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The Research Director
Agriculture, Resources and Environment Committee
Parliament House
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Submission about the Environmental Protection and Other Legislation Amendment Bill 2014

Thank you for inviting the Queensland Environmental Law Association (**QELA**) to make a submission about the Environmental Protection and Other Legislation Amendment Bill 2014 (**EPOLA Bill**) to the Agriculture, Resources and Environment Committee.

QELA is a non-profit, multi disciplinary organisation. Its members include lawyers, town planners and a broad range of consultants who represent and advise a miscellany of participants in the development industry.

While noting that the EPOLA Bill proposes substantial amendments to the *Environmental Protection Act 1994* (**EP Act**) relating to the contaminated land provisions and the maximum penalties for various offences prescribed in that Act, this submission specifically focuses on the following aspects of the EPOLA Bill:

(a) The proposed amendments to the *Environmental Offsets Act 2014* (**EO Act**); and

(b) The introduction of enforceable undertakings into the EP Act.

The proposed amendments to the EO Act

1 The EPOLA Bill proposes amendments to the EO Act in relation to the restriction on the imposition of offset conditions.

2 The potential for the provisions relating to the restriction on the imposition of offset conditions to be frustrated was identified in the submission made by QELA in respect of the Environmental Offsets Bill 2014. Specifically, QELA's submission raised a concern about the restriction relying upon approval conditions being issued in a particular sequence, that is, the restriction did not appear to operate to avoid potential duplication of offset conditions in circumstances where offset conditions are first imposed by local government (before there is an existing State condition) or State government (before there is an existing Commonwealth condition).

3 QELA suggested that provision be made in the EO Act for an existing offset condition imposed by a lower level of government to fall away/ yield to a subsequent offset condition imposed by a higher level of government where the condition relates to the same, or substantially the same, matter, for the same or substantially the same, impact, in substantially the same area.

4 The EO Act as passed did not address this concern. QELA however notes that the EPOLA Bill proposes amendments to the EO Act to the effect that an existing offset condition imposed by a lower level of government will stop applying if a higher level of government later imposes an offset condition for the same area and for the same or substantially the same prescribed activity and prescribed environmental matter.

5 Amendments to the EO Act to ensure that there is nil duplication of offset conditions are supported. QELA however holds concerns that the proposed amendments in the EPOLA Bill will not deliver the intention of nil duplication of offset conditions. Specifically, that the efficacy of the restriction on the duplication of offset conditions may be reduced for the following reasons:

(a) The proposed amendments contemplate a restriction on the duplication of offset conditions in circumstances where an offset condition is imposed or a decision has been made not to impose an offset condition. In circumstances where a deciding entity does not impose an offset condition, the restriction requires it to be demonstrated that a decision was made by a higher level of government not to impose an offset condition.

The EPOLA Bill's amendments to section 15 of the EO Act indicate that an administering authority may have regard to a document of the Commonwealth or State about a decision not to impose a Commonwealth or State condition. There is however no positive requirement for the Commonwealth or State to create such a document or for those documents to be made available to other levels of government or applicants. In the absence of an offset condition or any positive obligation on a decision maker to record when a decision is made not to impose an offset condition, it is unlikely that the intended restriction on nil duplication will be achieved.

To complement these sections, QELA suggests that provision be made for a deciding entity to give written notice to an applicant of any decision made not to impose an offset condition. Alternatively, provision could be made so that where a higher level of government had an opportunity to impose an offset condition, but does not do so, it is "deemed" that the higher level of government decided not to impose an offset condition.

(b) The proposed amendments should clarify that if the Commonwealth has determined that an action is not a "controlled action" pursuant to the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**), such a determination is "deemed" to be a decision made by the Commonwealth not to impose an offset condition. This clarification will result in the State or local government being unable to seek an offset for the same, or substantially the same, prescribed activity and prescribed environmental matter the subject of the EPBC Act referral, thereby assisting the delivery of nil duplication of offset conditions.

The rationale for such a clarification is that the Commonwealth, in making a controlled action decision, is required to assess whether or not a proposed action is likely to have a significant impact on a matter of national environmental significance. Following an informed assessment process, a decision by the Commonwealth that a proposed action is not a controlled action effectively means that a decision was made that the impact of the proposed action was not considered significant in terms of matters to which the referral relates. QELA submits that in making a "not controlled action" decision the Commonwealth necessarily determines that no conditions, relating to offsets or otherwise, ought to be applied. It is therefore appropriate to extend this deeming arrangement in circumstances of a controlled action determination as it is inherent in a "not controlled action" decision that the Commonwealth decided not to impose an offset condition.

(c) As drafted, proposed section 25A is driven by the administering agency. QELA suggests that provision be made in section 25A to allow an applicant to apply to the lower level of

government (at no cost to the applicant) to remove an offset condition after an offset condition is imposed by a higher level of government. Further, a short timeframe should be stipulated for the lower level of government to reissue its approval (without the duplicate offset condition) after it receives an application by an applicant or notice from an administering authority that a decision has been made by a higher level of government to impose an offset condition for the same, or substantially the same activity and environmental matter.

(d) As identified in QELA's submission on the Environmental Offsets Bill, QELA continues to see the potential for the restriction on imposition of offset conditions to be frustrated by the imposition of separate offset requirements for different, yet similar, prescribed environmental matters. This will depend upon how the matters of national, State and local environmental significance are framed.

6 The EPOLA Bill proposes that a regulation may provide for a review of a decision made by an administering agency that an earlier imposed offset condition is not for the same, or substantially the same, prescribed activity and prescribed environmental matter. QELA endorses preparation of such a regulation and suggests that the regulation include the following details:

(a) how and when a person may apply for review of such a decision;

(b) who will conduct the review;

(c) the matters that will be taken into account in making a decision with respect to the review;

(d) clear timeframes for each stage of the review process; and

(e) whether a dispute resolution process will be available.

The introduction of enforceable undertakings to the EP Act

7 The EPOLA Bill proposes to insert Chapter 10, Part 5 into the EP Act relating to enforceable undertakings. These provisions allow a person to apply for, and for an administering authority to accept, an enforceable undertaking in the approved form in circumstances where there has been a contravention or an alleged contravention of the EP Act, other than an indictable offence.

8 Proposed new section 508(3) of the EP Act (set out in clause 102 of the EPOLA Bill) provides that the making of an enforceable undertaking does not constitute an admission of guilt by the person making the undertaking. Having regard to the language used in proposed new section 507(1), it would appear that this protection applies once a written undertaking is made by a person, that is, prior to any decision made to accept or reject the enforceable undertaking. If this is not the intention, then section 508(3) should be clarified and carefully confined accordingly.

9 It is noted that the making of an enforceable undertaking in the approved form and any documents submitted with it are not privileged. As such they may be admissible in evidence against the person in a prosecution. Proposed new section 508(3) of the EP Act does not afford protection in this regard. QELA suggests that, similar to section 351 of the EP Act (program notice privileged), provision be made so that enforceable undertakings made and any documents submitted with enforceable undertakings made are privileged. Absent such a provision, the administering authority may reject the enforceable undertaking and rely on the evidence set out in the enforceable undertaking in a prosecution.

10 According to clause 104 of the EPOLA Bill, the chief executive may make guidelines about when an administering authority may accept enforceable undertakings. QELA supports the preparation of such a guideline and suggests that it would be useful for the guideline to include examples of

acceptable and unacceptable terms in enforceable undertakings (such as whether enforceable undertakings can require payment of money to the regulator or others) and also the circumstances and criteria relevant to a regulator considering a request to vary or withdraw an enforceable undertaking.

11 Finally, QELA notes that the EPOLA Bill does not provide for the review or an appeal in respect of a decision made by an administering authority not to accept an enforceable undertaking. In the absence of any appeal or review rights, QELA reiterates the importance for the preparation of guidelines and other explanatory materials to inform persons about when enforceable undertakings are appropriate and how an application for an enforceable undertaking will be assessed.

We thank you for the opportunity to make a submission about the EPOLA Bill. Representatives of QELA would welcome the opportunity to discuss the submission in further detail as required.

Yours faithfully

James Ireland
President
Queensland Environmental Law Association