

Environmental Protection and Other Legislation Amendment Bill 2022

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Committee Secretary
Health and Environment Committee
PARLIAMENT HOUSE QLD 4000

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

Dear Committee Secretary

Environmental Protection and Other Legislation Amendment Bill 2022

The Queensland Law Society (QLS) appreciates the opportunity to provide feedback on the Environmental Protection and Other Legislation Amendment Bill 2022 (the **Bill**).

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law and help protect the rights of individuals. 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 prepared with input from the QLS Corporations Law Committee, the Planning and Environmental Law Committee and the Energy and Resources Law Committee, whose members have substantial expertise in this area.

In the time available, we have limited our comments to the proposed amendments to executive officer liability provisions in the *Environmental Protection Act 1994 (EP Act)*, in particular, new s 493(5) and s 493(6) introduced by the Bill. We have also commented more broadly on the consultation, drafting and introduction of the Bill.

Background

QLS recognises that where there is non-compliance with the EP Act and environmental harm results, appropriate enforcement action should be pursued in appropriate circumstances. However, any enforcement regime must be fair and balanced, as well as being clear and unambiguous in its application.

We understand the proposed amendments to s 493 of the EP Act seek to respond to the Court of Appeal decision in *R v Dumble & Ors* [2021] QCA 161.

Although we acknowledge the impetus for the proposed amendments, QLS and our members do not support the proposed amendments as they are currently drafted, for the reasons discussed below.

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The effect of the proposed amendments is to extend executive officer liability to an executive officer who is a former executive officer when the offence is committed, but who was an executive officer when the earlier act or omission that caused the offence to be committed happened.

The Explanatory Notes state that if the 'amendments are not made to capture former executive officers, there is a risk of serious damage to the environment'. This is said to be 'a compelling public policy reason for justifying this amendment'. There is no evidence of a proper risk assessment having been done to suggest that these statements are supportable.

Extensive reach of obligations, failure to consider knowledge of executive officer at time of decision and potential intervening events or advancements

The fundamental concern with the amendments is aptly illustrated by the example provided in the Bill. The example refers to an act done by a corporation in January 2023, which results in serious environmental harm being caused in January 2024 (at which point the offence is committed).

The proposed amendments will mean that a person who was an executive officer of the corporation in January 2023, but who is no longer an executive officer of the corporation in January 2024, is taken to have committed the offence of failing to ensure the corporation complies with the Act.

The difficulty with that approach, in the context of the example, is that there is no requirement that the former executive officer knew or ought reasonably to have known that the act or omission would result in the corporation failing to comply with the Act. This is despite the fact that this appears to be intent of the amendments according to the Explanatory Notes, which refer to executive officers who 'leave office to avoid liability'.

Further, the current drafting would also impose liability on an executive officer who makes a decision based on the best available information or advice at the time, in an effort to ensure that the decision will not lead to a failure to comply with the Act. If despite these efforts, environmental harm results, liability would be imposed in circumstances where the executive officer could not reasonably have known that the acts or omissions following that decision would cause an offence to be committed.

There are also other concerns about the amendments, including that:

- there may be a significant time gap between the act or omission happening and the offence being committed;
- during this time gap, intervening events might have occurred to exacerbate the situation, over which the former executive officer could have no influence;
- during this time gap, intervening events might have occurred to improve the situation (e.g. the advent of new information, technological or other advancements or changes to industry practice), however, the former executive officer could have no influence in their implementation;

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- during the time gap, further information may have come to light that the act or omission was based on factual inadequacies or inaccuracies, but the former executive officer could have no influence to take corrective action.

Additionally, the executive officer may, while in office, have taken all reasonable steps to comply with the Act, but, following the executive officer's departure, these steps were discontinued or not implemented in the way in which the executive officer anticipated.

Scope of definition of 'executive officer'

Section 493 applies to 'executive officers', which is broadly defined in the Act to include an individual concerned with, or who takes part in, the entity's management.¹

Accordingly, the term 'executive officer' includes a large number of potential employees, including those employees who may have no decision making power, but are responsible for implementing the management decisions of the corporation.

We are of the view that it is inappropriate for the amendments to apply to all 'executive officers' and the potential defences provided in s 493(4) are not an acceptable mechanism to overcome this concern.

Defence provisions

The defences under s 493(4) may be relevant in some of the circumstances referred to above.

We note that the Explanatory Notes state that these defences will be available to former executive officers, as well as executive officers in office at the time of the commission of the offence.

We have a number of concerns about the practical operation of the defences:

- The defences are not an adequate response in circumstance where a former executive officer is charged in connection with acts and omission which the executive officer did not know or could not have known would lead to an offence against the Act.
- Additionally, a former executive officer will find it difficult to establish the defences, in circumstances where that person will no longer have access to the records and employees of the corporation.
- We query whether the defences will apply if an executive officer resigns in protest at a decision because the executive officer fears that environmental harm might result but is unable to change the corporation's course of action. Does this amount to the defence in section 493(4)(b)? By way of example:
 - If the executive officer is on a board at the time of a decision (act or omission) and the board member does not agree with the decision, the board member may resign immediately afterwards but is still considered to have participated in the decision of the corporation;

¹ *Environmental Protection Act 1994* (Qld) sch 4 'executive officer'.

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- If the executive officer is a senior employee of a corporation, the executive officer may not be aware of a board decision until some time after the decision has been made. If the executive officer later resigns because he or she does not agree or support the decision, would this executive officer be considered liable because they could be perceived as resigning “to avoid liability”?

Operation of deemed liability and onus on executive officer to prove defence

A further concern is the practical operation of the offence provisions in combination with the limited defence provisions, when the scope of the offence provisions is being widened so significantly.

The practical outcome is that a person might be caught in a very wide ‘offence’ net whilst finding the available defences quite narrow, particularly if the person has resigned from the board or left the employ of the corporation and cannot access the information or evidence required to establish the defence in subsection (4).

The offence set out in ss 493(2) and 493(3) is established by way of deeming provisions:

- “(2) If a corporation commits an offence against a provision of this Act, each of the executive officers of the corporation also commits an offence, namely, the offence of failing to ensure the corporation complies with this Act.
- (3) Evidence that the corporation committed an offence against this Act is evidence that each of the executive officers committed the offence of failing to ensure that the corporation complies with this Act.”

The offence provision does not include any mental element of intent or indeed the executive officer even being aware of the offence.

The deeming provision is then coupled with s 493(4) which shift the onus to the executive officer to establish a defence:

- “(4) However, it is a defence for an executive officer to prove ...”

We recognise that the onus generally rests on an accused to establish any defence, but the s 493(4) defence follows a deemed offence provision where evidence of a corporation’s offence is deemed to be evidence against each of the executive officers.

The shift of onus for the defence is particularly concerning when the deeming provision is so wide.

Insurance implications

Our members have also raised concerns about the insurance implications of the proposed amendments to the Act. In particular, our members note an executive officer will remain indefinitely liable for historical acts or omissions until a contravention of the Act crystallises.

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Our members are concerned that the amendments could render historical acts or omissions of executive officers uninsurable, or alternatively, prohibitively expensive when obtaining director and officer run-off liability insurance.

Our members have also raised concerns that, in their current form, the proposed amendments may deter appropriately experienced and qualified individuals from taking on executive officer roles given individual liability would extend (potentially indefinitely) after their time at a relevant corporation.

Conclusion on proposed amendment to section 493 of the EP Act

With these issues in mind, QLS does not support the amendments to 493 of the EP Act as they are currently drafted.

Significantly more consultation with and consideration by industry and legal stakeholders is required before a provision of this nature is pursued, given the proposed amendments would substantially extend liability to historical acts or omissions taken by a broad group of individuals, some of whom may no longer be involved in the corporation's management.

Concerns regarding legislative process for the bill

QLS also has concerns about the process that was adopted in drafting and preparing the bill, and particularly regarding the method in which consultation on the policy proposals was undertaken.

QLS would be concerned if the process used in relation to this bill were to be adopted by the government more broadly moving forward.

Both the Explanatory Note and the Departmental Brief for the Bill, as provided to the Committee, indicate targeted consultation was undertaken on exposure drafts of the Bill, on a highly confidential basis, with particular key stakeholders.² These materials suggest that the sensitive nature of the Bill warranted such confidential consultation.

As identified in the Explanatory Notes, QLS was part of the consultation process but only in relation to one exposure draft and on one limited aspect of the Bill.

The Bill as introduced contains significant amendments which will be of interest to a wide cross-section of the community and industry, including QLS members.

QLS is concerned that such significant amendments have not been the subject of a public consultation process, for the following reasons:

- **Public consultation leads to improvements in policy development:** Public consultation has many benefits, including generating debate amongst and between stakeholders and government agencies. This process regularly results in improvements to legislation and finding the right balance between competing interests.

² Briefing Paper – Departmental brief by the Department of Environment and Science, Written Briefing for the Health and Environment Committee on the Environmental Protection and Other Legislation Amendment Bill 2022 (dated 20 Oct 2022), at page 4 of the attachment – accessed here: <https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=0&id=4201>

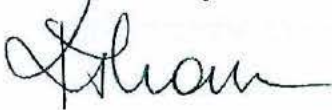
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Undertaking such a process in a public way ensures that all perspectives are heard and taken into account in a transparent way.

- **Limited timeframe for comment:** The lack of public consultation on the proposed amendments is further exacerbated by an extremely short timeframe for public submissions responding to the Bill as part of this Committee inquiry. The Bill was introduced on 12 October 2022 and submissions are required a short 10 business days later – or realistically 9 business days later, given the 9am deadline on 26 October 2022.
- **Principles of good consultation:** The process to date does not accord with the principles outlined in the Queensland Cabinet Handbook which indicate that:
 - consultation is an essential element of the legislative and Cabinet process;³
 - consultation with persons or organisations external to government is a routine part of policy development and Cabinet submissions;⁴ and
 - when developing legislative proposals, the Queensland Government is committed to consulting effectively with affected stakeholders at all stages of the regulatory cycle.⁵

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



Kara Thomson
President

³ [The Queensland Cabinet Handbook](#), p 1.

⁴ [The Queensland Cabinet Handbook](#), pp 71 and 89.

⁵ [The Queensland Cabinet Handbook](#), p 103.