Environmental Protection and Other Legislation Amendment Bill 2022

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AMEC SUBMISSION

AMEC
ASSOCIATION OF MINING AND EXPLORATION COMPANIES

To: Health and Environment Committee

Re: Environmental Protection and Other Legislation Amendment Bill 2022

Date submitted: 26 October 2022

Introduction

The Association of Mining and Exploration Companies (AMEC) appreciates the opportunity to make a submission on the Environmental Protection and Other Legislation Amendment Bill 2022 (EPOLA / the Bill). AMEC has been actively engaged with the Department of Environment and Science (DES) on this matter to articulate the real and potential operational problems that will arise for the exploration and mining industry if the Bill is passed in its current form.

AMEC's previous submissions dated the 22 February 2022 and 4 July 2022, articulated some of the operational challenges that currently exist within the proposed legislation. This submission reiterates challenges that will result if the legislation is progressed as proposed.

About AMEC

AMEC is a national peak industry body, representing more than 520 mineral exploration and mining companies across Australia. In Queensland, AMEC has more than 60 member companies actively exploring, mining and developing projects, as well as companies that work in and for the industry.

The AMEC membership base in Queensland explore, develop and produce minerals including Antimony, Bauxite, Coal, Cobalt, Copper, Gold, Graphite, Lead, Lithium, Mineral Sands, Molybdenum, Nickel, Phosphate, Rare Earths, Silver, Tungsten, Vanadium and Zinc.

General comments

It is encouraging to see some of the feedback provided by the resources sector has been considered in the Bill.

The Bill, however, still seeks to put in place legislative amendments that are a step backwards for Queensland's resources sector, considering the growing demand for critical minerals and rare earths. Some of the proposals will deliver a framework that put simply, will make it harder to develop minerals and to do business in Queensland. This outcome generates an environment that does not attract strong investment in mineral exploration or support a modern Queensland economy that facilitates development of a diverse resources sector and consequently supports regional and broad economic growth.

The lack of alignment of DES's framework to deliver their own emissions reduction targets for the state, as well as support delivery of other key government commitments including the Queensland Resources Industry Development Plan and the Queensland Energy and Jobs Plan is surprising. There is no clear commitment or recognition from DES in their efforts or frameworks that the renewable energy technologies and innovations, as well as the transmission infrastructure necessary to deliver emissions reductions are reliant on responsibly sources critical minerals and steel-making

coal. The lack of maturity in DES's recognition that disturbance is necessary to achieve these targets and commitments, and that responsible, highly ESG-credentialed, domestic disturbance is preferable to sourcing these minerals, technologies and infrastructure over less stable economies that do not possess the ESG performance we have here in Queensland, is plainly disappointing. AMEC advocates that a capability uplift internally within DES and their culture is critical if Queensland is any chance in leading change in the emissions and climate space.

This submission again reiterates AMEC's support for a robust environmental management framework that protects the environmental values of our state, but also calls for reasonableness and greater efficiency. The resources sector does not deny having a footprint of disturbance, but is willing to lead, be innovative and operate in a new framework cohesively, where it is supportive of development.

Estimated Rehabilitation Calculator (ERC) and Progressive Rehabilitation and Closure Plans (PRCP)

The current and proposed operation of the ERC and PRCP remains a framework that will only continue to appropriately deal with those organisational and environmental authority holders that have very large-scale footprints and multiple operational linkages. The current operation of these frameworks fundamentally fails the junior and emerging producers. Basing these provisions on a site-specific environmental authority (EA), evolved out of the coal business framework, means that it fundamentally lacks true intelligence and insight into how the emerging junior and mid-tier mineral (non-coal) companies operate.

Moving from a standard EA to a site specific EA can result in situations where the liability calculation for operations becomes unviable. The current operation of this calculator is not supportive of several industry innovations that the Queensland Government is pursuing, in particular the push to re-commercialise abandoned mines or historic mines that still have commercial and economic potential and will deliver net environmental improvement if developed.

Sites that have historically remained dormant in the minerals space are now receiving fresh life with identification of minerals, for example cobalt in tailings facilities. This is a positive outcome for industry and the environment, the State and its residents, as old sites become modernised. The framework to achieve this outcome however is so severe and harsh as companies navigate the complexities of calculating liability become faced with crippling costs. Match this to general inflation, COVID recovery and a national labour shortage, experience shows that this can become a hurdle that perversely stops development.

While ERC and PRCP are a step in the right direction for independent calculated value of rehabilitation, it is critical that there is a degree of flexibility, and understanding for those matters, and sites that don't neatly fit within the calculated values. These matters were heavily discussed and debated during the recent review of the ERC Calculator, with minimal practical change coming from the process.

Environmental Impact Statements (EIS)

AMEC previously submitted that the current EIS process was significantly cumbersome in its administration management. The proposed reforms under the Bill, would not result in a better or

greater environmental outcome. They result in increased, and earlier (pre-assessment) provision to refuse an application, which will discourage investment and business in Queensland.

Providing that EIS assessment reports lapse after three years to ensure that, for the purposes of an environmental authority application, the assessment reports reflect contemporary environmental legislation, policies and standards.

As previously indicated, the hypotheses examples provided in the exposure draft did not cover the full range of likely reasons an EIS does not progress. It failed to recognise markets shifts (given that some EIS can take more than 6 years to be approved), in which time it is viable to achieve the EIS, but the market driver and investment may have changed. Forcing an EIS into operation at that point to justify contemporary approval grounds, fails to understand the greater context of why some EA projects do not evolve, or simply don't evolve at the originally planned scale and nature. There needs to be, as previously submitted, an ability to extend the expiry date, if there isa reasonable and justifiable grounds to do so, and particularly if no changes to the surrounding environment have arisen. An EIS process is required to consider many factors and facets, for example offsets; and it may take up to 3 years to achieve an offset provision alone, prior to allowing the commodity to commence.

Allowing the chief executive to refuse an EIS from proceeding if it is unlikely the project could proceed under the EP Act or another law.

Refusal and the notion that a project's chief consideration is based on the chief executive's express interpretation of the EP Act or other acts, shows a move away from modern constitutional values. A project should always be assessed and weighted under all considered factors and risk aversion where possible. The purpose of the EIS is to allow for scientific and evidence-based decision making by the regulator, however this proposed provision is a shift away from that principle and the paradigm of ecologically sustainable development and not supported by AMEC. To assume that the environmental considerations refused prior to an opportunity to resolve the matter, is a strong signal to the resources sector and investors of the intent of the Queensland Government's approach to resource project development, and development broadly.

Improving compliance and enforcement powers to enable the more effective protection of the environment.

AMEC supports environmental enforcement to ensure a safe and environmentally robust framework of operation. The reforms have not been able to demonstrate the following aspects at law and at tort law:

- Powers of entry need to be supported by a number of legislative tools which appear to be lacking, including:
    - Grounds for what is defined as reasonable suspicion
    - Powers for a search warrant or a form of warrant to gain entry
    - Collection of evidence, or the restrictions around surveillance; surveillance still requires a warrant to be issued on reasonable suspicion.
- Inserting a power to allow an authorised persons to require a corporation to nominate an executive officer or employee to answer questions on behalf of the corporation.

It is difficult to support an amendment that is provocating that an individual can be potentially criminalised or pre-nominated to be criminalised. The intention of this legislation can be easily misused by DES and does not protect employees. There are already nominated persons on an EA, so it is not clear how this new power will be used and what it achieves, but it clearly does not support the sector.

Moreover, AMEC understands that there is a separate review being undertaken of the Department's enforcement powers while the Bill is being rapidly progressed, and considers it would be appropriate to await the outcomes of that publicly funded process before introducing amendments of this type with rigorous regulatory impact assessment.

Extended deemed liability for executive officers

AMEC does not support the proposed amendments to section 493, dealing with executive officer liability. These amendments have significant implications and have not been sufficiently examined or analysed in terms of likely implications.

The proposed amendment is particularly inappropriate in the absence of amendments to the associated defence. It is important to remember the following contextual matters in looking at the proposed amendments:

- An executive officer can be one of many employees, and is not limited to directors and company officers
- Section 493 is a deemed liability provision, with no fault element applied, and
- There are already a range of mechanisms in the EP Act which allow the regulator to take enforcement action against individuals in appropriate circumstances, including 'after the fact' of relevant decision-making, such as the chain of responsibility provisions.

The proposed amendments as drafted would also likely severely limit the availability of D&O insurance to industries regulated by the EP Act, and in the current constrained labour market, discourage otherwise good quality industry leaders from taking up or staying in decision-making roles.

Automatic notification of major amendments

The proposed amendment to require all resource project major amendment applications to be publicly notified is not supported. Notably, resource projects are the only types of activities regulated under the EP Act requiring notification of EA applications already.

The inclusion of public notification as a required step for any amendment application will add significantly to the time taken, as well as the departmental resources required, in progressing and deciding the application. Accordingly, the proposed amendment will serve to increase the time and cost (both average and overall) taken up by EA amendment applications related to the resources industry; noting that applications related to other industries are not required to undergo public notification at all. There is no clear direct associated benefit with the proposed amendments.

The unfortunate experience of industry, and in particular metals miners, in recent years has been that the Department tends to determine that mining-related EA amendments are major, even where there is no associated increase risk of environmental harm, or the other statutory criteria have not been met. For example, existing sites authorised to mine multiple metals (in particular, both gold and copper, although often others are also included) have been required to complete major EA

amendments when seeking to refine conditions around the operational requirements for existing water management and tailings structures, even where no physical changes to those structures are involved, and it has been plainly demonstrated that there is no associated increased environmental risk.

While operators have been willing to progress such amendment applications despite increased cost where public notification has not been required, the addition of an automatic public notification requirement is likely to change companies' attitudes in this respect particularly given the increased time involved. This will likely lead to increased disputes between operators and the regulator, and potentially lead to companies electing to litigate assessment level decisions.

Consultation process for Bill

Aside from the detail of specific provisions of the Bill, AMEC has concerns about the process surrounding consultation undertaken for the Bill to date. In particular, AMEC notes that the early consultation, included as described in the Explanatory Notes to the Bill, was:

- engagement with specific selected groups only, and
- conducted under confidentiality arrangements, including requiring AMEC to sign a deed which in large part prior to June this year prevented AMEC for circulating any version of the Bill purportedly being consulted on to its members for the purpose of responding to invitations.

This is contrary to principles of good policy development and best practice legislative process. A departmental briefing note dated 20 October 2022 states the confidential arrangements were necessary 'due to the preliminary nature of the exposure draft' and 'to ensure that the department could maintain confidentiality on sensitive information'.

AMEC does not consider it is appropriate to impose strict confidentiality requirements on the consultation of draft legislation, or more broadly on policy documents on issues of public importance and concern such as the environment.

The Commonwealth Office of Best Practice Regulation notes the importance of releasing exposure drafts of legislation in a transparent manner, and suggests confidential consultation (more generally) should only occur in limited circumstances (for example, where there is market sensitivity or when dealing with national security or commercial-in-confidence matters). The Bill and its subject matter do not give rise to these types of considerations, and as such, the confidential and restricted consultation which occurred was highly inappropriate and inadequate.

AMEC also considers the manner in which consultation has been undertaken, combined with consistently short timeframes for responses to various iterations of documents, necessarily means the policy development behind the Bill will suffer from a lower quality and smaller breadth of responses that would otherwise likely be provided.

AMEC would be very concerned if the Department, or indeed the Queensland Government more broadly, were to adopt such practices more broadly moving forward.