Submission form: Exposure draft - Strong and Sustainable Resource Communities (SSRC) Bill

Your details

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Your comments on the draft SSRC Bill (If there is not enough space on this form, please attach additional pages in a similar table format)

Section of Bill	Topic	Describe the issue	Suggested solution
Passim / s.3	Object of the Act – A Fair Go	More effectively capturing the intent / purpose of the Act. In essence an SSRC Act seems to be about ensuring a “fair go” for suitably qualified and work ready nearby residents to get jobs in local major resource projects. Putting to one side the merits/justification of this and the assumptions behind it, if that is the intent, why not say so, and capture that concept in the purposes of the Act.	Section 381 of the Fair Work Act 2009(Cth) sets out the object of the federal unfair dismissal scheme. It includes in ss.381(2): *(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a " fair go all round" is accorded to both the employer and employee concerned.*

			Note: The expression "fair go all round" was used by Sheldon J in in re Loty and Holloway v Australian Workers' Union [1971] AR (NSW) 95. The drafters of the SSRC might look at incorporating such a concept into the Object of the Act (s.3), if that is what is intended.
Exemptions	Exemptions	There are circumstances to which this Act and its requirements should not legitimately apply, and there needs to be a series of exemptions.	Explicitly exempt at least the following: - Internal transfers / relocation – which is a very common practice in the industry which is positive for both employers and employees. - Internal advertising (on an employer's intranet). - The maintenance or carrying over of an existing contractor or provider working elsewhere in Queensland for the employer. - Managerial, supervisory and specialist positions. This might be achieved with an income based qualification (exempting positions paying above a certain threshold).
s.6	Exceptional circumstances	There should be scope to allow 100% FIFO, and to preclude litigation under a SSRC Act from unsuccessful resident applications, in exceptional circumstances.	<u>Safety</u> - It is quite plausible (with greater exploration) that in the future deposits (reserves/resources) may be found in areas that are "nearby regional community" areas, but are not safely accessible for a daily commute by nearby residents. - The area might be tidal, flood effected, other geographic features may preclude commuting, or environmental or cultural

			concerns may preclude building roads that would facilitate local commuting. - It is therefore recommended the SSRC Bill be amended to provide that there may be exceptional circumstances in which 100% FIFO should be permitted with the permission of the Coordinator General (where safety etc. must prevail over ideology). This should at least be included as an exceptional option available to the Coordinator General to declare under s.6 if needed in the future.
s.6	Refer to "Schedule 1 Dictionary"		s.6 raises a number of issues, addressed below and separately in relation to Schedule 1.
Chapeaux point on discrimination	Use of Discrimination – wording and concept.	The Anti-Discrimination Act 1991 is a major piece of protective social legislation. It reflects the moral values of Queenslanders opposing racism, sexism, and prejudice based on the fundamental attributes listed in s.7 of the Act. The preamble to the Anti-Discrimination Act 1991 makes the fundamental nature of the Act and its protection of "fragile freedoms" clear. Respectfully, shoehorning the concerns giving rise to the SSRC into existing anti-discrimination machinery and state action on discrimination risks trivialising and detracting from the operation of one of the most fundamental non-criminal protections offered by Queensland legislation.	Find an alternative concept and wording, and don't seek to conflate or confuse what the person on the street would view as unacceptable "discrimination" with the issues being addressed in the SSRC Act. Also find some other way to determine any actions brought under an SSRC Act, rather than taking up the time and resources of the Anti-Discrimination tribunal which should be focussing on the conduct already prohibited by the Anti-Discrimination Act 1991.

Section 8(1)	Projects to which the anti-discrimination provisions apply	The proposed trigger date in 2009 raises concerns regarding retroactive application, and in turn issues of sovereign risk for doing business in Queensland.	The SSRC should apply prospectively to new large projects. This section should not apply to large resource projects that have been through an EIS evaluation under the State Development and Public Works Organisation Act 1971 or an EIS assessment under the Environmental Protection Act 1994 prior to commencement of the SSRC Act.
s.8(2) Prohibition on Discrimination	Qualifying that the various obligations to (and rights for) local residents in regional areas should only be triggered where the residents are suitably qualified, experienced and work ready.	Various provisions of the Bill would be improved by qualifying its application to situations where the applicant local resident is qualified, experienced and work ready. This is an essential change. It is essential that the rights proposed for residents, be restricted to those who are suitably qualified and ready to take up a position. It would be perverse if somehow a resident could take action under this Act where they were for example not qualified or trained, or were not able to start work/training on the dates required by the employer. And the person must actually have applied, and not be somehow seeking to trigger rights where they did not (for example) apply during the advertised period for applications to be lodged.	Thus, a provision such as s.8(2) should be qualified along the following lines: *(2) The owner must not, after the commencement—* *(a) discriminate against a suitably qualified, experienced and work-ready resident of the nearby regional community who has applied for a position with the owner when recruiting workers for the project; or*
s.8(3) Prohibition on Discrimination	Clarifying who the employer is	During the operation phase of a mine, other major organisations are often contracted to do specific tasks, for example to do maintenance, run onsite accommodation,	Schedule 1 should include a specific definition of “owner”. Any anti-discrimination requirements should only be imposed on those making employment decisions, which may be the

		catering etc., or to do shut downs and turn arounds. There are also contract miners, who operate entire operations for non-operational owners. Each of these organisations are substantial employers in their own right, and they are contracted on the basis that they employ their staff and assume the legal obligations for doing so.	project owner, or it may be an unrelated entity entering into a commercial contract with the owner. Section 8(3) should be redrafted to confine the owner's liability to its direct employment decisions for those it directly employs, or for employment by a related entity directly controlled by the owner. Were any obligations to be imposed beyond this, they should be borne by the direct employer only, and not an owner that is not "hiring and firing" for the work concerned.
s.8(4)(a) Prohibition on Discrimination	Who should be liable – organisations not individuals	We are concerned about the use of the word "person" in this context. Whilst this is a legal concept that extends beyond natural persons (i.e. individuals) to organisations, we would be concerned if this could create accessorial or additional liabilities for individual staff members of resource employers, such as for example recruitment managers, or HR staff. We are fortified in this view by the expression of s.8(4)(a) which describes a recruitment exercise in terms which could apply equally to organisations and individuals acting on their behalf.	This difficulty / liability could be disposed of by replacing the word "person" with "owner or related body corporate of the owner" (i.e. consistent with s.8(3) however you end up drafting it). This is a very significant issue, and resource employers would not want their HR and other staff exposed to actions for "discrimination" with all the negative connotations that carries in relation to the matters addressed in an SSRC Act.
s.8(4)(b) Prohibition on Discrimination	Trigger	• S.8(4)(b) needs to be qualified to ensure that the discrimination can only occur if the resident has properly applied for the job. This is not clear from the exposure draft.	
s.8(4)(b) Prohibition on Discrimination	Tests	The tests for discrimination in proposed s.(4) are imprecise and lack the specificity necessary for importation into the Anti-Discrimination Tribunal.	Proposed s.8(4)(b) turns on the test of causation, and the word "because", which in this instance appears to mean something

			along the lines of “for the purpose of”, or “due to having the characteristic of”. This needs greater precision, as it is creating liability and attaching a prohibited purpose to an ordinary business activity that is a legitimate right of any employer, i.e. not accepting everyone who applies for a position or positions. Part 3 of the Anti-Discrimination Act 1991 (Qld) provides necessary detail to properly operationalise the broad concept of discrimination, and in doing so illustrates the complexity of applying legal liabilities to actions, in actions, decisions and non-decisions. It illustrates the dangers of an unduly simplistic approach, which with respect is how proposed 8(4) has been drafted to date. We suggest that the drafters look to the concept and expression of direct discrimination in the Anti-Discrimination Act 1991, and in particular the test of dominant purpose. This might yield a provision more along the lines of: *8(4) For subsection (2)(a), the owner is taken to discriminate against a resident of the nearby regional community if—* *(a) the owner is recruiting employees to work at the project site; and* *(b) the resident, having applied for a position in accordance with the application process and deadlines set by the employer and being suitably qualified, experienced and work-ready, is not offered work on the project, or is disadvantaged*

			in the recruitment process for the project, on the basis of or for the substantial reason of being a resident of the nearby regional community.
s.8(4) Prohibition on Discrimination	Guidance required on Prohibition on Discrimination	As it currently stands, there is significant confusion in the draft legislation over what will be and what will not be discrimination. This will create unintended consequences, confusion and unnecessary litigation, and will leave employers, residents and employees very dissatisfied unless addressed at this stage of the process.	Recommendation: Insert a new 8(4)(c) providing indicative guidance on when a local is discriminated against; and when a local is not discriminated against. Note also our wider comments on the proper treatment of the nexus being imposed between SSRC and anti-discrimination law.
s.9 Remedy	Remedy – Clash with Diversity Commitments / Collision of Discrimination	In addition to our other significant concerns with s.9, there are two pre-eminent concerns that must be addressed upfront. The first is an entirely foreseeable collision with the values and achievements of the contemporary resource industry which cannot be allowed to proceed as presently drafted.	The Queensland resource industry is committed to diversity and in particular providing employment opportunities to women and Indigenous Australians. This commitment is based on the values of the contemporary industry and these values will continue to guide our employment decision making – this is a non-negotiable for the industry. The industry is very concerned that any prohibition on discrimination against residents of proximate regional communities not create ambiguities or collisions with our diversity commitments, to the hiring of women and Indigenous Australians in particular. To put it crudely, if all the qualified potential employees from the surrounding regional area are white males, the effect of the law (including but not limited to an SSRC Act) cannot legitimately be to require a project owner to hire these white males to the

			exclusion of women or Indigenous Australians. An SSRC Act also cannot have the effect of requiring an owner or operator to not provide continuity of employment and opportunity to (for example) a previous Indigenous trainee, or to contract with an Indigenous business. Resource employers need to be able to continue to pursue their diversity commitments in regional Queensland, and these diversity efforts need to come before or sit above requirements to hire from regional areas, and need to sit above or prevail over the requirements of an eventual SSRC Act. The remedy to this problem should be to qualify the SSRC Bill, and in particular the offence and remedy provisions to exempt from any action or liability measures which an owner is pursuing to make their workforce more diverse in regard to any of the attributes listed in s.7 of the Anti-Discrimination Act 1991. We urge the Government to address this issue with the gravity and importance it merits, and not to put employers in the resource industry in a position in which there is any threat or ambiguity to their continuing commitment to employ more women and Indigenous Australians. At a suitable point in the SSRC (and perhaps also noted in s.9) something to the effect of the following should be included: *Nothing in this Act should be taken as rendering discriminatory, or creating liability for the owner or cause of action for a resident, where a position is filled by a non-resident person and this is*

			consistent with or progresses the owner's efforts to make their employment profile more diverse. This would need more work, and we are not sure if each of these concepts is suitable for legislation, but it captures our concern and the outcome sought. This also requires an addition to s.9 along the lines of: *9(4) Where a position is filled by a non-resident person, and this is consistent with or progresses the owner's efforts to make their employment profile more diverse, a resident may not make the complaint referred to in s.9(1).*
s.9 Remedy	Who will make the anti-discrimination decision?	There are a number of extant legal issues regarding the enforcement of decisions of the Qld Anti-Discrimination Commission, which are both raised by the SSRC Bill and which complicate the assumptions regarding process and determination underpinning the Bill These centre on QCAT's jurisdiction to deal with any complaints made under the SSRC Bill. If the SSRC Act enables the jurisdiction of QCAT by referencing the Anti-Discrimination Act/jurisdiction (as s.9 does) then the SSRC will become a "workplace law" for the purposes of the Fair Work Act and give residents of regional towns access to the general protections jurisdiction of the Commission. This will create a massive additional litigious risk for resource companies operating in Queensland, and may be deliberately gamed	Before proceeding, a careful technical analysis must be undertaken of the provisions in the QCAT Act dealing with jurisdiction, and of the Anti-Discrimination Act and s.9 of the SSRC Bill. This concern should be subject to advice from the Crown Solicitor before proceeding.

		as the preferred means of litigation as it would offer the prospect of individual reward, which is not the approach the government has taken in drafting the SSRC Bill. It would in short, inadvertently undo what the authors of the SSRC might have seen as their "lighter touch" approach to regulation in this area.	
s.9 Remedy	Remedy – Title	The title presumes the discrimination has occurred. This is not consistent with the Anti-Discrimination Act 1991, which refers to "complaints" and in various provisions to "alleged contravention(s)".	s.9 could usefully be retitled as follows: ***Remedy for resident of nearby regional community alleging discrimination in recruitment*** Also, 9(1) could more usefully be in the following terms: *"A resident of the nearby regional community may make a complaint under the Anti-Discrimination Act 1991 alleging discrimination in recruitment for a large resource project contrary to section 8(2).*
s.9 Remedy	Remedy – Cross References	The cross references in s.9(1) to various elements of s.8 seem wrong and should be reviewed.	The cross-reference to 8(1) seems to logically be to 8(2). However, at the end of 9(1), the following words could be omitted for greater clarity "by a person mentioned in section 8(2)", they don't appear to add anything and merely serve to confuse.
s.9 Remedy	Remedy – Nexus with Anti-Discrimination Laws	The cross references in s.9(1) to various elements of s.8 seem wrong and should be reviewed.	The consequences of the proposed nexus to the Anti-Discrimination Act 1991 need to be properly reviewed, suitable addressed and qualified.

		The reference to 8(1) seems to logically be to 8(2)	The industry will need to look further at the proposed interaction with the Anti-Discrimination Act 1991, and we can signal at this point a concern that this will not be as simple or straightforward as the Bill presumes. Industry is particularly concerned about unintended consequences of the proposed nexus with the Anti-Discrimination Act 1991 and enforcement by the Anti-Discrimination Commission. Proposed s.9(3) points to one of these consequences however, with respect we fear there will be more that have not been picked up, or not properly canvassed.
s.9 Remedy	Direct v Indirect Discrimination	The Anti-Discrimination Act 1991 addressed two facets of discrimination in relation to the attributes listed in s.7; direct and indirect discrimination. This is legitimate for matters that are properly the preserve of the Anti-Discrimination Act, but when additional concerns are imported into that process, it will need to be qualified and areas where the usual tribunal approach should not apply need to be addressed.	This legislation should make its explicitly clear that: - Only direct discrimination is actionable, not indirect. - The test of discrimination to be used by the Anti-Discrimination Tribunal is that included in s.8 of this Act, not the Anti-Discrimination Act tests that would otherwise apply to usual complaints under that Act and the attributes listed in s.7 of that Act.
s.10	Advertising jobs	This solely speaks of the owner, where 8(3) extends the concept to related entities. This is inconsistent with other draft provisions, but it is closer to the right approach, to talk about the “owner”. If a some broader application of owner is proposed, such as that in s.8(3), subject to the practical modifications we suggest, this	s.10(2)(a) This should include a test of intention, and only impose obligations and penalties where an owner knowingly or deliberately pursued an advertising strategy with the purpose of excluding residents of the nearby regional community from applying. Drafting in the following terms would be more targeted to the “wrong” being addressed and more effective:

		might usefully be included in Schedule 1 as a definition.	*(2) The owner must not—* *(a) advertise positions for workers for the project in a way that <u>intentionally or knowingly</u> stops residents of the nearby regional community for the project from applying for the positions; or* Many resource employers have substantially moved to online recruitment, through general recruitment sites, industry specific recruitment sites or through their own websites (at considerable cost to the companies concerned). We are concerned that employers cannot legitimately be asked to be accountable for how potential employees in regional communities access information on prospective employment. We note in particular that employers cannot be asked to be accountable for the roll out or non-roll out of the NBN in particular areas of regional Queensland. Companies should be able to continue to advertise online for positions proximate to regional communities, even where the regional community may have low internet penetration. This would not (and should not be treated as) be an avoidance measure under s.10(a), and the drafting should make that clear. We propose that a note be included in s.10 to the effect that: *Note: Nothing in the preceding should be taken as precluding the owner from advertising positions online, either as the sole means of advertising, or as one amongst a range of means, where this is the prevailing policy or practice of the owner.*

			Clarification Note also, there are usually going to be multiple regional communities if the test is 200 or more people within 100 km of the project, and this may need to be picked up in the wording, i.e. not in the singular in s.10(2)(b). • The maximum penalty level is also very high, at (on our calculation) $97,520. This underscores the importance of restricting offences to situations where an owner/employer is deliberately and consciously seeking to stop residents applying for jobs. • Section 10(3) should be amended to omit the personal liability for persons acting for the owner as set out above. Accessorial liability is a serious issue and should not be extended to this proposed extension of the law.
Section 10(2)(a)	Recruitment advertising	The (presumably inadvertent) consequence of the way in which this is drafted is that an owner could potentially be in breach for, e.g., advertising a position internally. Recruits internally (mitigates this) instead now it looks like all positions must be advertised. (Intercompany transfers).	Include appropriate qualifiers to limit the reach of this subsection to externally advertised roles only. This appears to require a specific amendment to the definition of “recruitment process” in Schedule 1 to clarify that for the purposes of the SSRC Act it will only apply to externally advertised positions.
s.11 Social Impact Assessment	Social Impact Assessment	It is vitally important that the SSRC changes do not blow out, delay, or unduly complicate the SIA process. Doing so will harm the reputation of Queensland as a place to invest and do business.	AMMA has separately provided comments on the proposed SIA guidelines. A particular concern and focus area for AMMA is the proposed instructions on the Workforce Management Plan.

		AMMA stresses the need for streamlined, cost efficient and user friendly SIA processes.	AMMA has offered a redraft of the plan parameters (and structure) which would make it more user friendly and better advance the policy intentions in this area.
s.12 and s.13 Conditions and Approvals		It seems ambiguous from these provisions as to where the Coordinator General's conditions or determinations are appealable.	Administrative law should dictate there is some capacity for an owner to dispute the decision making process on the matters addressed in s.12 and 13, but it is unclear where this would lie. The proposed guidelines or explanatory materials might clarify how this information is released. Is it formally gazetted or published on the CG website? Clarifying this would assist the process.
Section 13	Power of the Coordinator-General	The breadth of proposed powers for the Coordinator-General to set additional conditions post-EIS approval will create ongoing uncertainty for both existing and new large resource projects. Again, this is set to negatively impact negatively on the sovereign risk profile of resource activity within Queensland. This threatens less investment, fewer jobs, and foregone future taxes and royalties, and threats to the future living standards of Queenslanders.	Amend the SSRC Act to apply only to large resource projects that will go through an EIS evaluation or an EIS assessment after the commencement of the SSRC Act. Need to define the limits of the CG powers (should not be uncapped). Can they change by changes in government (if so, this poses increased risks for investors as it adds an extra layer of uncertainty).
s.14	Timing	The published information on nearby regional communities for each large project is critical to the operation of the proposed requirements on owners, and is critical to minimising the prejudice and unfairness of the imposed new requirements.	A new section 14(2) making clear that the prohibitions, obligations and liabilities in the Act are not triggered in relation to a particular project prior to the Coordinator General publishing the information set out in 14(a) to (d) (which should become 14(1)(a)-(d). **Note: We are not suggesting there should be any loop hole for avoidance or somehow

			gaming this by hiring before the information is issued. If this were a genuine concern we would be happy to look again at an alternative clause that addressed any such concerns. **Note: This must not delay the approval process, and we want this information to be issued rapidly (and it need to be to protect the job seekers' interests that the Bill purports to support).
s.15(1)	Terminology	Reword suggested.	Consistent with the concerns outlined above in relation to the unfair imposition of new accessorial or the staff of resource companies, omit the references to "persons", and restrict the liability to the owner, or otherwise to organisations.
Schedule 1 Dictionary	Definition of **nearby regional community**	The definition (size of town & km definition) is not fit for purpose and seems: - Impractical - To use the wrong methodology - Risks curbing future resource investment in Queensland - (Even though it may have good intentions) it may/likely put people in danger (safety issues) - May create conflict of interests between safety laws and this Bill.	<u>Distance</u> - Towns within a simple radius from the main project entrance would be a lot easier to calculate and operationalise than the proposed definition based on "roads most commonly travelled". - The distance is one thing, but the size of the town and the town boundaries is another. <u>Size</u> - A community of 200 people is very small. It is in fact a micro community, and in the Australian vernacular will often not even be a "one pub town". - We would also be concerned about the validity of the data being relied upon at such a small scale. Many purported <500 person communities micro communities may have

			very different resident numbers than those last formally measured. - They may also have so few persons of working age as to make their inclusion in these requirements impractical and irrelevant. - Applying a risk based approach (must not be prescriptive) to determine whether 100% FIFO is permitted is more likely to yield some measure of suitably qualified employees, and bring the identified purpose / cause of this legislation into play (without in any way conceding that this legislation should be pursued at all). <u>Exemption</u> - There needs to be a risk based approach to determine whether 100% should be permitted. There are a significant number of reasons for this: - Important: There should be an explicit exemption in this definition for future offshore operations in Queensland (where there is no other choice but to logically have 100% operational FIFO workforce – as you work offshore). Further, we need to be mindful that there has been and will continue to be significant and constant innovation in exploration which continues to identify and open up new mining opportunities – and there is a probability that future discoveries that require 100% FIFO may be in areas that fall within the 100km / 200 people criteria .

			- This exemption should also be replicated or included as a note in proposed s.6. This might be along the following lines: *Note: This Act and its requirements has no application in relation to offshore resource projects (and perhaps a suitable statutory definition could be picked up here).* <u>Safety</u> - It is quite plausible (with greater exploration) that in the future deposits (reserves/resources) may be found in areas that are "nearby regional community" areas, but are not safely accessible for a daily commute by nearby residents. - The area might be tidal, flood effected, other geographic features may preclude commuting, or environmental or cultural concerns may preclude building roads that would facilitate local commuting. - It is therefore recommended the SSRC Bill be amended to provide that there may be exceptional circumstances in which 100% FIFO should be permitted with the permission of the Coordinator General (where safety etc. must prevail over ideology). - This should at least be included as an exceptional option available to the Coordinator General to declare under s.6.
Schedule 1 Dictionary	Definition required for "owner"	Need to describe (current uncertainty) of who the "owner" is - this needs to be defined.	Need to distinguish from major contractors etc.