Environmental Protection and Other Legislation Amendment Bill 2022

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Ms Renee Easten
Committee Secretary
Health and Environment Committee
Legislative Assembly

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

Dear Ms Easten

Environmental Protection and Other Legislation Amendment Bill 2022

I am writing to provide APPEA feedback on the *Environmental Protection and Other Legislation Amendment Bill 2022* (**the Bill**).

The amendments in the Bill were represented by the Department of Environment and Science (**DES**) to stakeholders as being limited to minor and administrative amendments. Although several elements were removed from the previous draft of the bill prior to introduction, we continue to hold significant concerns that it contains multiple proposals that amount to major shifts in government policy.

The Bill will undermine the approvals framework by introducing new appeal rights for minor changes in activities. Certain proposals are targeted solely at the resources industry for reasons that have not been explained. The Bill would also pre-emptively and substantially change areas of legislation that are currently the subject of major independent reviews which are either in progress or committed to by government.

The impact of certain parts of the Bill on investor sentiment towards Queensland should not be underestimated. Investment capital is globally mobile and ensuring Queensland remains an attractive destination for long term investment also requires a reasonable degree of regulatory and approvals certainty.

APPEA requests the proposals in the Bill that reflect major policy reform be either amended to bring them in line with the more limited intent identified by DES or removed from the Bill given they do not meet the exclusion categories for Regulatory Impact Assessment.

Public notification of all major amendments

We have major concerns with these provisions. We understand the intent of this amendment is to ensure consistency in decision making.

The *Environmental Protection Act 1994* (**EP Act**) provides that public notification requirements are triggered when an environmental authority amendment is likely to have a significant increase to the risk of environmental harm and that risk is from a substantial change in the quantity or quality of contamination or permitted release of contaminants.

APPEA supports reasonable notification and objections processes. However, processes that are not well designed can enable the abuse of the legal system by vexatious litigants whose objective is to frustrate development that complies with government policy and regulation. In Queensland, existing objection processes have seen some developments experience many years of ongoing legal action and re-litigation of the same issues in a variety of legal fora. The result has been unnecessary uncertainty and cost for proponents, the State, and the community.

APPEA and our members have for several years raised concerns with the definitions of major and minor amendments, and the consequent inconsistent and unpredictable use of public notification processes by DES. DES previously acknowledged these issues and commenced a process to resolve them. These matters are the underlying issue but will not be resolved by the Bill which instead proposes to establish an inflexible and inequitable rule in legislation.

The proposed mandatory requirement for public notification for all major amendments would apply:

- whether or not such amendments have any impact on environmental values – existing thresholds for a major amendment pick up very minor changes in activity
- whether or not there are potential material impacts on a third party
- whether or not the amendments relate to development that has already been through public notification processes
- without resolving the existing ambiguity around what is a minor or a major amendment, and
- for unexplained reasons, only to resource environmental authorities (**EAs**) and no other form of development

This amendment was also identified in the Explanatory Notes (pg 13) by Queensland's Office of Best Practice Regulations (**OBPR**) as requiring further assessment:

> *"All amendments have undergone regulatory impact analysis in accordance with The Queensland Government Guide to Better Regulation. Some of the amendments were deemed to fall within agency-assessed exclusion categories. For all other amendments, exclusion requests or preliminary impact assessments were submitted to the Office of Best Practice Regulation (OBPR) for assessment. With the exception of EP Act amendments related to mandatory notification of environmental authority amendment applications for resource activities and amendments relating to the lapsing of EIS assessment reports after three years, OBPR advised that the amendments were excluded from further regulatory impact assessment"*

However, in our view OBPR's determination has not been given effect. DES determined that no further assessment was necessary as the amendment is:

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> *"consistent with the objectives of the EP Act, will provide greater certainty for industry and will enable greater community involvement in the environmental authority amendment process."*

This statement is not accurate - APPEA has previously provided information to the department highlighting the significant increase in uncertainty for industry should this amendment proceed. The amendment will result in significant and unnecessary increases to costs, delays in approvals and uncertainty for investors during a critical time for the east coast energy market, which is increasingly reliant on the Queensland gas industry to firm renewable power and as coal generation declines. Efficient, predictable and stable regulation is foundational to securing the investment needed to meet these increasing demands. .

Most significantly, these substantive changes to public notification processes are being progressed in advance of a major review of objection processes to be conducted by the Queensland Law Reform Commission. The review reflects a whole of government commitment set out in the Queensland Resources Industry Development Plan (**QRIDP**) which includes processes in the EP Act. The QRIDP was approved by Cabinet and released on 24 June 2022 and makes no mention of pre-emptive changes to these processes.

In line with government commitments in the QRIDP, APPEA requests these amendments be withdrawn and no amendments relating to objections processes be progressed until the recommendations of the Queensland Law Reform Commission are finalised. As an interim step, we request that DES recommence its efforts to improve consistency in internal decision making and resolve ambiguity in the definition of major and minor amendments.

Prevention of a streamlined application process for Carbon Capture Use and Storage (CCUS)

The Bill would prohibit CCUS from being eligible for streamlined application assessment as CCUS is not a prescribed ERA. It is unclear whether this is a specific policy intent of government.

CCUS is a proven emissions reduction technology that has been used for decades, is recognised by the United Nation's Intergovernmental Panel on Climate Change and the International Energy Agency as essential to reaching net zero by 2050, and which the Australian petroleum industry is investing in.

The Bowen, Cooper, Eromanga, Galilee and Surat basins – which are currently the focus for natural gas production – have been identified as having high prospectivity and potential for CO_2 storage. Streamlined assessment processes are essential for all abatement technologies including CCUS.

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Pre-emption of the independent review into the adequacy of existing powers and penalties under the *Environmental Protection Act 1994*

The Queensland Government is currently undertaking an independent review into the EP Act headed by retired Judge Richard Jones.

Several components of the draft EPOLA Bill propose changes to enforcement provisions of the EP Act that will be considered as part of the ongoing independent review of the EP Act, including:

- environmental investigations (e.g. Clause 59 of draft Bill);
- environmental protection orders (e.g. Clauses 81 - 83);
- offences related to environmental requirements (e.g. Clauses 92 - 93); and
- powers of authorised persons for vehicles and places (e.g. Clauses 98 - 100).

Changes to enforcement provisions of the EP Act should not be progressed prior to completion of the independent review which is expected to complete in 2022.

Further comments on the Bill are provided in the **Attachment**.

Yours sincerely

Matthew Paull
Queensland Director

Attachment

EPOLA Bill – Summary of key issues

#	Summary	Issues with proposed amendments that should be addressed by the Health and Environment Committee	EPOLA Bill drafting
1	Extend executive officer liability to a person who has left the relevant position by the time a corporate offence has crystallised, but who was in office at the time of an act or omission that caused the offence	• No causation defence – opens the potential for an executive officer to have been in office at the time a lawful action was taken, which, only when combined with other acts or omissions by the company after the executive officer departed, has indirectly contributed to the causation of the offence. • No transitional provision – no clarification that this legislative change only applies to acts or omissions from the date of the commencement of the amendment. • The Linc prosecution was understood to have been thrown out on the basis that alleged impacts could not be substantiated. This proposed change will not improve the process followed by the Dept.	***New s493(5) & (6) – Executive officers must ensure corporation complies with the Act*** (5) Subsection (6) applies if the act or omission of a corporation that causes an offence to be committed happens earlier than the time of the commission go the offence. *Example – An act is done by a corporation in January 2023. The act results in serious environmental harm being caused bin January 2024, in contravention of section 437(1).* (6) A reference in this section to an executive officer of the corporation includes a reference to an executive officer who: (a) is not in office when the offence is committed; but (b) was in office when the act or omission happened.
2	Powers to refuse Environmental Impact Statement to proceed	• This provision is a significant change in policy and is not minor or administrative. • The proposed provision introduces a new Chief Executive assessment of compliance with any Commonwealth or Queensland law including matters that are outside the remit of the Qld EP Act, duplicating decision making and assessment requirements of many other laws including the Commonwealth EPBC Act. It is not feasible for the Chief Executive of DES to determine compliance of a project with 100s or 1000s of laws. • DES' stated intent is to only use this provision for specific circumstances, however the draft is extremely broad and able to be used under any State or Commonwealth law. • Consistent with S40 of the EP Act, the Bill should be amended to continue holistic consideration of the adverse and beneficial environmental, economic and social impacts. • The Bill should also be amended to remove regulatory consideration outside of the immediate EIS framework i.e. the EP Act.	***Amendment of s49 - Decision on whether EIS may proceed*** (1) The chief executive must consider the submitted EIS and, within 20 business days after the EIS is submitted (the ***decision period***), decide to— (a) allow the submitted EIS to proceed under division 4, with or without conditions; or (b) refuse to allow the submitted EIS to proceed. (2) The chief executive may extend the decision period by up to 12 months if— (a) the proponent agrees in writing to the extension; and (b) the chief executive has not previously extended the decision period for the submitted EIS. (3) The chief executive may allow the EIS to proceed only if the chief executive considers it addresses the final terms of reference in an acceptable form. (3A) Also, the chief executive may refuse to allow the EIS to proceed if— (a) the chief executive is satisfied it is unlikely the project could proceed under this Act or another law, including, for example, because the project— (i) would contravene a law of the Commonwealth or the State; or (ii) would give rise to an unacceptable risk of serious or material environmental harm; or (iii) would have an unacceptable adverse impact on a matter of State environmental significance or a matter of national environmental significance; or (iv) would have an unacceptable adverse impact on an area of cultural heritage significance; or

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			(b) the chief executive is required to refuse to allow the EIS to proceed under a regulatory requirement. *etc*
3	Removal of Ministerial review of refusal to allow Environmental Impact Statement to proceed	• These proposed amendments represent a significant change in policy and are not minor or administrative. • The Department has not provided any grounds for such reform or evidence of issues caused by current legislative processes. • Removing Ministerial review provisions is inconsistent with the Queensland Government's regulatory strategy of open and transparent governance.	***Removal of existing s50 - Ministerial review of refusal to allow to proceed***
4	Lapsing of Environmental Impact Statement assessment report	• This is a new provision which will require affected proponents to re-do the entire EIS project for major projects. • These proposed provisions represent a significant change in policy and are not minor or administrative. The existing provisions in the EP Act do not force the lapsing of EIS assessment reports. EIS Assessments examine the extent of impacts over the life of a project including rehabilitation and cumulative impacts. • Introducing an arbitrary 3 year 'expiry date' does not reflect the needs of 'large projects' or projects to be developed over a long period of time or requiring substantial investment. These provisions are likely to cause proponents to redo entire EIS type assessments for EA amendments. Will similar provisions be introduced for EIS processes in the SDPWOA? • Environmental values will not change significantly in 3 years. The EP Act contains provisions that allow the regulator to address changes in environmental values over time. • The proposed provisions will result in additional sovereign risk for investment in Qld across all sectors and will prevent future large projects because of time needed to secure funding once EIS is approved. The provisions discourages holistic and cumulative environmental impact assessment in accordance with the objectives of the EP Act. • Existing EP Act provisions (e.g. S125, S226A) can be used to identify and address any environmental values that may have changed since completion of the EIS.	***New s59A – Lapsing of EIS assessment report*** (1) An EIS assessment report for a project lapses— (a) on the day that is 3 years after the day the chief executive gives the proponent the EIS assessment report under section 57(2); or (b) if, before the day mentioned in paragraph (a), the chief executive extends the period mentioned in that paragraph—on the day the extended period ends. (2) However, if the proponent applies for an environmental authority before the EIS assessment report lapses under subsection (1), the report does not lapse until— (a) if the application for the environmental authority is refused—the application is decided and any appeal against the decision is finalised or withdrawn; or (b) if the application for the environmental authority is granted—the authority takes effect.
5	Requirements for applications generally	• This provision to introduce potentially reduced application requirements for research or testing technology projects is unnecessarily limited to prescribed ERAs. This provides a relative	***Amended s125 – Requirements for applications generally*** (7) Subsection (8) applies if —

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		disadvantage to the many industries operating as agricultural and resource ERAs. • Testing for greenhouse gas mitigation measures such as Carbon Capture, Utilisation, and Storage (CCUS) would not be eligible for streamlined application assessment requirements as this activity is not a prescribed ERA. • Streamlined assessment timeframes are essential for the feasibility of this critical greenhouse gas mitigation measure to be proven in a meaningful timeframe in Queensland. • This provision should be expanded to equally apply to all ERAs.	(a) an application for a prescribed ERA is accompanied by evidence showing the main purpose of applying for the environmental authority is to conduct research into, or test, technology or processes relating to an environmentally relevant activity for which information mentioned in subsection (1)(l)(i) and (ii) is not available; and (b) the application states that the term of the environmental authority applied for is 3 years or less. (8) Despite subsection (1), the application need not include the matters mentioned in subsection (1)(l)(i) and (ii) to the extent the information is not available.
6	Amend definition of 'waters' so that it includes: • all types of waters, including natural and constructed waters; • the bed and banks of waters; and • surface water and groundwater.	• Very broad – the proposed amendments could mean swimming pools in backyards, water troughs etc. It should be the same definition as in the *Water Act 2000* • There are extensive provisions in the EP Act to deal with loss of containment of contamination that would be applicable to protect and control impacts to infrastructure such as drains. • The significance of this change cannot be quantified based on the information provided.	***Amend Schedule 4*** [not copied]
7	Amendment Dictionary to include new definition of *groundwater*: ***groundwater** means underground water*	• The existing Environmental Protection (Water and Wetland Biodiversity) Policy 2019 includes a definition of groundwater limited to water occurring within aquifers: ***groundwater** means water that occurs naturally in, or is introduced artificially into, an aquifer* Under the Queensland Water Act ***underground water** means water that occurs naturally in, or is introduced artificially into, an aquifer. • The proposed change broadens the definition under the EP Act and is inconsistent with the Qld Water Act. which can excludes underground water occurring in aquitards. This significant change affects many industries in Queensland given the sheer number of Environmental Authorities that relate to activities that occur in proximity to groundwater. • No information has been provided about the extent of the additional matters captured by this expanded definition. The significance of this	[not copied]

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		change cannot be quantified at short notice and without genuine consultation with DES. • The proposed provisions are a change in policy are not minor or administrative change and require significant analysis of impacts.	
8	The definition of watercourse has not been amended in the Bill to fix the current issue.	• The current definition of watercourse currently includes anywhere where drops of water come together and flow because of the word "stream" in part 2 of the definition. • The Water Act contains an additional clause which excludes drainage features which eliminates the issue currently in the EP Act. • The EP Act should be amended to align with the Water Act 2000 and avoid unnecessary regulatory overreach.	[not copied]
9	Make amendment to remove the ability for proponents to submit a draft TEP	• No control / input – removes the right for an applicant to submit a draft voluntary TEP for approval by DES and instead only allows the applicant to request DES to impose a TEP. In most situations, the holder is obviously in a much stronger position to understand the operational opportunities and constraints for the various options to improve an environmental management issue over a period of time.	***New s333 – Voluntary application for transitional environmental program*** A person or public authority may, at any time, apply to the administering authority for the issue of a transitional environmental program for an activity the person or public authority is carrying out or proposes to carry out.