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

**Submission No:** 17

**Submitted by:** Association of Mining and Exploration Companies

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**Submitter Comments:**

AMEC
ASSOCIATION OF MINING AND EXPLORATION COMPANIES

# To: Health, Environment and Agriculture Committee

# Re: Inquiry into the Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024

**Date submitted: 7 March 2024**

## Introduction

The Association of Mining and Exploration Companies (AMEC) appreciates the opportunity to make a submission to the Inquiry into the *Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024*.

## About AMEC

AMEC is a national industry body representing over 560 mineral exploration and mining companies across Australia, with over 70 having operations based primarily in Queensland. Our members are mineral explorers, emerging miners, producers, and a wide range of businesses working in and for the industry.

AMEC's members explore for, develop and produce minerals including antimony, bauxite, coal, cobalt, copper, gold, graphite, lead, lithium, manganese, mineral sands (such as silica), molybdenum, nickel, phosphate, potash, rare earths, silver, tungsten, vanadium and zinc, across Queensland.

## General Comments

AMEC has included our original submission on this matter provided to the (then) Department of Environment and Science on 10 November 2023 as an attachment to this submission.

In our November 2023 submission, AMEC provided detailed comments on proposed environmental protection powers and penalties, particularly in relation to the drafting of section 319. We also provide examples of terms used by other jurisdictions and a case example to provide sound detail and constructive feedback on the measures being proposed. We are disappointed to see that our concerns remain unaddressed and that the matters raised in our submission appear to have been largely set aside.

AMEC is concerned that the drafting of section 319 would create a clear duplication with other acts that are already in operation in Queensland and that are associated with the regulated resources community, namely:

- *Coal Mining Safety and Health Act 1999*: Part 2, Division 1
- *Petroleum and Gas (Production and Safety) Act 2004:* Division 3, Sections 699-701
- *Petroleum and Gas (Safety) Regulation 2018:* Part 2, Division 1
- *Workplace Health and Safety Act 2011:* Part 2, Subdivision 1, Section 17

As currently drafted, the passage of this legislation will result in Queensland potentially developing a multi-tiered approach to defining risk profiles and risk management frameworks that will be in direct conflict with each other.

AMEC believes that the measures outlined in the draft Bill have not only been developed in isolation from existing legislation, they also do not reflect what occurs operationally, as well as what is already in legislation and in other administrative tools.

## For further information contact:

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# ORIGINAL SUBMISSION – 10 NOVEMBER 2023

## Background

AMEC was heavily involved in the EPOLA process during late 2022 and 2023. During this process it was made clear to stakeholders that the legal and policy position for the QLD Government would be to take a stronger stance on provisions that are drafted into the current legislation. The Draft consultation paper lacks the detail required to make an adequate assessment of the perceived impacts on the regulated community. Their recommendations are clearly stated but the actual functionality and how the amendments will take effect and be administered are left undetailed. AMEC has reviewed in detail some of the recommendations to highlight how the lack of adequate supporting material leaves interpretation and perceived impacts wide open for critical review.

In particular, AMEC notes the following:

### Recommendation 2

The inclusion of additional parameters under the definition of environmental is considered desirable. However, the commentary and explanation of how this amendment will be administered and interpreted is unclear based on the information provided. AMEC is concerned about the inclusion of safety. The aspects of safety have the potential to create a direct conflict with existing parameters for safety governed and legislated under other instruments. It should be reconsidered as the definition of safety in the context of the EP Act proposed amendments and how this will be extrapolated in the actual functionality of the legislation could have unintended consequences and appears to be a concerning overlap. Although the commentary states that other legislative mechanisms have been considered and there is a sentiment not to create an overlap or conflict, it is unclear how this will be achieved based on the current information in the Drafted Consultation Paper. It is also unclear how other legislative mechanisms were considered when developing the recommendation. Expanding the definition to cover aspects that are already drafted in other complex matters would undoubtedly cast confusion in some areas it is recommended this be better articulated and detailed for the stakeholders, especially for those parties that have complex and vast obligations around safety.

### Recommendation 3

Environmental activities that impact the environment are either a nuisance, material or serious in nature. This seems to be a way to draft out the definition of environmental nuisance. Environmental nuisances are not trivial, but they may not be serious and material either and the list of parameters that are listed under Section 15 are there as guidance as to what a nuisance is and how it can be defined.

Nuisance is a manner by which an action or activity can be captured as having the potential to escalate to greater impacts. To draft this out and allow for nuisance events to be deemed serious and material, is to lose a simple right for activation and activities that do not cause and will never cause harm.

If the limitations and classification of scenarios and material need to be expanded under Sections 16 and 17 to include those matters prescribed under Section 15 to account for all parameters then it would be more logical to simply do that, rather than amending Section 15. Section 15 allows for a balanced

approach in relation to environmental incidents that are not frivolous but are not necessarily going to or have the intention to cause harm of a serious and material nature.

### Recommendation 4

Section 319 of the *EP Act 1994* is drafted in the negative. Simply, the instruction is not to carry out harmful activities. If there were to be an amendment to this section, or a broadening of the concepts, it need not focus on the specific terms. Any deficiency that is perceived around the terms practical and reasonable, comes from the lack of utilisation. This is because the general duty of care is not understood by the wider community or communicated to the wider community, it is not limiting in any way. What might be more helpful is to consider by contrast the definitions of the general environmental duty in the Australian Capital Territory, Northern Territory and Tasmania, where the general environmental duty of care is expressed positively. The sentiment in these jurisdictions is that there are requirements to take steps or measures that are 'practicable and reasonable to prevent or minimise any environmental harm caused by an activity'.

If this style of regulation was adopted it would broadly demonstrate a shift to instil preventative practices as part of the overall regulatory framework and a more positive regulatory culture.

If the review panel were to consider the following *Environmental Protection Act 1997(ACT)* s 22 and *Environmental Management and Pollution Control Act 1994 (Tas)* s 23A and *Wate Management and Pollution Control Act 1998 (NT)* s12 you will find that this style of legislative approach articulates in the general duty of care relevant consideration in assessing the reasonableness and practicality of measure. The above-mentioned Acts also take into consideration and include the nature of the potential environmental harm, the sensitivity of the environment and the current state of technical knowledge. This allows for contemporary techniques to be integrated into environmental management and overall better outcomes.

AMEC respectfully suggests that taking a narrow view based on the Victorian model of legislative reform and not considering the more positive legislative drafting available in other jurisdictions diminishes the progress and the advanced nature of regulation in Queensland that already exists and the effective controls in place for the management of environmental harm the degree to which the regulated community is already applying advanced technologies to prevent and minimise environmental harm. This should be celebrated not met with additional hardening of the framework.

To be clear the intention is to replace '*reasonable and practicable*' with '*reasonably practicable*' appears unnecessary, and a missed opportunity when there are good local examples of a better way to regulate.

## General feedback on Powers and Penalties Consultation Paper

- For the past 12 month period there have been ongoing amendments to the EP Act. AMEC continues to advocate that there is a lack of substance and balanced consideration of how these changes will impact all intended stakeholders. The ongoing sentiment is that these amendments are occurring without adequate stakeholder engagement and genuine engagement.
- AMEC is not in disagreement with the principles of improve environmental efficiency in the state but the diminutive drafting of the legislation is reckless and potentially will cause greater litigation and conflict as opposed to creating better environmental outcomes.
- Finally, AMEC is not supportive of rolling out legislative amendment after legislative amendment with minimal lead time for review. AMEC requires a reasonable time to be able to adequately consult and gain feedback from our membership base and respective consultive networks. At this time

there is approximately only a 4-week turnaround on submissions. Given the gravity of the changes and the impact these changes can and will have on the regulated community more time would lead to better feedback and regulatory outcomes. When the final consultation paper is released AMEC looks forward to greater engagement and respective lead times to prepare.

AMEC has also prepared a table that details additional comments on each recommendation as they appear in the Draft paper.

## Conclusion

The above signals the Queensland Government's move towards "criminalisation" and a strong increase in environmental criminal enforcement and the penalties imposed.

There may be sectors of the community that welcome and may even applaud this approach believing that it is effective in deterring and appropriately recognising the deemed serious nature of environmental offences.

AMEC strongly opposes this view and finds it extreme in nature. AMEC would warn that criminal law is an extremely blunt instrument for addressing environmental issues when statistically Queensland does not have either high rates of offences or prosecution of environmental offences so it is hard to understand "the why?". Indeed, AMEC challenges that the entire regulatory approach is rigid, legalistic, cumbersome, inflexible, and reactive. It is not cost-efficient, and this proposed advancement will not encourage regulated companies to develop innovative technology or to go beyond compliance. This is also without considering an actual test of functionality when it comes to the administration of the proposed changes and criminalisation of environmental laws.

By taking an approach towards a command-and-control style of regulation, has in some jurisdictions where it is required to reduce pollution and environmental degradation, been a successful model. However, it is often seen as slow to curb activities and unduly expensive. In Queensland, we don't have high rates of pollution and degradation, we have a very robust and advanced licencing and approval system and a well-developed regulatory approach. There may be a need (as with all system to review and amended to make modern) but AMEC would suggest that the command-and-control style of regulation is not fit for our Queensland specific circumstances, it is not evident from the consultation paper that this will generate any great results and should be disregarded. The focus should be on a variety of broader, more flexible, and cost-efficient mechanisms for curbing environmental degradation.

AMEC appreciates the opportunity to make a submission on the Draft Consultation Paper.

## For further information contact:

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## Table 1. Proposed Response Schedule

| # | Recommendation | Government response (incl. comments) | | AMEC Comments |
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| **Principles** | | | | |
| 1. | The principles underpinning the Environmental Protection Act 1994 (Qld) should be amended to include:<br>1. The principle of polluter pays;<br>2. The proportionality principle;<br>3. The principle of primacy of prevention; and<br>4. The precautionary principle. | Support | The Government may also consider the need for a duty to restore environmental harm to complement the polluter pays principle. | Where will the principals be included and how will the act be amended? Some of these principles already exist. The Draft paper fails to provide a clear statement on where the deficiencies are inherently drafted and where there needs to be an amendment. |
| **Definitions** | | | | |
| 2. | Sections 8 and 9 of the EPA (Qld) should be amended to include the concept of "human health, safety and wellbeing" in the definitions of environment and environmental value. | Support | The inclusion of human health, safety, and wellbeing will be in relation to qualities or physical characteristics of the environment. | Please refer to AMEC specific comments regarding this recommendation. In particular the ability for this to cause confusion and conflict |
| 3. | Section 15 or sections 16 and 17 of the EPA (Qld) should be amended to make clear that environmental harm that may constitute a nuisance at low levels, may also constitute material and serious environmental harm if it meets the definitions of those terms. | Support | Sections 15 to 17 relate to the definitions of environmental nuisance and material and serious environmental harm.<br>The body of the review also contained the following recommendation, which is related and also supported in<br>principle: 'amending the Act to provide that in respect of offences under section 437 or 438, environmental nuisance is a further alternative.' | Please refer to AMEC comments drafted above. |

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| 4. | The threshold amounts for material and serious environmental harm should be reviewed and increased. | Delivered by EPOLA Act 2023 | | AMEC made previous very clear submissions on EPOLA. |
| 5. | Section 319 of the EPA (Qld) be amended by omitting the words "reasonable and practicable" and inserting in lieu thereof "reasonably practicable". | Support | | Please refer to AMEC comments above. |
| **Statutory Notices** | | | | |
| 6. | Direction notice provisions should be amended as follows:<br>1. amend section 363D(1) to make clear that the remedying of the contravention of a prescribed provision includes the obligation to carry out any remedial work that might be required to remedy the contravention;<br>2. provide powers for the administering authority to undertake remedial works and recover the costs thereof;<br>3. include as a prescribed provision for the purposes of section 363A offences involving the causing or risk of environmental harm or the contravention of the general environmental duty in section 319. | Support | Partially addressed in the EPOLA Act 2023 | Will the department be required to be come Suitable operator if they are to carry out works on a resource activity site if remediation is required to be carried out. OR will the Department engage a third party to perform the works?<br><br>Cost recovery might be in excess or inflated depending on how these arrangements will come to be. For example, the Department might take over 12months to perform the works or longer and then the costs will inflate or potentially blow out given their lack of knowledge and experience in this space. It would have to be an agreed value or the works, not a sliding scale.<br><br>Again, this shows that the lack of details leaves the actual schematics of how this is a) beneficial and or b) logicality practical and or achievable for both the Department and the regulated community. |

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| 7. | The Environmental Protection Order provisions should be amended to:<br>1. remove the need to consider the standard criteria in deciding whether to issue an EPO under section 358(a)-(c) and (e) of the EPA (Qld);<br>2. extend the power to issue an EPO for contravention of an offence under section 358(e) to all offences under the EPA (Qld) which relate to acts that have caused or might cause environmental harm;<br>3. rationalise the powers to step in to undertake remedial works and recover the costs thereof in respect of EPOs issued pursuant to section 358 of the EPA (Qld) | | | Not supported by AMEC:<br>• standard criteria provides sound guidance on the provisions and requirements for EPO., By removing this there is interpretation given only to the Department and no opportunity to demonstrate, provide an alternative or quantify if an EPO is the best or most suitable mechanism in the circumstances. For example, AMEC is aware of EPOs that have been used post-natural disaster events, when TEL would have been preferred and sensible options. That is under the current framework so to further remove provisions would be to sanctify any means of practical and reasonable. Which ironically are also the subject of these amendments.<br>• 7b. not supported it is again an open interpretation of the compliance team and its reduces flexibility for site by site and case by case consideration of mechanisms that achieve the best outcome.<br>• 7c. as stated under recommendation 8 not practical or clear manner to resolve costs. |

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| 8. | Unless dealt with elsewhere in the Act, consideration be given to introducing an offence provision to capture obstruction of compliance with an EPO issued pursuant to section 358 of the EPA (Qld) or an offence provision that captures both related persons and persons issued an EPO pursuant to section 358. | Support | | What is deemed obstruction? Without a definition e.g. refer to the Criminal Code for QLD there needs to be a clear definition of what obstruction is in this context. For example, limiting access to the site for safety reasons e.g. until inductions are adequately performed, to appropriate PPE is in place, would not be obstructing, but without a definition, this could be deemed obstructive behavior and leaves no remedy for the regulatory community. |
| 9. | The raft of requirements that are provided for pursuant to section 360(2) be included in the requirements that might be contained in a clean-up notice (section 363H). | Support | | |
| 10. | The power to amend a Transitional Environmental Program (TEP) be expanded to:<br>1. allow the administering authority to amend without consent of the operator;<br>2. allow the administering authority to refuse an amendment of a TEP if it is not also satisfied that the amendment would be likely to achieve advancement of compliance with the Act. | Support | Partially addressed in the EPOLA Act 2023. | Not supported. No TEP should be amended without consultation, that is an absolute over reach. TEP are a Transitional agreement to take an operation from a state of non-compliance to compliance. During that period there are weekly sometimes daily reports provided to the Department, with clear outcomes. To go and change an outcome or make additional outcomes without consultation, would jeopardize the whole program of works. In most cases, the Department has very little technical or on-ground knowledge of specific matters and this would be just diabolical. |

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| | | | | Those matters that a refusal can be made on would be clearly stated e.g.<br>• If the amendment was to extend the timeframe for longer than 12months,<br>• If the amendment was to introduce a new method for the operation, that would or has the potential to cause environmental harm<br>The drafting of this recommendation without sufficient support material shows a great lack of knowledge of the current use and or the success of TEPs that have occurred in QLD. |
| **Restraint orders** | | | | |
| 11. | In the event that a general environmental duty offence was not preferred, consideration might be given to including the general environmental duty within the scope of operation of section 505 of the EPA (Qld), by way of example, by introducing the words "a contravention of the general environmental duty or…" after the words "or restrain" and "or anticipated" and before the word "offence" in section 505(1). | Delivered by recommendation 15 | Recommendation 15 is the preferred option for providing enforcement actions to DES in the event a person contravenes the GED. | Please refer to AMEC submission on Recommendation 15. |

| Environmental authority conditions | | | | |
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| 12. | The power to amend environmental authority conditions be expanded to allow the Chief Executive or the Minister to amend conditions where the Minister or Chief Executive considers the environmental impact of the activity is not being appropriately avoided, mitigated or managed. | Support in principle | The intent of keeping conditions fit for purpose is supported. This recommendation is supported in principle subject to the outcome of consultation and regulatory impact assessment.<br><br>Consideration of the caveats mentioned in paragraph 223 of the Report is also supported. | AMEC does not support this amendment. AMEC supports a modern framework that provides adequate guidance and support to the regulated community as well as safeguards against environmental harm. Amending conditions which are the essential framework for which an operation is built on is not something that can be or should be amended at the whim of the Department. If there is a need to modernize an EA or conditions therein, this should be voluntary. Or should be drafted in a manner that can only occur, if the scale nature, and design of the operation are to be amended.<br><br>To suggest that an operation's activities are not appropriately avoided, mitigated, or managed is non-sequential. EAs are applied for and appropriately administered at the time of the approval. Things may change over time, but to apply modern condensation retrospectively to an operation and think that the regulatory community is going to support this is ridiculous. Some EAs may have taken years to achieve and to destabilise the approval baseline would be to destabilise the investment base for QLD. |

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| 13. | The provisions regarding continuing obligations under cancelled or suspended environmental authorities be clarified to ensure that an operator must continue to comply with conditions regarding management of the site to reduce environmental risk and rehabilitation. | Delivered by EPOLA Act 2023 | | |
| **Registers suitable operators** | | | | |
| 14. | Schedule 4 of the EPA (Qld) be amended to include a contravention of sections 357I and 363E as disqualifying events for the purposes of section 318K of the EPA (Qld). | Support | The recommendation is to amend the definition of an 'environmental offence' for a disqualifying event to include a failure to comply with conditions of a license under section 357I and an offence not to comply with a direction notice under section 363E. | |
| **Offences** | | | | |
| 15. | Consideration should be given to creating an offence for breaching the general environmental duty. | Support | | AMEC is not in a position to make broad recommendations or comments on the suitability of criminal offenses or civil matters as mentioned below. As such AMEC requests that the Draft consultation paper provide adequate legal commentary so as AMEC may infer and seek counsel on the implications to the regulated community and understand the full ramifications of what may be implied by these changes. |

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| 16 | The duty to notify of environmental harm provisions (Chapter 7, Division 2) be amended to include a duty to notify to a similar effect, as that provided for in section 74B of the EMPCA (Tas). | Support | | |
| **Civil matters** | | | | |
| 17 | Chapter 10, Part 1 of the EPA (Qld) be amended to expand the evidentiary aids limited to criminal proceedings to be available in civil proceedings. | Support | | |
| 18 | The words "by the prosecutor" be deleted from section 490(7). | Support | The section referred to in the recommendation has been consequentially renumbered as section 490(8) due to amendments under the EPOLA Act 2023. | |

**References**

Fisher, D.E. 1993a, "Australian Legal Response to Ecologically Sustainable Development", Workshop on Environment and Sustainable Development: Social Science Perspectives, 30-31 March, Academy of the Social Sciences in Australia, Canberra. ---------- 1

993b, "The nature of the environmental legal system" in Planning and Environment Law in Queensland, ed. W.D. Duncan, The Federation Press, Sydney.