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INFRASTRUCTURE REFORM IN QUEENSLAND – SOLUTIONS FOR THE 21ST CENTURY

Reforming Tenure for Linear Infrastructure Projects in Queensland

By Daryl Clifford

The development and delivery of important linear infrastructure projects in Queensland is being hampered by outdated legislation which is in urgent need of reform. The problems are evidenced across a variety of gas, water, electricity and rail projects.

The current difficulties effect both State owned and controlled entities and the private sector.

The current legislative framework is outdated. It shows the hallmarks of a model designed when most major infrastructure was provided by the State (or bodies owned by or representing the State).

Historically, utility services (other than retail gas distribution) have been provided by government controlled entities and local governments. Those bodies have relied on the State acquiring land and interests in land (such as easements) to secure the corridor for the relevant infrastructure. Local governments have also had compulsory acquisition powers.

In other cases, specific industry legislation has been put in place. For example:

- retail distributors of gas have been given wide powers to carry out work in publicly controlled places such as roads (currently under the *Gas Supply Act 2003* (Qld));
- electricity entities have similar powers of entry and can be authorised by the Minister to acquire land under the *Electricity Act 1994* (Qld) – section 116; and
- the telecommunications industry has the benefit of ranging rights and powers under the *Telecommunications Act 1997* (Cth).

WHAT IS LINEAR INFRASTRUCTURE?

Linear infrastructure is required to deliver a wide range of services such as:

- bulk water transportation;
- water reticulation;
- waste water disposal;
- sewerage systems;
- retail gas reticulation;
- bulk transportation of gas;
- electricity transmission and distribution;
- passenger railways;
- freight railways;
- coal haulage railways;
- cane tramways;
- light rail;
- busways;
- toll roads;
- toll bridges; and
- telephone and other communications systems such as cable TV.

INCREASED PRIVATE SECTOR ROLE

Nowadays major public infrastructure projects (such as toll roads and light rail) are being delivered by the private sector.

There are also many private infrastructure projects. For example, major resource projects often require privately constructed and owned infrastructure for roads, railways, water supply, waste water disposal, electricity, bulk gas transportation and communications.

These projects are being carried out under a legal framework designed for the delivery of such projects by the State (and State controlled entities) or designed for small, local projects.

GENERAL PROBLEMS

While there are industry specific issues that need to be resolved, a number of issues arise across most sectors.

Limited compulsory acquisition powers

Powers of compulsory acquisition need to be appropriately controlled. However, if an entity is not a constructing authority under the *Acquisition of Land Act 1967* (Qld) it has very limited scope to compulsorily acquire land or easement for infrastructure corridors.

While there is some scope for compulsory acquisition by or on behalf of private entities under the *Electricity Act 1994* (Qld) and the *Petroleum and Gas (Production and Safety) Act 2004* (Qld), most projects have little scope to have land and easements compulsorily acquired.

The *State Development and Public Works Organisation Act 1971* (Qld) (**SDPWO Act**) can provide significant assistance in the development of major projects. Nevertheless the SDPWO Act is of limited use unless:

- the works are included in a program of works or development scheme under the SDPWO Act;
- the works are to be undertaken by a local body (which includes government owned corporations, entities established under legislation and bodies owned by local governments); or
- the acquisition relates to an infrastructure facility of significance.

Under the SDPWO Act, the requirements for an infrastructure facility of significance are demanding. The infrastructure facility must be economically or socially significant, to Australia, Queensland or the region in which the facility is to be constructed, and must be approved by the governor in council as having that significance.

Furthermore, the process for achieving status as an infrastructure facility of significance can be very expensive and push out the timeframes for the delivery of projects.

The State should consider how the SDPWO Act could be amended to allow other projects to have the benefit of the compulsory acquisition powers in the SDPWO Act. The existing guidelines also require updating to remove any uncertainty as to what is required in order to comply with the SDPWO Act. Despite this, the existing requirements in the guidelines for all reasonable efforts to have been taken to reach agreement with the land owners should be retained.

Current restrictive requirements of easements

Types

The law of easements relies heavily on cases decided in the 19th and 20th centuries. They contain arcane discussion about what can constitute the subject matter of an easement – largely driven by the desire to limit the creation of easements by use. However, where easements are negotiated between the parties, it is difficult to see the basis for some of those restrictions.

The State should review the existing statutory and common law requirements for the subject matters of easements.

Public Utility Provider

Statutes now provide for easements in gross (for purposes such as power lines, water pipelines and gas pipelines). Nevertheless those provisions have been interpreted so that they can only be used where the easement is in favour of a public utility provider and is to provide a public utility service. The requirement to provide a public utility service also creates problems for private infrastructure. For example a power line or a water pipeline which will only provide power or water to a single mine may not qualify as a public utility service.

There does not seem to be any policy basis for requiring an easement in gross to be in favour of a public utility provider and to be for the purpose of providing a utility service to the public.

We recommend this condition be removed from the *Land Act 1994* (Qld) and the *Land Title Act 1994* (Qld).

Creation of sub rights

The existing statutory frame work and policy guidelines proceed on the basis that the owner of the easement corridor (ie the holder of the easement) must own the infrastructure contained in the corridor.

This is hindering the ability to create multi use corridors.

A simple solution would be to have a statutory ability to create sub easements (in the same way that it is possible to create a sub lease).

Non-tidal boundary water courses

Generally it is not possible to obtain any form of tenure over a non tidal boundary water course. This means that there are gaps in tenure for important infrastructure such as railways, roads, power lines and pipelines.

Lack of security of tenure

In the case of roads, railways, State forests and water courses, it is very difficult to obtain any form of long term tenure. This creates issues for proponents and financiers of private infrastructure projects.

GOING FORWARD

Many of these issues have been well known for many years. Furthermore, there is generally a recognition within State government departments that these issues are worthy of reform.

Nevertheless, to date, there has not been a uniform approach to these problems.

Rather, there have been one off industry specific solutions. For example:

- there had been proposed amendments to the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) to allow easements in gross in certain circumstances without the need to be a public utility provider. Interestingly this would merely reinstate the arrangements which existed under the *Petroleum Act 1923* (Qld); and
- the concept of Miscellaneous Transport Infrastructure Corridors was included in the *Transport Infrastructure Act 1994* (Qld) in 1995 (chapter 12) to provide a means to transport slurry through a pipeline for a proposed mine – but cannot be used for road transport infrastructure, rail transport infrastructure, air transport infrastructure, public marine transport infrastructure, port infrastructure, bus way transport infrastructure or light rail infrastructure.

The current arrangements have stretched the existing framework to breaking point. Furthermore some titling arrangements which were previously used to circumvent restrictions are no longer available due to changes in policy.

Urgent reforms are necessary to avoid major infrastructure projects being delayed or thwarted by outdated legislation which no longer reflects or serves the economic realities of the delivery of infrastructure in the 21st century.

A second paper on this issue will shortly be published in which I will address:

- specific industry issues including bulk water transportation, bulk transportation of gas, transmission and distribution of electricity, rail and light rail;
- issues arising under the *Land Act 1994* (Qld); and
- project risk considerations for proponents and financiers of linear infrastructure.

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