



# Environmental Protection and Other Legislation Amendment Bill 2014

**Report No. 49**  
**Agriculture, Resources and Environment  
Committee**  
**October 2014**



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## **Agriculture, Resources and Environment Committee**

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### **Acknowledgements**

The committee thanks submitters and the officers who briefed the committee on the Bill.

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## Abbreviations and definitions

ACCC	Australian Competition and Consumer Commission
ACLCA	Australian Contaminated Land Consultants Association
APPEA	Australian Petroleum Production and Exploration Association
ASIC	Australian Securities and Investments Commission
BUA	beneficial use approval
CLR	contaminated land register
DAFF	Department of Agriculture, Fisheries and Forestry
DEHP	Department of Environment and Heritage Protection
EDOQ	Environmental Defenders Office of Queensland
EMR	environmental management register
EO Act	<i>Environmental Offsets Act 2014</i>
EP Act	<i>Environmental Protection Act 1994</i>
ERA	Environmentally Relevant Activity
FLP	Fundamental legislative principles
MCU	material change of use
MLES	Matters of Local Environmental Significance
OFSWQ	Office of Fair and Safe Work Queensland
OHS	occupational health and safety
OQPC	Office of Queensland Parliamentary Counsel
PCA	Property Council of Australia
QAO	Queensland Audit Office
QELA	Queensland Environmental Law Association
QRC	Queensland Resources Council
SDAP	state development assessment provisions
SKM	Sinclair Knight Merz
SLC	Scrutiny of Legislation Committee
SMP	site management plan
SPA	<i>Sustainable Planning Act 2009</i>
UDIA	Urban Development Institute of Australia
WHSQ	Workplace Health and Safety Queensland
WRIQ	Waste, Recycling Industry Association of Queensland
WRRRA	<i>Waste Reduction and Recycling Act 2011</i>

## Chair's foreword

This report presents the findings from the committee's inquiry into the Environmental Protection and Other Legislation Amendment Bill 2014 introduced by the Hon Andrew Powell MP, Minister for Environment and Heritage Protection.

The Bill progresses a second tranche of greentape reduction reforms. The legislative amendments proposed in the Bill aim to deliver regulatory simplification and business efficiency in the areas of waste and landfill management, contaminated land, environmental assessment and other related issues. This highlights the progress and commitment of this government and the Minister to balance greentape reduction, whilst ensuring industry is accountable and responsible through chain of responsibility requirements.

As part of the government's balanced regulatory strategy, the Bill also proposes to enhance the compliance and enforcement tools available to the department. In particular, the introduction of enforceable undertakings will be of enormous benefit to the industry in the long term as it provides flexible, responsive and cost-effective ways to achieve compliance. This process, along with the increase in penalties, highlights how serious the Minister and this government are about protecting the environment.

I commend this report to the House.



Ian Rickuss MP  
**Chair**

October 2014

## Recommendations

### **Recommendation 1** **4**

The committee recommends that the Environmental Protection and Other Legislation Amendment Bill 2014 be passed.

### **Recommendation 2** **11**

As part of implementation, the committee recommends that the department provide further information to stakeholders to confirm the intent of the *Environmental Offsets Act 2014*, and in support of the amendments in this Bill.

### **Recommendation 3** **11**

The committee recommends that the Bill be amended at clause 16 to retain a definition for Matters of Local Environmental Significance (MLES) and that the wording of the definition be amended to recognise the role of local matters in the framework and clarify for industry the scope of matters which may be considered Matters of Local Environmental Significance (MLES).

### **Recommendation 4** **11**

The committee recommends that the Bill amends section 24 'Requirements for financial settlement offsets' of the *Environmental Offsets Act 2014* to allow administering authorities' flexibility to determine a suitable financial settlement amount. The committee notes that the department may wish to reach agreement with local government as to a method for calculating an appropriate range for financial settlement to ensure offsets deliver an equivalent environmental outcome, and liability should a lower financial settlement be accepted.

### **Recommendation 5** **28**

The committee recommends that clause 102 of the Bill be amended to replace 'State' with 'administering authority', to correct the inconsistency in the terms used in this section.

### **Recommendation 6** **28**

The committee recommends that the department consider making a statutory guideline in the first instance, rather than non-statutory guidelines initially, so as to support greater certainty and adoption of enforceable undertakings as an alternative to prosecution.

### **Point of clarification** **28**

The committee invites the Minister and department, as part of implementation planning, to consider its approach and business system requirements in support of effective monitoring, auditing and evaluation of the implementation of enforceable undertakings.

### **Recommendation 7** **28**

The committee recommends that the Minister consider an amendment to clause 2 of the Bill to provide that the introduction of enforceable undertakings commence by proclamation, when the Minister and department are fully confident that the guidelines and related business processes and systems are in place.

**Point of clarification** **36**

The committee invites the Minister to advise the House when regulations and end of waste guidelines will be finalised and when these will be made available for industry stakeholders.

**Recommendation 8** **36**

The committee recommends that the department consider whether:

- section 155 could be amended to clarify the point at which a resource ceases to be a waste and becomes a resource; and
- section 156 to amended to differentiate between an 'end of waste user' and 'resource user'.

**Recommendation 9** **37**

The committee recommends that sections 173P and 173Q(1) and 173Q(2) be retained in the Bill as originally drafted and introduced to the House, as it maintains an appropriate policy position with respect to chain of responsibility for persons acting under end of waste approvals.

**Recommendation 10** **41**

The committee recommends that the Bill be amended to remove sections 173Q(3) and 173Q(4) specifically, to preserve the general principal that the legal onus or burden of proof lies with the party which brings an action, and the approved holder is 'innocent until proven guilty'. The approved holder, if accused, must still satisfy the evidential onus of proof for any defence or excuse they raise.



## 1. Introduction

### Role of the committee

The Agriculture, Resources and Environment Committee is a portfolio committee established by a resolution of the Legislative Assembly on 18 May 2012. The committee's primary areas of responsibility are agriculture, fisheries and forestry, environment and heritage protection, and natural resources and mines.<sup>1</sup>

In its work on Bills referred to it by the Legislative Assembly, the committee is responsible for considering the policy to be given effect and the application of fundamental legislative principles (FLP).<sup>2</sup>

In relation to the policy aspects of Bills, the committee considers the policy intent, approaches taken by departments to consulting with stakeholders and the effectiveness of that consultation. The committee may also examine how departments propose to implement provisions in Bills that are enacted.

FLPs are defined in Section 4 of the [Legislative Standards Act 1992](#) as the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament.

### The referral

On 28 August 2014, the Hon Andrew Powell MP, Minister for Environment and Heritage Protection, introduced the Environmental Protection and Other Legislation Amendment Bill 2014 (the Bill). The Legislative Assembly referred the Bill to the committee for examination, in accordance with Standing Order 131. The committee was given until 22 October 2014 to table its report to the Legislative Assembly, in accordance with Standing Order 136(1).

### The committee's processes

In its examination of the Bill, the committee:

- invited written submissions from stakeholder groups and members of the public. The committee accepted written submissions from 13 parties. A list of submitters is at **Appendix A**.
- sought advice from the Department of Environment and Heritage Protection (DEHP) on the issues raised in submissions received by the committee. This advice from the department is published on the Parliament of Queensland website at: <http://www.parliament.qld.gov.au/documents/committees/AREC/2014/25-EnvProtOLA2014/DEHP-Response-to-Subs.pdf>
- sought expert advice on possible FLP issues with the Bill,
- convened public briefings by officers from DEHP and Department of Agriculture, Fisheries and Forestry (DAFF) on 10 September and DEHP on 15 October 2014, and
- held a public hearing to hear evidence from submitters and others on 15 October 2014.

The briefing officers and hearing witnesses who assisted the committee are listed at **Appendix B**.

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<sup>1</sup> Schedule 6 of the Standing Rules and Orders of the Legislative Assembly of Queensland.

<sup>2</sup> Section 93 of the *Parliament of Queensland Act 2001*.

## 2. Background information on key objectives of the Bill

### Background

The value of Queensland's environment is at the forefront of many aspects of our lives. It is reflected in interest across all three levels of government in Australia, across different industries that use and manage its natural resources, and across the community as a whole.

Government's program of greentape reduction has occurred over several years, with a view to achieving a balance between regulatory ease and maintenance of strong environmental standards and outcomes.

### Policy objectives of the Bill

The policy objectives of the Bill, as set out in the Explanatory Notes are to:

- deliver greentape reduction reforms to reduce costs to business and government while maintaining environmental standards
- support firm but fair environmental regulation, and
- promote the recovery and use of waste within the economy.<sup>3</sup>

The Bill seeks to achieve these objectives by amending the following Acts:

- *Biological Control Act 1987*, to more broadly define the entity responsible for the process for declaring organisms as agents for biological control to remove the need for amendments when the title of the entity changes over time
- *Environmental Offsets Act 2014*, to clarify and strengthen legislative clauses to reinforce the intent of nil duplication of offsets across and within jurisdictions, and other minor amendments in response to issues raised since the Act's commencement on 1 July 2014
- *Environmental Protection Act 1994*, to restructure the contaminated land provisions, increase penalties for environmental offences, and introduce enforceable undertakings to 'make good' on identified non-compliance
- *Nature Conservation Act 1992*, to require councils to prepare a Statement of Management Intent for flying-fox roost management, as the final component of that management framework for defined urban areas
- *Waste Reduction and Recycling Act 2011*, to replace beneficial use approvals with a new management framework of 'end of waste' codes and approvals, and for identifying waste management priorities in published priority product statements, and
- legislation to remove duplication in civil liability provisions for state employees, including *Coastal Protection and Management Act 1995*, *Environmental Protection Act 1994*, *Waste Reduction and Recycling Act 2011* and *Wet Tropics World Heritage Protection and Management Act 1993*.<sup>4</sup>

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<sup>3</sup> Environmental Protection and Other Legislation Amendment Bill 2014, Explanatory Notes, p. 1.

<sup>4</sup> Environmental Protection and Other Legislation Amendment Bill 2014, Explanatory Notes, pp. 2-3.

### 3. Examination of the Environmental Protection and Other Legislation Amendment Bill 2014

The current Bill is an omnibus Bill, containing proposed amendments in relation to six distinct objectives and seven Acts.

The committee considered the clauses of the Bill in their entirety and as against the existing legislation.

The committee had also previously considered matters that are the subject of amendments in this Bill, in particular, in its reports:

[Report No. 3 Environmental Protection \(Greentape Reduction\) and Other Legislation Amendment Bill 2012](#)

[Report No. 40, Environmental Offsets Bill 2014](#)

Through its research and evidence received through submissions and hearings, the committee has concluded that the proposed amendments with respect to the following Acts should proceed: *Biological Control Act 1987*, *Nature Conservation Act 1992*, *Coastal Protection and Management Act 1995* and *Wet Tropics World Heritage Protection and Management Act 1993*.

Sections 4 – 7 of this report discuss the main issues that were raised during the committee's examination of the Bill, and which the committee wishes to bring to the attention of honourable members. These relate to amendments to:

- *Environmental Offsets Act 2014*
- *Environmental Protection Act 1994*, and
- *Waste Reduction and Recycling Act 2011*.

#### Should the Bill be Passed?

Standing Order 132(1) requires the committee to recommend whether the Bill should be passed.

After examining the form and policy intent of the various aspects of the Bill, the committee determined that the Bill should be passed.

#### Committee Comment

The committee recognises that the amendments contained in this omnibus Bill have been introduced following a series of policy reviews and consultation. The committee commends the efforts of the department to improve the administration of necessary frameworks that maintain environmental standards and values in our community.

The committee has identified provisions in the Bill that warrant consideration of amendment, when the Bill is considered by the House. These form the basis for the committee's recommendations in this report, along with non-legislative issues also identified during the course of the committee's inquiry.

The committee did consider that different interpretations of the provisions of the Bill gave rise to some of the issues identified by stakeholders, as did limited detail on matters to be included in other instruments and documents. On this matter, the committee believes there may have been fewer stakeholder issues raised during the committee's consideration of the Bill had a greater depth of background and more precise detail regarding the nature of the amendments been included in the Explanatory Notes to the Bill. Nonetheless, the committee considers that the stronger regulatory approach that underpins the amendments in this Bill still provides an opportunity for further consultation, to ensure that the details not currently available to stakeholders with this Bill are made

available for information and consultation as work continues towards implementation of key reforms.

The committee also wishes to note the importance of timely and effective compliance monitoring and enforcement, and review, in ensuring that environmental standards are maintained through this approach.

**Recommendation 1**

The committee recommends that the Environmental Protection and Other Legislation Amendment Bill 2014 be passed.

## 4. *Environmental Offsets Act 2014*

On 13 February 2014, the Hon Andrew Powell MP, Minister for Environment and Heritage Protection, introduced the Environmental Offsets Bill 2014. The Legislative Assembly referred the Bill to the Agriculture, Resources and Environment Committee for examination. The committee tabled its report to the Legislative Assembly on 14 May 2014<sup>5</sup>.

The *Environmental Offsets Act 2014* commenced on 1 July 2014. It provides the single, consistent, whole-of-government framework for imposing environmental offsets conditions and assessing environmental offset proposals in Queensland.

The intent of the framework when introduced was to streamline environmental offsets by providing an outcome-based approach to offsets, including when an offset may be required and suitable offsets delivery options. The framework also aimed to remove the duplication of environmental assessment and duplicative offset conditions across the three levels of government for the same environmental matters.

On this point, the Explanatory Notes for the Environmental Offsets Bill 2014 stated:

*The Bill addresses this issue by mandating there be only one offset for the same matter for the one activity. This means that where the Commonwealth requires an offset the State will not require an offset for the same matter. In addition, local government may not require an offset where the State requires an offset.*<sup>6</sup>

Since its introduction, some implementation and interpretation issues have been brought to the attention of DEHP. As noted in the Explanatory Notes, the amendments contained in this Bill:

*... respond to issues raised by industry bodies including the Property Council of Australia and the Urban Development Institute of Australia since the commencement of the Act on 1 July 2014. The amendments strengthen Queensland's commitment to reduce duplication of offset conditions, correct errors and omissions, or clarify the operation of existing provisions.*<sup>7</sup>

### Key provisions

Clauses 9-16 of the Bill make amendments to the *Environmental Offsets Act 2014* to clarify and strengthen legislative clauses to reinforce the intent of nil duplication of offsets conditions across and within jurisdictions for the same, or substantially the same, environmental matters.

Clause 11 amends section 14 of the *Environmental Offsets Act 2014* to replace the word “may” with “must” in subsection (3). This amendment makes it mandatory for administering agencies to have regard to existing offset conditions for an area that relates to the same, or substantially the same prescribed activity and prescribed environmental matter.

Clause 12 amends section 15 of the *Environmental Offsets Act 2014* to clarify the existing policy intent for the imposition of environmental offsets. The policy intent is that once the Commonwealth has considered an application and made a decision to impose or not to impose an offset condition, the matter cannot be considered by other levels of government. The clause also clarifies what evidence is required to demonstrate the Commonwealth decision when an offset condition has been imposed or not imposed by the Commonwealth.

The Explanatory Notes make it clear that this clause only applies where the Commonwealth has considered the same prescribed activity and environmental matter:

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<sup>5</sup> Queensland Parliament, 2014, ‘Report No 40, *Environmental Offsets Bill 2014* ‘

<http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2014/5414T5077.pdf>

<sup>6</sup> Environmental Offsets Bill 2014, Explanatory Notes, p. 3.

<sup>7</sup> Environmental Protection and Other Legislation Amendment Bill 2014, Explanatory Notes, p. 7.

*In addition, consistent with the existing situation, the restriction only applies where the Commonwealth decision covers the same area and the same or substantially the same activity managed by the State or local government.*<sup>8</sup>

Clause 13 inserts a new section 15A into Part 5 of the *Environmental Offsets Act 2014* to clarify when an offset condition has been imposed or not imposed by the State, and what evidence is required to demonstrate the State's decision. This section clarifies the existing policy intent – that is, to ensure that once the State has considered an application and made a decision to impose or not to impose an offset condition, the matter cannot be considered by local government.

As above, the Explanatory Notes make it clear that this clause only applies where the State has considered the same prescribed activity and environmental matter:

*In addition, consistent with the existing situation, the restriction only applies where the State has a head of power to impose an offset condition in relation to the matter and the State decision covers the same area and the same, or substantially the same, activity managed by local government.*<sup>9</sup>

Clause 14 inserts a new Part 6A, section 25A into the *Environmental Offsets Act 2014* to remove existing conditions imposed by a lower level of government, if a higher level of government later imposes the same or substantially the same condition and provide a dispute resolution process associated with those decisions.

The new section also requires that an administering agency give written notice to a holder of an authority where it is satisfied that an offset condition imposed by a higher level of government covers the same things (that is, the same area and the same or substantially the same environmental matter and activity) as the offset condition imposed by the administering agency. The offset condition imposed by the administering agency stops having effect from the day the condition imposed by the higher level of government starts or started applying.

This section also requires the administering agency to give an authority holder notice of its decision if it does not agree that a condition imposed by a higher level of government covers the same things as the offset condition imposed by the administering agency. The section allows a regulation to provide for a review of such decisions. A regulation-making power is necessary to allow the same court that may review a decision to impose an offset condition to also review decisions made under this section.

### **Issues with the current framework and proposed amendments**

The Property Council of Australia (PCA), Urban Development Institute of Australia (Queensland) (UDIA) and Queensland Environmental Law Association (QELA) raised similar concerns in their submissions regarding the operation of the current legislation and the extent to which the proposed amendments adequately addressed these operational concerns. Specifically they argued that the revised wording at section 15 and new section 15A do not adequately meet the intent of restricting the imposition of offset conditions across jurisdictions.

Specifically PCA, UDIA and QELA were concerned that the drafting of clauses relating to when a jurisdiction decides 'not to impose' an offset condition do not reflect the practical realities and processes by which such a decision is made.

*The first of these concerns arises from the use of the term 'decision'. Governments do not make 'decisions' not to act. An applicant would very rarely receive a notice from a government stating they will not be imposing a condition. The terminology must be changed to reflect the fact that a government may have considered an impact on a matter, or had the opportunity to consider it, and has chosen not to impose a condition.*

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<sup>8</sup> Environmental Protection and Other Legislation Amendment Bill 2014, Explanatory Notes, p. 12.

<sup>9</sup> Environmental Protection and Other Legislation Amendment Bill 2014, Explanatory Notes, p. 12.

...

*The Commonwealth's decision that an action is 'not a controlled action' or 'not a controlled action – particular manner' is a decision that the Commonwealth has decided not to impose a condition, this is not clearly recognised... The intention of the Act is to ensure that because the Commonwealth- as a higher level of government- has chosen not to seek offsets for a matter, the local government in this situation is then not permitted to seek offsets for substantially the same matter. For s.15 to operate as intended there must be recognition by the Government that notices of not controlled action are decisions made by the Commonwealth under the EPBC Act in relation to significant impacts on prescribed environmental matters.*<sup>10</sup>

Further, it was argued in submissions from PCA and UDIA that section 25A as currently drafted does not meet its stated intention as it only applies to situations where a higher level of government has imposed an offset condition, and it relies on a lower level of government notifying an authority holder where they agree that an offset condition for a particular matter has been duplicated and therefore will stop applying.

As stated in PCA's submission:

*S.25A relies on a lower level of government notifying an applicant where there is a duplication of offset conditions. In reality, the lower level of government will likely be unaware of a condition imposed by the Commonwealth, so the onus must be on the applicant to inform the administering agency of the duplication. Once the applicant has notified the administering agency, there must be a process and timeframe by which the agency is required to remove the duplicative condition.*<sup>11</sup>

In response, DEHP advised the committee that the government is and will continue to work with stakeholders to improve the wording of sections 14, 15, 15A and 25A to deliver the policy intent.<sup>12</sup>

Submissions also highlighted a lack of clarity and a possible disagreement amongst stakeholders regarding the interpretation of what is meant by 'the same or substantially the same' area, activity and prescribed environmental matters and the interaction between matters prescribed as matters of national, state or local environmental significance. This manifests as frustration from industry about the continued opportunity for duplication across matters they see as fitting the definition of the 'same or substantially the same' such as koala species and koala habitat, and concern from local government over the extent to which they can recognise environmental values at a local level.

In relation to the scope of the legislation to prevent duplicated assessment of the same prescribed environmental matter, DEHP noted:

*The revised wording was necessary to clarify existing policy position – section 15 of the Act was intended only to apply to the same impacts (that is the impacts on prescribed environmental matters) arising at the same point in time from the same activity.*

*The use of the terms "same or substantially the same prescribed environmental matter" acknowledges that environmental values are described and classified differently under State and Commonwealth legislation. For example, the same endangered regional ecosystem under the Queensland legislation may be called a 'vulnerable ecological community' under the Commonwealth Environment Protection and Biodiversity Conservation Act 1992.*<sup>13</sup>

Further Mr Huxley Lawler, Executive Coordinator, Environment of the City of Gold Coast indicated that there was potential for a perverse outcome to result if, as suggested by industry stakeholders, a

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<sup>10</sup> PCA, *Submission No. 2*, pp. 2-3.

<sup>11</sup> PCA, *Submission No. 2*, p. 5.

<sup>12</sup> DEHP, 2014, *Correspondence*, 9 October.

<sup>13</sup> DEHP, 2014, *Correspondence*, 9 October.

Commonwealth government deems an application as not requiring a controlled activity and that decision then has the effect of limiting State and local governments' ability to assess other impacts on the area of land:

*They [the Commonwealth] are making that assessment based on the fact that [for example] koala species are present on the site. If we remove the duplication, what I believe has been suggested is that therefore state government does not have an interest in that property or piece of land and therefore the local government does not have an interest in that property or piece of land. However, if the federal government deemed that there are no koalas present on the site, the state government would have an interest in the habitat that is present on the site... the federal government is not considering the habitat. If the state government is not considering that koala habitat is there or that is of interest, there may be habitat present on the site that a vast range of other species will be using and the local government would have interest in ensuring that those interests for other species are present.*

*... I think the issue here is what is of interest to the federal, state and local governments. So we might be talking about the same patch of bush, for example, but they might have different values. So the feds could look at it and say, 'There is no koala species in there so we are not interested. It is not a controlled activity. You beauty.' So the developer is fine and they go to the next level. The state government then looks at it and says, 'Yes, it is koala habitat but in this instance we are not prepared to ask you for an offset. We are happy for you to do what you want with it. Go ahead.' We might look at it and say, 'There is less than five per cent of that vegetation community left in the City of Gold Coast and that is a real issue for us, so we ask you to provide an offset for it.'*

*... So I believe that it is important that the legislation gets this right and that it allows the federal, state and local governments to protect values that are important to them. If that is the case, then it is up to the local government and the governance around that to determine what they think those local interests are. So the local council will make those decisions and that will go through a transparent and public process to determine what those values are and how important they are.<sup>14</sup>*

Local government submissions raised concern for the removal of a definition for 'Matters of Local Environmental Significance' or 'MLES' from schedule 2 of the *Environmental Offsets Act 2014*.

As noted by the City of Gold Coast in their submission:

*A MLES is the key value used for the identification and protection of locally significant environmental features. Its removal from both the EO Act and State Planning Policy 2014 will provide uncertainty around the existence and potential to protect these locally significant features.<sup>15</sup>*

However some stakeholders<sup>16</sup> indicated support to limit the identification and application of MLES in some circumstances, for example in urban areas, so as to restrict the ability of local government to require offsets where State agencies have a predominant planning and assessment role.

DEHP responded:

*The government is currently reviewing options to further clarify what can be prescribed as MLES. The government is currently reviewing options to address this issue and provide further clarity.*

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<sup>14</sup> Lawler, H. 2014, *Draft public hearing transcript*, 15 October, pp. 8,10

<sup>15</sup> City of Gold Coast, *Submission No. 10*, p. 1.

<sup>16</sup> PCA, *Submission No. 2*, p. 4 and UDIA, *Submission No. 4*, p. 2-3.

*The State government will oversee the identification of MLES through existing planning powers under the Sustainable Planning Act 2009. MLES can only be identified in the planning instruments under the Sustainable Planning Act 2009.<sup>17</sup>*

Finally, whilst acknowledged as being outside of the scope of the Bill, matters relating to the environmental offsets calculator and financial settlement approach were raised in submissions.

PCA and UDIA suggested amendments to allow local governments some flexibility in determining a financial settlement amount which may be lower than the amount derived through the financial calculator.

*There is no discretion in s.24(3) of the legislation for administering agencies to charge less than the maximum amount set out in the environmental offsets policy for financial settlement offsets. Anecdotal evidence suggests that many local governments want to charge less than the amount required in the policy, however the legislation prevents them from doing so.*

*S.24(3) should be amended to provide that administering agencies are permitted to charge no more than the amount set out in the environmental offsets policy. This would provide local governments with the same discretion they have when levying infrastructure charges, where they are able to set the charge at any amount up to the maximum amount specified by the State Government.<sup>18</sup>*

The UDIA and Logan City Council also suggested a review of the assumptions and costs underpinning the financial offset calculator as in some circumstances financial amount was considered to be excessive and unviable for applicants.

*The current calculator will render important developments unviable in key growth regions and pose significant risk to the development industry and the community.<sup>19</sup>*

*It is suspected that costs associated with the EO Act are going to be cost prohibitive resulting in more proponent driven offsets rather than financial contributions. This will take more time to complete an application rather than reduce time/'green tape' for developers.<sup>20</sup>*

However, whilst the City of Gold Coast agreed that a financial settlement amount is a matter for a local government to decide, they suggested caution as it may affect the ability of local government to deliver offsets as required under the Act:

*The [City of Gold Coast] council can work with the offsets calculator. We interpreted the legislation that you could seek less than what the calculator is seeking, so our view is a little bit different than previously expressed today. There might be a benefit if a local government, as was stated before, wanted to charge less for environmental offsets. But what happens then is, if the local government is charging for environmental offsets and it chooses to charge less than the state is calculating, the local government are going to have to use other sources of revenue to top up to ensure that those offsets are delivered like for like or at the appropriate ratio that the state is suggesting, like a three for one replacement.*

*The local government is the appropriate level of government to be able to make that decision. If they want the general rates revenue to underpin or fund offsets and enable development to ensue at a much lesser rate or at a lesser cost than otherwise would be the case—in other words, externalise those costs to the city and the city's ratepayers—that is a*

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<sup>17</sup> DEHP, 2014, *Correspondence*, 9 October.

<sup>18</sup> PCA, *Submission No. 2*, p. 5.

<sup>19</sup> UDIA, *Submission No. 4*, p. 4.

<sup>20</sup> Logan City Council, *Submission No. 7*, p. 2.

*decision for the city to make. I do not have any problem with local governments charging anything less than what the state government calculator says.*<sup>21</sup>

#### **Committee Comment**

The committee continues to support the single, consistent, whole-of-government framework for environmental offsets in Queensland, as established under the *Environmental Offsets Act 2014*. The intent of the Act is clear – to ensure an efficient approach to the assessment and conditioning of development activities and to counterbalance any significant residual impacts resulting from these activities.

The committee acknowledges that some of the concerns raised in relation to the amendments included in the Environmental Protection and Other Legislation Amendment Bill 2014 are similar to the concerns raised as part of the committee's previous consideration of the Environmental Offsets Bill 2014. The committee applauds the department's commitment to working closely with industry during the initial implementation phase of the *Environmental Offsets Act 2014* to ensure the framework meets its policy objectives.

The committee notes that DEHP has undertaken to make further amendments to address some of the industry concerns prior to the passing of the Bill. These include amending the Bill to better reflect the processes where an authority decides not to impose an offset condition and the Commonwealth's processes where a 'not controlled action' decision is made. The department has also indicated they will amend the Bill to provide flexibility to councils for financial settlement amounts. The committee supports these amendments and believes they will address stakeholder concerns.

However the committee has recognised that there is a fundamental difference in expectations between the property and development industry and the government in relation to the intent of the *Environmental Offsets Act 2014* as it relates to environmental impact assessment across jurisdictions. The committee wishes to affirm its support for the reduction in duplication of assessment and the imposition of offset conditions across jurisdictions, where that duplication relates to the same or substantially the same prescribed environmental matter.

However, the committee does not believe that the intent of the legislation is to limit of ability for state and local governments to assess and condition environmental impacts for matters where they have clear jurisdiction to do so. Further, the committee does not support the suggestion that, where a higher level of government has decided not to impose an offset condition for a prescribed activity or matter, this decision excludes lower levels of government from undertaking assessments in relation to other prescribed matters and values.

Accordingly, the committee believes there is an imperative for the department to continue to work with stakeholders to clarify the intent and interpretation of a number of key aspects in the Bill including:

- The intent of the 'same or substantially the same' provisions in the *Environmental Offsets Act 2014* in relation to prescribed environmental matters and prescribed activities. The committee believes this is being interpreted differently by industry. To use an example referenced in the committee's deliberations, the committee believes that 'koala' species (a Commonwealth matter) is not the same as 'koala habitat' (a state matter) which is not the same as remnant bushland (which may be a local matter).
- The processes and protocols already established in legislation which act to limit the possibility that there can be a direct duplication of prescribed environmental matters across commonwealth, state and local levels of government including: the review undertaken by DEHP

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<sup>21</sup> Lawler, H. 2014, *Draft public hearing transcript*, 15 October, pp. 9-10.

of the prescribed environmental matters and MSES; and the role of the state interest check in ensuring that local matters of environmental significance do not duplicate state protections.

Further, the committee believes that it is important that local governments retain, to some extent, the ability to assess and require offsets for impacts on environmental matters which reflect social, economic and environmental values and expectations at a local level. Accordingly, a definition for Matters of Local Environmental Significance (MLES) and provisions recognising its use within the framework should be considered in the *Environmental Offsets Act 2014*. This Bill may be a suitable vehicle for making these minor amendments.

Finally, whilst outside the direct scope of the Bill, the committee believes there is merit in further minor amendments at section 24 'Requirements for financial settlement offsets' of the *Environmental Offsets Act 2014* to provide flexibility to administering authorities in determining amounts payable as a financial offset. However, the committee cautions that any agreed financial settlement amount must still meet the suitability requirements set out in the Act and allow for the delivery of environmental outcomes. As above, this Bill may be a suitable vehicle for making these minor amendments. The committee does not however believe there is any immediate need to review the assumptions underpinning the offsets calculator, as this was subject to significant consultation and testing prior to the commencement of the *Environmental Offsets Act 2014* earlier this year. Further, the committee recommended as part of its inquiry report on the Environmental Offsets Bill 2014 (Report No. 40, May 2014) that the department review the operation and performance of the Queensland Environmental Offsets Framework within four years of its commencement, and that the offsets calculator be considered as part of this review.

#### **Recommendation 2**

As part of implementation, the committee recommends that the department provide further information to stakeholders to confirm the intent of the *Environmental Offsets Act 2014*, and in support of the amendments in this Bill.

#### **Recommendation 3**

The committee recommends that the Bill be amended at clause 16 to retain a definition for Matters of Local Environmental Significance (MLES) and that the wording of the definition be amended to recognise the role of local matters in the framework and clarify for industry the scope of matters which may be considered Matters of Local Environmental Significance (MLES).

#### **Recommendation 4**

The committee recommends that the Bill amends section 24 'Requirements for financial settlement offsets' of the *Environmental Offsets Act 2014* to allow administering authorities' flexibility to determine a suitable financial settlement amount. The committee notes that the department may wish to reach agreement with local government as to a method for calculating an appropriate range for financial settlement to ensure offsets deliver an equivalent environmental outcome, and liability should a lower financial settlement be accepted.

## 5. *Environmental Protection Act 2009 - Contaminated land*

Contaminated land includes land that has been contaminated by a hazardous contaminant (such as heavy metals, asbestos, chemicals, pesticides and/or hydrocarbons), which poses or may pose a risk to human health or the environment. In some instances, land contamination is a historical problem resulting from past activities which for example pre-date modern management/regulation and may not have been known to be dangerous at the time, or may have involved chemicals that are now banned or subject to much stricter controls. Sites where known contaminants are present are listed on the contaminated land register (CLR) so that appropriate remediation, management and monitoring can be undertaken.<sup>22</sup>

Contaminated land also includes land which has been subject to a number of activities that have been identified as likely to cause land contamination. These are called 'notifiable activities' and include some common land uses such as service stations, cattle dips, tanneries, wood treatment sites, landfills, fuel storage and refuse tips. Those sites where 'notifiable activities' have been conducted are listed on the environmental management register (EMR) so that the nature and extent of any actual or potential contamination can be assessed if the land use is changed.<sup>23</sup>

There are currently 22,000 actual and potentially contaminated sites across the State listed on one of Queensland's two contaminated land registers (EMR/CLR). Between February 2013 and February 2014, 930 sites were notified for listing on the EMR; over the same period 300 sites were removed from either the EMR or CLR.<sup>24</sup>

The majority of sites on the EMR/CLR do not require immediate remediation or management. This is because the current use of the land poses a low risk to human health and the environment.<sup>25</sup>

### **Contaminated land management**

Queensland's contaminated land framework is premised on the principle that the polluter should be responsible for the remediation of contaminated land (*polluter pays* principle). However, recognising that in some circumstances it may be impractical or impossible to allocate liability to the polluter, the following hierarchy of liability exists under the EP Act if it is not practicable to hold the polluter liable:

- the local council that gave approval for an activity which resulted in the contamination (provided, however, that the approval was given contrary to legislative requirements and the local council should have known that contamination would result from the giving of such approval),
- the owner of the land (provided that the land was contaminated before 1 January 1992 or when, at the time an owner purchases the land, the land was listed in the CLR or EMR or where contamination occurred after the land was purchased by the owner).<sup>26</sup>

Chapter 7, Part 8 of the EP Act contains the provisions related specifically to contaminated land, which are based on a risk management approach that requires contaminated land to be assessed in relation to its land use.

The EP Act requires that a landowner, occupier and/or local government notify the administering authority if they become aware that land is contaminated, to ensure all contaminated land is recorded on the relevant register. It is the responsibility of the department as administering authority to decide if land investigated/ managed/ remediated should be placed or removed from

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<sup>22</sup> DEHP, [www.ehp.qld.gov.au](http://www.ehp.qld.gov.au)

<sup>23</sup> DEHP, [www.ehp.qld.gov.au](http://www.ehp.qld.gov.au)

<sup>24</sup> DEHP, 2014, *Technical Services for Contaminated Land: Decision Regulatory Impact Statement*, p. 3.

<sup>25</sup> DEHP, 2014, *Technical Services for Contaminated Land: Decision Regulatory Impact Statement*, p. 3.

<sup>26</sup> DEHP, [www.ehp.qld.gov.au](http://www.ehp.qld.gov.au)

the registers and this decision is based on information/reports provided on the contamination status of the land.

The contaminated land provisions also ensure that, when ownership of the land changes, the new owners are made aware of the land's status and their obligations in relation to managing the contamination on the site.<sup>27</sup>

As part of the contaminated land management framework under the EP Act, a person can/will need to, at times, prepare and submit and one or all of the following:

- a site investigation report—a scientific assessment to determine if contaminants are present on a site and, if so, whether the contaminants pose a risk to human health or the environment (a site investigation can only be undertaken by a 'suitably qualified person')
- a validation report about remediation work undertaken on a contaminated site, and
- a Site Management Plan (SMP) which outlines how hazardous contaminants will be managed so that they do not pose a risk to human health or the environment.

The administering authority and/or an approved auditor under the EP Act are currently responsible for the assessment of these documents.

In addition, a soil disposal permit is also required for the transportation of contaminated soil to a waste facility. An applicant is required to prepare and submit an application for a soil disposal permit.

#### **Issues with current framework<sup>28</sup>**

The stated focus of the government's contaminated land review is to:

*...deliver a regulatory framework that is better integrated with other sections of the EP Act and recognise the capabilities of private sector auditors in contaminated land assessment.<sup>29</sup>*

The current provisions in the EP Act are inconsistent with recent amendments relating to development assessment for material change of use (MCU) and reconfiguration of a lot for contaminated land under the *Sustainable Planning Act 2009* (SPA) and Sustainable Planning Regulation 2009. Under the SPA, contaminated land development approvals are now compliance assessable rather than code assessable against the state development assessment provisions (SDAP). This means that, to progress a proposal for development or land change use that involves land listed on the EMR or CLR, landowners and developers may have their reports assessed by a private sector auditor and obtain a compliance permit to change the use of the land rather than submitting a development application through the SDAP. However landowners/developers do still retain the option to voluntarily apply to DEHP under the EP Act provisions to remove the contaminated land from the EMR/CLR prior to development approval<sup>30</sup>. In this case, DEHP provides the contaminated land assessment services rather than private sector auditors.<sup>31</sup>

As the approved auditor framework for is voluntary in nature, the use of private sector auditors has been low. The preference has been to continue to use the low-cost department provided

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<sup>27</sup> During consultation on the RIS, submissions raised concern for the lack of transparency and cost associated with the EMR/CLR. The cost to conduct a site/lot specific search of the EMR/CLR is \$55 per search. There was support for free broad public access to EMR and CLR, on the basis that the department has a number of existing database and remapping systems.

<sup>28</sup> Issues identified in the 'Technical Services for Contaminated Land: Consultation Regulatory Impact Statement' April 2014

<sup>29</sup> DEHP, 2014, at <http://www.qld.gov.au/environment/pollution/management/contaminated-land/review/>. Accessed 16 October 2014.

<sup>30</sup> If a development application was then to be lodged under the SPA, a contaminated land assessment would not be triggered as the site is no longer listed on either the EMR or CLR.

<sup>31</sup> Stakeholders raised concern in submissions that the amendments to the SPA including ROL and MCU applications that involve contaminated land listed on EMR or CLR were progressed separately, and in fact already in place prior to the finalisation of the RIS consultation process for the contaminated land framework.

contaminated land assessment services rather than pay for the services of the private sector auditors. However, over the past ten (10) years, DEHP's capacity to provide technical advisory and assessment services has diminished, which has purportedly challenged the department's responsiveness to fluctuations in demand for contaminated land assessment services. The provisions of low cost technical services by DEHP has also limited commercial opportunities for potential auditors and potentially stifled auditor supply to the market.

### **Key provisions and issues with the proposed contaminated land framework**

Clause 135 of the Bill removes the current contaminated land provisions contained in Chapter 7, Part 8 of the EP Act and inserts new Part 8 with an amended contaminated land framework.

Key provisions include:

#### **389 Content of contaminated land investigation document**

*(1) A contaminated land investigation document for relevant land must include the following information about the land—*

*(a) the reasons particulars of the land have been recorded in a relevant land register;*

*(b) a description of all surface and subsurface infrastructure on the land, including details of the location, size and type of the infrastructure;*

*(c) a description of the surrounding area of the land, including a description of each of the following in the surrounding area—*

*(i) all environmentally sensitive areas;*

*(ii) the location of all water, watercourses and wetlands;*

*(iii) the location of all stormwater drainage;*

*(iv) all uses of the land, including uses that may affect the safety of the relevant land or cause environmental harm;*

*(v) all activities carried out that may affect the safety of the relevant land or cause environmental harm;*

*(d) for waste disposed of or stored on the land that contains, or may potentially contain, hazardous contaminants—*

*(i) details of the location, volume and type of the waste; and*

*(ii) details of any potential contamination of the land caused by disposing of or storing the waste on the land;*

*(e) a description of the geology and hydrogeology of the land;*

*(f) details of any environmentally relevant activities or notifiable activities carried out on the land, including the materials used and waste produced during the carrying out of the activities;*

*(g) details of any earthworks carried out on the land, including the materials used and waste produced during the earthworks;*

*(h) if work has been carried out on the land to remediate the contamination of the land— the contamination levels recorded on the land before and after the work was carried out;*

*(i) for a draft site management plan—*

*(i) the proposed objectives to be achieved and maintained under the plan; and*

*(ii) the proposed methods for achieving and maintaining the objectives; and*

*(iii) the proposed monitoring and reporting compliance measures for the land.*

Contrary to other approaches, this amendment seeks to prescribe expanded content requirements for contaminated land report within the EP Act, where it is presently across the EP Act and Environmental Protection Regulation 2008; however, no concerns about this approach were raised with the committee during its inquiry.

...

*(3) A contaminated land investigation document must be accompanied by a written certification (an auditor's certification) by an auditor verifying that the document complies with subsections (1) and (2).*

This represents a shift to mandatory certification of contaminated land investigation documents by an approved auditor, before being submitted to DEHP, to apply to all contaminated land reports regardless of the legislative trigger and process through which they are initiated (i.e. proponent initiated under the EP Act or, development approval via SPA).

In its submission, the Queensland Resource Council (QRC) advised:

*While we understand that the Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act 2012 introduced a framework for the approval and regulation of 'auditors' and we were also aware that there had been a practice of utilising third party auditors before then, our members were not anticipating in 2012 that this would translate into a requirement that only these auditors could be used for certification of contaminated land reports.*

...

*At present, auditors can be used to streamline the assessment process, but it is not the case that every document needs to have been officially signed off by an [approved by the Chief Executive] auditor. A suitably qualified person is also currently authorised.*

*The current system already allows flexibility for the proponent to engage an auditor to assist with development and implementation of contaminated land assessment at all stages of the Project, if a proponent deems it necessary. Companies have done this to provide them with greater certainty around the outcomes (given complexity of our site), however this may not be necessary for all sites. The requirement for an auditor to be involved at all stages should be able to be assessed by the proponent on a case-by-case basis, as per the current system. The proposed system may also lead to inefficiencies associated with reduced availability of auditors.<sup>32</sup>*

DEHP advised:

*The use of mandatory auditors was canvassed through the release of a consultation Regulatory Impact Statement (RIS). Most submitters generally supported this option....*

*The list of approved auditors has already doubled since the introduction of related amendments to the Sustainable Planning Regulation 2009. With the introduction of this Bill, more applications for approval as an auditor under the Environmental Protection Act 1994 are anticipated; particularly give the mutual recognition of interstate auditors where this framework is already well established.<sup>33</sup>*

This clause also removes the requirement for a soil disposal permit to transport contaminated soil to a licenced waste facility. DEHP advised that these permits duplicate other regulated waste tracking and management approvals as the source site is most likely managed under a SMP and/or Environmentally Relevant Activity (ERA) and the destination site, which can only be a Waste Disposal

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<sup>32</sup> QRC, *Submission No. 6*, p. 28.

<sup>33</sup> DEHP, 2014, *Correspondence*, 9 October.

Facility or a Regulated Waste Treatment Facility, is managed under an ERA.<sup>34</sup> Further, it is proposed that contaminated soil will be listed as a trackable waste under Schedule 7 of the *Environmental Protection Regulation 2008*. As a trackable waste, contaminated soil will be monitored and tracked from source to destination.<sup>35</sup>

Australian Contaminated Land Consultants Association (ACLCA) advised:

*In relation to the initial introduction of the disposal permit system and why it has been used so rigorously here in Queensland, the concerns that we have in regards to why this was initially implemented still exist and we are yet to get a response about how those concerns will be adequately managed.*

*The original disposal permit system, or the soil disposal permit system, was for basically managing contaminated soils from the likes of service stations and gas works—a great stack of different contaminating activities. The purpose of that initial disposal permit system was to prevent: the removal of contaminated soil to clean sites because obviously we do not want to contaminate those; the removal of contaminated soils to other contaminated sites increasing the cumulative risk to those sites; the inappropriate characterisation of contaminated soils, so it was managed by a government department to make sure it was adequately categorised; the inappropriate trucking and handling of contaminated soil; and basically a lack of understanding at the landfills about emerging contaminants and some of the types of impacts from contaminants that they may not come up against every day. The management system within EHP was derived to try to manage some of these risks. The general environmental duty still remains and I think the push towards having that manage the risk associated...*

*The other key aspect relates to the sheer amount of waste. We have waste reduction targets set here in Queensland. By removing the requirements under the waste reduction targets and the like—they talk about obviously reuse and disposal as the last option—by having landfills manage the system through waste tracking and the like, we cannot see how those waste targets can actually be met.<sup>36</sup>*

DEHP advised:

*As the Bill mentions, the soil disposal permits overlap quite a bit with the waste-tracking system, but I think what the Explanatory Notes maybe do not clarify as well as possible is the rest of the contaminated lands system that works around that in Queensland and in particular site management plans and remediation action plans. If there is a contaminated site and it has to be remediated, a remediation action plan will be prepared. That articulates where the soil can go. That is articulated in a document agreed to by the department. At the moment, we also put on a soil disposal permit. Then we also track it through the waste-tracking system. So there are multiple systems. As was identified, the soil disposal permit system is not used elsewhere. So we believe that, between the remediation action plan framework and the waste-tracking system, we can adequately cover all the risks associated with that.*

....

*The remediation action plan also assesses what should happen with the contaminated soil. Our intention is always a hierarchical situation, as was outlined. That soil is remediated on*

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<sup>34</sup> DEHP, 2014, *Draft public briefing transcript*, 10 September, pp. 2,5,7.

DEHP, 2014, *Technical Services for Contaminated Land: Decision Regulatory Impact Statement*, p. 20.

<sup>35</sup> DEHP, 2014, *Technical Services for Contaminated Land: Decision Regulatory Impact Statement*, p. 20.

<sup>36</sup> Pomeroy, M. 2014, *Draft public hearing transcript*, 15 October, p. 11.

*site wherever possible and the landfill is the last alternative. That already happens in that remediation action plan.*<sup>37</sup>

ACLCA also highlighted that the permit system was relevant to cross-border issues with transportation of contaminated soil, advising:

*The other aspect is that, unlike other states that impose large levies on contaminated soil, we do not have those levies here in Queensland. For example, the removal and disposal of similar types of material across the border in New South Wales would incur costs of \$1,000 or \$1,500 a tonne. Here in Queensland we might be looking at \$30 to \$50 per tonne for disposal. There are two aspects that come with that. It becomes cost efficient for contaminated soil to be moved across the country and be disposed in our landfills, and the end result of that is that obviously we are picking up a lot more contaminated waste than we would otherwise. The other thing is that the price of waste disposal locally here as our landfills fill up becomes a burden on our local industry. In the past there was an informal control system at the border through this disposal permit system whereby, before the landfill could accept, there was a disposal permit acceptance that was required. Without that system, we do not know how that gate I guess can be controlled.*<sup>38</sup>

DEHP advised:

*Interstate waste generally is a general problem in terms of not being able to address that. As you are aware, the waste levy was removed. So there is a disparity of costs in Queensland. However, the general response to date is that that is a commercial decision of operators as to where they dispose of their waste. As long as they are disposing it in an appropriately licensed landfill, that is considered to be appropriate.*<sup>39</sup>

...

*New South Wales and Victoria also have a very comprehensive contaminated land framework. There is also a national framework. There is also a national environmental protection measure for contaminated land. So we all have very consistent kinds of frameworks for operating with that so we would expect that that process had been dealt with in New South Wales and only soil that is allowed to be disposed of through that framework may find its way into Queensland as the ultimate disposal point.*

....

*If comes up from New South Wales it will be required to be tracked. At the moment, it would be required to be tracked if it contains certain types of contaminants, which are actually quite extensive, in our regulated waste list. Additionally, they will need to take it to a landfill that has acceptance criteria. That is something that goes on to the environmental authority that says what kind of materials may be accepted in a landfill. So it would have to go to a landfill that is able to accept contaminated soil with those particular contamination characteristics.*

.....

*They are implementing in New South Wales what they are calling a proximity principle, where people cannot take waste out of the particular proximity—I cannot remember the distance at the moment; it is about 200 kilometres—if there is an appropriate facility for dealing with it in their local area. So that will affect interstate waste transport.*<sup>40</sup>

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<sup>37</sup> Nichols, E. 2014, *Draft public briefing transcript*, 15 October, p. 5.

<sup>38</sup> Pomeroy, M. 2014, *Draft public hearing transcript*, 15 October, pp. 11-12.

<sup>39</sup> Nichols, E. 2014, *Draft public briefing transcript*, 15 October, p. 5.

<sup>40</sup> Nichols, E. 2014, *Draft public briefing transcript*, 15 October, pp. 8-9.

When asked about the possibility that contaminated material can be dumped before the department receives the paperwork, DEHP advised:

*...potentially, yes, that would be the case. That is also conceivable with the soil disposal permit, though, if somebody is intent on breaching the law.*<sup>41</sup>

In its submission to the committee, the Brisbane City Council noted some potential issues arising from the removal of the soil disposal permits:

*Local governments use soil disposal when dealing with contaminated land listed on either the EMR or CLR.*

....

*There may be circumstances where a landfill will be unable to accept contaminated soil when expressed as a particular regulated waste type that it was able to accept in the past.*<sup>42</sup>

DEHP advised:

*Consultation has shown that in practice many operators also track contaminated soil which is already technically a waste. As such, consistent practice is not occurring. These amendments will address this.*

*The department will be assessing whether any changes are necessary to the landfill acceptance criteria prior to commencement of the waste tracking requirements for contaminated soil. This will include the ability of regional landfills to accept this type of material so that operators are prepared for the changes.*<sup>43</sup>

The committee also heard different views from submitters and DEHP of the timeframes for notification in respect of contaminated land, which appeared to be a matter of interpretation of the provisions.

For example, Brisbane City Council interpreted the provisions as:

*...for the happening of events or changes in the condition of contaminated land, the notification time is only 24 hours.*<sup>44</sup>

Similarly, QGC also view the provision as offering limited time.

*The Explanatory Notes identify that the new requirement to notify is consistent with the current requirement under the current section 371 in respect of contaminated land. In fact, the timeframe for notification under that provision is 22 business days, which is a significantly longer period than 24 hours.*<sup>45</sup>

In being advised of these comments, DEHP clarified that:

*The timeframe for the duty to notify of serious or material environmental harm in chapter 7, Part 1 of the Environmental Protection Act 1994 is 24 hours from the time it comes to the person's attention. This was inconsistent with the duty to notify in section 372(2) of the pre-amendment Environmental Protection Act 1994 (which was 22 business days). The 24 hour timeframe is appropriate for the duty to notify about material or serious environmental harm, whether that harm is caused by an activity, an event, or a change in the condition of the land.*

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<sup>41</sup> Nichols, E. 2014, *Draft public briefing transcript*, 15 October, p. 8.

<sup>42</sup> Brisbane City Council, *Submission No. 5*, pp. 7-8

<sup>43</sup> DEHP, 2014, *Correspondence*, 9 October.

<sup>44</sup> Brisbane City Council, *Submission No. 5*, p. 4.

<sup>45</sup> QGC, *Submission No.9*, p. 6.

*The duty to notify that a notifiable activity is being carried out is an administrative procedure, with the intent that this is not required within 24 hours, but within 20 business days. Timeframes for administrative procedures of this nature are usually 20 business days in the rest of the Environmental Protection Act 1994.*<sup>46</sup>

#### **Committee Comment**

The committee notes the concerns by stakeholders with respect to market supply of approved auditors; however the committee concurs with DEHP's view that supply will increase to meet demand within an acceptable period that will support the practical implementation of the change from voluntary to mandatory certification of contaminated land investigation documents by approved auditors. The committee further notes the role of professional membership groups that exist to develop and support capacity among its members, including in providing information and training on changes in relevant legislation and policy.

The committee notes the supplementary advice provided by DEHP during the public briefing with respect to the governance across the contaminated land framework, specifically how the existing remediation action plan in conjunction with the waste tracking system is in place to assess and determine the management of contaminated soil. While key to the framework, this was not evident from the Explanatory Notes accompanying the Bill and may have contributed to differing views as to the soundness of the proposed change to remove soil disposal permits. With this further information, the committee considers on balance that there is opportunity to remove the permits from the governance framework, and deliver a more streamlined and integrated approach to the management of contaminated soil.

The committee notes that amendments to the Environmental Protection Regulation 2008 will be required at the same time as the commencement of the amendments for contaminated land in this Bill, so that there is no gap or overlap in requirements.

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<sup>46</sup> DEHP, 2014, *Correspondence*, 9 October.

## 6. *Environmental Protection Act 2009 - Enforceable undertakings*

Enforceable undertakings are promises ‘offered’ by an individual or firm who has allegedly breached the law, and accepted by a regulator. They operate as an agreement between the individual or firm and the regulator, in which the former undertakes to do certain activities, to redress the alleged breach, comply in the future or take other actions to enhance compliance outcomes.

The enforceable undertaking serves as a substitute for prosecution, thus is a form of settlement. If contravened, the undertaking is enforceable in court, often with additional penalties for the contravention of the undertaking.

Enforceable undertakings are designed to secure quick, more predictable and effective remedies for contraventions of regulatory provisions without the need for court proceedings, and have potential to provide non-adversarial and constructive solutions to regulatory compliance issues.

### **Development and use of enforceable undertakings**

Enforceable undertakings are an Australian invention. The concept was developed by the Australian Competition and Consumer Commission (ACCC) and legislated for the first time in 1993 in the *Trade Practices Act 1974* (Cth). Section 87B of the *Trade Practices Act 1974* formalised the ACCC’s practice of accepting ‘administrative resolutions,’ or deeds of settlement, from parties in lieu of, or in addition to, prosecution. The Australian Securities and Investments Commission (ASIC) received the legislative power to accept enforceable undertakings in 1998. In more recent years, many other federal and state regulatory agencies have been given the power to accept enforceable undertakings.

Enforceable undertakings are already used in Queensland law in the *Electrical Safety Act 2002* (Part 3), *Water Efficiency Labelling and Standards Act 2005* (Part 8, Division 3), *Work Health and Safety Act 2011* (Part 11), *Fair Trading Act 1989* (for matters arising other than under Australian Consumer Law – section 62); *Property Agents and Motor Dealers Act 2000* (Chapter 16, Part 2); *Tourism Services Act 2003* (Part 7) and *Introduction Agents Act 2001* (Part 8, Division 1).<sup>47</sup>

At their most ambitious, enforceable undertakings can be seen as a regulator-controlled model of how to ‘build’ a compliant organisation by promoting management commitment, inducing firms to ‘learn how to comply’ and to institutionalise compliance, and encouraging long-term change within the organisational culture.<sup>48</sup> The ASIC states that:

*We see enforceable undertakings as an important component in our array of enforcement remedies to influence behaviour and encourage a culture of compliance for the benefit of all participants in the market we regulate.*<sup>49</sup>

The Office of Fair and Safe Work Queensland (OFSWQ) advises:

*Enforceable undertakings are consistent with a graduated approach to enforcement... They must be recognised as part of a suite of enforcement tools. They might be the only response to a breach or may complement other action (including enforcement notices).*

*By involving the alleged offender in developing the conditions of the enforceable undertaking, ongoing commitment to sustainable improvements is more likely. Depending on the nature of the undertaking it can provide significant benefits, not only to the*

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<sup>47</sup> Environmental Protection and Other Legislation Amendment Bill 2014, Explanatory Notes, p. 51.

<sup>48</sup> Johnstone, R and King, M, ‘A Responsive Sanction to Promote Systematic Compliance?: Enforceable Undertakings in Occupational Health and Safety Regulation’ (2008) 21 *Australian Journal of Labour Law* 280-315, citing Parker, C, *The Open Corporation: Effective Self-regulation and Democracy*, Cambridge University Press, Cambridge, 2002, pp. 43-61, and Hutter, B, *Regulation and Risk: Occupational Health and Safety on the Railways*, Oxford University Press, Oxford, 2001, pp. 301-303.

<sup>49</sup> ASIC, 2007, *Enforceable Undertakings: An ASIC Guide*, (Commonwealth of Australia), at 4, online at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/EU\\_guide.pdf/\\$file/EU\\_guide.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/EU_guide.pdf/$file/EU_guide.pdf)

*immediate workplace and workers, but to the relevant industry and the community as a whole.*<sup>50</sup>

As Macrory noted in his extensive review of the United Kingdom's system of regulatory sanctions, enforceable undertakings:

*...represent a powerful alternative to traditional coercive, regulatory enforcement action, and have the potential of imposing fit-for-purpose sanctions which are more satisfying for both offender and the victims of non-compliance.*<sup>51</sup>

This view is shared by Queensland's OFSWQ:

*Not only are enforceable undertakings less adversarial than prosecution, they also enable regulators to tailor their response to the particular circumstances and management capacities of the regulated enterprise. They can, for example, focus on defects in management systems and structures and how these might be overcome (for instance, a requirement to implement systematic work health and safety management, with implementation subjected to third party audit).*<sup>52</sup>

Firms interviewed as part of a study undertaken by Johnstone and King (a project of the Melbourne University and Griffith Law School) indicated that their motives for applying for an undertaking were to avoid conviction, coupled with an aspiration or identified need to improve compliance processes and systems within the business.

*Essentially . . . we had a management view that there were certain areas that did need a lift in their safety approach, and an enforceable undertaking would be a good vehicle for giving that impetus. There was the other view that a prosecution would involve a penalty which essentially is money that is foregone with no real benefit.*

*Whereas the money spent during the enforceable undertaking, while considerably more than the penalty, was money that was essentially invested back into the business in the process of making the business safer, and some of those safety measures actually made aspects of the business more efficient.*<sup>53</sup>

The OFSWQ estimates that, of the 121 enforceable undertaking applications accepted by the regulator since 2004,

*[t]hese accepted enforceable undertakings have contributed over \$25M in safety benefits to workers, workplaces, relevant industry sectors and the community...Alternatively, if these matters were successfully prosecuted in court, penalties of approximately \$7M would have applied, with no resulting safety benefits.*<sup>54</sup>

### **Use of enforceable undertakings in environmental legislation**

As noted by Longo, the broad types of obligation provided in enforceable undertakings apply well to environmental regulation as they address each of the following: i) promise to cease the unlawful conduct, ii) measures to protect against recurrences of the misconduct, and iii) remedial action to address any harm caused.<sup>55</sup>

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<sup>50</sup> OFSWQ, 2014, *Tabled document*, 15 October, pp. 2-3.

<sup>51</sup> Macrory, R. 2006, *Regulatory Justice: Making Sanctions Effective*, Cabinet Office: Better Regulation Executive, UK, November 2006, para 4.18.

<sup>52</sup> OFSWQ, 2014, *Tabled document*, 15 October, p. 2.

<sup>53</sup> Johnstone, R. and King, M., 2008, *A Responsive Sanction to Promote Systematic Compliance?: Enforceable Undertakings in Occupational Health and Safety Regulation* in 21 *Australian Journal of Labour Law*, 280-315., pp. 303-304.

<sup>54</sup> OFSWQ, 2014, *Tabled document*, 15 October, p. 4.

<sup>55</sup> Longo J, *Enforceable Undertakings: Quicker and More Flexible Regulatory Responses* in 16 *Company Director* 2002, pp. 28-29.

Enforceable undertakings are used for environmental matters by the Commonwealth Government under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*<sup>56</sup>, New South Wales Government under the *Protection of the Environment Operations Act 1997 (NSW)*, and Victorian Government under the *Environment Protection Act 1970 (Vic)*.<sup>57</sup>

### **Current enforcement actions under the EP Act in Queensland**

The range of enforcement actions presently available to DEHP includes:

- warning notices and letters
- penalty infringement notices
- administrative notices and orders made under legislation
- proceedings for court orders provided for under legislation
- prosecution, and
- suspension or cancellation of permit, licence or authority.

Sometimes a number of enforcement actions may be taken in combination.<sup>58,59</sup>

A previous review by the Queensland Audit Office (QAO) found that DEHP's enforcement actions in respect of the resources and waste industries are generally proportionate and commensurate to circumstances; though it found that actions were not always timely or effective in achieving compliance.<sup>60</sup>

The rationale for the introduction of enforceable undertakings through this Bill is consistent with the broader experience of undertakings and issues above, in stating:

*The Bill also introduces enforceable undertakings as a flexible and cost effective enforcement alternative where this may enable a better overall regulatory outcome.*<sup>61</sup>

### **Key provisions and issues with the proposed amendments to introduce enforceable undertakings**

The Bill introduces enforceable undertakings as an enforcement alternative for breaches under the EP Act (insertion of new chapter 10, part 5). The Explanatory Notes advise that the proposed new sections of the EP Act are based on relevant sections of the *Workplace Health and Safety Act 2011*, with minor changes to reflect drafting styles but which are not intended to change the effect or interpretation of the provisions.<sup>62</sup>

#### **Clause 102 Insertion of new ch 10, pt 5 Chapter 10—**

##### *insert— Part 5*

##### ***Enforceable undertakings***

##### ***507 Administering authority may accept enforceable undertakings***

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<sup>56</sup> The Commonwealth approach does not require corrective or affirmative compliance action. Under Sections 486DA and 486DB of the Commonwealth EPBC Act, an enforceable undertaking is limited to a written undertaking to make a monetary payment to the Commonwealth or to another organisation for the purpose of protection and conservation of a protected matter.

<sup>57</sup> Environmental Protection and Other Legislation Amendment Bill 2014, Explanatory Notes, pp. 51-52.

<sup>58</sup> Enforcement actions do not include measures intended only to inform or educate a person, and do not include investigations into alleged breaches of legislation although such investigations may be required to inform enforcement actions.

<sup>59</sup> DEHP, 2014. *Enforcement Guidelines*, p. 2.

<sup>60</sup> QAO, 2013, *Report No. 15: 2013-14 Environmental regulation of the resources and waste industries*, p. 34.

<sup>61</sup> Environmental Protection and Other Legislation Amendment Bill 2014, Explanatory Notes, p. 3.

<sup>62</sup> Environmental Protection and Other Legislation Amendment Bill 2014, Explanatory Notes, pp. 53-54.

(1) The administering authority may accept a written undertaking (an **enforceable undertaking**) made by a person in relation to a contravention or alleged contravention by the person of this Act, other than an indictable offence.

(2) An enforceable undertaking must be—

- (a) in the approved form; and
- (b) accompanied by the fee prescribed by regulation.

(3) The administering authority must give the person written notice of—

- (a) the administering authority's decision to accept or reject the enforceable undertaking;
- (b) the reasons for the decision.

(4) The administering authority must not accept the enforceable undertaking unless the administering authority reasonably believes that the undertaking will—

- (a) secure compliance with the Act; and
- (b) enhance the protection of the environment.

(5) If the administering authority decides to accept the enforceable undertaking, the administering authority must publish a copy of the undertaking on the administering authority's website.

(6) The administering authority may accept an enforceable undertaking in relation to a contravention or alleged contravention before proceedings in relation to the contravention end.

(7) If the administering authority accepts an enforceable undertaking before the proceedings end, the administering authority must take all reasonable steps to have the proceedings discontinued as soon as possible.

In terms of the principles/objectives in (4) above, the Victorian *Environmental Protection Act 1970* (section 67D(1)(b)) explicitly requires that the relevant authority agrees to an enforceable undertaking 'having regard to the criteria specified in guidelines' made under the same Act, arguably providing a clearer legislative requirement for the guidelines, and accordingly undertakings, to meet principles and objectives of achieving a beneficial and lasting compliance outcome.

Further to this and (1) above, the Victorian Enforceable Undertakings Guidelines also preclude enforceable undertakings in other circumstances.

*EPA considers that enforceable undertakings are not appropriate where any of the following circumstances exist:*

- serious breaches of the EP Act involving high or serious levels of culpability
- multiple serious breaches or systemic failures
- significant incidents involving considerable public interest requiring a transparent hearing in court
- applicants have been the subject of previous prosecutions of a serious nature
- EPA cannot be satisfied of ongoing compliance.<sup>63</sup>

### **508 Effect of enforceable undertaking**

(1) An enforceable undertaking takes effect when the administering authority gives the person who made the undertaking notice of the decision to accept the undertaking.

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<sup>63</sup> Victorian Government, 2012, *Environment Protection Act 1970 Enforceable Undertakings Guidelines*.

*(2) No proceedings for a contravention or alleged contravention of this Act may be taken against the person in relation to the contravention that is the subject of the undertaking if the person is complying, or has complied, with the undertaking.*

*(3) The making of an enforceable undertaking does not constitute an admission of guilt by the person making the undertaking.*

Further to this, in its submission, QELA suggests:

*...that similar to s.351 of the EP Act (program notice privileged), provision be made so that enforceable undertakings made and any documents submitted with enforceable undertakings made are privileged. Absent such a provision, the administering authority may reject the enforceable undertaking and rely on the evidence set out in the enforceable undertaking in a prosecution.<sup>64</sup>*

DEHP advised:

*This would be contrary to the intent of the undertaking, since any action about the original offence would have to introduce the undertaking as evidence for section 510 to operate.<sup>65</sup>*

### **509 Withdrawal or variation of enforceable undertaking**

*(1) A person who has made an enforceable undertaking may at any time, with the written agreement of the administering authority—*

*(a) withdraw the undertaking; or*

*(b) vary the undertaking.*

*(2) However, the provisions of the undertaking may not be varied to provide for a different alleged contravention of the Act.*

*(3) The administering authority must publish notice of the withdrawal or variation of an enforceable undertaking on the administering authority's website.*

### **510 Contravention of enforceable undertaking**

*(1) The administering authority may apply to a Magistrates Court for an order if a person contravenes an enforceable undertaking.*

*(2) If the court is satisfied that the person who made the enforceable undertaking has contravened the undertaking, the court, in addition to imposing any penalty, may make 1 or both of the following orders—*

*(a) an order directing the person to comply with the undertaking;*

*(b) an order discharging the undertaking.*

*(3) Also, the court may make any other order that the court considers appropriate in the circumstances, including an order directing the person to pay to the State—*

*(a) the costs of the proceedings; and*

*(b) the reasonable costs of the administering authority in monitoring compliance with the enforceable undertaking in the future.*

*(4) Nothing in this section prevents proceedings being taken for the contravention or alleged contravention of this Act to which the enforceable undertaking relates.*

The Brisbane City Council submission recommended that:

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<sup>64</sup> QELA, *Submission No. 3*, p. 3.

<sup>65</sup> DEHP, 2014, *Correspondence*, 9 October.

*Costs of any proceedings should be payable to the entity that brought the proceedings.*<sup>66</sup>

Similarly, the Environmental Defenders Office of Queensland (EDOQ) recommended that:

*...proposed s.510(1) be broadened to allow third parties standing to apply for an order if a person contravenes an enforceable undertaking. This will alleviate pressure on the administering authorities to monitor and enforce all enforceable undertakings, better ensure compliance and ensure that potential harm is limited.*<sup>67</sup>

DEHP responded that it:

*...agrees that the order to pay costs to the State should be amended to an order to pay costs to the administering authority...[but that] the undertaking is an agreement between the administering authority and the alleged offender; therefore, it is only appropriate for the administering authority to enforce compliance with the undertaking.*<sup>68</sup>

Monitoring compliance with agreed undertakings appears critical to the effectiveness and confidence in enforceable undertakings; yet the few empirical studies carried out on enforceable undertakings suggest that the weakest point in processes for implementing enforceable undertakings is auditing and monitoring compliance with the terms of undertakings. This is consistent with review of other monitoring activities.<sup>69</sup>

In its submission to Fair Work Australia on the model national workplace health and safety legislation (which proposed introduction of enforceable undertakings nationally), the Queensland Government commented:

*Enforceable undertakings should be consistently used, not over-utilised, open to public scrutiny (for example, via the regulator's website), entered into voluntarily and should require comprehensive systematic approaches to [occupational health and safety (OHS) Management]. OHS regulators must have specialist in-house staff to oversee the implementation of enforceable undertakings, and must develop auditing criteria, oversee the appointment of, and ensure the independence and quality of work of, auditors, and strongly enforce contraventions of undertakings.*<sup>70</sup>

The OFSWQ advised the committee:

*Strict monitoring of the agreed terms and time frames of an enforceable undertaking are essential to avoid it being seen as a soft option.*

.....

*Terms of the [OSWQ enforceable undertakings] are robust and contain clear, positive language and time frames that ensure compliance is able to be accurately monitored and enforcement action taken where appropriate. All of the [OSWQ enforceable undertakings] contain a commitment to implement or maintain a safety management system and to have that system audited annually by an auditor with specified qualifications. Essentially, there is a two-tiered approach to compliance monitoring in that the enforceable undertaking is monitored by us, the department, as well as an independent auditor.*<sup>71</sup>

#### **Clause 104 Amendment of s 548 (Chief executive may make guidelines for administering authorities)**

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<sup>66</sup> Brisbane City Council, *Submission No. 5*, p. 6.

<sup>67</sup> EDOQ, *Submission No. 11*, p. 1.

<sup>68</sup> DEHP, 2014, *Correspondence*, 9 October.

<sup>69</sup> QAO, 2013, *Report No. 15: 2013-14 Environmental regulation of the resources and waste industries*, chapter 3.

<sup>70</sup> Queensland Government Submission to the National Review into Model OHS Laws, p. 33 (<http://www.safetyrisk.net/wp-content/uploads/downloads/2010/11/qgsub-nationalohsreview.pdf>)

<sup>71</sup> Blackwood, S. 2014, *Draft public briefing transcript*, 15 October, p. 2.

Section 548(1) and (2)—

*omit, insert—*

(1) The chief executive may make guidelines about—

- (a) how an administering authority complies with a regulatory requirement; or
- (b) when an administering authority may accept enforceable undertakings.

(2) The administering authority must follow any guidelines made by the chief executive.

The use of statutory guidelines for enforceable undertakings is consistent with approaches elsewhere and provide accountability to support public confidence in the process of accepting or rejecting applications.

In its submission to the committee, QELA stated that:

*QELA supports the preparation of such a guideline and suggests that it would be useful for the guideline to include examples of acceptable and unacceptable terms in enforceable undertakings (such as whether enforceable undertaking can require payment of money to the regulator or others) and also the circumstances and criteria relevant to a regulator considering a request to vary or withdraw an enforceable undertaking.*

.....

*In the absence of any appeal or review rights, QELA reiterates the importance for the preparation of guidelines and other explanatory materials to inform persons about when enforceable undertakings are appropriate and how an application for an enforceable undertaking will be assessed.<sup>72</sup>*

The regulatory literature and the OFSWQ experience with enforceable undertakings suggest a number of important features required of an effective, transparent and credible approach. These include that enforceable undertakings:

- bear a clear and direct relationship to the alleged breach and measures undertaken are proportionate to the severity of the breach
- generally require a statement of regret or acknowledgement of the contravention; and assurances about future behaviour of the organisation
- generally require a systemic components such as compliance program, implementation and/or upgrading of monitoring systems
- deliver benefits beyond compliance such that actions actually address the issues underlying/causing non-compliance and, in many cases, have a public/community benefit component, for example funding for industry education programs, safety advertisements in industry magazines or research into preventative schemes
- are assessed and decided by appropriately qualified person, typically Minister or executive officer or panel of experts or compliance committees<sup>73</sup>
- represent genuine negotiated resolution to a regulatory compliance problem which involves/engages senior management and compliance managers of the organisation/firm and often the affected persons/stakeholders (of the alleged breach)

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<sup>72</sup> QELA, *Submission No.3*, pp. 3-4.

<sup>73</sup> For example, the Victorian Government's 'Enforceable Undertakings Guidelines' requires that the decision whether or not to accept an enforceable undertaking and the assessment of draft/final enforceable undertaking offers must be made in consultation with an 'EPA Enforcement Review Panel' which is an independent expert panel who advise EPA on enforceable undertaking matters.

- are accepted in accordance with published guidelines which clearly outline the circumstances when an enforceable undertaking will be accepted, outline the decision and assessment criteria and provide examples what is considered acceptable measures,<sup>74</sup> and
- are listed on a public register for the purposes of public scrutiny and transparency.

At an operational level, jurisdictions using enforceable undertakings appear to approach their assessments with the help of compliance panels or enforcement committees/advisors. The OFSWQ advised the committee:

*In terms of transparency and accountability, the administrative practice of the department has proposed that undertakings be examined by a group of experts, reviewed by three and then come to the regulator.<sup>75</sup>*

In response to the committee request for advice on possible fundamental legislative principles, DEHP advised:

*The department is considering release of a non-statutory guideline initially to provide guidance on the process and decision making framework, with the guideline developed by the Victoria EPA as the benchmark. Following a review (and stakeholder feedback) regarding its progress and use, a statutory guideline will then be finalised in accordance with section 548 of the Environmental Protection Act 1994.<sup>76</sup>*

The guidelines provided for under this Bill are not yet available to enable the committee and stakeholders and opportunity to further assess the use and appropriateness of enforceable undertakings.

However, DEHP advised the committee that:

*There are definitely going to be guidelines, exactly along the lines that the workplace health and safety department representatives outlined. That is the exact sort of thing that we think is necessary for us to be able to implement them properly. We intend on taking their experience and applying it in our own situation.<sup>77</sup>*

#### **Committee Comment**

The committee supports the introduction of enforceable undertakings through this Bill as a new enforcement alternative, where this may enable a better regulatory outcome, both in comparison to prosecution as well as the potential for investment in improved practices.

The committee accepts the approach outlined with respect to the use of a published guideline, to set out relevant matters relating to the acceptance or rejection of an enforceable undertaking. The committee is satisfied with DEHP's advice as to the benchmarks available upon which to base a guideline under the EP Act.

In terms of its implementation, the committee notes that the department has proposed a two stage approach to finalising the guideline, involving an initial non-statutory guideline and then preparation of the final statutory guideline following a process review. The committee does not consider this necessary for two reasons. Firstly, information from like and dislike areas where enforceable undertakings are already in place is available against which to model and benchmark the system, which is the department's intent. Secondly, given the length of time involved in an enforceable undertaking, there would be a reasonable delay before a review can usefully occur and therefore the guideline could be finalised. It is the committee's view therefore that a statutory guideline would not

<sup>74</sup> The Victorian EP Act (s67D) requires that the administering authority may agree to an Enforceable Undertaking only after having regard to the criteria specified in the Guidelines which are made under s67F of the same Act.

<sup>75</sup> OFSWQ, 2014, *Tabled document*, 15 October, p. 3.

<sup>76</sup> DEHP, 2014, *Correspondence*, 9 October.

<sup>77</sup> Nichols, E. 2014, *Draft public briefing transcript*, 15 October, p. 10.

negatively affect the capacity for review after a reasonable period, but may support greater certainty and adoption of enforceable undertakings as an alternative to prosecution in the short-term.

The committee further believes that consideration should be given to the commencement of these provisions by proclamation, rather than on assent as is proposed in the Bill, to allow the guidelines to be finalised, given the fundamental nature of the guidelines' content to the fair administration of enforceable undertakings.

The committee accepts the evidence provided during its inquiry as to the importance of monitoring and audit of enforceable undertakings to support their implementation as intended, that is, that the use of enforceable undertakings is not seen as a soft option but rather delivers resolutions to regulatory compliance problems and benefits beyond compliance. The committee believes that, as part of implementation planning, the department should consider and determine its approach and business systems requirements to support monitoring, auditing and evaluation of the implementation of enforceable undertakings. This may include consideration of the two-tiered approach adopted by the Office of Fair and Safe Work Queensland, but may also include consideration of other options based on the skills and resources available within the department and industry.

**Recommendation 5**

The committee recommends that clause 102 of the Bill be amended to replace 'State' with 'administering authority', to correct the inconsistency in the terms used in this section.

**Recommendation 6**

The committee recommends that the department consider making a statutory guideline in the first instance, rather than non-statutory guidelines initially, so as to support greater certainty and adoption of enforceable undertakings as an alternative to prosecution.

**Point of clarification**

The committee invites the Minister and department, as part of implementation planning, to consider its approach and business system requirements in support of effective monitoring, auditing and evaluation of the implementation of enforceable undertakings.

**Recommendation 7**

The committee recommends that the Minister consider an amendment to clause 2 of the Bill to provide that the introduction of enforceable undertakings commence by proclamation, when the Minister and department are fully confident that the guidelines and related business processes and systems are in place.

## 7. Waste Reduction and Recycling Act 2011

### End of Waste Framework (Beneficial Use Approvals)

The *Waste Reduction and Recycling Act 2011* (WRRRA) is the primary legislative instrument governing the management of waste in Queensland. The objective of the Act is to provide a single, consolidated approach to waste management and reduction in Queensland.

The WRRRA promotes higher resource recovery and recycling rates and aims to transform the perception of waste from being seen as ‘waste’ to being valued as a ‘resource’. Consistent with this principle, an approval of a resource for beneficial use (otherwise known as beneficial use approvals or BUAs) is given where it is considered that a waste has a beneficial use. In approving a waste, conditions under which the resource is to be used are often imposed on the approval holder.

An approval to reuse a waste material/product is only necessary for certain types of wastes referred to as regulated wastes (as listed in Schedule 7 of the *Environmental Protection Regulation 2008*). Examples of wastes that can be approved as a resource include concrete washout wastes, biosolids, foundry sand, fly/bottom ash and other coal combustion products or coal seam gas water.

Once a waste becomes a resource it is not subject to waste management controls and can then be governed under other applicable controls, for example products legislation, and the general environmental duty under section 319 of the EP Act. For example, fly ash would be a waste and need to be managed/treated as a hazardous waste until it becomes a raw material (that is, a resource) at a concrete manufacturing plant.

There are currently two types of BUAs – general and specific.

A general BUA has clear standards which, if complied with, do not require individual assessment by the department. Anyone can operate under this type of approval, provided they comply with the conditions of the approval. The following general beneficial use approvals have been issued:

- Sugar mill by-products
- Coal combustion products
- Irrigation of associated water (including coal seam gas water), and
- Other associated water uses (including coal seam gas water).

In most cases it is a requirement that operators notify the department prior to starting or within a stated period under the general approval.

Specific approvals are those which a company or individual may apply for specifically relating to their proposed activity and requires case-by-case assessment and approval by the department. The WRRRA outlines the application and approval process for specific BUAs.

In 2013 Sinclair Knight Merz (SKM) was commissioned to undertake an assessment of the current BUA process in direct response to industry concerns that *‘the current process is onerous, costly and complex and often required more stringent management than if the material was managed and disposed of as a waste or a regulated waste’*.<sup>78</sup>

The SKM assessment found that there was significant evidence to support the claims of industry and agreed that the *‘BUA process is not sufficiently robust as a mechanism to support the aims and objectives of the WRR Act’* and was acting as a disincentive to industry to take up waste and resource recovery and new market opportunities.<sup>79</sup> SKM made a number of recommendations to reform the

<sup>78</sup> SKM, 2013, *‘Assessment of Queensland’s Beneficial Use Approval Process: Final Report’*, p. 4.

<sup>79</sup> SKM, 2013, *‘Assessment of Queensland’s Beneficial Use Approval Process: Final Report’*, p. 6.

beneficial use regulatory framework to ensure that industry are supported in their efforts to manage wastes as resources and facilitates positive waste reuse and market development.<sup>80</sup>

### Key provisions

Clause 167 amends the WRRRA to replace the existing chapter 8 'Approval of resource for beneficial use' with a new chapter 8 'Provisions for end of waste'. Under proposed new chapter 8 provisions, the existing BUA approach is replaced with 'end of waste codes and approvals'.

New section 155 describes the purpose of chapter 8. The purpose of this chapter is to enable the development of end of waste codes and end of waste approvals, which will define when and under what circumstances a waste stops being a waste under section 13 of the EP Act, and becomes a resource.

This section also defines 'resource'. A waste becomes a resource '*when it meets the conditions or requirements stated in an end of waste code or end of waste approval*'.

Section 156 provides definitions for terms used in chapter 8. In particular, it defines registered code user as follows:

***registered code user*** means a person who is registered for an end of waste code under section 173B.

Section 157 ensures that only registered code users can operate under an end of waste code, whilst section 158 creates an offence for failing to comply with the requirements specified in an end of waste code. If a person complies with the code, but fails to register with the department, the waste is still considered to be a waste (not a resource) and continues to be managed by any applicable waste management controls. Therefore, by default, if an unregistered person does not manage the waste in accordance with other regulatory requirements, they will be in breach of the WRRRA (and potentially the EP Act) and penalties will apply.

Section 159 enables the chief executive to make end of waste codes and end of waste approvals to enable waste to be classified as a resource. The codes and approvals will provide a definitive end point for when a waste ceases to be a waste, and any risk to the environment will be minimised through a defined set of requirements and conditions.

The Explanatory Notes outline that:

*End of waste codes will be outcome-focused in that they will specify outcomes that need to be achieved in order for a waste to be deemed a resource. That is, it is not intended that requirements in the code will regulate the process by which a waste becomes a resource. It is the responsibility of the registered code user to assess the most efficient and effective way to achieve the outcomes specified, provided that they comply with any other relevant management controls. This is consistent with the department's Regulatory Strategy.<sup>81</sup>*

The process for making an end of waste code is outlined in new part 2, division 1. The process commences with the chief executive issuing a notice of intent to make an end of use waste code and inviting submissions (section 160). After considering submissions, the chief executive may decide if it is necessary to prepare a draft end of waste code (section 161). The chief executive will then appoint a technical advisory panel to prepare the draft end of waste code (section 162).

The introduction of a technical advisory panel to assist in the development of end of waste codes and provide advice on other end of waste matters is intended to reduce administrative burden on the department's resources and enable industry expertise to be incorporated into the process of developing end of waste codes and driving industry development. There are no details in relation to the forming and relevant expertise of the panel, as this is to be included in regulation.

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<sup>80</sup> SKM, 2013, 'Assessment of Queensland's Beneficial Use Approval Process: Final Report', p. 6.

<sup>81</sup> Environmental Protection and Other Legislation Amendment Bill 2014, Explanatory Notes, p. 95.

Section 163 is a list of matters that the chief executive and technical advisory panel must have regard to when making a draft end of waste code. These matters are considered critical to maintaining good environmental outcomes, while allowing value to be added to waste and allowing more wastes to be managed as resources. Matters for consideration include:

- (a) *the objects of the Waste Reduction and Recycling Act 2011;*
- (b) *the proposed use of the resource under the proposed end of waste code;*
- (c) *whether the proposed use of a particular resource, may or is likely to cause serious or material environmental harm;*
- (d) *the waste and resource management hierarchy; and*
- (e) *any other matter prescribed in regulation.*

Section 165 describes the process for public notification of a draft end of waste code. Once the chief executive is satisfied with the draft end of waste code, the chief executive is required to publish the draft code for public consultation on the department's website for the duration of the consultation period.

Section 166 prescribes the process for finalising an end of waste code. After considering the submissions and any other relevant matters, the chief executive may approve the code and will notify the public by gazettal notice of the commencement of a new end of waste code.

Division 3, sections 167 – 173A prescribe the procedures for amending, cancelling or suspending an end of waste code. In these circumstances, the chief executive must notify each registered code user (for that code) and issue a notice of intent advising of the proposed action to amend, cancel or suspend an end of waste code. Any person may make a submission objecting to the amendment, suspension or cancellation of the code.

Division 4 outlines the process for registration as a registered code user for an end of waste code. The Explanatory Notes explain that the registration *'enables the department to monitor users to ensure registered code users are meeting the requirements in the code, and take enforcement action if they are not'*.<sup>82</sup> This division also outlines the circumstances under which the chief executive may cancel or suspend a registration.

New Part 3 outlines the process for applying for an end of waste approval. 'End of waste approvals' replace current specific BUAs, serving the same purpose/intent but with streamlined and improved application and approval processes.

Section 173I requires an application for an end of waste approval to be accompanied by a written assessment of the application from a suitably qualified person. This is a new requirement. The explanatory notes explain that *'Incorporating suitably qualified persons into the application process for an end of waste approval will reduce administrative burden on the department and ensure specialist expertise is sought early in the process in the form of a written assessment'*.<sup>83</sup> The criteria a person must meet to be a suitably qualified person and the matters to be included in the assessment by a suitably qualified person will be outlined in regulation.

Sections 173J-173M outline the processes and criteria for deciding and granting an application. Section 173N allows the chief executive to impose any conditions on an end of waste approval that they deem to be necessary or desirable, and the types of conditions that may be imposed may be prescribed by regulation.

Sections 173P and 173Q creates a new offence for failing to comply with a condition of an end of waste approval. It extends an obligation on the holder of an end of waste approval to ensure that

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<sup>82</sup> Environmental Protection and Other Legislation Amendment Bill 2014, Explanatory Notes, p. 105.

<sup>83</sup> Environmental Protection and Other Legislation Amendment Bill 2014, Explanatory Notes, p. 107.

everyone acting under the approval, such as employees and subcontractors, complies with the conditions of the approval.

### **Issues with proposed amendments to introduce the end of waste framework**

The definition for 'resource' included in the Bill is intended to make it clear when a waste stops being a waste and becomes a resource. Hence this definition is intended to also make it clear to operators the point at which the waste is longer regulated as a controlled product and compliance with hazardous waste regulation is no longer required. However, in this regard, submissions raised concern that, as currently drafted, the Bill provides no greater clarity than previously the case under the current beneficial use framework.

The definition for resource included at section 155 reflects a stage in a process rather than a defined outcome in terms of the product:

*(2) Waste stops being a waste and becomes a resource when—*

*(a) a registered code user manages the waste in accordance with an end of waste code; or*

*(b) a holder of an end of waste approval manages the waste in accordance with the approval.*

Stakeholders also expressed concern that corresponding definitions for waste and regulated waste in other areas of legislation have not been updated to reflect the intent of the amendments and, as such, there is potential for confusion and overlapping requirements to persist in the management and regulation of waste products.

For example QRC and the Waste, Recycling Industry Association of Queensland (WRIQ) submitted:

*By framing waste in terms of being a surplus to an activity, this defines a waste at its point of generation (i.e. the conclusion of the activity) rather than at the point of disposal. This means that irrespective of whether there is still a potential use or residual value of the material beyond the life of that generating activity, the material falls within the definition of waste under the EP Act. The resources industry is of the opinion that this definition is too broad in scope and unnecessarily captures material that is still a resource with residual value. This leads to perverse outcomes as it only considers the use of the material at that generation point, rather than taking a holistic view of the material, and whether third parties could use or find value in the product... It would be more effective to define waste at the point of disposal rather than generation, thus deregulating the disposal of a resource that does not meet the waste criteria.<sup>84</sup>*

*WRIQ also notes on this matter that the definition of 'product' in the Bill may not be wholly appropriate for the reclassification of wastes (see Clause 164, Amendment of Schedule, Dictionary). Other waste-related definitions also require review, and this is a fundamental aspect of the regulation and its successful reform which has not yet been addressed.<sup>85</sup>*

The SKM report discussed this very problem in its 'assessment of Queensland's Beneficial Use Approval Process' report to DEHP:

*The existing definition of waste, specifically the definition of regulated wastes in Chapter 5, section 65 of the EP Regulations (2008) was considered to be a key limiting factor inhibiting wider application of the BUA process. Under the regulations, regulated waste is defined as "commercial or industrial waste, whether or not it has been immobilised or treated", implying that a waste remains a waste, regardless of effects to treat, process or manage the waste. The regulations therefore do not provide a clear path by which regulated waste can become 'de-regulated' leading to over-onerous conditions imposed as part of a BUA*

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<sup>84</sup> QRC, Submission No. 6, pp. 31-32.

<sup>85</sup> WRIQ, Submission No. 14, pp. 4-5.

*application approval on the waste generator and the end user, with respect to handling, transporting and using the resource.*<sup>86</sup>

As noted by WRIQ in its submission:

*The aim of this amendment is to help meet the objective of increased 'resource productivity' set out in the draft 'Waste Avoidance and Resource Productivity Strategy' which is due for final release in late 2014. These changes are also as a result of the 'Assessment of Queensland's Beneficial Use Approval Process' and subsequent report produced by SKM (on behalf of the Department) in June 2013... At this point, the Bill does not adequately address all of these findings from the SKM report.*<sup>87</sup>

The ambiguity which persists in relation the relationship between and the regulation of a waste and a resource leads to other unintended interpretation issues as raised in submissions. In particular stakeholders sought clarification on the intent of section 157 relating to registration of an 'end of waste code user'. Stakeholders were concerned that the current drafting implied that both the producer of the waste and the user of the treated end product/resource would be required to register under the provisions in the Bill.

For example QRC and AgForce submitted the following:

*S.157 states that if "a person sells, gives away or uses a resource under an end of waste code" they must become a registered end of waste user for the material to be classified as a product instead of a waste. This is concerning as it implies that both the user and the producer must register. This could have significant privacy issues for the resource industry where third party users may not want to register that they are receiving and using a resource that has gone through an end of waste code process, for example associated water. It would also attach a penalty for failure to register, making the process overly onerous and burdensome for third parties that may be receiving the resource for free as part of stakeholder negotiations e.g. landholders etc. This could create another hurdle in convincing the community to use such resources and seems contrary to the intention of the WRR Act, which is about encouraging re-use above disposal.*<sup>88</sup>

*AgForce through discussions with APPEA understands that it is not the intention of the amendments that either a producer of waste or an end user of the converted waste (farmer or grazier) could be required to become a registered end user and incur registration costs and reporting requirements, and that the section will be reworded to state that only suppliers of the primary resource need to be registered, not end users of the resource. If the end of waste code is designed to ensure that following waste conversion to a resource by the producer there is no risk of material environmental harm from its use, there should be no need to require further oversight of the end user, as for beneficial use of treated CSG water for irrigation.*<sup>89</sup>

DEHP confirmed that this is not the intent of the registration provisions and has agreed to review the drafting:

*The department agrees that users of a resource under an end of waste code should not have to become a registered code user for the material to be classified as a resource instead of waste.*

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<sup>86</sup> SKM, 2013, 'Assessment of Queensland's Beneficial Use Approval Process: Final Report', p. 34.

<sup>87</sup> WRIQ, Submission No. 14, pp. 3-4.

<sup>88</sup> QRC, Submission No. 6, p. 34.

<sup>89</sup> AgForce, Submission No. 13, p. 2.

*The department will seek approval to make amendments during consideration in detail to address this issue.*<sup>90</sup>

On the matter of registered code users, APPEA raised additional concern that the requirement for end of waste code users to register would increase operating costs and administrative burden for industry.

*There is currently no requirement to 'register' to operate under a general BUA. The proposed new requirement to become 'registered code user' in order to operate under an EOWC will increase costs and administrative burden for industry. APPEA insists the supplier should be exempt on the basis of having an eligible environmental authority in place.*<sup>91</sup>

DEHP noted that this requirement was however consistent with the policy intent which underpins the framework:

*Registration enables the department to undertake monitoring and compliance activities to ensure the requirements in the code are being adhered to by the registered code users.*

*Operators who are conditioned as part of an environmental authority will not be operating under an end of waste code and therefore would not be required to register.*<sup>92</sup>

WRIQ strongly supported the introduction of registration requirements for code users, however also noted the need to ensure registration processes were efficient and low cost:

*WRIQ supports the articulation of the responsibility of the waste generator for their wastes (be it in sending the wastes for disposal or for beneficial reuse – under an end of waste code/approval). A necessary part of this is the registration of all users of a resource under a waste code, and WRIQ strongly supports this element in the Bill. This permits the Department to undertake appropriate compliance activities (if required), audits and also to notify the users (and generators) of any regulatory or policy amendments relating to the use of the end of waste code – in particular, if a code is cancelled or suspended.*

...

*Registration of users (and generators) must not be onerous or costly. WRIQ recognises that the Department has the technology-facility to create an 'open register' on-line for these purposes.*<sup>93</sup>

QRC and APPEA also stated serious concerns for the compliance and penalty provisions at sections 173P and 173Q which extends liability to a registered user/authority holder for the actions of all other persons acting under an end of waste approval. It was their interpretation that this would extend such liability for the compliance of 'users' of the resource also.

For example QRC stated they had has serious concerns with this section:

*[T]his section has the capacity to act as a disincentive for our members thinking of applying for an end of waste approval. This is because s173P ties the offence under s173Q to someone 'acting under an approval' (e.g. a farmer receiving associated water). Once a proponent supplies a resource to a third party, they have no control as to how the third party uses the product.*

*... [QRC recommends] that s.173P and s.173Q be significantly amended to ensure that proponents that refine/process/treat a product are not held accountable for the activities of*

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<sup>90</sup> DEHP, 2014, *Correspondence*, 9 October.

<sup>91</sup> APPEA, *Submission No. 8*, p. 7.

<sup>92</sup> DEHP, 2014, *Correspondence*, 9 October.

<sup>93</sup> WRIQ, *Submission No. 14*, p 4.

*a user of that product, given that those actions are outside of the control of the proponent.*<sup>94</sup>

At the public briefing, Ms Hayter, QRC further commented in respect to this matter:

*Another issue is that the act currently says that if there is a misuse of what is now no longer a waste by the person who has received the waste, the supplier should be held accountable for the impacts that they may have caused on the environment. That is clearly unacceptable. Once it has left the building, it is the responsibility of the person who uses this. As I said, we have discussed these concerns with the department and we have been given some indication that they will be improved.*<sup>95</sup>

The Chair followed with a line of questioning which sought to clarify if the QRC agreed that responsibility for the end use of a treated waste (or resource) under the end of waste codes reflected 'chain of responsibility' principles, to which the QRC responded:

*I think this was with respect to when the product has been passed from the producer to the user. It depends if the product is being faultily produced or whether it is purely that the product is being used to cause environmental harm. If it has been a result of a faultily produced product, then the producer should be held accountable. However, if it is just that it has been used and it has caused environmental harm—so a good example might be associated water from a CSG operation. If it has been produced and its finance met the conditions and it causes harm being used down the process, it is not about holding the producer accountable; it is holding the user accountable, and there are already protections under the EP Act.*<sup>96</sup>

...

*I think it is about where the line is drawn and who causes the harm. I recognise that there is a moral imperative for a company to make sure that they are not selling it to Dodgy Brothers, and so it does not end up reflecting back on them. But where do you draw that line between personal responsibility or company responsibility in terms of penalties and the way the act works?*<sup>97</sup>

DEHP responded to the concerns relating to general liability of end of waste code authority holders as follows:

*Sections 173P and 173Q were not intended to make holders responsible for the activities of users but the department acknowledges that this has unintentionally occurred. To address this oversight, the department will seek to make amendments during consideration in detail to ensure that proponents are not held responsible for users. This will include seeking to delete section 173Q in its entirety.*<sup>98</sup>

#### **Committee Comment**

The committee supports amendments which introduce a new 'end of waste' framework. An efficient and effective end of waste framework will drive industry and market development and support the efficient use of resources in Queensland.

However the committee has noted the concerns raised by stakeholders which may unintentionally restrict the use of end of waste codes and approvals and limit market opportunities. In the

<sup>94</sup> QRC, *Submission No. 6*, pp. 41-42.

<sup>95</sup> Hayter, F. 2014, *Draft public hearing transcript*, 15 October, pp. 14-15.

<sup>96</sup> Garland, N. 2014, *Draft public hearing transcript*, 15 October, p. 15.

<sup>97</sup> Hayter, F. 2014, *Draft public hearing transcript*, 15 October, p. 16.

<sup>98</sup> DEHP, 2014, *Correspondence*, 9 October.

committees opinion these concerns reflect a systemic problem with definitions and interpretation of the amendments, rather than an issue of policy or intent.

In particular the committee holds concerns that the delineation or guidance on the critical point at which waste ceases to be a waste and becomes a resource, and accordingly the point at which regulation of the waste as a waste ceases, is ambiguous. Consequently a lack of clarity on who is obliged to register under end of waste codes and the extent to which operators are liable under end of waste approvals ensues. Ambiguous drafting of key definitions related to these matters, including for 'resource' 'end of waste user', 'product' and 'regulated waste', may further contribute to the concern. The committee believes it may be useful to include a definition for "resource user" so as to differentiate the users of the resource (for example, persons who have purchased fully treated CSG water for use on their property) from the users of the code/approval.

Accordingly, it is the committee recommendation that DEHP review clauses 155 and 156 to ensure a more appropriate drafting, which minimises ambiguity and provides certainty to industry and end of waste users about the delineation between waste and resources and the key definitional matters to the greatest extent possible. The committee acknowledges that clarity around these matters may be further enhanced through regulations and guidelines, and encourages the department to draft these in a timely manner and in consultation with key stakeholders.

The committee does however wish to emphasise that the end of waste framework is intended to have application across a broad range of waste types and industry sectors, some of which may not even be conceptualised at this current point in time. Therefore it is important that the framework is robust to minimise any risk of environmental damage or market exploitation. Whilst the committee acknowledges DEHP's advice that the liability provisions at sections 173P and 173Q were not intended to make holders responsible for the activities of users of the "resource" (such as agricultural purchases of treated water) and that DEHP has undertaken to remove these clauses completely, the committee strongly believes that it is important that 'chain of responsibility' principles continue to be reflected in the legislative framework to ensure there is sufficient incentive for an end of waste approval holder to manage waste appropriately through to the final point where the waste meets the standards required for that product to be considered a "resource", regardless of whether the treating or processing is carried out by a third party.

The committee therefore cautions against the complete removal of sections 173P and 173Q(1) and (2) and suggests that it may be more appropriate to redraft the sections to align with the original intent and to clarify that the obligation applies only to end of waste users, not to the resource user.

#### **Point of clarification**

The committee invites the Minister to advise the House when regulations and end of waste guidelines will be finalised and when these will be made available for industry stakeholders.

#### **Recommendation 8**

The committee recommends that the department consider whether:

- section 155 could be amended to clarify the point at which a resource ceases to be a waste and becomes a resource; and
- section 156 to amended to differentiate between an 'end of waste user' and 'resource user'.

**Recommendation 9**

The committee recommends that sections 173P and 173Q(1) and 173Q(2) be retained in the Bill as originally drafted and introduced to the House, as it maintains an appropriate policy position with respect to chain of responsibility for persons acting under end of waste approvals.

## 8. Other amendments/ matters

The Bill includes amendments to the penalty provisions in the EP Act across a range of offences. The Explanatory Notes state that the maximum penalties are increased to align with the same maximum penalties as the *Regional Planning Interests Act 2014*.

*This amendment increases penalties for the most serious offences to a maximum monetary penalty of 6250 penalty units (currently \$711,562.50 as the value of a penalty unit is \$113.85) to provide for an improved correlation between similar offences within other Queensland legislation and other state jurisdictions.<sup>99</sup>*

*This increase ensures that penalties accurately reflect the seriousness of the offences and are comparable to similar offences. High penalties are necessary to deter operators from causing significant and potentially irreparable damage to the State's economic, social and environmental prosperity.<sup>100</sup>*

As part of the increases to maximum penalties, the term of imprisonment for the most serious offences is being increased from two to five years for the wilful component of the offence.

Whilst stakeholders did not fundamentally disagree with the increase in penalties, some expressed concern that the underlying offence is not well defined and that the existing definitions did not adequately reflect the seriousness of the underlying offence.

For example, Ms Hayter from QRC explained at the public briefing:

*We have no problems with the principle of increasing penalties to bring equity across Queensland, but our biggest concern remains—and, again, we have discussed this with DEHP many times—that the definition of environmental harm around which the increased penalties are based has not been changed since the act was introduced 20 years ago. We also have concerns with a number of the other definitions related to environmental harm. We seek some detailed discussion on improving those before the penalties come into effect.<sup>101</sup>*

DEHP responded as follows:

*The offence definitions have been in place for a long time, and that issue of the monetary component of it I would point out is not the only way to define whether or not something is material or serious environmental harm; it is just one of the factors that have to be considered and not a definitive factor. QRC has raised those concerns a number of times. They are not concerns we have had broadly raised from other stakeholder sectors. As has been pointed out, they are broadly consistent with definitions in other states so we feel that at this stage there is not an imperative to reform those fundamental definitions that underpin the entire act before looking at the penalties. Again, other states are increasing their penalties. At the moment New South Wales are doing so. Victoria are reviewing their penalties with a view to increasing for the same sorts of purposes. So we are really aiming to stay in step to make sure that people who are not complying with our legislation very much have appropriate penalties applied to them.<sup>102</sup>*

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<sup>99</sup> Environmental Protection and Other Legislation Amendment Bill 2014, Explanatory Notes, p. 3.

<sup>100</sup> Environmental Protection and Other Legislation Amendment Bill 2014, Explanatory Notes, p. 27.

<sup>101</sup> Hayter, F. 2014, *Draft public hearing transcript*, 15 October, p. 14.

<sup>102</sup> Nichols, E. 2014, *Draft public briefing transcript*, 15 October, pp. 9-10.

**Committee Comment**

The committee notes the concerns raised by stakeholders regarding the relevance and scope of some offence provisions to current industry practices and operating costs. The committee also notes that these offence provisions have been increased in the absence of detailed analysis and cross-jurisdictional review of existing offence provisions and penalties.

The committee however supports the intent of the amendments to penalty provisions in the Environmental Protection Act 1994 and notes that this is consistent with the department's risk based regulatory approach. The committee encourages DEHP to consider a review of the underlying offences, including how offences and the seriousness of offences are defined within the short-to-medium term.

## 9. Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that ‘fundamental legislative principles’ are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of parliament.

The committee sought advice from DEHP in relation to a number of possible fundamental legislative principles issues. This section outlines the issues raised by the committee and the advice provided by the department.<sup>103</sup>

### Rights and liberties of individuals

#### Onus of proof - Section 4(3)(d) *Legislative Standards Act 1992*

##### Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?

Clause 167 amends the *WRRRA* to replace the existing chapter 8 with a new chapter 8 - Provisions for end of waste.

Section 173Q requires the holder of an end of waste approval to ensure that everyone acting under the approval complies with the conditions of the approval. The responsibility extends to persons acting under the approval, such as employees and subcontractors. Pursuant to section 173P, if a person acting under an end of waste approval is proven to have contravened a condition of the approval, that person is guilty of an offence. If the person acting under the approval was contracted by the holder and was directed to take the action which contravenes the approval, the holder will also be held responsible for the contravention.

Section 173Q (3) provides that evidence that another person has been convicted of an offence under section 173P while acting under an approval, is evidence that the approval holder committed the offence of failing to ensure the other person complies with the conditions.

Section 173Q (4) provides that it is a defence for the holder to prove:

- the holder issued appropriate instructions and used all reasonable precautions to ensure compliance with the conditions
- the offence was committed without the holder’s knowledge, and
- the holder could not, by the exercise of reasonable diligence, have stopped the commission of the offence.

#### Potential FLP issues

Section 4(3)(d) of the *Legislative Standards Act 1992* provides that legislation should not reverse the onus of proof in criminal matters, and it should not provide that it is the responsibility of an alleged offender in court proceedings to prove innocence.

*For a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned to disprove guilt”.<sup>104</sup> Generally, the former Scrutiny of Legislation Committee (SLC) opposed the reversal of the onus of proof.<sup>105</sup>*

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<sup>103</sup> DEHP, 2014, *Correspondence*, 9 October.

<sup>104</sup> OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p. 36.

<sup>105</sup> Alert Digest 2002/4, page 27, para. 10.

In providing that an approved holder will be equally liable for an offence committed by another person, sections 173Q(3)&(4) breach section 4(3)(d) of the *Legislative Standards Act 1992* by removing elements to prove an offence and reversing the onus of proof. Section 173Q(3) provides that elements of an offence are not required to be proven against a holder if the holder has directed another person to carry out an act which contravenes an approval. Section 173Q(4) places the onus of proof on the defendant (holder) to prove their innocence.

The Explanatory Notes provide the following justification for sections 173Q(3) and (4):

*This section raises a potential fundamental legislative principle because subsection (3) relieves the prosecution from the obligation of proving elements of the offence. The approval holder may be liable simply for the commission of an offence by another person. However, the original offence in section 173P is a strict liability offence, so it appropriate that the responsible holder should be equally liable. The provisions are appropriate in these circumstances as it would be considered inappropriate to have a situation where a person operating under an approval (other than the approval holder) is asked to undertake an action by the approval holder that would bring about an offence, but the approval holder is not found to be guilty of the same offence.*

*A further potential fundamental legislative principle is also raised by subsection (4) which reverses the legal onus for proving a defence by expressly placing the onus on the defendant. This provision can be justified as the matters to be proved will be within the defendant's knowledge and would be extremely difficult, or very expensive, for the State to prove.<sup>106</sup>*

Section 173(Q)(3) provides that an approved holder will be equally liable for an offence committed by another person.

**Request for advice:**

The committee sought advice from DEHP on why it is considered appropriate to reverse the onus of proof, and practical examples as to how it would be 'difficult' and/or 'expensive' for the state to meet the burden of proof such that it necessitates the provision placing that burden on the defendant. The committee also sought clarification on what would constitutes 'appropriate instructions' pursuant to section 173(Q)(4)(a).

**DEHP advice:**

*After considering submissions on this matter, the department will seek approval to make amendments during consideration in detail to remove section 173Q which includes the reversal of the onus of proof.*

**Committee comment**

The committee notes the department's advice.

**Recommendation 10**

The committee recommends that the Bill be amended to remove sections 173Q(3) and 173Q(4) specifically, to preserve the general principal that the legal onus or burden of proof lies with the party which brings an action, and the approved holder is 'innocent until proven guilty'. The approved holder, if accused, must still satisfy the evidential onus of proof for any defence or excuse they raise.

**Institution of Parliament**

**Delegation of legislative power – Section 4(4)(a) *Legislative Standards Act 1992***

<sup>106</sup> Environmental Protection and Other Amendment Bill 2014, Explanatory Notes, p. 112.

**Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?**

Clause 167 amends the WRRRA to replace the existing chapter 8 'Approval of resource for beneficial use' with a new chapter 8 'Provisions for end of waste'.

Section 173I prescribes the process for applying for an end of waste approval and provides that an application must be in the approved form, and include any information and fee that are prescribed by regulation. It also requires an application for an end of waste approval to be accompanied by a written assessment of the application from a suitably qualified person. A regulation may prescribe the criteria a person must meet to be a suitably qualified person and the matters to be included in the assessment by a suitably qualified person.

Section 173S defines the process for how an applicant can amend or transfer an end of waste approval. To transfer an approval, the holder applies to the chief executive in the approved form, with the signed consent of the proposed transferee, and any fee that may be prescribed in regulation. To amend an approval, the holder applies to the chief executive in the approved form, with any information that is required by regulation, a written report prepared by a suitably qualified person about the application, and any fee that may be prescribed in regulation. Details relating to the preparation of the amendment report are to be prescribed in regulation. A report by a suitably qualified person is required to accompany an amendment application.

Potential FLP issues

Sections 173I & 173S potentially breach the fundamental legislative principle pursuant to section 4(4)(a) of the *Legislative Standards Act 1992* that a Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons. As noted in the Office of the Queensland Parliamentary Counsel (OQPC) Fundamental Legislative Principles Notebook, this matter is concerned with the level at which delegated legislative power is used. Further, section 27A of the *Acts Interpretation Act 1954* requires that an *appropriately qualified person* have the qualifications, experience or standing appropriate to perform or exercise the power of a function or, for the appointment to an office, the qualifications, experience or standing appropriate to perform the functions of the office.

The Explanatory Notes provide the following justification for section 173I:

*This section raises the potential fundamental legislative principle, namely, that legislative power should be appropriately delegated. However, the details to be prescribed by regulation are technical details around the role and requirements the suitably qualified person must meet. Prescribing this information by regulation will ensure that the process for granting an end of waste approval is flexible enough for continuous improvement, which will benefit industry applicants, experts retained to produce written assessments, and administrators of the process. This approach is consistent with the department's regulatory strategy.*<sup>107</sup>

In relation to section 173S, the Explanatory Notes advise:

*This section raises the potential fundamental legislative principle that legislation should allow for the delegation of legislative power only in appropriate cases. However, as with the original application for an end of waste approval, the details to be prescribed by regulation are technical details. Therefore, prescribing this information by regulation will ensure that the process for granting an amendment of an end of waste approval is flexible enough for continuous improvement, which will benefit industry applicants and administrators of the process, and also reflects the department's regulatory strategy.*<sup>108</sup>

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<sup>107</sup> Environmental Protection and Other Amendment Bill 2014, Explanatory Notes, pp. 107-108.

<sup>108</sup> Environmental Protection and Other Amendment Bill 2014, Explanatory Notes, p. 113.

Sections 173I and 173S both allow for circumstances whereby a regulation may prescribe for a suitably qualified person to carry out a function.

**Request for advice:**

The committee sought advice from DEHP on the type of criteria to be prescribed in regulation to determine if a person is a 'suitably qualified person' for the purposes of the beneficial use approval provisions in the Bill and, if possible, some examples of the type of qualifications and/or experience that is likely to meet the requirements. The committee also sought comment more generally on the extent to which these matters would be likely to change or the extent to which the criteria that defines an 'industry expert' would require flexibility in order to satisfy the committee that the use of regulation to achieve the Bill's objectives is appropriate in this instance.

**DEHP advice:**

*A 'suitably qualified person' is only used to certify the application for an end of waste approval. End of waste approvals are designed to be used for trial projects to demonstrate proof of concept for non-traditional wastes and resource uses. Since these are, by their nature, emerging fields, the criteria which defines an 'industry expert' is likely to be different depending on the nature of the waste and the process being used to turn the waste into a resource. It is the new or emerging nature of these processes which requires flexibility in determining the appropriate qualifications for a suitability qualified person.*

*It is difficult to determine what type of experts might be required in any detail. However, the type of criteria which might be prescribed could be having a particular qualification or membership of a professional or regulating organization.*

*For example, with the production of diesel from waste cooking oil, the process might involve using sulfuric acid and microwave irradiation processes. In order to determine that the process will not have significant adverse effects on the environment, the regulation might require the suitably qualified person in that instance to have a degree in chemical engineering and be registered with the Board of Professional Engineers Queensland.*

**Committee comment**

The committee notes and is satisfied with the department's advice.

**Scrutiny of the Legislative Assembly – Section 4(4)(b) Legislative Standards Act 1992**

**Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Assembly?**

The Bill inserts a new chapter 10, Part 5 into the EP Act in relation to enforceable undertakings. An enforceable undertaking is an agreement between an administering authority and a person which specifies actions that the person agrees to undertake in return for the administering authority agreeing to not prosecute the person for an alleged contravention of the Act.

Clause 104 amends section 548 of the EP Act to provide that the chief executive may make statutory guidelines about when the administering authority may use enforcement tools, including enforceable undertakings.

The Explanatory Notes advise:

*These guidelines provide guidance about the statutory requirements (i.e. in this case, what it means where the legislation states that the administering authority must not accept the undertaking unless the administering authority reasonably believes that the undertaking will secure compliance with the Act and enhance protection of the environment).<sup>109</sup>*

<sup>109</sup> Environmental Protection and Other Amendment Bill 2014, Explanatory Notes, p. 55.

### Potential FLP issues

Clause 104 amends section 548 of the EP Act to allow the chief executive to make a statutory guideline as to when enforcement measures can be used by an administering authority. This arguably breaches section 4(4)(b) of the *Legislative Standards Act 1992* in that an instrument, in this case a statutory guideline, should be subjected to scrutiny of the Legislative Assembly.

A Bill should sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.<sup>110</sup>

The former SLC commented adversely on provisions allowing matters, which might reasonably be dealt with by regulation, to be processed through some alternative means that does not constitute subordinate legislation and therefore is not subject to parliamentary scrutiny. In considering the appropriateness of delegated matters being dealt with through an alternative process, the former SLC considered:

- The importance of the subject dealt with
- The practicality or otherwise of including those matters entirely in subordinate legislation
- The commercial or technical nature of the subject matter, and
- Whether the provisions were mandatory rules or merely to be had regard to.<sup>111</sup>

The former SLC also considered that despite an instrument not being subordinate legislation, if there is a provision requiring tabling and providing for disallowance there is less concern raised.<sup>112</sup>

### **Request for advice:**

The committee sought advice from DEHP to explain why the guideline information in relation to when enforcement measures may be used will be prescribed in a guideline and not a regulation, which would have enhanced the legislative scrutiny process and had greater regard to the institution of Parliament.

The committee also sought advice on:

- what information is likely to be included in the enforceable undertaking guidelines
- when the department is likely to finalise and publish the guidelines for the acceptable use/acceptance of enforceable undertakings, and
- if the guidelines will be developed in consultation with any relevant stakeholders and/or will consider guidelines currently used by other agencies and in other jurisdictions.

### **DEHP advice:**

*The enforceable undertaking is a broad tool that could apply to very different offences with very different actions to be undertaken by the alleged offender. They need to be flexible in order to achieve good environmental outcomes in all of the circumstances of the case. Since they are an agreement entered into between the administering authority and the alleged offender, the actions taken are not imposed and could vary widely.*

*In these circumstances, it is often more useful to describe what might be an acceptable offence type or action to the undertaking by reference to scenarios, rather than prescribing a list of matters. This type of information cannot be written into regulation due to drafting protocols, so a guideline is used instead.*

*In response to the specific advice sought:*

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<sup>110</sup> *Legislative Standards Act 1992*, section 4(4)(b).

<sup>111</sup> OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p. 155.

<sup>112</sup> Alert Digest 2004/3, pages 5-6, paras 30-40; Alert Digest 2000/9, pp. 24-25, paras 47-56.

a) *The guideline is likely to outline the enforceable undertaking framework, including information about matters that must be included in the undertaking and matters that will not be accepted in an undertaking. It may also include information about variations and withdrawals of undertakings. The intent of the guidelines (as a consequence of initial research) is likely to be similar to the Victorian guidelines for enforceable undertakings. This guideline is available online at <http://www.epa.vic.gov.au/our-work/compliance-and-enforcement/~media/Files/compliance-enforcement/Sanctioning/Docs/Enforceable-Undertakings-Guidelines.pdf>.*

b) *The department is aiming to finalise and publish the initial guideline by early 2015.*

c) *The department is considering release of a non-statutory guideline initially to provide guidance on the process and decision making framework, with the guideline developed by the Victoria EPA [as the benchmark. Following a review (and stakeholder feedback) regarding its progress and use, a statutory guideline will then be finalised in accordance with section 548 of the Environmental Protection Act 1994.*

#### **Committee comment**

The committee notes and is satisfied with the department's advice as to use of a guideline for enforceable undertakings. See section 6 of this report for further comment.

#### **Amendment of an Act only by another Act – Section 4(4)(c) *Legislative Standards Act 1992***

##### **Does the Bill allow or authorise the amendment of an Act only by another Act?**

Clause 167 amends the WRRRA to replace the existing chapter 8 'Approval of resource for beneficial use' with a new chapter 8 'Provisions for end of waste'.

Clause 167, section 163 prescribes a list of matters that the chief executive and technical advisory panel must have regard to when making a draft end of waste code. Matters for consideration include:

- the objects of the WRRRA
- the proposed use of the resource under the proposed end of waste code
- whether the proposed use of a particular resource, may or is likely to cause serious or material environmental harm
- the waste and resource management hierarchy, and
- any other matter prescribed in regulation.

Clause 167, section 173L, prescribes the criteria the chief executive is required to consider when deciding whether to grant or refuse an 'end of waste' application. The criteria will help the chief executive consider the potential environmental outcomes while enabling more wastes to be managed as resources. Criteria for the chief executive's consideration include:

- the objects of the WRRRA
- the waste and resource management hierarchy
- whether the proposed management of a waste or use of a resource, may or is likely to cause serious or material environmental harm
- whether it is reasonably practicable for an end of waste code to be made for a particular waste or resource the subject of the application, and
- other criteria to be prescribed in regulation.

#### Potential FLP issues

Clause 167 (163, 173L) allows for future amendments to be made by regulation.

A Bill should only authorise the amendment of an Act by another Act.<sup>113</sup> A clause in an Act, which enables the Act to be expressly or impliedly amended by subordinate legislation or executive action, is defined as a Henry VIII clause. The former SLC's approach to Henry VIII clauses was that if an Act was purported to be amended by a statutory instrument (other than an Act) in circumstances that were not justified, the former SCL would voice its opposition by requesting that Parliament disallow the part of the instrument that breached the FLP requiring legislation to have sufficient regard for the institution of Parliament.<sup>114</sup> The former SLC considered the possible use of Henry VIII clauses in the following limited circumstances:

- To facilitate immediate executive action
- To facilitate the effective application of innovative legislation
- To facilitate transitional arrangements, and
- To facilitate the application of national scheme legislation.<sup>115</sup>

The OQPC Notebook explains that the existence of these circumstances does not automatically justify the use of Henry VIII clauses, and, if the Henry VIII clause does not fall within any of the above situations, the SLC classified the clause as 'generally objectionable'.<sup>116</sup>

Section 163 of the Explanatory Notes advise:

*This section raises a potential fundamental legislative principle because some matters can be prescribed by regulation. Sufficient heads of power are being retained in the Act, with only further detail to be prescribed in regulation. This is to ensure that that matters to be considered are flexible enough for continuous improvement, which will benefit industry applicants and administrators of the process, and is consistent with the department's regulatory strategy.*<sup>117</sup>

Section 173L of the Explanatory Notes advise:

*This section raises the potential fundamental legislative principle because some criteria can be prescribed by regulation. Sufficient heads of power are being retained in the Act, with only further detail to be prescribed in regulation. This is to ensure that the criteria prescribed for granting an end of waste approval is flexible enough for continuous improvement, which will benefit industry applicants, and administrators of the process, and also reflects the department's regulatory strategy for setting standards.*<sup>118</sup>

#### **Request for advice:**

The committee sought advice from DEHP of the types of matters which may require further detail through regulation in relation to a) the matters which may be considered in the making of an end of waste code; and b) the criteria which may be considered in deciding an end of waste approval.

The committee also requested that DEHP explain what benefit industry would gain from the flexibility to amend regulation as opposed to certainty in regulation affecting their commercial operations, and what assurances can be provided that industry would not be disadvantaged and adequately consulted in the event that regulations relating to end of waste provisions were amended.

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<sup>113</sup> *Legislative Standards Act 1992*, section 4(4)(c).

<sup>114</sup> OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p. 159.

<sup>115</sup> OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p. 159.

<sup>116</sup> OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p. 159; Alert Digest 2006/10, page 6, paras 21-24; Alert Digest 2001/8, page 28, para 31.

<sup>117</sup> Environmental Protection and Other Amendment Bill 2014, Explanatory Notes, p. 100.

<sup>118</sup> Environmental Protection and Other Amendment Bill 2014, Explanatory Notes, p. 110.

**DEHP advice:**

*Sections 163 and 173L both contain a list of the high level matters for consideration for end of waste codes or approvals. The ability to add other criteria prescribed in the regulation does not amend these criteria, rather it provides the ability to add additional criteria which must be considered by the chief executive in making the decision. Consequently, it is the department's view that this is not a Henry VIII clause, though it may raise the principle that a Bill should allow the delegation of legislative power only in appropriate cases. The Scrutiny of Legislation Committee has previously noted that the extensive reliance on regulations for matters of significance may reflect the subject matter of the empowering legislation and perhaps the innovative nature of the legislation. That is the case here where the end of waste codes and approvals are a new framework and once they become operational, it may become evident that further criteria are required to be prescribed.*

*This distinction between high level criteria in the Act and specific criteria in the regulation is similar to the 'standard criteria' and the 'regulatory requirements' in the Environmental Protection Act 1994. The standard criteria are the high level criteria which must be applied for every decision, while the 'regulatory requirements' specific specific considerations for particular types of decisions or particular types of environmental impacts.*

*Examples of matters which may be prescribed in the regulation are the administrative or process criteria which are currently prescribed for the beneficial use approvals. These criteria would be appropriate for some decisions, but are overly onerous for others. Consequently, providing this flexibility removes greentape for industry where those criteria are not relevant to that type of decision.*

*Any prescription of additional criteria would require assessment of the impacts of the regulation on government, business and the community. Where these impacts are significant, a Regulatory Impact Statement is required which would ensure that broad public consultation is carried out on the proposals.*

*In addition, it should be noted that the criteria prescribed by the Act or a regulation are not the only criteria which may be considered (see section 136(2) and 173L(2) of the Bill). Consequently, prescribing additional criteria to be considered by the decision maker may in fact increase the certainty of requirements for industry and community stakeholders.*

**Committee comment**

The committee notes and is satisfied with the department's advice.

## **Appendix A – List of submitters**

[1 - Australian Tyre Recyclers Association](#)

[2 - Property Council of Australia](#)

[3 - Queensland Environmental Law Association Inc.](#)

[4 - Urban Development Institute of Australia \(Queensland\)](#)

[5 - Brisbane City Council](#)

[6 - Queensland Resources Council](#)

[7 - Logan City Council](#)

[8 - Australian Petroleum Production and Exploration Association](#)

[9 - QGC Pty Ltd](#)

[10 - Council of the City of Gold Coast](#)

[11 - Environmental Defenders Office \(Qld\) Inc.](#)

[12 - Queensland Rail Limited](#)

[13 - AgForce Queensland Industrial Union of Employers](#)

[14 - Waste Recycling Industry Association of Queensland](#)

## **Appendix B – Briefing officers**

### **Briefing officers at a public briefing held on 10 September 2014**

#### Department of Environment and Heritage Protection

Mr Scott Buchanan, Director, Biodiversity Implementation  
Mr Laurie Hodgman, Director, Environmental Policy and Legislation  
Ms Tamara Miller, Team Leader, Environmental Policy and Legislation  
Mr Wade Oestreich, Director, Business Reform  
Ms Kate Watkins, Team Leader, Environmental Policy and Legislation

#### Department of Agriculture, Fisheries and Forestry

Mr Pat Coyne, Principal Policy Officer, Legislation

### **Witnesses at a public hearing held on 15 October 2014**

Ms Jen Williams, Senior Policy Advisor, Property Council of Australia  
Mr Duncan Maclaine, Director, Economic Research and Policy, Urban Development Institute of Australia (Queensland)  
Ms Sarah Macoun, Co-Chair, Planning and Environment Committee, Urban Development Institute of Australia (Queensland)  
Mr Logan Timms, Team Leader – Strategic Policy and Intergovernmental Relations, Local Government Association of Queensland (LGAQ)  
Mr Huxley Lawler, Executive Coordinator, Environment, City of Gold Coast  
Mr Matthew Pomeroy, Queensland President, Australian Contaminated Land Consultants Association  
Mr Matthew Paul, Policy Director Queensland, APPEA  
Mr Nathan Lemire, Policy Adviser Queensland, APPEA  
Ms Frances Hayter, Director Environment Policy, Queensland Resources Council  
Ms Nicola Garland, Advisor Environment Policy, Queensland Resources Council

### **Briefing officers at a public briefing held on 15 October 2014**

#### Department of Justice and Attorney-General (Office of Fair and Safe Work Queensland)

Dr Simon Blackwood, Deputy Director-General  
Ms Julie Nielsen, Acting Senior Director, Compliance and Business Engagement

#### Department of Environment and Heritage Protection

Ms Elisa Nichols, Executive Director, Environmental Policy and Legislation  
Ms Anne Lenz, Executive Director, Petroleum, Gas and Compliance  
Mr Laurie Hodgman, Director, Environmental Policy and Legislation  
Mr Andrew Mullens, A/Director, Legislation and Policy, Business Reform

## Statement of Reservation

### Environmental Protection and Other Legislation Amendment Bill 2014

The *Environmental Protection and Other Legislation Amendment Bill 2014* is another example of the Newman Government's inability to conduct meaningful, detailed, collaborative dialogue with the Queensland community. It is further evidence of Minister Powell's propensity for ill-considered, poorly-defined, under-developed legislative and policy overhauls.

While there are some elements for which Queensland Labor can provide support, most notably the increased penalties for environmental offences, for the most part the Government has failed to provide coherent justifications for the wholesale changes contained within this bill.

The *Environmental Protection and Other Legislation Amendment Bill 2014* can only be judged in the context of the broad-ranging and regressive environmental policies already enacted by this Government. It can only be properly considered in conjunction with the severe monitoring and compliance deficiencies identified by the Auditor-General in Report No.15 of 2013-14, *Environmental Regulation of the Resources and Waste Industries*. As that report states;

*"EHP is not fully effective in its supervision, monitoring and enforcement of environmental conditions and is exposing the state to liability and the environment to harm unnecessarily. Poor data and inadequate systems continue to hinder EHP's planning and risk assessments. As a result, EHP cannot target its monitoring and enforcement efforts to where they are most needed."*

The Government has used the deficiencies identified in that report to justify a fundamental reorientation of the Department of Environment and Heritage Protection (EHP) towards a compliance framework. It is disappointing that the majority report of this committee has not properly considered this contextual framework, or the significant reduction in the capacity of EHP caused by the Newman Government's massive staff cuts.

### Waste Management

The Newman Government's poor track record on environmental protection is perhaps most evident in waste management. According to the most recent available data the amount of construction and demolition waste deposited in Queensland landfill has increased by 273,000 tonnes since the election of the Newman Government, including an additional 101,000 tonnes generated interstate. The amount of ash, red mud and contaminated soil going to landfill has also increased under the Newman Government.

The *Environmental Protection and Other Legislation Amendment Bill 2014* would replace chapter 8 'Approval of resource for beneficial use' of the *Waste Reduction and Recycling Act 2011* with a new chapter entitled 'Provisions for end of waste.' First of all it is problematic to progress significant changes to the Waste Reduction and Recycling Act while the government's industry-led waste strategy is still only at the draft stage. It is also strange, although given the government's record on waste management, perhaps not surprising that Minister Powell has not issued a press release on this draft strategy.

While the beneficial use framework was separately reviewed by Sinclair Knight Merz this report has disappeared from the Department of Environment and Heritage Protection's website. The justification provided for this change in the explanatory notes is insulting in its paucity. If the Government is determined to progress a complete revision of an entire chapter

in an act which is only three years old, it is incumbent on the Minister to properly justify that change; unfortunately he has chosen not to make a genuine attempt to do so.

It is also incumbent on the Minister to provide a clear idea of how the new regime will operate, unfortunately he has again been unable or unwilling to do so. The new framework relies on the development of 'end of waste codes' however it is not evident exactly how such a code will be developed or how long the Government will continue to rely on the existing beneficial use approvals. Unfortunately the suggested framework for this process is amorphous and cannot be properly assessed with the limited information provided by the Government.

### **Contaminated Land**

While the changes to the assessment process for the material change of use on either of Queensland's two contaminated land registers is relatively non-controversial the Government has again given no clear idea of the costs involved under the current process. The decision regulatory impact statement states that departmental assessment costs some \$600,000 annually. The Minister should clarify for the benefit of the house why the decision has been taken to move to a private auditor framework instead of to a cost-recovery basis.

Queensland Labor understands the intent behind the decision to remove the requirement for a soil disposal permit to transport contaminated soil to a waste facility however we believe it is a significant lost opportunity to reintroduce some rigour into waste management. It was clear from departmental briefings to the committee that contaminated soil will potentially be able to be transported from another state and disposed of in our state without the Queensland authorities being informed.

### **Offsets**

The Opposition reiterates the concerns it raised during the consideration of the *Environmental Offsets Act 2014* earlier this year; that is the Act essentially introduces a pay-and-go offsets framework which is not based on science. We continue to be concerned that the mandatory cap on the ratio of an asset is designed specifically to limit costs for proponents.

The specific considerations of this bill for the *Environmental Offsets Act 2014* are relatively minor and do not address Queensland Labor's ongoing concerns.

### **Enforceable Undertakings**

The Opposition is not philosophically opposed to the introduction of enforceable undertakings to the *Environmental Protection Act 2009* however the current provisions are significantly weaker than is desirable. The Environmental Defenders' Office made the following recommendations in its submission;

- 1. We recommend that proposed section 510(1) be broadened to allow third parties standing to apply for an order if a person contravenes an enforceable undertaking. This will alleviate pressure on the administering authorities to monitor and enforce all enforceable undertakings and better ensure compliance. As recent audits of the Queensland and Federal Governments have stated, adequate monitoring and enforcement of activities is essential to limit environmental harm and these activities have reportedly not been undertaken adequately by the Queensland Government to date. It is advisable to allow open standing to third parties to ensure that potential environmental harm is limited.*

2. *We recommend that proposed section 510(4) be clarified to state that the limitation period for proceedings that may be taken for contravention or alleged contravention of the EP Act, which are prevented by an enforceable undertaking, recommences from the date on which the contravention of the enforceable undertaking takes place. This will ensure that the subsection is given full effect and the opportunity to commence proceedings is not lost where limitation periods have passed prior to any contravention of an enforceable undertaking.*

Queensland Labor supports the expansion of enforceable undertakings to provide third parties with legal standing to apply for orders if one is contravened. Modern environmental management is best served by allowing public interest groups and individuals to challenge for better outcomes rather than rely solely on a Government department which has been stripped of much of its former responsibilities and has reduced capacity after having its staffing numbers cut by approximately one third.

### **Flying Foxes**

The Opposition has had longstanding concerns with the Newman Government's flying fox management regime. Flying fox colonies are difficult to move and the decision to devolve flying fox management to local governments represents an abrogation of the State's responsibilities. Queensland Labor understands the view articulated below by Logan City Council;

*"Logan City Council restates its disappointment in the State Government for putting Council in an untenable position by creating the expectation to the community that we are solely responsible for flying-foxes. Council remains concerned about the cost burden this move has placed on Council and the policy shift from the State has clearly resulted in the community holding an expectation that local governments are no the "flying-fox roost managers" with no budgetary support"*

### **Conclusion**

The *Environmental Protection and Other Legislation Amendment Bill 2014* is not the worst piece of environmental legislation introduced by the Newman Government however it continues the haphazard, arrogant and retrograde legislative process for which the Government has become known.

Yours sincerely



Jackie Trad MP

**Member for South Brisbane**

