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

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Office of the President

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Committee Secretary
Health, Environment and Agriculture Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: heac@parliament.qld.gov.au

Dear Committee Secretary

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

Thank you for the opportunity to provide feedback on the Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024 (**Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Planning and Environmental Law Committee, whose members have substantial expertise in this area.

Executive Summary

QLS is broadly supportive of the policy intent underpinning the Bill but considers some technical legal drafting issues require additional consideration, particularly in relation to potential unintended consequences, avoiding retrospective legislation and impacts upon third parties including imposing administrative burdens on local governments.

QLS highlights the following provisions of concern:

- General environment duty the apparent 'defence' contained within the offence provision may have unintended consequences and be unfair to existing approval holders in retrospectively impacting their development entitlements;
- Amendments to the "duty to notify" offence provisions to expand the duty beyond approval holders to a person who 'ought reasonably to have become aware of the event'.

This amendment extends the duty, and offence provisions, to land owners, occupiers and local governments in relation to incidents or events caused by others.

- Powers of entry – QLS is concerned the proposed new section 369E of the *Environmental Protection Act 1994* (**EP Act**) is too expansive and will adversely affect third party property rights. The proposed section will authorise the recipient of an environmental enforcement order to enter land they do not own to take actions directed of them in the order on only 2 business days' notice.

Introductory comments

QLS was pleased to be invited to participate in the consultation for the *Independent Review of the Environmental Protection Act 1994 (Qld) Report: Independent review into the adequacy of existing powers and penalties* (the **Review**) prepared by Judge Richard Jones and Barrister Susan Hedge in 2022.

QLS broadly endorses and supports the findings of the Review, including that the EP Act generally contains an adequate range of powers and penalties to enforce environmental obligations and reduce the risk of environmental harm, although there were opportunities for improvements.

We understand that many of the amendments in the Bill are intended to give effect to the recommendations of the Review.

However, we have identified some specific concerns in this submission with the drafting of the Bill.

General environmental duty – offence provisions

QLS holds two key concerns with the amendments in the Bill to introduce a new offence of contravening the general environmental duty:

1. The amendments will have retrospective effect in practice for an existing holder of a thing mentioned in section 493A(2) of the EP Act, such as a development approval or an environmental authority; and
2. For a person yet to be issued with a new authority or approval, the amendments will make it practically difficult, if not impossible, to establish the in-built defence mechanism as currently drafted in section 319(3)(a)(b)(ii), because the person has no control over the conditions or measures set out in the relevant approval.

This amendment also blurs the line between separate legislative processes. Whilst the offence is proposed to be added to the EP Act, some of the approvals and authorities mentioned in section 493A(2) of the EP Act are issued under other legislation by other approving agencies, and it would be an excessive administrative burden if these other agencies were required to review their own separate approval and conditioning process to ensure those approvals can be lawfully acted upon in their own right.

Elements to establish the statutory defence

Under the Bill, proposed new section 319(3)(b)(i) of the EP Act relevant provides that a person does not commit an offence contravening the general environmental duty in relation to an activity if:

- The activity is authorised by an approval or authority listed in section 493A(2) of the EP Act; **and**
- The approval or authority provides for reasonably practical measures to be taken in relation to the doing of the act.

Unfair outcomes for existing or new holders of approvals

This drafting could lead to an unfair outcome in the following circumstances:

- A person was granted a development approval (**DA**) 5 years ago under the *Planning Act 2016*. The DA permits the person to undertake certain acts but the DA does not set out specific 'measures' to be taken in relation to the act.
    - Development conditions are set by an approving authority and not by the applicant.
    - This Bill could have the effect that a person undertakes an act in compliance with the development approval, but if the act gives rise to a contravention of the general environment duty, the person cannot rely on the defence provision because the person cannot point to any "reasonably practicable measures" in the approval which would enliven the defence in this proposed section.
- A person is applying for an environmental authority (**EA**) under the EP Act.
    - Although the person prepares the application documents, the administering authority determines the conditions and details of the EA and the final form of the EA is not under the applicant's control.
    - The EA might authorise a range of activities, but if the conditions do not include "reasonable practicable measures" to be taken in relation to the relevant acts, the person will be unable to point to the EA as the basis of a defence to any charge under this section.

Recommendation

QLS recommends removing the words *"and provides for reasonable practicable measures to be taken in relation to the doing of the act"* in clause 13(3) of the Bill, introducing a new section 319(3)(b)(i) to the EP Act.

QLS considers the relevant considerations outlined in the new section 319(5) of the EP Act provide adequate opportunity for the administering and prosecuting authorities to have regard to appropriate standards and measures when deciding "whether the general environment duty is contravened."

Clauses 17-22 – duty to notify - overreach of amendments to offence provisions

Clauses 17 to 22 introduce amendments to expand the *duty to notify* in Chapter 7, Part 1, Division 2 the EP Act. The Bill proposes to amend the duty to apply to situations where a person not only becomes aware, but where they '*ought reasonably to have become aware*' of an event that requires notification under Chapter 7, Division 2 of the EP Act.

QLS is concerned these amendments extend the duty beyond the approval holder for an activity to third parties who are caught up in incidents or events caused by others.

The Explanatory Notes indicate that:

- "This duty previously required only for a person to notify once they 'became aware' of an event causing environmental harm, or a change in the condition of contaminated land, rather than accounting for an awareness of consequences as a result of carrying out an activity as prescribed in section 320A" (at page 18); and
- "The duty was based on the person's knowledge alone which may present issues in determining when the person became aware of a circumstance, and therefore whether they complied with the duty when required. This amendment provides that the test for determining whether notification should have occurred is not just when the person becomes aware but includes whether the person reasonably believes or should in the circumstances reasonably believe that a notifiable event has occurred. This allows for the circumstances surrounding the event or contamination, or observable indicators of environmental harm, to be considered in determining when notification ought to have occurred" (page 19, emphasis added).

QLS recognises there is some utility in introducing an objective element to the duty to notify of environmental harm, where that duty is imposed on a person who is carrying out an activity which is connected to the environmental harm caused (as contemplated in section 320A(1) of the EP Act). It also seems sensible to extend the duty to a person who is carrying out that activity during their employment or engagement by someone else (as contemplated in section 320B of the EP Act).

However, the Bill also proposes to expand the duty to notify to include this objective element to other categories of persons who are affected by incidents or events caused by others but who were not responsible for the activity:

- 'Other persons' not carrying out the activity during employment (clause 19 of the Bill – amending section 320C of the EP Act);
- Owners and occupiers of land affected by an activity or an event involving harm even where the harm is occasioned by others (clause 21 – amending section 320DA of the EP Act); and
- Local governments purely by virtue of being an administering authority in the relevant locality (clause 22 – amending section 320DB of the EP Act).

The expansion of this duty could have unfair consequences for these third parties, particularly when failing to comply with the duty is an offence and these third parties could be exposed to penalties of up to $77,400 for an individual and $387,000 for a body corporate, including a local government.

The Explanatory Notes appear to suggest that 'other persons', owners, occupiers and local governments are now expected to actively monitor potentially affected land for "observable indicators of environmental harm", even though they do not hold the approval or are not otherwise undertaking the activities which might give rise to the harm.

Powers of entry – third party property rights

Proposed new section 369E of the EP Act authorises the recipient of an environmental enforcement order (**EEO**) to enter land they do not own to take actions directed of them in an EEO.

QLS considers the power to enter a third party's property is too expansive and could have significant adverse consequences if not properly exercised.

Given the proposal under the Bill to combine a variety of EP Act orders into a single compliance tool known as an 'environmental enforcement order', QLS considers it is timely to reconsider the existing provisions and ensure the appropriate balance is struck.

As drafted, the legislation would permit the EEO recipient to enter onto any other property affected by the environmental harm to undertake remediation work, with only 2 business days' notice if consent cannot be obtained.

QLS recognises that under the existing section 363AF of the EP Act, a recipient of an environmental protection order may enter any land necessary to comply with the order either with consent or on 2 business days' notice to the owner and occupier. However, a similar power for clean-up notices under existing section 363J of the EP Act requires consent or 5 business days' notice.

QLS suggests that even 5 business days' notice is inadequate in many cases.

Statutory powers of entry are usually exercised by a senior government officer who has undertaken appropriate training. If such a power was to be exercised by a police officer, a warrant would be required from a judge or a justice of the peace. QLS is concerned the amending legislation proposes to confer these powers on private entities with little limitation and to reduce the notice period to a standardised 2 business days in all cases.

QLS recognises that some environmental harm must be dealt with quickly but 2 business days' notice is inappropriate except for the most urgent of cases.

The amendments as currently drafted do not strike an appropriate balance between:

- an assessment of the level of urgency to address the environmental damage;
- third party property rights of the innocent party; and
- the exercise of compulsive powers of entry by any EEO recipient and not an authorised government officer.

Recommendation

QLS strongly recommends the EP Act powers of entry be reconsidered and the following matters addressed.

- If there is a need to enter onto third party property, the EEO recipient must contact the administering authority for assistance. The administering authority should then be responsible for contacting the third party to negotiate access. If consent cannot be obtained, a period of at least 10 business days' notice should be given for non-urgent work.
- If the remediation work is urgent, the authority to enter onto third party property must be authorised by the administering authority and on appropriate conditions. QLS would be comfortable if 2 business days' notice was allowed for urgent matters, provided the administering authority is responsible for issuing the entry notice.
- The administering authority must establish a process to address any workplace health and safety consequences where entry is to a workplace without the consent of the owner or occupier.
- Further consideration must be given to compensation rights for the owner or occupier of an affected third party property if damage occurs. Proposed section 369G contemplates reasonable compensation will be available for certain damage, but there also needs to be a clear compensation pathway if the EEO recipient is financially unable to satisfy any subsequent compensation determination. This is not presently addressed in the Bill.
- We also query whether new section 369G(4) is appropriate, given the wide definition of "related person" in section 363AB of the EP Act.
    - The new section excludes compensation rights if the loss or damage is incurred by a company of whom an EEO recipient is a 'related person'.
    - Current section 363AB[1] contemplates that the administering authority can decide the person is a *related person* of a company (EEO recipient) if they were, at any time during the previous 2 years, in a position to influence the company's conduct in relation to the way in which the company complies with the EP Act.
    - If this connection no longer exists, and is irrelevant to the harm the subject of the EEO, this exclusion could have unfair consequences. This exclusion should be narrowed.
- QLS also notes the EP Act presently includes a framework to authorise entry to land to comply with an environmental requirement. This requires an application to the Magistrates Court for an entry order and the application must be served on the owner or occupier of the affected land (section 575 of the EP Act). The order is also subject to a clear compensation framework (section 579 of the EP Act). QLS suggests this mechanism should generally be used for non-urgent entry requirements.

[1] The Bill proposes to renumber section 363AB to be section 369N of the EP Act.

It may be the intent to draft guidelines or other informative material to support these powers, but at present, the risks to third party property rights appear significant and should not be left to non-statutory documents which are not enforceable.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted].

Yours faithfully

[redacted]

Rebecca Fogerty
President