Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024

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Submission to the Health, Environment and Agricultural Committee on the *Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024*

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QREC
Queensland Renewable Energy Council

Mr Aaron Harper MP

Chair, Health, Environment and Agriculture Committee

Email: heac@parliament.qld.gov.au

Dear Mr Harper MP,

Thank you for the opportunity to provide a submission to the Health, Environment and Agriculture Committee (HEAC) on the *Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024* (E3POLA 2024).

The Queensland Renewable Energy Council (QREC) is a not for profit industry association, focused on providing policy leadership and advocacy on matters relating to the development and operation of renewable energy projects in Queensland. We act in the best interests of our members and connecting stakeholders to build a clean, reliable and affordable energy future where Queensland communities prosper.

QREC values adequate time to consider and consult with its members on policy and proposed legislative amendments. The timeframes provided to stakeholders to respond to the amendments in E3POLA 2024 are far from ideal with QREC member engagement required to be truncated. This is particularly the case when there has not been any form of stakeholder engagement by the Department of Environment, Science and Innovation (DESI) beyond that set out in its Consultation Paper released in September 2023. It is also noted that the Departmental briefing is occurring post the closure of submissions.

There are some significant, but highly technical changes in E3POLA 2024 which require measured consideration, especially where amendments result in a legal defence being turned into an offence. In our experience, such substantial changes to any legislation generally benefit from a more comprehensive consultation process and longer submission deadlines.

As representatives of a responsible industry QREC of course supports, in principle, the government's 2022 independent review into the adequacy of the powers and penalties available under the *Environmental Protection Act 1994* (EP Act), and the intent of the Bill, understanding that the review was initiated in part due to the significant odour nuisance issues in the Swanbank industrial area.

Notwithstanding this, QREC feels that, in part, the Bill is also being presented as the solution to the concerns of 'growing communities' in 'coexistence' with industrial areas.[1] In town planning terms, this is about residential development inappropriately encroaching in the direction of existing industrial areas, particularly waste facilities at Swanbank. According to longstanding town planning principles, this residential encroachment would have been regarded as incompatible with the existing industrial area without adequate separation distances and buffer areas. To the extent that this Bill may partly be considered a response to suboptimal town planning, it is inappropriate for this issue to be used as a justification for other legislative changes that have the potential to impact other industries such as the renewable sector.

QREC does support the overarching findings of the review that the EP Act does already have adequate powers and penalties to, in most instances, enforce environmental obligations and reduce the risk of environmental harm and that it highlighted the enforcement tools and penalties within the EP Act were in line with other legislation within Australian jurisdictions.

However, it seems a number of the changes proposed in the Bill will have a much broader reach than the resolution of those issues, and beyond even the recommendations of the Inquiry (to which no broad stakeholder input was sought). This is exacerbated by the lack of a Regulatory Impact Assessment process in the preparation of this Bill.

[1] As per the Minister's First Reading Speech.

Within this context, many of the legislative changes proposed, including new powers to override existing development approvals on which a wide range of compliant operators throughout the State have been relying on, seems unnecessary, using the proposal of the introduction of broad powers to solve a more granular issue.

Noting that likelihood that some or all of the challenges labelled as 'complex regulatory issues' could already be resolved through existing legislative powers, QREC appreciates:

- The general principle of trying to simplify the current complex system of clean-up notices, direction notices, and environmental protection orders into a single 'environmental enforcement order' (EEO) (subject to QREC's key concerns about expansion of this power overriding existing conditions, outlined below);
- the transitional provisions recognising that particular instruments remain as per the unamended EP Act, however, it is noted that this does not apply for Transitional Environmental Programs (TEPs) (which are often long term instruments and ought not be subject to any amendments from legislative changes following finalisation (apart from non-compliance reasons); and
- the expansion of Original Decisions to include TEPs amended without the consent of the holder.

Several broad concerns with DESI's Consultation Report in response to the Consultation Paper submissions and the contents of the Bill are set out below, along with a number of specific issues.

Ensuring necessary supporting material is updated prior to commencement

QREC notes that DESI's Consultation Report makes a number of references to the call from stakeholders to the parallel need to update supporting material such as the Enforcement Guidelines for some of the most significant amendments. This is critical to ensure updates to relevant guidelines do not lag many months behind the corresponding commencement of the legislation.

All supporting material should be drafted, negotiated and finalised prior to commencement. This could be achieved if the amendments are set to start at a date by proclamation, rather than on assent.

To this end, we are concerned at the statement in the Consultation Report that, '*The Department will update guidelines and guidance material as part of the usual implementation of legislation change, including consulting with stakeholders where appropriate*.' This provides no comfort the revisions will be available for the commencement of the significant changes proposed.

QREC requests that the supporting policy and guidance documents particularly be updated (NB DESI also flags these in its Consultation Report) for:

- The expansion of the General Environment Duty (GED) (S319)
- The new Duty to restore (insertion of new section 319C)
- Expansion of the Duty to Notify (amendment of S320A and consequential amendments), especially as the Consultation Report stated, '*Explanatory Notes to the Bill and guidance material issued by the Department will address what is required to comply with the modified duty.*' The Committee should be aware there is nothing evident in the Explanatory Notes. Comprehensive consultation should be had on defining when a person '*ought reasonably to have become aware of the event*'.
- When an Environmental Enforcement Order (EEO) (insertion of new section 362 relation to the completely new EEO amendments) may be issued, even if the person holds an authorising environmental authority,

QREC would be pleased to assist with the revisions and development of such guidance material.

Key issues

Clause 13 - Specifying that a failure to comply with the general environmental duty (GED) is an offence where the failure of the duty is likely to cause serious or material environmental harm (S.319) - this is a substantial change in government policy which the Explanatory Notes do not identify as such, as it applies to every person and business in Queensland. Since the introduction of the EP Act, the GED has been, in criminal law terms, a defence, not an offence (noting most of our members, particularly the ones working across jurisdictions and those familiar with the 2019 changes to the Victorian environmental laws, would always look to be compliant and already have environmental management systems in place.

While the Explanatory Notes recognise that there is a clear linkage with s.493A in the EP Act that where harm is authorised under an existing Development Approval (authority) it is not unlawful, s.319(3)(b) is proposed to be inserted such that for a defence to be available, the authority needs to both exist and its contents provide for reasonably practicable measures. The second of these is problematic, as the content of an approval is the responsibility of the issuing authority, in the case of a development authority, one of many local or state government agencies. This is not a matter the applicant/holder ought to be required to pursue to ensure it is protected from an offence under separate legislation). Equally, there is a genuine legal query about whether a condition which satisfies proposed s319(3)(b) would be lawful where there is separate legislation for government development approvals.

This consequential change is not recognised in the Notes and can be regarded as a retrospective consideration of a lawfully granted approval. Amendments which introduce an element of retrospectivity do not meet Queensland's Fundamental Legislative Principles. QREC suggests that this provision is carefully considered by the HEAC, and recommends it be removed from the Bill, and the defence instead reflect the existing section 493A(2) only. This is especially important given Clauses 23, 24 and 28 (see below).

QREC is concerned that not only is the creation of this new offence unnecessary but the definition of the general environmental duty is too vague for either operators or DESI to be able to proactively identify the demarcation between compliance and contravention. A vague definition may not be unacceptable when used as a defence, however it is problematic for the creation of a serious new offence.

Rather ironically, the proposed new Section 319(5) includes a list of fairly prescriptive (whilst almost unmeasurable) examples that a person should do if they are not to be considered as having breached the GED. eg '*use and maintain systems to ensure that information, instruction, supervision and training is provided to any person engaging in the activity in a way that minimises risks of environmental harm that may arise in connection with the activity*'.

Questions about these examples include:

- How will the administering authority (AA) determine whether the installation of plant and equipment has been sufficient to minimise risk? In absentia of any specific conditions, how will the AA or proponent be able to demonstrate this?
- How will the AA determine whether risk management systems have been maintained, let alone whether they can evaluate the effectiveness of the controls? How will proponents be able to demonstrate this?

The failure to included additional defences, instead resting on the overall s319 'all reasonable practical measures' (as to be revised) is not sufficient, especially given the proposed amendments to s.319 as set out above.

Instead QREC suggests removing the examples and replacing them with a corresponding defence provision, then setting out examples in guidance material instead of the parent legislation as to how an operator may approach providing evidence for this defence.

In addition, given a prosecutorial offence will be created at the time of any alleged breach (eg a site audit that identifies improvements), DESI may feel that the usual process of sending a pre-enforcement letter allowing the operator the opportunity to respond is no longer available. QREC would expect to see the usual enforcement guideline process being utilised in the case of an alleged breach of GED, I.e. it should be generally subject to a right of due process with the operator before any proceedings or even penalty infringement notices are issued following routine inspections. QREC notes that the Consultation Report supported this stepped approach.

Clause 16 - Introducing a standalone duty to restore the environment (new s319C) – this is another example of the potential for compliance issues, and significant ramifications arising for companies, without any commitment to updated guidance material being prepared or publicly available prior to the commencement of the amended Act (on the assumption the Bill is passed).

Along the lines of the amendments to s.319, note also the difficulty with the examples in the new s319C(4) in the deciding of the measures required to be taken. For instance, where does DESI draw the line around which measures are reasonably practicable based on the factor of Section 319C(4)(e), 'financial implications' of the measures, ie, costs? People can reasonably hold different views about which costs are appropriate, for example factoring in the source or ownership of the money.

Clauses 17, 18, 19, 20, 21 and 22 - Ensuring that the duty of a person to notify of serious or material environmental harm includes circumstances where the person '*ought reasonably to have become aware of the event*' giving rise to the harm (amendment of s320A) - this is a significant concern given that the consultation report said that the Explanatory Notes would address what is required to comply with the modified duty, and such guidance is noticeably absent from the Notes. Definitions will be crucial for this section. For example, if 'reasonably' is defined in a regulatory location, precedent court case, that is able to be pointed to, this should have been included in the Explanatory Notes.

The statement in the Explanatory Notes on page 19 that, '*The amendment to the duty to notify supports industry and other persons undertaking activities that present a risk of environmental harm to monitor for contamination incidents more readily and respond to them more proactively*.' is not based on any empirical evidence, nor recognition that many industries already do this monitoring, both as leading practice and as required in Development Approvals. This addition appears to be excessive duplication not demonstrated to respond to an identified concern.

Clause 23 (amendment of s326B (Amendment of s 326B (When environmental investigation required—environmental harm), 24 (amendment of s326BA (Amendment of s 326B (When environmental investigation required—contamination of land) and 28 – Replacement of ch7, pt5, div 1 – creation of Environmental Enforcement Orders s362 – while QREC does not object to the creation of the new instrument itself, there are concerns with the principle behind the amendments given their reach into approvals that have been lawfully granted ie '*To remove any doubt, it is declared that the administering authority may issue an environmental enforcement order*/investigation notice *to a person in relation to an activity even if the person is the holder of an environmental authority* [Development Authority] *that authorises, or purportedly authorises, the activity*.'

Other matters

Clause 6 - Insertion of new S6A Principles of environmental protection

This section does not recognise the economic balancing aspects of government's consideration of Ecologically Sustainable Development, including only the concept of 'polluter pays' in relation to 6A(iv), '*improved valuation, pricing and incentive mechanisms*'. Incentives should also be considered in the positive.

Clause 7 – Amendment to the Definition of Environment (s8)

The new inclusion of 'odours and tastes' seems problematic without a clear definition. Will such subjective items be clarified with measurable indicators?

In addition, the inclusion of 'climate' has the potential to be interpreted very broadly for assessment and conditioning purposes, and may even inadvertently capture the direct regulation of the renewables sector. This would surely be counter to the government's emission and renewables targets. Again, a reason for updating guidance material to clearly explain the use of these additional components of the definition.

Clause 8 - Amendment to the Definition of Environment Value (s9)

While the inclusion of 'harmony' and 'sense of community' is pre-existing in the current definition of 'Environment', moving this terminology to s9 does not make it any clearer as to how the government would regulate these two characteristics. Although the intent is understood, matters need to be measurable, particularly in the context of legislation that has definitions for compliance purposes.

New s364(5) definition of an affected person – the Bill states this definition as '*affected person, for an emission, means a person who the administering authority knows to be affected by the emission*'. It is suggested that the committee may like to recommend a less circular definition to enhance the value of the amendments.

Part 32 - Transitional provisions for Environmental Protection (Powers and Penalties) and Other Legislation Amendment Act 2024 - s817 Continuation of particular guideline

While the continuation of the existing 'Issuing 'chain of responsibility' environmental protection orders under chapter 7, part 5, division 2 of the *Environmental Protection Act 1994*' guideline is recognised, the amendments which expand the circumstances in which an EEO may be issued to related persons under the chain of responsibility provisions is significant. Consequently DESI must consult on the related amendments to the Chain of Responsibility Guideline, prior to the commencement of the relative provisions.

Follow up

QREC would welcome the opportunity to appear before the HEAC to discuss this submission.

The QREC contact is Frances Hayter, QREC's Director Sustainability and First Nations, who can be contacted at [redacted] or on [redacted]

Yours sincerely,

[redacted]

Katie-Anne Mulder

Chief Executive Officer
Queensland Renewable Energy Council

QREC is a not for profit industry body that represents solar, wind, pumped hydro, electricity transmission, battery storage and hydrogen proponents, operators and their suppliers.

Our role is to be a leader in renewable energy policy development and support best practices and successful coexistence with communities.

QREC works with industry, communities, their supporting regions, and all levels of government to deliver a thriving renewable energy sector for Queensland.

Contact

Phone: (07) 3556 7995

Email: info@qrec.org.au

Level 14, 100 Edward Street, Brisbane City, Queensland 4000, Australia

ABN 37 670 943 209