relation to prescribed projects.[68]

8. Conclusion

Whilst the SDPWOA is described to be an "Act to provide for State planning and development through a coordinated system of public works organisation, for environmental coordination, and for related purposes"[69] [our underlining], it does little if anything to ensure that developments which it facilitates are ecologically sustainable, that environmental impacts of those developments are minimised, or that the environment is otherwise properly protected or conserved.

One of the duties of the CG is to coordinate departments of the Queensland government in activities which are directed to ensuring that "proper account" is taken of the environmental effects of any development which the SDPWOA covers.[70] Again however, this does not in itself not ensure that ecologically sustainability, minimisation of environmental impacts or environmental protection or conservation.

As this factsheet outlines, the SDPWOA *does* create mechanisms (such as an EIS process and voluntary environmental agreements) which *may* be used to ensure that developments which the SDPWOA facilitates are ecologically sustainable, that environmental impacts of those developments are minimised, and that the environment is otherwise properly protected or conserved. However, whether they are used for that purpose is largely at the discretion of the Governor in Council, the Minister or the CG.

[66] s.83
[67] s.76E(1)
[68] Part 5A, Division 4
[69] Long title of the SDPWOA
[70] s.25

There should be no doubt that the overriding priority of the SDPWOA is to facilitate development (often large development) in Queensland, and not ecological sustainability, or environmental protection or conservation.

9. Further information

If you have any further questions or concerns about any of these matters, then please contact us on the details below. While we have limited resources, often we can give you quick advice over the phone or direct you to someone who may help on a free or reduced rate basis.

Stay in contact with your local Environmental Defenders Office.

10. Useful Contacts

EDO-NQ
Suite 1, Level 1
96-98 Lake Street
CAIRNS QLD 4870
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To become a member of the Environmental Defenders Office of Northern Queensland, or for more information about factsheets and legal advice, please contact us at edonq@edo.org.au or on 07 4031 4766. Our web address is www.edo.org.au/edonq