

## Environmental Protection and Other Legislation Amendment Bill 2022

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25<sup>th</sup> October 2022

Committee Secretary  
Health and Environment Committee  
PARLIAMENT HOUSE QLD 4000  
**By email: [hec@parliament.qld.gov.au](mailto:hec@parliament.qld.gov.au)**

Dear Committee Secretary,

## **Environmental Protection and Other Legislation Amendment Bill 2022 Regulatory Issues – Contaminated Land Management**

The Australian Contaminated Land Consultant Association, Queensland Inc (**ACLCA Qld**) is the peak professional body representing professionals who undertake contaminated land assessment in Queensland. ACLCA Qld has established a sub-committee of experienced ACLCA Qld member auditors who assists its members navigate contaminated land legislation, guidelines and regulation issues pertaining to their business operations, including liaison with regulatory authorities.

ACLCA Qld has previously written to the Department of Environment & Science (**the Department**) regarding key regulatory issues impacting on the business operations and risks of its members. We are taking this opportunity to highlight the key issues raised, considering the *Environmental Protection and Other Legislation Amendment Bill's (EPOLA)* proposed *Environmental Protection Act 1994 (EP Act)* amendments, particularly in relation to proposed amendments that relate to contaminated land, including contaminated land auditors. Issues are raised in the spirit of the EPOLA amendments, which are intended to support industry, streamline and clarify regulatory processes, better protect the environment, and improve community input and transparency.

On 25 February 2019, ACLCA Qld wrote to the Department regarding issues associated with the interaction between the Queensland Government's regulated waste and contaminated land assessment frameworks. ACLCA Qld subsequently received a reply from Tony Roberts, Deputy Director-General, Environment Policy and Programs (undated).

On 4 March 2019, ACLCA Qld wrote to the Department regarding issues associated with the State's contaminated land certification system compliance program. ACLCA Qld did not receive a reply to this letter, although issues raised were included in subsequent correspondence (refer below).

On 9 March 2021, ACLCA Qld wrote to the Department regarding a wide range of items relating to the contaminated land audit framework, contaminated land assessment and legislative framework. ACLCA Qld subsequently received replies to this letter from Ashley Seiler, Manager, Technical Support (28 May 2021) and from Kathrin Sherman, Director, Waste Operations (11 August 2021).

ACLCA Qld subsequently consulted extensively with the Department, in 2021, in relation to a proposed Site Management Plan (**SMP**) guideline and proposed changes to the EP Act. Neither the proposed SMP guideline, nor the proposed EP Act amendments, have eventuated, to date.

ACLCA Qld members have become increasingly concerned that several key regulatory issues which have remained unclear / unresolved following the above consultation, continue to represent material professional and commercial risks to their respective business operations and a significant source of uncertainty to those who work with the contaminated land regulatory framework in Queensland. ACLCA Qld is, therefore, seeking the Department's urgent advice / action, in relation to these outstanding issues, as outlined below.

ACLCA Qld looks forward to continuing to work closely with the Department to address these important matters. Please do not hesitate to contact me for clarification or further discussion on the information presented herein.

Regards,

**Helen Jones – ACLCA Qld President**



and,

**ACLCA Qld Auditor Sub-Committee:**

- Mark Stuckey (Auditor – Chair)
- Trevor Lloyd (Auditor)
- Brad May (Auditor)
- Marc Salmon (Auditor)
- Christian Atkinson (Auditor)

## KEY OUTSTANDING REGULATORY ISSUES

### 1 Audit Standards

ACLCA Qld members, acting as suitably qualified persons (**SQPs**), undertaking site investigation of contaminated land, continue to report experiencing a wide range of auditing standards in Queensland. Members are also aware of legal proceedings that have arisen in relation to these matters, on some projects. Given this situation, there is continued and growing concern that the Department's auditor compliance program is failing to address this key issue, previously raised with the Department in March 2019. Of particular concern, is advice provided in the Department's letter of 28 May 2021, indicating that in the (only) two instances where the Department has acted on auditor compliance grounds, these actions were both overturned, on appeal. There is also concern that audit standards will be further affected following adoption of Commonwealth automatic mutual recognition laws, given the Department does not currently hold regular meetings with certified Queensland contaminated land auditors (there have only been two auditor meetings held in the last three years, with the last meeting held on 29 January 2021). Advice provided in the Department's letter of 28 May 2021, that it was considering further requirements for auditors to provide evidence of actively completing audits in Queensland and in relation to the adequacy and frequency of audit site inspections has not yet eventuated. Action and advice from the Department on how these issues are being / will be addressed is urgently requested.

It is noted that the EPOLA Bill looks to address this matter by requiring auditors to provide a declaration with each certification stating the auditor's qualifications and experience relevant to the subject matter of the relevant document and any audit, investigation, or evaluation to which the document relates. This is a duplication of the auditor approval process whereby auditors are approved by the Department to conduct auditor's functions under s. 568(b) and is an unnecessary administrative burden on auditors and the Department's auditor compliance program.

### 2 Statutory Triggers for Land Contamination Assessment

The limited statutory triggers that are currently in place for assessable development, under Schedule 10, Part 4 of the *Planning Regulation 2017*, means that there is land being re-developed and/or used in Queensland that has not been subject to site investigations that accord with applicable guidelines and standards and may not, therefore, have adequate assessment of land contamination and /or appropriate management plans in place to ensure the safe use of the land. The omission of land that is currently subject to a 'sensitive use' (as defined under the *Planning Regulation 2017*) from the need for investigation is inconsistent with (and in fact, contradicts) national, risk-based assessment guidance adopted by the Department. This issue has been raised many times, over many years, with the Department, without adequate response. Resolution can be readily achieved through simple and straightforward amendments to relevant parts of the *Planning Regulation 2017*. ACLCA Qld asks that this be undertaken.

Failings of the current statutory triggers in the *Planning Regulation 2017* are evident in many ACLCA member projects, including a current example where twenty-four low density residential lots were created, sold, and developed on land that is listed on the Environmental Management Register (**EMR**) without the required prior assessment and statements of suitability. In this instance, twenty-four landowners are now exposed to the economic and possible safety burden of potentially contaminated

land, most likely without any knowledge, because of a failing of regulation ostensibly intended to protect Queenslanders from precisely these risks.

### 3 Regulated Waste v. Contaminated Land Assessment

ACLCA Qld previously raised the issue of material conflicts between regulated waste regulations and contaminated land assessment guidelines with Department (in February 2019). ACLCA Qld received a response from the Department which stated that “The waste categorisation framework is not designed, or intended to be used, for contaminated land assessment or site remediation purposes. Hazardous contaminants relating to contaminated land will remain part of a separate regime to the regulated waste framework provisions”. This position is inconsistent with (and in fact, contradicts) national, risk-based contaminated land assessment guidance adopted by the Department. ACLCA Qld members have reported concerns that sites investigated and certified as not contaminated land and able to be removed from the EMR (meaning soil can be removed from the site without assessment or restriction) may contain material, that, upon excavation, would be classified as a regulated waste. This issue also affects the proposed re-use/on-site containment of low-level contaminated soil. This is clearly an untenable situation for all parties involved. This issue must be addressed, as a matter of urgency, through publication of appropriate guidance and/or amendment of applicable regulated waste regulations, as outlined in previous correspondence.

### 4 State Government Contaminated Land Policy Framework

#### ***Asbestos in Soil***

The Department’s policy in relation to asbestos in soil is currently unclear, with no advice available regarding the adoption (or otherwise) of the updated Western Australian Department of Health Guidelines for the Assessment, Remediation and Management of Asbestos Contaminated Sites (2021), nor any clarity regarding alignment between the Department’s asbestos in soil policy with the Queensland Government’s other asbestos management guidance and certification processes (related to buildings and structures) and the Department’s regulated waste management framework (particularly, in relation to the proposed re-use of low level contaminated soil). Formal guidance from the Department, to clarify its policy position on asbestos in soil and the relationship between this policy and other, various regulatory instruments relating to asbestos, is urgently requested.

#### ***Assessment of Site Contamination Guidance***

It is noted that the *Environmental Protection and Other Legislation Amendment Bill 2022* looks to replace Section 389 of the EPA and the revised section omits the current content of 389 (2)(b)(iv) *the extent to which the assessment of the land is in accordance with the contaminated land NEPM*. This effectively means that all reference to the *National Environment Protection (Assessment of Site Contamination) Measure (contaminated land NEPM)*, made by the National Environment Protection Council under the National Environment Protection Council Act 1994 (Cwlth) is removed from the EP Act. It is considered essential that the linkage between the EP Act contaminated land investigation document content requirements and the contaminated land NEPM remain explicit given that the contaminated land NEPM’s purpose is to establish a nationally consistent approach to the assessment of site contamination to ensure sound environmental management practices by the community which includes regulators, site assessors, environmental auditors, landowners, developers and industry.

#### ***Soil Sampling Guidance***

The Department's position on current best practice soil sampling guidance is unclear given the withdrawal of Australian Standard AS4482.1-2005 *Guide to the investigation and sampling of sites with potentially contaminated soil Part 1: Non-volatile and semi-volatile compounds* and AS 4482.2-1999 *Guide to the sampling and investigation of potentially contaminated soil, Part 2: Volatile substances* and the recent publication the NSW Environment Protection Authority Contaminated Land Guidelines *Sampling design part 1 - application* and *Sampling design part 2 – interpretation*.

## 5 EA Transition to SMP

ACLCA Qld previously raised the issue of the transition from environmental authorities (EAs) to SMPs with Department (in March 2021). ACLCA Qld received a response from the Department (in August 2021) relating to closed (decommissioned) landfills, which specifically referenced ERA60(4). ACLCA Qld members have since reported instances where EAs for Environmentally Relevant Activities (ERAs) which are not landfills have included the requirement for the EA holder to submit a draft SMP to the administering authority 12 months prior to cessation of the ERA/EA. This condition is inconsistent with the regulated requirements for submission of a draft SMP, which necessitate preparation of a site suitability statement (SSS) and certification by an auditor, that unequivocally states that "There is no potential now or in the future for contamination to migrate off the site". The SSS and draft SMP must be supported by a contaminated land investigation that adequately defines the nature and extent of contamination at a site and demonstrates that contamination is sufficiently 'stable' and not impacted by any on-going activities such that the management provisions specified in the draft SMP remain effective over time. These requirements cannot be met on operational sites.

Clarification of these requirements and/or amendment of such conditions within existing EAs is needed. It is noted that ACLCA Qld has previously provided (in 2017, under the ACLCA Qld – Department Partnership arrangement) the Department with a policy paper *Relationship Between Environmental Authorities and Site Management Plans* which provides a framework for this transition.

## 6 SMP Compliance

ACLCA Qld previously raised the issue of SMP compliance with Department (in March 2021) and received a response (in August 2021) that stated that "The department takes compliance of all sites that it is responsible for regulating seriously. At any time, the department can undertake a site inspection or request monitoring data to ensure compliance with site management plans or other statutory notices. We have passed on this feedback to our compliance area to consider the allocation of additional resources during their 2021/22 compliance program planning process.". ACLCA Qld members report that no evidence of SMP compliance activity nor action has been observed since this advice was received and that many issues relating to SMP compliance remain unaddressed.

It has been noted by ACLCA Qld members that the majority of SMPs issued by the Department do not comply with current legislation (including recently issued SMPs) primarily due to legislative changes, historical noncompliance with regulatory guidance and noncompliance with current EP Act contaminated land investigation document content requirements. This has led to the inefficacy of the majority of SMPs, confusion and an extensive re-work burden on landowners.

Extensive feedback on the Department's draft SMP guideline was provided by ACLCA Qld in mid-2021. ACLCA Qld members continue to await a SMP guideline, proposed to be issued by the Department, in 2021.

## **7 Departmental Technical Advice**

ACLCA Qld members have raised instances where Departmental staff have provided technical advice to SQPs regarding the suitability of various sampling methodologies, etc. ACLCA Qld members have expressed concern that should such, apparently 'blanket' advice only be provided to some SQPs in an 'ad-hoc' manner, significant business risks will accrue to parties to whom the advice has not been made available. Whilst the process of the Department providing 'site specific' consultation advice to SQPs and auditors on projects is accepted and appreciated, any broader ranging / 'blanket' advice needs to be formally published, with supporting information, to avoid untenable situations for site owners, consultants, and auditors.