Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024

Explanatory Notes

Short title

The short title of the Bill is the Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024.

Policy objectives and the reasons for them

The primary objective of the Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024 (the Bill) is to ensure the powers and penalties in the *Environmental Protection Act 1994* (EP Act) are contemporary and fit for purpose. The Bill aims to facilitate a more proactive approach to environmental risk management to prevent the community from being exposed to harm and remove barriers to streamline timely and effective regulatory responses to manage and restore environmental harm which has occurred.

The objectives of the Bill will be achieved through:

- clarifying and refining environmental policy principles;
- rationalising statutory notices to ensure compliance with authorities, duties, and obligations and to respond to environmental harm events;
- establishing a new duty to restore the environment and associating existing duties or obligations to offences; and
- improving evidentiary provisions relating to court proceedings.

Most of the amendments in the Bill give effect to recommendations from retired Judge Richard Jones and Barrister Susan Hedge's 2022 report, *Independent Review of the Environmental Protection Act 1994 (Qld) Report: Independent review into the adequacy of existing powers and penalties* (the review). The review aimed to identify whether the tools available under the EP Act, particularly in relation to environmental nuisance, are sufficiently contemporary to address the challenges of the future and make any recommendations for the improvement of the EP Act for the regulation of Queensland's environment. The review considered the environmental legislation of other jurisdictions, as well as other Queensland legislation.

The review found that, generally, the EP Act contains an adequate range of powers and penalties to enforce environmental obligations and reduce the risk of environmental harm, although there were opportunities for improvements. For example, the focus of existing

powers and penalties tends to be reactive rather than proactive, and there is a need to prevent harm occurring, which was reinforced though a recommendation for a new offence for a breach of the general environmental duty. The review also found that the introduction of clearer policy principles, such as the precautionary principle, polluter pays, primacy of prevention and proportionality principles, would be beneficial. Other key recommendations included enhancing the effectiveness of available compliance tools, with a particular focus on addressing nuisance issues and protecting human and community health and well-being.

The Bill also includes amendments to the EP Act to update provisions for contemporary circumstances and improved interpretation and application.

Achievement of policy objectives

The Bill achieves its objectives by amending the EP Act to:

- prominently include the polluter pays principle, proportionality principle, principle of primacy of prevention and the precautionary principle as the identified environmental policy principles to be applied to the general administration of the EP Act, including for the making of regulations, Environmental Protection Policies, guidelines and codes of practice;
- specify that a failure to comply with the general environmental duty is an offence where the failure of the duty is likely to cause serious or material environmental harm;
- replace the phrasing 'reasonable and practicable' with 'reasonably practicable' under the general environmental duty, and throughout the EP Act, to aid interpretation and reflect more consistency with other Queensland legislation;
- ensure that, despite a matter having prescribed characteristics of environmental nuisance (for example, unreasonable interference from release of aerosols, fumes, light, noise, odour, particles or smoke), it may constitute serious or material environmental harm;
- introduce a new compliance tool known as an 'environmental enforcement order' through combining the existing powers and scope available under environmental protection orders, direction notices and clean-up notices into one statutory notice to respond to environmental harm events. Provisions for environmental protection orders, direction notices and clean-up notices will be removed and replaced by the environmental enforcement order;
- clarify that an environmental enforcement order can be issued to the holder of an environmental authority, regardless of whether the environmental authority authorises, or purportedly authorises, the activity causing harm;
- clarify that the administering authority may require a person to conduct or commission an environmental investigation about an activity or event causing harm, regardless of whether the activity is authorised by an environmental authority;
- improve the 'notice of proposed amendment' process by allowing the administering authority to, after considering written submissions from the holder of the environmental authority or Progressive Rehabilitation and Closure Plan (PRCP) schedule, make revisions to proposed amendments in response to the holder's submissions and make the amendment to the environmental authority or PRCP schedule without the need for further submissions or agreement;
- introduce a standalone duty to restore the environment, which requires that, if a person permits or causes contamination that results in environmental harm they must,

as far as reasonably practicable, restore the environment to the condition it was in before the harm occurred;
- allow for the administering authority to initiate and decide amendments to transitional environmental programs, having regard to any submission by the transitional environmental program holder;
- ensure that that the duty of a person to notify of serious or material environmental harm includes circumstances where the person 'ought reasonably to have become aware of the event' giving rise to the harm; and
- expand the evidentiary provisions currently limited to criminal proceedings to be available in civil proceedings.

The Bill will also make several administrative amendments, including:
- replacing a reference to Aboriginal peoples in the EP Act with more culturally appropriate language;
- removing uses of 'reasonably' throughout the EP Act as they are unnecessary to facilitate interpretation of the provision because the requirement to do the action under the provision presumes it be done reasonably; and
- clarifying a confidentiality of information provision that was inserted in the EP Act by the *Environmental Protection and Other Legislation Amendment Act 2023* and ensure agencies can share information when necessary.

Alternative ways of achieving policy objectives

There are no alternative ways of achieving the policy objectives other than by legislative amendment. Administrative changes are not sufficient to achieve the policy objectives.

Estimated cost for government implementation

The amendments in the Bill will not present significant additional costs to implement. Any costs will be covered by existing resources of the Department of Environment, Science and Innovation (the Department).

Consistency with fundamental legislative principles

The Bill has been drafted with regard to the fundamental legislative principles (FLPs) as defined in s 4 of the *Legislative Standards Act 1992* and is generally consistent with these provisions. Clauses of the Bill in which FLP issues arise or are perceived, together with the justification for any departure, are outlined below.

Legislation must have sufficient regard to the rights and liberties of individuals – Legislative Standards Act 1992, s 4(2)(a)

The Bill inserts new section 369E which provides for a procedure for the recipient of an environmental enforcement order to enter land they do not own to take actions directed of them in an environmental enforcement order. This power retains and marginally extends the powers provided under former section 363J for clean-up notices as well as under former section 363AF for environmental protection orders issued to related persons of companies. This, however, raises a possible FLP related to whether the legislation has sufficient regard to

the rights and liberties of individuals. The recipient or person acting on their behalf may only enter the land to act with the consent of the owner and occupier of the land, or if 2 business days written notice, which includes the purpose, date and times of entry, has been given to the owner and occupier of the land. The 2-business day timeframe may be considered to provide only short notice. However, it is consistent with the former section 363AF, and this short notice period is necessary to ensure that any urgent action required to prevent environmental harm can be taken in a timely fashion, even if the owner or occupier has not provided consent. Further provisions ensure that the recipient or person acting on their behalf must cause as little damage and inconvenience as possible and is not authorised to enter a residential building. While the FLP is raised by this provision, the checks and balances in place mean that it is not objectionable.

Legislation must have sufficient regard to the rights and liberties of individuals – Legislative Standards Act 1992, s 4(2)(a)

The Bill inserts new section 369F which provides that an authorised person or contractor may take any of the actions stated in an environmental enforcement order if the recipient fails to comply with it within the period stated, or the decision to issue an environmental enforcement order has been stayed. This power retains and marginally extends the powers provided under former section 363K for clean-up notices as well as under former section 363AG for environmental protection orders issued to related persons of companies. This, however, raises a possible FLP related to whether the legislation has sufficient regard to the rights and liberties of individuals. This is a permissive power, and the administering authority is not required to take action merely because it is enabled to. The first preference will always be to ensure that the recipient of the environmental enforcement order takes the action themselves. The authorised person or contractor may only enter the land to act with the consent of the owner and occupier of the land, or if 2 business days written notice, which includes the purpose, date and times of entry, has been given to the owner and occupier of the land. The 2-business day timeframe may be considered to provide only short notice. However, it is consistent with the former section 363AG, and this short notice period is necessary to ensure that any urgent action required to prevent environmental harm can be taken in a timely fashion, even if the owner or occupier has not provided consent. Further provisions ensure that the recipient or person acting on their behalf must cause as little damage and inconvenience as possible and is not authorised to enter a residential building. While the FLP is raised by this provision, the checks and balances in place mean that it is not objectionable.

Legislation must have sufficient regard to the rights and liberties of individuals – Legislative Standards Act 1992, s 4(2)(a)

The Bill inserts new section 369A which provides that it is an offence to not comply with an environmental enforcement order. A wilful contravention of an environmental enforcement order issued for certain grounds carries a maximum penalty of 6,250 penalty units or 5 years imprisonment, and a non-wilful contravention a maximum penalty of 4,500 penalty units. The relevant enforcement grounds include to secure compliance with the general environmental duty where serious or material environmental harm is involved, to secure compliance with an environmental authority condition, and where the recipient is a prescribed person for a contamination incident.
For all other grounds for which the environmental enforcement order was issued (for example, the causing of environmental nuisance or for securing a person's compliance with

an audit notice or surrender notice), a wilful contravention carries a maximum penalty of 1,655 penalty units, and a non-wilful contravention a maximum penalty of 600 penalty units.

Any new or increased maximum penalties raises the FLP that the penalty should be proportionate to the offence. The penalties under the offence for not complying with an environmental enforcement order are consistent with the values of maximum penalties that were available for the repealed environmental protection order, direction notice and clean-up notice, as well as penalty values across the EP Act. The separation of the offence into penalty two tiers ensures the applicable maximum penalty for not complying with the order is proportionate to the underlying offence that is associated with the grounds for which the order was issued. Generally, the maximum penalty for not complying with an environmental enforcement order does not exceed the penalty for the offences which the order may seek to enforce. In a small number of instances, a penalty can exceed the penalty for the underlying offence, but the penalty for breaching the environmental enforcement order remains proportionate to the underlying offence's penalty. For example, the offence under section 426 of carrying out an Environmentally Relevant Activity without an environmental authority carries a maximum penalty of 4,500 penalty units, and while the offence for not complying with an environmental enforcement order issued on this ground is equivalent, it can carry a maximum penalty of 6,250 penalty units if it is a wilful contravention. These penalty amounts are closer in value and more proportionate to the penalties attached to the underlying offence than if non-compliance with the order was subject to the lower tier of penalty which carries a maximum penalty of 1,655 penalty units.

The penalty amounts are justified as they ensure they accurately reflect the seriousness of the offences and are necessary to deter operators from causing significant and potentially irreparable damage to Queensland's economic, social and environmental prosperity.

Legislation must have sufficient regard to the rights and liberties of individuals – Legislative Standards Act 1992, s 4(2)(a)

The Bill inserts new section 369C which requires the recipient of an environmental enforcement order who proposes to sell the place or business to which the environmental enforcement order relates to give the buyer written notice of the existence of the environmental enforcement order. Under this section, the recipient also must, within 10 business days after agreeing to the sale of the place or business to which the environmental enforcement order relates, give written notice of the sale to the administering authority. The Bill also inserts new section 369D which requires the recipient of an environmental enforcement order to, within 10 days of ceasing to carry out the activity to which an environmental enforcement order relates, give written notice to the administering authority that the activity has been ceased. Failing to comply with these requirements is an offence and each carries a maximum penalty of 50 penalty units. Sections 369C and 369D retain and marginally extend the obligations and offences as they applied only to environmental protection orders under the former sections 362
and 363. Any new or increases to maximum penalties raises the FLP that the penalty should be proportionate to the offence. The offences are justified as a deterrent is needed to discourage recipients of an environmental enforcement order from not being transparent either about their business or place at the time of sale, or about their activities which have become subject to enforcement action. The penalties for the offences are of an appropriate level, and are the same as for the repealing sections 362 and 363 as well as existing penalties

in the EP Act for similar offences related to giving notice about transitional environmental programs (sections 347 and 348).

Legislation must have sufficient regard to the rights and liberties of individuals – Legislative Standards Act 1992, s 4(2)(a)

The Bill inserts new section 369I which provides that a person must not obstruct the recipient of an environmental enforcement order in the taking of action to comply with the environmental enforcement order. Committing this obstruction is an offence and carries a maximum penalty of 165 penalty units. This offence retains and marginally extends the offences provided under former section 363L for clean-up notices as well as under former section 363AH for environmental protection orders issued to related persons of companies. Any new or increases to maximum penalties raises the FLP that the penalty should be proportionate to the offence. The offence is justified as a deterrent to preventing remedial actions being taken under any circumstances. The penalty for the offence is of an appropriate level and is the same as for the repealed section 363L, as well as former 363AH and other existing penalties in the EP Act for obstruction of an authorised person (section 482) and interfering with monitoring equipment (section 444).

Legislation must have sufficient regard to the rights and liberties of individuals – Legislative Standards Act 1992, s 4(2)(a)

The Bill inserts new offences for contravening the general environmental duty and the duty to restore the environment. Wilful contravention for each offence carries a maximum penalty of 4,500 penalty units or 2 years imprisonment, and a contravention otherwise of each offence carries a maximum penalty of 1,655 penalty units. The offences are justified as a deterrent for persons failing to meet their environmental obligations. Any new or increases to maximum penalties raises the FLP that the penalty should be proportionate to the offence. The offences only apply where the person has caused or is likely to cause serious or material environmental harm so that that application of an offence is proportionate to the conduct, and penalties for the offences are of an appropriate level. These penalties are considered necessary to ensure persons meet their environmental obligations and are comparable to other penalties for environmental offences under the EP Act, including offences for causing serious or material environmental harm, and other Queensland legislation.

Legislation should make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review – *Legislative Standards Act 1992,* s 4(3)(a)

The Bill introduces the environmental enforcement order as a new compliance tool to consolidate the functions of environmental protection orders, direction notices and clean-up notices into one statutory notice. The environmental enforcement order will incorporate the elements designed to achieve environmental outcomes that exist in environmental protection orders, direction notices and clean-up notices under the pre-amendment EP Act. It is the intent that the existing powers provided by the three notices will remain. It is not the intent to substantially broaden the administrative powers beyond what is already permitted under the EP Act. The issuing of an environmental protection order, direction notice or clean-up notice are original decisions under schedule 2 which establishes review and/or appeal rights for the recipient of the notice. To ensure that this FLP will not be breached, the issuing of an environmental enforcement order will be an original decision under schedule 2, allowing for

the continuation of review and appeal rights for compliance notices. However, an environmental enforcement order issued for an incident involving contamination may only be subject to court appeal, not internal review. This is consistent with the treatment of the repealed clean-up notices under section 521(14) (which is consequentially amended to refer to environmental enforcement orders) and is intended to ensure clean-up of serious or material harm contamination incidents is not unduly delayed while still allowing for the issue of a notice to be challenged through appeal to court.

Legislation should make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review – *Legislative Standards Act 1992*, s 4(3)(a)

The Bill amends the transitional environmental program provisions to provide for the power of the administering authority to initiate and decide amendments to transitional environmental programs. This power is intended to clarify the application of section 24AA of the *Acts Interpretation Act 1954* (Qld) (AI Act) to decisions to make or amend a transitional environmental program. Section 24AA provides that if an Act authorises or requires the making of an instrument or decision, the power includes power to amend or repeal the instrument or decision, and the power to amend or repeal the instrument or decision is exercisable in the same way, and subject to the same conditions, as the power to make the instrument or decision. The new provisions of the EP Act (sections 344AA to 344AH) specify how the decision to amend a transitional environmental program is to be made by the administering authority to remove any doubt that section 24AA of the AI Act applies.

The new provisions require the administering authority to have regard to any submission by the transitional environmental program holder. While submissions can be made from the holder of a transitional environmental program, the administering authority will maintain the power to decide amendments. To ensure this FLP is not breached, the Bill makes clear that decisions to amend a transitional environmental program are prescribed as original decisions under schedule 2 to provide for sufficient review and appeal rights.

Legislation should allow the delegation of administrative power only in appropriate cases and to appropriate persons – *Legislative Standards Act 1992*, s 4(3)(c)

The Bill introduces the environmental enforcement order as a new compliance tool to consolidate the functions of environmental protection orders, direction notices and clean-up notices into one statutory notice. Environmental protection orders and direction notices are statutory notices available to local governments in the administration and enforcement of their devolved (not delegated) responsibilities for particular prescribed Environmentally Relevant Activities, environmental nuisance, noise standards and water contamination set out in the Environmental Protection Regulation 2019 (EP Regulation). The environmental enforcement order will continue to be available for local governments to use for devolved matters in the same manner the power to issue environmental protection orders and direction notices was previously available. While combining the existing power to issue environmental protection orders, direction notices and clean-up notices into the environmental enforcement order will place all grounds to issue notices under one instrument, the grounds local governments can utilise to issue notices will continue to be limited to their devolved responsibilities. For example, a local government will not be permitted to issue an environmental enforcement order to a prescribed person for a contamination incident as the grounds for doing so are limited to matters of serious or material environmental harm, and

administration and enforcement of serious or material environmental harm is not devolved to local government. This is consistent with the existing restriction on issuing clean-up notices under the pre-amendment EP Act and EP Regulation. This ensures the administrative power remains available in appropriate cases and to authorised persons, and is consistent with this FLP.

Legislation should not reverse the onus of proof in criminal proceedings without adequate justification – *Legislative Standards Act 1992*, s 4(3)(d)

The Bill introduces a duty to restore the environment under new section 319C with an associated offence for non-compliance. The duty is stated to apply where the environmental harm the person causes or permits is unlawful, and the offence applies where the unlawful environmental harm is serious or material in nature.

In the event of a legal proceeding, section 493A of the EP Act, which identifies when acts causing environmental harm or related acts (contravening noise standards and water contamination) are unlawful, will have application to the offence. Under section 493A(3), it is a defence to a charge if proven that the act was done while carrying out an activity that is lawful apart from the EP Act, and the defendant complied with the general environmental duty. Section 493A(2) provides a defence where the relevant act was authorised under an instrument such as an environmental authority or transitional environmental program.

The Bill also inserts a new offence into the EP Act under section 319 for failure to comply with the general environmental duty where the failure causes or is likely to cause serious or material environmental harm. This offence provision allows for an exemption from having committed the offence for persons who were authorised to perform the act, in accordance with reasonably practicable measures, that causes or is likely to cause environmental harm under an instrument that is identified in section 493A(2) (for example, an environmental authority), or if they complied with a code of practice that applied to the relevant act.

These amendments raise the FLP that legislation should not reverse the onus of proof in criminal proceedings without adequate justification. The reversal of onus under section 493A(3) for the defendant to prove their compliance with the general environmental duty, or that their act causing environmental harm was authorised by an instrument mentioned in section 493A(2), or that they complied with a code of practice, is justified as the measures taken by the defendant to satisfy their duty or comply with their authorisation will be particularly within the knowledge of the defendant. While the onus to prove the defence is on the defendant, the onus will always be on the prosecution to prove all the elements of the offence.

Legislation should not reverse the onus of proof in criminal proceedings without adequate justification – *Legislative Standards Act 1992*, s 4(3)(d)

The Bill expands the scope of section 490 to allow a certificate about a sample analysis to be produced in a civil proceeding. It is a FLP that legislation should not reverse the onus of proof without adequate justification. The amendment to section 490 of the EP Act could potentially reverse the onus of proof by placing the onus on the defendant to prove a certificate about a sample analysis is proof of the evidence stated in the certificate about a sample analysis. However, the certificate is only to be treated as evidence and is not conclusive proof of the matters stated in the sample analysis. The party affected by the

production of the certificate as evidence in a civil proceeding will continue to be provided an opportunity to challenge a fact sought to be proven by the certificate.

Legislation should provide appropriate protection against self-incrimination – *Legislative Standards Act 1992*, s 4(3)(f)

The Bill inserts an offence under section 319 for breaching the general environmental duty. The existing section 493A(3) provides that where a person is charged with other offences involving environmental harm under the EP Act, a defence is available where a person proves they complied with the general environmental duty. This defence, which entails a reversed onus of proof, will continue to operate and have application. This raises the FLP that legislation should provide appropriate protection against self-incrimination. For example, if a circumstance arose where a person was prosecuted for the serious environmental harm offence under section 437, they could raise evidence of their compliance with the general environmental duty in accordance with section 493A(3). If the evidence raised tended to show they had actually failed to satisfy their duty, this could amount to self-incrimination of a breach of section 319.

To provide protection against self-incrimination that may arise from the interaction of the general environmental duty offence and section 493A(3), the Bill inserts provisions that restrain prosecutions in certain circumstances. The new section 319B provides that a person being prosecuted for an offence involving environmental harm, the person cannot be charged in the alternative with an offence against the general environmental duty in relation to the same, or substantially the same, conduct that gave rise to the environmental harm offence charge. In addition, there is a limitation on raising a charge in a separate proceeding against the general environmental duty offence in relation to the same, or substantially the same, conduct that gave rise to the environmental harm offence where the prosecution would be using information obtained in the proceeding for the environmental harm offence. These provisions ensure that a person is not unfairly disadvantaged by the operation of section 493A(3) and giving evidence in their defence.

Consultation

Consultation was undertaken through the public release of a consultation paper in September 2023. The consultation paper outlined proposals for amendments to implement enhancements and efficiencies to existing powers and penalties under the EP Act, as well as to introduce a new statutory obligation, the duty to restore. Prior to the consultation paper's release, the Government released the report outlining the independent review findings and the Government Response to the review recommendations in May 2023.

During October 2023, information sessions were held by the Department for representatives from the resources sector, regulated industry, local government, environmental and conservation groups, and First Nations groups such as registered native title bodies corporate. The purpose of the information sessions was to provide an overview of the independent review, the amendments proposed to implement its recommendations, and opportunity to ask questions.

The consultation period on the consultation paper closed on 10 November 2023. The Department has published a consultation report detailing the feedback received and stakeholders that provided submissions.

Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland and is not uniform with or complementary to legislation of the Commonwealth or another state.

Notes on provisions

Part 1 Preliminary

Short title

Clause 1 states that the short title is the Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024.

Commencement

Clause 2 states that sections 49 and 50 of the Bill commence immediately after the commencement of section 121 of the *Environmental Protection and Other Legislation Amendment Act 2023*.

All other amendments commence on assent.

Part 2 Amendment of Environmental Protection Act 1994

Act amended

Clause 3 states that this part amends the *Environmental Protection Act 1994* (EP Act).

Amendment of s 4 (How object of Act is to be achieved)

Clause 4 amends section 4(6) to replace the phrase 'all reasonable and practicable measures' with 'all reasonably practicable measures'. This replacement avoids an interpretational issue of a possible two-tier test of what is 'reasonable and practicable' and provides for a single test of deciding what measures are reasonably practicable. The amendment does not affect the intent of the section.

The same amendment is made throughout the EP Act to ensure the term 'reasonably practicable' is used consistently (see clauses 13, 14, 40 and 58).

Amendment of s 6 (Community involvement in administration of Act)

Clause 5 replaces the term 'Aborigines and Torres Strait Islanders' with 'Aboriginal peoples and Torres Strait Islander peoples' in section 6 to ensure that the EP Act is reflective of culturally and socially appropriate language.

Insertion of new s 6A

6A Principles of environmental protection

Clause 6 inserts new section 6A which requires the EP Act to be administered having regard to specified environmental policy principles. The principles of environmental protection have been embedded in the EP Act and good regulatory practice to varying degrees. Increasing the prominence of these principles in the EP Act reinforces proactive approaches to harm prevention and minimisation, in preference to reactive responses to harm that has already occurred. Increasing the prominence of these principles is not an introduction of new concepts considered in decision-making under the EP Act.

The proportionality principle and the principle of primacy of prevention adopt the definitions for similar principles in the *Environment Protection Act 2017* (Vic), while the precautionary principle, and the principles of intergenerational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms which includes the polluter pays principle are set out in the Intergovernmental Agreement on the Environment (IGAE). The IGAE is included as a schedule to the *National Environment Protection Council (Qld) Act 1994*.

The precautionary principle, and the principles of intergenerational equity, and conservation of biological diversity and ecological integrity, have long been considered in decision-making under the EP Act through the requirement to consider the standard criteria. New section 6A also provides that if a provision of the EP Act requires the chief executive or administering authority to consider or have regard to the standard criteria, then they must still consider or have regard to the standard criteria. However, they are not required to consider or have regard to any other principle mentioned in this section, although they are not precluded from doing so.

Amendment of s 8 (Environment)

Clause 7 amends section 8 to include human health, well-being and safety more clearly in the definition of ‘environment’. This is achieved by specifying that the ‘physical characteristics of locations places and areas’, and ‘physical surroundings of people’ are part of the environment. Physical surroundings include the land, waters, atmosphere, climate, sound, odours and tastes that surround humans.

The amendment is essentially splitting the existing paragraph (c) into two, being:

- the environment of locations, places and areas; and
- the environment as it relates to people.

The new paragraph (e) is the same as the existing paragraph (d).

This amendment reinforces the aspects of the environment conducive to human health, well-being and safety that are already prescribed as environmental values through environmental protection policies, while also limiting that human health is only protected by the EP Act to

the extent it is affected by the environment. This approach is important for maintaining clarity and avoiding duplication or overlap across Queensland statutes, particularly the *Public Health Act 2005* given its object to protect and promote the health of the Queensland public.

Amendment of s 9 (Environmental value)

Clause 8 amends section 9 to more clearly incorporate human health as an environmental value. This amendment means that adverse effects on human health, safety and well-being are also more clearly incorporated into concepts of environmental harm, environmental nuisance, material environmental harm and serious environmental harm. However, the term 'public health' is used in the provision, rather than 'human health', in keeping with existing wording in section 9.

The section states an environmental value is 'a quality or physical characteristic of the environment that is conducive to public health, safety or amenity'. The adjective 'public' applies distributively to the words that follow it such that 'public health, safety or amenity' can be read as 'public health, public safety or public amenity'.

The concept of environmental values incorporating public amenity or safety was already in existing paragraph (a), but this amendment separates it from paragraph (a) and places it in new paragraph (b).

This amendment also relocates a component of the definition of environment from existing section 8(c) ('a quality or physical characteristic of the environment that contributes to its biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community;') into section 9 as this is better reflected in the definition of 'environmental value'.

The new paragraph (d) is the same as the existing paragraph (b).

Amendment of s 16 (Material environmental harm)

Clause 9 omits reference to 'environmental nuisance' in section 16. This amendment provides that environmental harm that is environmental nuisance will no longer be precluded from being material environmental harm.

Given environmental nuisance is a matter devolved to local governments under section 130 of the EP Regulation, certainty is required as to whether a particular matter is environmental nuisance or material environmental harm, so it is clear who is the responsible administering authority. Amendment is made to section 130 of the EP Regulation so that matters with the characteristics of environmental nuisance remain with local government unless the chief executive decides the matter is one of material environmental harm (see clause 55).

Amendment of s 17 (Serious environmental harm)

Clause 10 omits reference to 'environmental nuisance' in section 17. This amendment provides that environmental harm that is environmental nuisance will no longer be precluded from being serious environmental harm.

As stated above, a mechanism for clarifying devolution of environmental nuisance, and when it is serious environmental harm and therefore not devolved to local government, is provided by amendment to section 130 of the EP Regulation (see clause 55).

Amendment of s 24 (Effect of Act on other rights, civil remedies etc.)

Clause 11 amends section 24 to include the new duty to restore the environment. Section 24 states that the breach of particular duties under the EP Act do not, in and of themselves, give rise to a civil right or remedy. This amendment adds the new duty to restore (section 319C as inserted by clause 16 of this Bill) to the existing duties that this applies to. It is appropriate to clarify that the duty to restore alone does not give rise to a civil right or remedy where the duty is based on taking reasonably practicable measures.

Amendment of s 219 (Decision on proposed amendment)

Clause 12 amends section 219 to allow the administering authority to make revisions to a proposed amendment to an environmental authority (EA) or Progressive Rehabilitation and Closure Plan (PRCP) schedule within the notice of proposed amendment (NOPA) process. The administering authority may make such revisions after considering, and in response to, the written submissions made by the holder of the EA or PRCP schedule. The administering authority can subsequently include the revised amended condition in the EA or PRCP schedule without the need to seek further submissions from the holder, but is not precluded from doing so.

This amendment creates flexibility in the NOPA process to make limited variations to the amendment proposal in response to the EA or PRCP schedule holder's submissions prior to making a final decision on whether to proceed with the amendment. This provides for a faster process for making amendments to EAs and PRCP schedules which continue to be necessary and desirable. This creates efficiencies for both the administering authority and EA and PRCP schedule holders by avoiding a duplication of processes, for example, re-commencing the NOPA process from the start where there is only a minor variation to the proposed amendment following consideration of written submissions from the EA or PRCP schedule holder.

Amendment of s 319 (General environmental duty)

Clause 13 amends section 319 to establish an offence for contravening the general environmental duty. A person commits an offence if they contravene the general environmental duty while undertaking an activity, and the contravention causes, or is likely to cause, serious or material environmental harm.

This offence is underpinned by the principle of primacy of prevention, strengthening deterrence and encouraging stronger environmental management for the prevention and mitigation of environmental harm. An offence will place an emphasis on prevention by operators rather than waiting for harm to occur and facing expensive clean-up and remediation operations, noting that communities can continue to be affected for the duration

of a remediation period. It provides an additional tool for the administering authority to take proactive action in relation to sites at risk and intervene before serious or material environmental harm occurs. In this way, where environmental harm has occurred, the general environmental duty offence does not limit the availability of separate offences under the EP Act, for example, the offence of serious environmental harm under section 437. However, new section 319B places some limitations around prosecutions of the general environmental duty offence where other environmental harm offences are charged due to the same or similar conduct (see clause 15).

The offence only applies where serious or material environmental harm is caused, or likely to be caused, by the failure of duty so that the applicability of an offence and associated penalties are proportionate to the conduct. Wilful contravention of the general environmental duty carries a maximum penalty of 4,500 penalty units or 2 years imprisonment, and a contravention otherwise carries a maximum penalty of 1,655 penalty units. The penalty for the offence is of an appropriate level and considered necessary to ensure persons meet their environmental obligations. The penalty is comparable to other penalties for environmental offences under the EP Act and other Queensland legislation.

Exemptions from the offence provision exist in certain circumstances based on whether environmental harm, which may arise from a particular act or omission in carrying out the activity, can be said to have been appropriately managed. A person will not have committed the offence where the act from which the contravention arises was authorised under an instrument identified in section 493A(2) (for example, an environmental authority), and that instrument provides for the reasonably practicable measures to be taken in relation to the act. Alternatively, a person will not have committed the offence if, in doing the act that gives rise to the contravention, they complied with a code of practice that applied to the relevant act. .

Section 319 is also amended to include relevant considerations to which regard may be had in determining whether a person has contravened the general environmental duty. For example, failing to install, use and maintain plant, equipment, processes and systems in a way that minimises risks of environmental harm, and failing to use and maintain systems that ensure all substances are handled, stored used or transported in a way that minimises the risks of environmental harm. The provision does not limit the existing section 319(2) in the pre-amendment EP Act, which is renumbered as section 319(4) by the Bill, or considerations otherwise of what may be required for a person to have taken reasonably practicable measures to prevent or minimise environmental harm.

The introduction of the offence for contravention of the general environmental duty does not limit the ability of the administering authority to issue a statutory notice, that is, an environmental enforcement order, to secure compliance with the duty. This ground to issue an environmental enforcement order will remain in place under the new section 359, and is intended to be available regardless of whether the relevant contravention of the general environmental duty has caused or is likely to cause serious or material environmental harm.

This clause also amends section 319 to replace the phrase ‘all reasonable and practicable measures’ with ‘all reasonably practicable measures’ to avoid an interpretational issue of an implied two-tier test as outlined for clause 4 above.

The same amendment is made throughout the EP Act to ensure the term 'reasonably practicable' is used consistently (see clauses 14, 40 and 58 in addition to clause 4).

Amendment of s 319A (Special provision for activities involving relevant industrial chemicals)

Clause 14 amends section 319A to replace the phrase 'all reasonable and practicable measures' with 'all reasonably practicable measures' to avoid an interpretational issue of a possible two-tier test as outlined for clause 4 above.

The same amendment is made throughout the EP Act to ensure the term 'reasonably practicable' is used consistently (see clauses 13, 40 and 58 in addition to clause 4).

Insertion of new s 319B

Clause 15 inserts new section 319B which introduces relevant provisions for proceedings related to contraventions of the general environmental duty and addresses the interactions between sections 319 and 493A of the EP Act.

319B Prosecutions for contravention of general environmental duty

New section 319B provides legal protections for particular persons who are charged with an offence involving a relevant act mentioned under section 493A(1). A person is subject to these provisions if they cause an offence of, and are charged with, serious or material environmental harm or environmental nuisance, contravening a noise standard, or depositing a contaminant or releasing stormwater runoff under section 440ZG (a 'relevant offence').

Section 493A(3) provides a defence to a charge of doing a relevant act mentioned under section 493A(1) where the defendant proves they complied with the general environmental duty. Where a person is intending to rely on the defence under section 493A(3) in a proceeding for a relevant offence, the person may not be charged in the alternative with an offence of contravening the general environmental duty in relation to the same, or substantially the same, conduct as was engaged in when causing a relevant act. Additionally, any information obtained in relation to the defence under section 493A(3) in a proceeding for a relevant offence cannot be used against the person in a proceeding for an offence of contravening the general environmental duty that is constituted by the same, or substantially the same, conduct as was engaged in when causing a relevant act.

These provisions are necessary to ensure that persons may still rely on the general environmental duty in a defence of causing a relevant act, without the risk of the failure of this defence then resulting in self-incrimination or a subsequent a charge of contravening the general environmental duty. These provisions remove the possibility of a person being charged with two separate offences for the same conduct.

Insertion of new ch 7, pt 1, div 1A

Clause 16 inserts new chapter 7, part 1, division 1A to provide for a duty to restore the environment to complement other duties in the EP Act.

Division 1A Duty to restore the environment

319C Duty to restore the environment

New section 319C introduces the duty to restore the environment. This duty requires that, if a person causes or permits unlawful environmental harm through contamination, the person must take appropriate action, as soon as reasonably practicable, to rehabilitate or restore the environment as far as reasonably practicable to its condition before the harm was caused.

The introduction of the duty to restore the environment places an obligation for the proactive remediation of environmental harm on the person responsible for the harm they have caused or permitted. The duty is underpinned by the 'polluter pays' principle, and reinforces and complements the general environmental duty which has the objective of harm prevention and mitigation, whereas the duty to restore applies where environmental harm nevertheless occurs. The duty clarifies that a person should not wait for the administering authority to issue a notice to commence clean-up or remediate, and is intended to encourage quicker responses to incidents involving contamination to ensure they are remedied before they cause greater harm.

A distinction is made between the use of the phrase 'incident involving contamination' in the new section 319C and the defined term 'contamination incident' under new section 360 for environmental enforcement orders. The concept of an incident involving contamination under the duty to restore aligns only with the component of the section 360 definition articulated in paragraph (a). However, it does not contain the same criteria that the environmental harm must be serious or material. This provides a simple threshold for the duty to restore the environment whereby there need only be an incident involving contamination resulting in environmental harm.

The duty applies to the person causing or permitting, or who caused or permitted, the incident. 'Permit' includes 'to let (something) be done or occur' which implies inaction or an omission, for example inaction to maintain a containment structure for contamination. It is directed towards the persons responsible for the environmental harm (in line with the 'polluter pays' principle). A person's duty could be triggered whether in the course of an activity being carried out or not, or whether by an act or omission, having regard to the definition of 'contamination' in section 10 of the EP Act.

The duty only applies where the environmental harm was caused unlawfully. Section 493A defines when environmental harm is unlawful. By enlivening section 493A, it means the duty will not apply to a person if the act causing environmental harm was authorised to be done under certain instruments such as an environmental authority or

PRCP schedule, a prescribed condition for a small scale mining activity, or a transitional environmental program. It is presumed that where such instruments regulate a particular harm caused by an activity, they also set out requirements for how the impacts of that harm are to be managed or remedied. However, where such instruments do not, the administering authority is not precluded from issuing a statutory notice, that is, an environmental enforcement order, requiring clean-up of contamination.

When deciding appropriate measures to take to restore the environment, what is reasonable will depend on the circumstances. However, new section 319C requires that in deciding reasonably practicable measures to take, regard must be had to the nature and extent of the environmental harm, the sensitivity of the receiving environment to remedial measures that might be taken, the current state of technical knowledge for remedial action relevant to the harm, the likelihood of successful application of the different measures that might be taken, and the financial implications of remedial actions that might be taken. These considerations are aligned with the considerations found under section 319 for deciding reasonably practicable measures to satisfy the general environmental duty.

This clause also makes it an offence to contravene the duty to restore the environment where the contravention relates to environmental harm that is serious or material. The purpose of this offence is to sufficiently deter persons from walking away from serious or material environmental harm they have caused. The offence only applies where serious or material environmental harm was not restored so that the applicability of an offence and associated penalties are proportionate to the conduct. Where environmental harm falls below the threshold of material environmental harm, compliance with the duty to restore can still be secured through other administrative means, such as the issuing of an environmental enforcement order. The duty will be a ground on which the administering authority can issue an environmental enforcement order under new section 359.

Wilful contravention of the duty to restore the environment carries a maximum penalty of 4,500 penalty units or 2 years imprisonment, and a contravention otherwise carries a maximum penalty of 1,655 penalty units. The penalty for the offence is of an appropriate level and considered necessary to ensure persons meet their environmental obligations when they cause or permit contamination. The penalty is comparable to other penalties for environmental offences under the EP Act and other Queensland legislation.

Amendment of s 320A (Application of div 2)

Clause 17 amends section 320A to expand the duty to notify to situations where a person not only becomes aware, but where they ‘ought reasonably to have become aware’, of an event that requires notification under chapter 7, division 2. This duty previously required only for a person to notify once they ‘became aware’ of an event causing environmental harm, or a change in the condition of contaminated land, rather than accounting for an awareness of consequences as a result of carrying out an activity as prescribed in section 320A.

The duty was based on the person's knowledge alone which may present issues in determining when the person became aware of a circumstance, and therefore whether they complied with the duty when required. This amendment provides that the test for determining whether notification should have occurred is not just when the person becomes aware but includes whether the person reasonably believes or should in the circumstances reasonably believe that a notifiable event has occurred. This allows for the circumstances surrounding the event or contamination, or observable indicators of environmental harm, to be considered in determining when notification ought to have occurred. In practice, there will likely be significant overlap in when a person became aware, and when circumstances indicate they should reasonably believe harm or change or condition in contaminated land has occurred. However, the amendment to the duty is relevant where there is some doubt the person acted on the duty when they were supposed to, for example, if it appears they delayed notification on the basis they were not aware of the event even though it can be objectively determined there were indicators that the event had occurred before the time they claimed to have 'become aware'.

The amendment to the duty to notify supports industry and other persons undertaking activities that present a risk of environmental harm to monitor for contamination incidents more readily and respond to them more proactively.

This clause also makes a consequential amendment to section 320A to reflect the replacement of chapter 7, part 5, division 1 made through the Bill. This amendment removes the term 'environmental protection order' and replaces it with the term 'environmental enforcement order' to reflect the consolidation of statutory notices into the environmental enforcement order.

Amendment of s 320B (Duty of particular employees to notify employer)

Clause 18 makes a consequential amendment to section 320B to reflect the changes to the duty to notify under section 320A by clause 17 of this Bill.

Amendment of s 320C (Duty of other persons to notify particular owners and occupiers)

Clause 19 makes a consequential amendment to section 320C to reflect the changes to the duty to notify under section 320A by clause 17 of this Bill.

Amendment of s 320D (Duty of employer to notify particular owners and occupiers

Clause 20 makes a consequential amendment to section 320D to reflect the changes to the duty to notify under section 320A by clause 17 of this Bill.

Amendment of s 320DA (Duty of owner, occupier or auditor to notify administering authority)

Clause 21 makes a consequential amendment to section 320DA to reflect the changes to the duty to notify under section 320A by clause 17 of this Bill.

Amendment of s 320DB (Duty of local government to notify administering authority)

Clause 22 makes a consequential amendment to section 320DB to reflect the changes to the duty to notify under section 320A by clause 17 of this Bill.

Amendment of s 326B (When environmental investigation required–environmental harm)

Clause 23 amends section 326B to remove any doubt that the administering authority may issue a person with a notice to conduct an environmental investigation for an activity, despite the activity being carried out under an environmental authority which authorises, or purportedly authorises, the activity being carried out.

This clarifying amendment ensures that an environmental authority is not regarded as a barrier to issuing the investigation notice given that the grounds for issuing the notice are that the administering authority be satisfied environmental harm has been caused or is likely.

Amendment of s 326BA (When environmental investigation required–contamination of land)

Clause 24 amends section 326BA consistently with the amendment to section 326B by clause 23. The amendment is to remove any doubt that the administering authority may issue a notice to conduct an environmental investigation to a prescribed responsible person for contaminated land despite the person holding an environmental authority which authorises, or purportedly authorises, activities carried out on the relevant land.

Insertion of new ch 7, pt 3, div 3, sdiv 1, hdg

Clause 25 inserts a heading for chapter 7, part 3, division 3, subdivision 1 which establishes that existing section 344, for the amendment of a transitional environmental program upon application from the program's holder, falls under a new subdivision 1. This amendment is a consequence of the insertion of new chapter 7, part 3, division 3, subdivisions 2 and 3 which provide powers to the administering authority to initiate amendments to transitional environmental programs.

Insertion of new ch 7, pt 3, div 3, sdivs 2 and 3

Clause 26 inserts new subdivisions into chapter 7, part 3, division 3 to confirm the administering authority's power to initiate and decide amendments to transitional environmental programs. These amendments are considered necessary to ensure the

power of the administering authority to make amendments to transitional environmental programs is exercised in the same way as the power to make and issue a transitional environmental program. This clause is intended to align with, and make certain, the operation of section 24AA of the *Acts Interpretation Act 1954* which provides that a power to amend or repeal an instrument or decision is exercisable in the same way, and subject to the same conditions, as the power to make the instrument or decision.

Subdivision 2 Amendments by administering authority

344AA Corrections

New section 344AA provides that the administering authority may amend a transitional environmental program to correct clerical or formal errors. These corrections may be made if they do not adversely affect the interests of the holder of the transitional environmental program or anyone else, and the holder of the transitional environmental program has been notified in writing of the correction. This section is based on a similar power to amend environmental authorities in section 211 of the EP Act.

344AB Other amendments

New section 344AB provides that the administering authority may amend a transitional environmental program if it considers the amendment is necessary or desirable for the purpose of the program achieving compliance with the EP Act for the activity to which the program relates, and the procedure for the notice of proposed amendment is followed. The administering authority may also amend a transitional environmental program if the holder of the program has agreed to the amendment in writing. The grounds for amendment by the administering authority in subsection (1) are expressed similarly to the power to amend environmental authorities in section 215 of the EP Act, but the ground under paragraph (a) relates back to the definition and function of a transitional environmental program as stated in section 330 of the EP Act.

Section 344AB also sets out what the administering authority must consider when deciding whether to amend a transitional environmental program. The considerations are based on existing criteria for making decisions to make or amend transitional environmental programs under sections 338 and 344.

If the amendment is not made by agreement, the administering authority must follow the procedure outlined in the new sections 344AD to 344AH to ensure that the holder of the transitional environmental program is given due process before the amendment is made. Transitional environmental program amendments initiated and decided by the administering authority are also prescribed as original decisions in schedule 2 of the EP Act by clause 52 of this Bill which makes them subject to review and appeals where the transitional environmental program holder is dissatisfied with the decision.

344AC Steps to be taken after amendments

New section 344AC provides the process that the administering authority must follow once it has made a decision to amend a transitional environmental program to give effect to the amendment. This section is based on similar procedural provisions for amending environmental authorities in section 221 and for issuing transitional environmental programs, including amended transitional environmental programs, in section 340 of the EP Act.

Subdivision 3 Procedure for particular amendments

344AD Application of subdivision

New section 344AD specifies that this division applies if the administering authority proposes to amend a transitional environmental program, other than to make a correction or with the written agreement of the holder of the program. This section is based on a similar procedural provision for amending environmental authorities in section 216 of the EP Act.

344AE Notice of proposed amendment

New section 344AE provides that when proposing to amend a transitional environmental program, the administering authority must give the holder of the program written notice. The written notice must state the amendment proposed by the administering authority, the grounds for the proposed amendment, and the facts and circumstances that are the basis for the grounds for the proposed amendment. The notice must also state that the holder may make written representations to the administering authority to demonstrate why the amendment should not be made. The period for the holder to make written representations must be at least 20 business days after they are given the notice. This section is based on a similar procedural provision for amending environmental authorities in section 217 of the EP Act.

344AF Considering representations

New section 344AF provides that the administering authority must consider any written representation made within the period stated in the proposed amendment notice by the holder of the transitional environmental program. This section is based on a similar procedural provision for amending environmental authorities in section 218 of the EP Act and ensures procedural fairness for an affected transitional environmental program holder.

344AG Decision on proposed amendment

New section 344AG provides that after considering written representations of the holder of the transitional environmental program, the administering authority may make the amendment if a ground still exists. However, if the administering authority decides not to make the amendment, written notice must promptly be provided to the

holder. This section is based on a similar procedural provision for amending environmental authorities in section 219 of the EP Act, as amended by clause 12 of this Bill.

344AH Notice of amendment decision

New section 344AH provides that the administering authority must give written notice about the amendment decision to the holder of the transitional environmental program within 10 business days of the decision being made. This section is based on similar procedural provisions for amending environmental authorities in section 220, and provisions for issuing transitional environmental programs, including amended transitional environmental programs, in section 340 of the EP Act.

Amendment of ch 7, pt 5, hdg (Environmental protection orders)

Clause 27 amends the heading for chapter 7, part 5 as a consequence of the introduction of the environmental enforcement order (EEO), which replaces and consolidates the functions of environmental protection orders, direction notices and clean-up notices under the pre-amendment EP Act.

Replacement of ch 7, pt 5, div 1 (General)

Clause 28 replaces chapter 7, part 5 division 1 to introduce the EEO, which replaces and consolidates the current functions of environmental protection orders, direction notices and clean-up notices. The introduction of the EEO will result in a simpler process for notice recipients, as well as the administering authority. It will support better environmental outcomes by enabling a more responsive compliance approach. New chapter 7, part 5 division 1 retains and consolidates the functions of former chapter 7, parts 5, 5A, 5B and 5C (former sections 358 to 363O). Consequential amendments are also made to replace references to environmental protection orders, direction notices and clean-up notices throughout the EP Act under clauses in the Bill, and to ensure review and appeal rights continue to apply to decisions to issue EEO (see clause 52).

Division 1 Interpretation

358 Definitions for part

New section 358 defines the term ‘relevant matter’ for the purposes of the EEO. A relevant matter for an EEO issued on an enforcement ground (under new section 359) is the matter forming the basis for the enforcement ground. Otherwise, a relevant matter is the matter forming the basis for the issuing of the EEO. This section also sets out definitions for a ‘contamination incident’, a ‘prescribed person for a contamination incident’, ‘place’ and a ‘related person’ of a company. Each of these definitions are retained from the pre-amendment EP Act.

359 Meaning of enforcement ground

New section 359 defines the term 'enforcement ground' for the issuing of an EEO to a person. These grounds generally reflect the grounds and matters for which environmental protection orders and direction notices could be issued under the pre-amendment EP Act. However, it extends the grounds to issue a notice to secure compliance with a transitional environmental program and a temporary emissions licence. A new enforcement ground to secure compliance with the duty to restore the environment under new section 319C is also included in this section. A ground for issuing EEOs to address contamination incidents, based on clean-up notices under the pre-amendment EP Act, is provided elsewhere in new section 362.

The ground of issuing an EEO to secure compliance with the general environmental duty also supersedes a ground previously articulated under former section 358(c) where a notice could be issued for unlawful environmental harm following an environmental evaluation.

360 Meaning of contamination incident

New section 360 defines the term 'contamination incident' for this part. The definition is retained from the pre-amendment EP Act (former section 363F) and remains unchanged.

361 Who is a prescribed person for a contamination incident

New section 361 identifies the prescribed persons for a contamination incident. This is retained from the pre-amendment EP Act (former section 363G) and remains unchanged, with the exception of replacing reference to a 'clean-up notice' with 'environmental enforcement order'.

Division 1A Environmental enforcement orders

Subdivision 1 General provisions

362 When environmental enforcement order may be issued

New section 362 prescribes the circumstances or events for when the administering authority may issue an EEO to a person. An EEO can be issued to a person if the administering authority believes an enforcement ground listed under new section 359 exists, or if the administering authority believes a person is a prescribed person for a contamination incident. An EEO can also be issued to a related person of a company in the circumstances under chapter 7, part 5, division 4 (division 2 under the pre-amendment Act).

This section also clarifies that the administering authority may issue an EEO to a holder of an environmental authority in relation to an activity even if the person is a holder of an environmental authority that authorises, or purportedly authorises, the activity. The EEO replaces and consolidates the functions of environmental protection orders, direction notices and clean-up notices under the pre-amendment EP Act. The provision neither expands nor limits the administering authority's existing power to issue statutory notices. The intent of this provision is to clarify that an environmental authority is not a barrier to issuing an EEO to address environmental harm or the risk of environmental harm where such harm is not clearly authorised or regulated by the environmental authority.

Where an operator is carrying out their activity lawfully and in compliance with an environmental authority which clearly provides for the management of the levels and type of environmental harm occurring, the administering authority would not issue an EEO in response to such harm. This clarifying provision also does not preclude the requirement for grounds to be satisfied for an EEO to be issued.
Where an operator was failing to take reasonably practicable measures to prevent or minimise environmental harm as a result of activity that cannot be said to be authorised or regulated by the environmental authority, the administering authority could issue the EEO on the grounds of securing compliance with the general environmental duty.

363 Standard criteria to be considered before issue of environmental enforcement order

New section 363 prescribes that before deciding to issue an EEO, the administering authority must consider the standard criteria. The standard criteria are defined under schedule 4 of the EP Act.

This section also identifies the circumstances or events where the administering authority is not required to consider the standard criteria before deciding to issue an EEO. These are the grounds under section 359(a), (b), or (f). The grounds contemplate circumstances where an investigation has shown that obligations under the EP Act have not been complied with, and given that the standard criteria or regulatory impact has been considered in establishing those obligations, further consideration of standard criteria does not provide an additional benefit. EEOs issued under section 362(2)(a) for contamination incidents will also be exempt from consideration of the standard criteria as clean-up notices under the pre-amendment EP Act, on which this ground is based, were not subject to the requirement to consider the standard criteria.

364 Matters to consider before issuing environmental enforcement order relating to particular emissions

New section 364 provides the matters that the administering authority must consider before issuing an EEO for the contravention of section 440 (offence of causing

environmental nuisance). The section is retained from the pre-amendment EP Act (former section 363C).

The administering authority must consider the applicable emission criteria in this section and consider whether an EEO is the most appropriate way to resolve the issue, before deciding to issue an EEO for the contravention of section 440.

The general emission criteria include, for example, the emission's characteristics or qualities, the duration and time of the emission, the emission's impact on the receiving environment, and the emission's impacts on any affected persons. For matters involving noise, the criteria include the measured sound pressure level of the noise, the audibility of the noise, whether the noise is continuous or intermittent, and whether the noise has vibration components.

This does not preclude that the administering authority may, after considering the matters under this section, decide that the level of environmental nuisance caused does not warrant the issue of an EEO. In this case, the administering authority may decide, for example, that targeted education for the person causing the environmental nuisance is more suitable to reduce or prevent future instances of the nuisance. Alternatively, if the contravention is of a serious enough nature, the administering authority may decide that issuing an EEO is the most suitable course of action.

Subdivision 2 Form, content and other matters

365 References to taking action

New section 365 provides that any references in subdivision 2 to taking an action stated in an EEO may include achieving an outcome. For example, an EEO may state, as an action that must be taken, that the recipient must ensure that a specific outcome is met. This section retains a provision from the pre-amendment EP Act (former section 363H(7)).

366 Form and content of environmental enforcement order

New section 366 prescribes the form and content requirements for an EEO. For example, an EEO must be in writing and include details about the relevant matter and enforcement ground on which the EEO has been issued. An EEO must state the actions the recipient must take to remedy or otherwise address the relevant matter to which the order relates. If an EEO is issued in relation to a contamination incident, it must state the description of the incident and where it is happening or has happened. The EEO may also include any other information the administering authority considers appropriate.

This section is based on form and content requirements for environmental protection orders, direction notices and clean-up notices under the pre-amendment EP Act (former sections 360, 363D and 363H).

367 Actions stated under environmental enforcement order

New section 367 provides actions that may be stated in an EEO for a recipient to undertake. An EEO may state the actions the recipient must take to address the relevant matter for which the order was issued. For example, an EEO may require the recipient to take stated action within a stated period. Actions for a recipient to take that may be imposed through an EEO are not limited, provided they relate to a relevant matter forming the basis for the enforcement ground for the issuing of the EEO.

If an EEO is issued in relation to a contamination incident, the recipient can be directed to take actions to prevent or minimise the contamination, rehabilitate or restore the environment to pre-contamination condition, assess the nature and extent of the harm that has been caused, or keep the administering authority informed about the incident and any subsequent actions taken.

This section is based on provisions about the scope of actions that may be required by an environmental protection order, direction notice or clean-up notice that existed under the pre-amendment EP Act (former sections 360, 363D and 363H).

368 Time for taking action must be reasonable

New section 368 provides that the time for a recipient to take an action stated in an EEO must be reasonable. The determination of the reasonableness of the available time must consider the nature of the action, the risks the relevant matter poses to human health, the environment or for the loss or damage to property, and how long the person has been aware of the matter.

This section is based on provisions for direction notices and clean-up notices about determining a reasonable time for actions under the notice that existed under the pre-amendment EP Act (former sections 363D and 363H).

369 Other provisions relating to issuing environmental enforcement orders

New section 369 provides how an EEO may be issued. If an EEO is issued to multiple recipients, the administering authority must ensure that a copy is given to each recipient. Flexibility is also provided to the administering authority and authorised persons to make a requirement to remedy a matter orally where it is not practicable to address the matter by a written order, and then confirm in writing through an EEO as soon as practicable afterwards.

Each of these provisions is based on previous provisions for clean-up notices and direction notices respectively that existed under the pre-amendment EP Act (former sections 363H and 363B).

Subdivision 3 Offence relating to environmental enforcement orders

369A Offence not to comply with environmental enforcement order

New section 369A provides offences for contravening a requirement of an EEO, unless the person has a reasonable excuse.

The offence establishes two tiers of contravention and associated penalties so that penalties are proportionate to the nature of the offending as well as the underlying offence or contravention that gave rise to the ground for issuing the EEO.

A wilful contravention of an EEO issued for certain grounds on which the order was issued carries a maximum penalty of 6,250 penalty units or 5 years imprisonment, and a non-wilful contravention a maximum penalty of 4,500 penalty units. The relevant enforcement grounds include to secure compliance with the general environmental duty where serious or material environmental harm is involved, to secure compliance with an environmental authority condition, and where the recipient is a prescribed person for a contamination incident.

For all other grounds for which the environmental enforcement order was issued (for example, the causing of environmental nuisance or for securing a person's compliance with an audit notice or surrender notice), a wilful contravention carries a maximum penalty of 1,655 penalty units, and a non-wilful contravention a maximum penalty of 600 penalty units.

This section also allows flexibility for the court, if it is not satisfied the defendant is guilty of a wilful contravention, to find the defendant guilty of the lesser offence.

369B Defences for particular proceedings

New section 369B makes defences available for a recipient of an EEO who is charged with an offence of contravening or wilfully contravening an EEO. These defences include that the recipient is not a prescribed person for a contamination incident, and that the contamination incident was caused by a natural disaster or act of sabotage and the recipient took all reasonable measures to prevent the incident. This is consistent with the existing defences for failure to comply with a clean-up notice in section 363I of the pre-amendment EP Act.

Subdivision 4 Other provisions

369C Notice of disposal by recipient in particular circumstances

New section 369C requires the recipient of an EEO to disclose the existence of the order to a buyer by a written notice when selling or disposing of the place or business

that is subject to the EEO. Failure to do so carries a maximum penalty of 50 penalty units. This is necessary for ensuring that potential buyers are aware of the existence of an EEO and can investigate any consequent financial implications before entering into a contract.

If the recipient fails to disclose this information to a buyer, the buyer is permitted to rescind the agreement to purchase the place or business in writing either before the completion of the agreement or possession under the agreement, whichever is earlier. If a recission is made, the buyer must be refunded any funds already paid, and the buyer must return any documents about the sale or disposal, other than their copy of the agreement.

If a sale or disposal of the place or business is agreed to, the recipient must, within 10 business days, give written notice of the disposal to the administering authority. Failure to do so carries a maximum penalty of 50 penalty units.

This section is consistent with an existing requirement for environment protection orders under former section 362 of the pre-amendment EP Act. However, the requirement is expanded as it applies to an EEO, issued on any grounds, that relates to a place or business. The offences for failing to comply with the requirements carry the same maximum penalty as in section 362 of the pre-amendment EP Act.

369D Notice of ceasing to carry out activity

New section 369D requires the recipient of an EEO who has ceased the activity to which the EEO relates to give written notice of the ceasing of carrying out the activity to the administering authority. This notice must be given within 10 business days of the activity being ceased. Failure to do so carries a maximum penalty of 50 penalty units.

This is consistent with an existing requirement for EPOs under section 363 of the pre-amendment EP Act. However, the requirement is expanded by applying to any EEO where the relevant matter for which the EEO was issued relates to the carrying out of an activity. The offence for failing to comply with the requirement carries the same maximum penalty as in former section 363 of the pre-amendment EP Act.

369E Procedure if recipient is not the owner of land on which action is required

New section 369E provides a statutory process to allow for a recipient of an EEO or someone acting on their behalf to take action on land that they do not own. These provisions are useful in situations where the contamination incident spreads from the site of the incident into nearby watercourses or onto neighbouring land.

In these circumstances, the land may be entered only with the consent of the owner and occupier of the land, or if the recipient or person acting on their behalf has given at least 2 business days written notice to the owner and occupier. The written notice must state the intention to enter the land and purpose of entry, and specify the days

and times when the land will be entered. It is specified that this section does not authorise the recipient or contractor to enter a building used for residential purposes.

This section is based on the existing procedural requirements for clean-up notices in former section 363J, and for environmental protection orders issued to a related person of a company in former section 363AF, under the pre-amendment EP Act. However, the requirement is expanded by applying to an EEO issued on any grounds.

369F Taking action in place of recipient

New section 369F allows for the administering authority to take an action stated in the EEO when the recipient of an EEO fails to do so within the stated period. The administering authority may also take action if the EEO is subject to a stay granted by the court following an appeal of the decision to issue the EEO. In these circumstances, an authorised person, or person acting under the direction of an authorised person, may take any of the actions stated in the EEO.

Consistent with the provisions for recipients to enter land under new section 369E, an authorised person or person acting on their behalf may enter the land with the consent of the owner and occupier of the land, or if at least 2 business days written notice has been provided to the owner and occupier. The section does not authorise the authorised person or contractor to enter a building used for residential purposes.

This section is based on the existing procedural requirements for clean-up notices in former section 363K, and for environmental protection orders issued to a related person of a company in former section 363AG, under the pre-amendment EP Act. However, the requirement is expanded by applying to an EEO issued on any grounds.

369G Provision about taking action on land

New section 369G provides protections for owners and occupiers of the land being entered to undertake actions stated in the EEO pursuant to new sections 369E and 369F. In taking the action on the land, the recipient, an authorised person or person acting on their behalf must take all reasonable steps to ensure they cause as little inconvenience and damage as is practicable.

If the owner or occupier of the land incurs loss or damage because of the actions taken by the recipient, authorised person or the person acting on their behalf, they are entitled to reasonable compensation which can be agreed upon. If agreement is not reached between the parties on compensation, the court may order the recipient, the administering authority, or the person acting on their behalf to pay suitable compensation.

This section is consistent with the existing requirement for clean-up notices in former section 363J, and for environmental protection orders issued to a related person of a company in former section 363AF of the pre-amendment EP Act. However, the requirement is expanded by applying to an EEO issued on any grounds.

369H Cost recovery by recipient of environmental enforcement order in particular circumstances

New section 369H allows the recipient of an EEO, who is a prescribed person for a contamination incident, to recover costs in particular circumstances. If the recipient complies with the EEO, but was not the person who caused the contamination incident to occur, they are entitled to recover any costs they have incurred in complying with the EEO from the person responsible for the contamination incident.

This is consistent with the existing provision for cost recovery by a recipient of a clean-up notice under former section 363H in the pre-amendment EP Act. It does not expand the provision to enable cost recovery for any EEO, but keeps it limited to EEOs issued for contamination incidents under new section 362(2)(a).

369I Obstruction of recipient complying with environmental enforcement order

New section 369I provides an offence for the obstruction of a recipient of an EEO, or a person acting on their behalf. This is to ensure that a recipient or a person acting on their behalf can take action without other persons obstructing or delaying those actions. This offence carries a maximum penalty of 165 penalty units.

This is consistent with the existing offence provision for clean-up notices in former section 363L, and for environmental protection orders issued to a related person of a company in former section 363AH, under the pre-amendment EP Act. However, the requirement is expanded by applying to an EEO issued on any grounds. The offence and penalty are unchanged from former sections 363L and 363AH of the pre-amendment EP Act.

Division 1B Cost recovery notices

369J Administering authority may issue cost recovery notice

New section 369J provides that the administering authority may issue a cost recovery notice to a recipient of an EEO to recover costs it incurred in taking action in place of the recipient.

A cost recovery notice may be issued if an authorised person, or a person acting on the authorised person's behalf, takes action in place of a recipient who fails to comply with the EEO. This power can also be used if the recipient has sought a stay of the operation of the EEO. This is because the administering authority must have the power to do the works where there is a risk of significant damage to persons, property or the environment, whether a stay is in place or not. If the applicant is not successful in appealing the EEO, the administering authority can then recover the costs of doing those works by way of a cost recovery notice.

The administering authority may also issue a cost recovery notice to a prescribed person for a contamination incident if an authorised person takes action in an emergency situation under section 467 in relation to environmental harm caused or likely to be caused by the incident.

This section is based on the existing power to issue cost recovery notices to the recipient of a clean-up notices under former section 363N and to the recipient of environmental protection orders issued to a related person of a company under former section 363AI of the pre-amendment EP Act. However, the requirement is expanded to apply to an EEO, issued on any grounds, which requires the recipient to take an action to comply with the order.

This section also provides for the form and content requirements of a cost recovery notice. The requirements outlined in section 369J are adopted from section 363N of the pre-amendment EP Act, with the exception of subsections (5) and (6) of section 363N of the pre-amendment EP Act being extracted into a new section 369K (below).

369K When amount claimed under cost recovery notice is not payable

New section 369K provides the circumstances when amounts claimed under cost recovery notices are not required to be paid. These circumstances only apply to cost recovery notices that are issued under new section 362(2)(a) to the recipient of an EEO which was issued in relation to a contamination incident. Applicable circumstances include where the recipient is not a prescribed person for the contamination incident, or if the contamination incident was caused by a natural disaster and the recipient took all reasonably practicable measures to prevent the incident. The circumstances are consistent with those that existed under subsection (5) of former section 363N of the pre-amendment EP Act.

New section 369K also provides that if a person pays an amount stated in a cost recovery notice but was not the person who caused the associated contamination incident to occur, they are entitled to recover any costs they have incurred in complying from the person responsible for the contamination incident. This is consistent with the existing procedure under subsection (6) of former section 363N of the pre-amendment EP Act.

369L Several recipients of a cost recovery notice

New section 369L specifies that if a cost recovery notice is issued to two or more recipients, a copy of the notice must be given to each of the recipients. The amount claimed under the notice is payable by the recipients jointly and severally.

This is consistent with the existing requirement for cost recovery notices under former section 363O of the pre-amendment EP Act.

Renumbering of ch 7, pt 5, divs 1A-2

Clause 29 renumbers chapter 7, part 5, divisions 1A to 2 as chapter 7, part 5, divisions 2 to 4 consequential to the insertion of new divisions 1A to 2 as part of the replacement of chapter 7, part 5, division 1.

Amendment and renumbering of s 363AA (Definitions for division)

Clause 30 amends section 363AA to remove reference to the definition of 'related person' as it is defined in new section 369N and otherwise referred to in the definitions for part 5 under new section 358. This clause also renumbers section 363AA to section 369M.

Renumbering of s 363AB (Who is a related person of a company)

Clause 31 renumbers section 363AB to section 369N.

Amendment and renumbering of s 363ABA (Decision whether to issue an order)

Clause 32 amends section 363ABA to update cross references to sections from the pre-amendment Act to new section numbers, and to replace a reference to 'environmental protection order' with a reference to 'environmental enforcement order'. This clause also renumbers section 363ABA to section 369O.

Amendment and renumbering of s 363AC (Order may be issued to related person)

Clause 33 makes a consequential amendment to section 363AC to reflect the replacement of chapter 7, part 5, division 1 made through the Bill. This amendment removes the term 'environmental protection order' and replaces it with the term 'environmental enforcement order' to reflect the consolidation of statutory notices into the environmental enforcement order. Under this section, the administering authority may, when issuing an EEO to a company under division 2, or if an EEO issued to a company under division 2 is in force, issue an EEO to a related person of the company. However, the administering authority cannot issue an environmental enforcement order to a related person of the company if the EEO has been issued to the company on the grounds of a contamination incident under new section 362(2)(a). This clause also specifies that the EEO is issued under new division 2 (renumbered from division 1A under clause 29).

The amendment replaces subsection (1) to update the terminology, but also expands where the provisions apply to related persons of companies. The former section 363AC of the pre-amendment EP Act only applied to environmental protection orders, but this amendment will ensure these provisions apply to an EEO issued on any grounds (with the stated exception of an EEO issued under section 362(2)(a)).

This clause also renumbers section 363AC to section 369P.

Amendment and renumbering of s 363AD (Order may be issued to related person of high risk company)

Clause 34 makes a consequential amendment to section 363AD to reflect the replacement of chapter 7, part 5, division 1 made through the Bill. This amendment removes the term 'environmental protection order' and replaces it with the term 'environmental enforcement order' to reflect the consolidation of statutory notices into the EEO. Under this section, the administering authority may issue an EEO under division 2 to a related person of a high risk company, whether or not an EEO is being issued, or has been issued, to the high risk company. This clause also specifies that the EEO is issued under new division 2 (renumbered from division 1A under clause 29).

The amendment updates terminology in subsections (1) and (2), but also expands where the provisions apply to related persons of high risk companies. The existing section 363AD of the pre-amendment EP Act only applies to environmental protection orders, but this amendment will ensure these provisions apply to an EEO issued on any grounds.

This clause also renumbers section 363AD to section 369Q.

Amendment and renumbering of s 363AE (Order may provide for joint and several liability)

Clause 35 amends section 363AE to remove the term 'environmental protection order' and replaces it with the term 'environmental enforcement order' to reflect the consolidation of statutory notices into the EEO. This clause also renumbers section 363AE to section 369R.

Omission of ss 363AF–363AJ

Clause 36 omits sections 363AF to 363AJ. The provisions of sections 363AF to 363AI are now contained in new sections 369E, 369F, 369G, 369I and 369J as part of the consolidation of statutory notices into the EEO.

Section 363AJ no longer applies. Section 363AJ required a review of the 'chain of responsibility' provisions inserted into the Act in 2016 within two years. This review was completed and tabled in 2018, so this section is no longer necessary.

Omission of ch 7, pts 5A–5C

Clause 37 omits chapter 7, parts 5A–5C. Clause 28 of the Bill, which establishes the EEO, replaces these provisions.

Insertion of new s 440A

440A Court may find defendant guilty of causing environmental nuisance if charged with causing serious or material environmental harm

Clause 38 inserts new section 440A which provides that a finding of guilt against an environmental nuisance offence is available as an alternative when deciding in a proceeding for an offence of serious or material environmental harm where the court is not satisfied a person is guilty of serious or material environmental harm. This broadens conviction options for the courts, ensuring that proportionate penalties can be imposed on persons when the court instead finds that the alleged serious or material environmental harm constituted environmental nuisance.

This is consistent with the existing section 439 of the EP Act which provides that a court may find a defendant guilty of causing material environmental harm if charged with causing serious environmental harm.

Amendment of s 458 (Order to enter land to conduct investigation or conduct work)

Clause 39 amends section 458 as a consequence of the introduction of the environmental enforcement order which replaces and consolidates the current functions of environmental protection orders, direction notices and clean-up notices. This clause allows for an authorised person to apply to a magistrate for an order to enter land to take actions under an environmental enforcement order if the recipient has failed to comply with the environmental enforcement order. The amended provision only applies where the environmental enforcement order has been issued under section 362(2)(a) as inserted by clause 28 of this Bill, so this provision only applies where a prescribed person for a contamination incident has been issued an environmental enforcement order.

Consequently, this amendment does not expand the powers of authorised persons or a magistrate under section 458, which previously referred to clean-up notices, as relevant orders to enter land will be limited to environmental enforcement orders issued in relation to a contamination incident.

Amendment of s 478 (Failure to comply with authorised person's direction in emergency)

Clause 40 amends section 478 to replace the phrase 'all reasonable and practicable precautions' with 'all precautions, so far as they are reasonably practicable' to avoid an interpretational issue of a possible two-tier test as outlined for clause 4 above.

The same amendment is made throughout the EP Act to ensure the term 'reasonably practicable' is used consistently (see clauses 13, 14 and 58 in addition to clause 4).

Amendment of s 490 (Evidentiary provisions)

Clause 41 amends section 490 to allow the production of certificates, for example about the analysis of a sample, as evidence in a civil proceeding under or in relation to the EP Act. Section 490 has previously been limited to criminal proceedings, where the burden of proof is higher, and the consequences have the potential to be far more serious. There are no practical

limitations demonstrating why the production of certificates has not been available in civil proceedings.

This amendment does not expand the circumstances in which civil or criminal action can be taken. The EP Act already allows for any person to prosecute a person for breach of the EP Act, and the existing section 24 specifies that the EP Act does not limit any civil right or remedy that exists apart from the EP Act, and that a breach of the general environmental duty (or the duty to restore under the new section 319C as inserted by clause 16 of this Bill) does not, of itself, give rise to a civil right or remedy.

Amendment of s 491 (Special evidentiary provisions)

Clause 42 amends section 491 to provide that opinion evidence may be given in civil proceedings in relation to certain offences involving environmental nuisance. This amendment allows opinion evidence about emissions to be given by authorised persons which is based on their own senses, without the need to call further opinion evidence in civil proceedings. The amendment does not expand this evidentiary provision to the giving of opinion evidence by persons other than authorised persons.

Section 491 has previously been limited to criminal proceedings, where the burden of proof is higher, and the consequences have the potential to be far more serious. This amendment allows evidentiary provisions to apply consistently across both criminal and civil proceedings.

Section 491 will continue to only apply to proceedings in relation to an offence against section 430 (contravention of a condition of an environmental authority), 440 (offence of causing environmental nuisance) or 440Q (offence of contravening a noise standard).

Amendment of s 491A (Further special evidentiary provisions for noise)

Clause 43 amends section 491A to provide that opinion evidence may be given in civil proceedings for an offence under the EP Act related to noise, if it is claimed audible noise was made. The existing section 491A allows an occupier of a building, or an authorised person who is present in a building, to give evidence in proceedings that they could hear the noise at the building, and they formed the opinion, based on their own senses, that the noise was made from the alleged source and travelled to the building.

Section 491A has previously been limited to criminal proceedings, where the burden of proof is higher, and the consequences have the potential to be far more serious. This amendment allows evidentiary provisions to apply consistently across both criminal and civil proceedings.

Section 491A will continue to only apply to proceedings in relation to an offence against the EP Act where it is claimed that audible noise was made.

Amendment of s 516 (Delegation by chief executive)

Clause 44 amends section 516 to provide that a power under a regulation prescribed by that regulation as a power that cannot be delegated, is a power that cannot be delegated by the chief executive. This is relevant for clause 55 of the Bill, which amends section 130 of the EP Regulation to provide that local governments retain the administration and enforcement of environmental nuisance from an activity, unless the chief executive gives the local government written notice which states that the activity involves serious or material environmental harm. The amendment to section 516 enables the power of the chief executive to give these written notices to local governments to be prescribed by regulation as a power which cannot be delegated.

Amendment of s 539D (Stay of particular decisions if unacceptable risk of environmental harm)

Clause 45 makes a consequential amendment to section 539D to reflect the replacement of chapter 7, part 5, division 1 made through the Bill (see clause 28). This amendment removes the term 'environmental protection order' and replaces it with the term 'environmental enforcement order' to reflect the consolidation of statutory notices into the environmental enforcement order, and provides that a stay may be granted for a decision to issue an environmental enforcement order.

This amendment marginally expands out the grounds from just being where an environmental protection order is issued to where an environmental enforcement order is issued on grounds derived from the former direction notice under the pre-amendment EP Act. In effect, this means an environmental enforcement order issued under new section 362 on grounds that section 426 (carrying out an Environmentally Relevant Activity without an environmental authority) or section 440 (environmental nuisance offence) has been contravened can now be refused a stay of decision if the Land Court or Court is satisfied there would be an unacceptable risk of serious or material environmental harm. This is an appropriate test having regard to the potential for ongoing impact to the environment if a stay is granted.

This section will continue to not apply where the environmental enforcement order relates to a contamination incident (i.e. similar to the former clean-up notice under the pre-amendment Act) as this is dealt with in section 539E of the EP Act as amended by clause 46 of this Bill.

Amendment of s 539E (Stay of decision to issue a clean-up notice)

Clause 46 makes a consequential amendment to section 539E to reflect the replacement of chapter 7, part 5, division 1 made through the Bill (see clause 28). This amendment removes references to 'clean-up notice' and replaces them with the 'environmental enforcement order' to reflect the consolidation of statutory notices into the environmental enforcement order. This section is also limited to an environmental enforcement order issued under section 362(2)(a) so that it only applies to orders that relate to contamination incidents (i.e. the former clean-up notice under the pre-amendment Act).

Amendment of s 548A (Guidelines about issuing particular environmental protection orders)

Clause 47 makes a consequential amendment to section 548A to reflect the replacement of chapter 7, part 5, division 1 made through the Bill (see clause 28) for the consolidation of statutory notices into the environmental enforcement order and update the terminology of 'environmental protection order' to 'environmental enforcement order'. Amendments are also made to the cross referencing of other sections due to the renumbering of these sections made through the Bill.

Amendment of s 551 (Codes of practice)

Clause 48 consequentially amends section 551 to include considerations inserted into section 319 by clause 13 of the Bill as matters the Minister may have regard to in making a code of practice for achieving compliance with the general environmental duty.

Section 551 already required the Minister to have regard to matters set out in section 319(2) (renumbered as section 319(4) by clause 13 of the Bill), which includes matters such as the nature of the harm or potential harm and the sensitivity of the receiving environment. The matters listed in the new section 319(5) will be matters the Minister may have regard to when making a code of practice. The section 319(5) matters are discretionary considerations for coverage in a code of practice as they are examples of circumstances that may be considered in deciding whether the general environmental duty has been contravened.

Amendment of s 579D (Confidentiality of information–generally)

Clause 49 amends section 579D to clarify that a person must not use or disclose confidential information unless the use or disclosure is done under particular circumstances. Confidential information may be used or disclosed if it is necessary for the administration of the EP Act or to perform the person's functions or exercise the person's powers under the EP Act, or it is otherwise required or permitted under the EP Act of another law. Further, confidential information may be used or disclosed if it is consented to by the person to whom the information relates, or the use or disclosure is in compliance with a lawful process requiring production of documents to, or giving evidence before, a court or tribunal.

The purpose of this amendment is to ensure that confidential information can be used or disclosed for the purposes of administering the EP Act, and is not restricted to the exercise of a specific statutory function or power under the EP Act. The amendment addresses a possible unintended consequence of the drafting of the pre-amendment EP Act where it may restrict the disclosure of information to other Queensland Government agencies and law enforcement agencies in other jurisdictions.

Consequential amendment is also made to the offence for the use or disclosure of confidential information. This ensures that it is an offence to use or disclose confidential information other than when it is used or disclosed under this section. This maximum penalty of 100 penalty units is unchanged from the pre-amendment EP Act.

This clause also renumbers sections 579D(2A) to (4) as sections 579D(3) to (5).

Insertion of new ch 12, pt 4D

Clause 50 inserts new chapter 12, part 4D to enable the chief executive to enter into an arrangement with another relevant entity for the purposes of sharing or exchanging information.

Part 4D Exchange of information

579E Exchange of information with relevant entity

New section 579E provides that the chief executive may establish an arrangement with another relevant entity for the purposes of sharing or exchanging information. Relevant entities are defined to be the chief executive of a department, local governments, or an entity of or representing the Commonwealth or another State.

The information subject to the arrangement may be held by the chief executive or the other entity, or be information to which the chief executive or other entity has access to. To ensure that such arrangements are not used inappropriately, this section ensures that any arrangement may relate only to information that helps the chief executive, or other authorised persons, in the administration of, or the performance of functions or exercise of powers under the EP Act. Alternatively, the arrangement must help the relevant entity in the administration of, or the performance of functions or powers under a law of the State, another State or the Commonwealth. Further, the information shared under an arrangement of this nature can only be used for the purpose for which it was shared.

This section is intended to facilitate information-sharing, for example, where having an arrangement in place will make the sharing and exchange of information more expeditious. It is a discretionary provision, so it does not limit the ability of the chief executive to share information outside of an information-sharing arrangement made under this section. Nor does it limit the circumstances in which confidential information can disclosed under section 579D, or the sharing of information internally in a department administering the EP Act.

Insertion of new ch 13, pt 32

Clause 51 inserts transitional provisions.

Part 32 Transitional provisions for Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024

809 Definitions for part

New section 809 contains definitions for the transitional provisions for the Bill.

810 Unamended Act continues to apply in relation to particular instruments

New section 810 provides that the former provisions continue to apply in relation to existing environmental protection orders, direction notices, clean-up notices and cost recovery notices as if the EP Act had not been amended by this amending Bill. These statutory notices, including all conditions, must still be complied with as issued. The introduction of the environmental enforcement order does not absolve recipients of their obligations under a notice they were already given. It follows that this section also allows for cost recovery notices to be issued in relation to a notice that was issued under the pre-amendment EP Act.

This section also confirms that review and appeal rights remain available in relation to an order or notice issued under the pre-amendment EP Act, so that a review or appeal or can be continued or started as though the EP Act had not been amended. Any stay of decision that related to an existing order or notice will also continue to be in effect as though the EP Act had not been amended.

811 Proceedings for particular offences relating to particular instruments

New section 811 provides the transitional provisions for offences against the offence provisions of former chapter 7, parts 5–5B (environmental protection orders, directions notices and clean-up notices). If a person commits an offence against any of these offence provisions, a proceeding for the offence may be continued or started, and the person may be convicted of and punished for the offence, as if this amending Bill, specifically provisions for the introduction of the environmental enforcement order, had not commenced. This section applies to an offence committed before commencement of the Bill, or an offence committed after where former statutory notice provisions are operating pursuant to new section 810.

The introduction of the environmental enforcement order does not absolve recipients of their obligations and does not nullify any actions or proceedings by the administering authority in response to the non-compliance with a notice issued under the pre-amendment EP Act. Retaining the applicability of the offences and penalties relating to statutory notices under transition is justifiable in circumstances where those offences are being re-enacted under the environmental enforcement order provisions, and persons subject to an existing notice should not have the benefit of a loophole to compliance if gaps are created in the ability to enforce notices.

812 Registers of particular documents to be kept

New section 812 requires the administering authority to continue to keep a register of existing environmental protection orders, existing direction notices and existing clean-up notices to ensure a historical record of compliance and enforcement actions remains available. Provisions for the keeping and inspection of registers, personal information on registers, and appropriate fees for copies under sections 541–543

continue to apply to the register of existing environmental protection orders, existing direction notices and existing clean-up notices.

813 References to environmental protection orders, direction notices and clean-up notices

New section 813 ensures that a reference in an instrument, which includes any document, to an environmental protection order, direction notice or clean-up notice may, if the context permits, be taken to be a reference to an environmental enforcement order.

814 Environmental enforcement order may be issued in relation to particular conduct

New section 814 provides that the administering authority has the power to issue an environmental enforcement order after the commencement of this amendment Bill for conduct or actions engaged in prior to its commencement that could have previously been dealt with through the issue of an environmental protection order, direction notice or clean-up notice but was not. This provision does not apply in relation to conduct for which a relevant statutory notice was issued before the commencement of the amended EP Act. It removes any doubt that the administering authority can act against conduct undertaken using appropriate tools, regardless of when it occurred.

815 Application of s 319C

New section 815 provides that the duty to restore the environment under section 319C only applies in relation to an incident involving contamination that happens after the commencement of this amending Bill. This makes clear the duty provision does not have retrospective application.

816 Application of s 440A to proceedings for offences

New section 816 provides section 440A applies only in relation to a proceeding for an offence that started after the commencement of the amendment Bill. This means that, in proceedings for an offence of causing serious or material environmental harm, the court may only find a defendant guilty of the alternative offence of causing environmental nuisance where it is not satisfied that the defendant is guilty of an offence of causing serious or material environmental harm in proceedings which start after commencement of this amending Bill.

817 Continuation of particular guideline

New section 817 provides that the guideline called ‘Issuing ‘chain of responsibility’ environmental protection orders under chapter 7, part 5, division 2 of the *Environmental Protection Act 1994*’ continues to be in effect until a new guideline for environmental enforcement orders is approved under 548A(2). For applying the guideline for an environmental enforcement order, a reference to an environmental protection order may be taken to be a reference to an environmental enforcement

order. Similarly, a reference in the guideline to a provision of former chapter 7, part 5, division 2 of the pre-amendment EP Act may be taken to be a reference to a corresponding provision found in chapter 7, part 5, division 2, 3 or 4 as inserted by this amendment Bill.

Amendment of sch 2 (Original decisions)

Clause 52 amends schedule 2 to ensure that particular decisions amended or inserted in the Bill are listed as original decisions. It omits decisions that existed under provisions that are being repealed (former sections 358, 363AB, 363AC, 363AD, 363AI, 363AI(3), 363B, 363H, 363N and 363N(2)) and replaces them to update section numbers as necessary and the nature of the decision as necessary. These amendments reflect the replacement of chapter 7, part 5, division 1 made through the Bill for the consolidation of statutory notices into the environmental enforcement order.

Decisions made under sections 362, 369J and 369J(2) are listed as original decisions. This ensures that decisions about the issue of an environmental enforcement order, and decisions about cost recovery notices are subject to appropriate review. Decisions made under section 344AG about an amendment decision for a transitional environmental program are also listed as original decisions.

The issuing of an environmental protection order, direction notice or clean-up notice were original decisions under schedule 2 which establishes review and/or appeal rights for the recipient of the notice. The issuing of an environmental enforcement order will be an original decision under schedule 2, allowing for the continuation of review and appeal rights for compliance notices. However, an environmental enforcement order issued for a contamination incident will only be subject to appeal, not internal review. This is consistent with the treatment of the repealed clean-up notices under subsection 521(14) (which is consequentially amended to refer to environmental enforcement orders), and is intended to ensure clean-up of serious or material harm contamination incidents is not unduly delayed while still allowing for the issue of a notice to be challenged through appeal to court.

Amendment of sch 4 (Dictionary)

Clause 53 amends the Dictionary in schedule 4 of the EP Act. These amendments are minor or consequential in nature. Specific amendments include:

- amending various definitions to address cross-referencing changes due to the replacement of chapter 7, part 5, division 1 made through the Bill for the consolidation of statutory notices into the environmental enforcement order;
- removing the definitions for clean-up notice, cost recovery notice, direction order, and environmental protection order;
- amending and inserting definitions for ‘proposed amendment’, ‘proposed amendment notice’ and ‘amendment decision’ to reflect the insertion of new provisions into chapter 7, part 3, division 3 to provide the administering authority with the power to initiate and decide amendments to transitional environmental programs;
- inserting definitions used in relation to the new environmental enforcement orders inserted by clause 28 of this Bill; and

- amending the definition of 'environmental offence' to include contravention of a temporary emissions licence (section 357I), the general environmental duty offence (section 319(2)) and the duty to restore the environment offence (section 319C(3)) to ensure that relevant offences, and any associated conviction, appropriately links to other mechanisms, processes and consequences provided for in the EP Act. For example, a conviction for an environmental offence is a ground for the administering authority to initiate amendments to a person's environmental authority under s 215(2)(a). Offences for failing to comply with direction notices and clean-up notices under the pre-amendment EP Act are also incorporated into the definition of environmental offence through the amendment to include the new section 369A offence for failing to comply with an environmental enforcement order.

Part 3 Amendment of Environmental Protection Regulation 2019

Regulation amended

Clause 54 states that this part amends the Environmental Protection Regulation 2019.

Amendment of s 130 (Environmental nuisance)

Clause 55 amends section 130 to provide that the administration and enforcement of environmental nuisance is no longer devolved to a local government if it relates to a particular matter that the chief executive has decided involves serious or material environmental harm. In these instances, the chief executive notifies the relevant local government in writing of their decision, which formalises that the administration and enforcement of the matter is no longer devolved to that local government.

This amendment accompanies the amendments to section 16 and 17 of the EP Act (clauses 9 and 10), which provide that environmental harm which has the defined characteristics of environmental nuisance under section 15 is no longer precluded from being serious or material environmental harm.

The amendment to section 130 is necessary to ensure certainty as to which regulator – a local government or the State government – is responsible for a particular matter. Ultimately, an environmental harm matter arising with the characteristics of nuisance remains the jurisdiction of the local government until such time the chief executive decides it is a matter involving serious or material environmental harm.

Pursuant to the amendment of section 516 of the EP Act (see clause 44), this amendment to section 130 also provides that the chief executive cannot delegate this decision-making power. This chief executive power essentially changes the devolution of matters to local governments for a specific incident or matter involving environmental nuisance where the chief executive is satisfied the incident or matter is one of serious or material environmental harm. This limitation on the ability for the power to be delegated recognises the potential significance of such decisions for both local and State government, for example, impacts on

resources or costs where the State government does or does not assume responsibility for a matter.

Amendment of s 137 (Issuing particular notices and orders)

Clause 56 amends section 137 as a consequence of the introduction of the environmental enforcement order. This amendment ensures that local governments continue to be restricted from issuing notices in certain circumstances. Under the pre-amendment EP Regulation, local governments were restricted from issuing environmental protection orders to related persons of a company, clean-up notices and cost recovery notices. The amendment to section 137 of the EP Regulation reflects the same restrictions as part of combining existing statutory notice powers into an environmental enforcement order, and local governments will not be permitted to issue an environmental enforcement order to a related person of a company, or to a prescribed person for a contamination incident, or to issue a cost recovery notice.

Omission of s 187 (Approval of guidelines about issuing particular environmental protection orders–Act, s 548A)

Clause 57 omits section 187 which declared the approval of the guideline called 'Issuing 'chain of responsibility' environmental protection orders under chapter 7, part 5, division 2 of the *Environmental Protection Act 1994*' under section 548A of the EP Act. The transitional provision under new section 817 allows for the continuation of this guideline for environmental protection orders issued in accordance with the pre-amendment EP Act, and is taken to apply to environmental enforcement orders until such time that a new guideline is made and approved for the issuing of environmental enforcement orders to related persons of a company.

Amendment of sch 8 (Environmental objective assessment)

Clause 58 amends schedule 8 to replace the phrase 'reasonable and practical' with 'reasonably practicable' to avoid an interpretational issue of a possible two-tier test as outlined for clause 4.

The same amendment is made throughout the EP Act to ensure the term 'reasonably practicable' is used consistently (see clauses 13, 14 and 40 in addition to clause 4).

Part 4 Amendment of State Penalties Enforcement Regulation 2014

Regulation amended

Clause 59 states that this part amends the State Penalties Enforcement Regulation 2014.

Amendment of sch 1 (Infringement notice offences and fines for nominated laws)

Clause 60 amends schedule 1 to prescribe offences for the purposes of issuing a penalty infringement notice (PIN) and applicable amounts. The offences prescribed relate to environmental enforcement orders and are offences that existed under the pre-amendment EP Act in relation to environmental protection orders, direction notices and clean-up notices.

The PIN amounts for failing to comply with an environmental enforcement order reflect the previous PIN amounts for the non-compliance with an environmental protection order, direction notice and clean-up notice. These PIN amounts are also proportionate to the severity of the non-compliance with the EP Act which gave rise to the issuing of the environmental enforcement order.

The PIN amounts for failing to give notice of disposal of a business or place, or notice of ceasing to carry out an activity subject to an environmental enforcement order are retained from the pre-amendment State Penalties Enforcement Regulation, and section numbers have been amended accordingly.

Part 5 Other amendments

Legislation amended

Clause 61 states that schedule 1 amends the legislation it mentions.

Schedule 1 Other amendments

Schedule 1 contains a number of minor and consequential amendments to the EP Act and the EP Regulation. These include:

- references to ‘reasonably’ have been removed from several sections as redundant for the purposes of interpreting the provisions;
- references to ‘environmental protection order’, ‘direction notice’ and ‘clean-up notice’ have been removed, and where needed, replaced with references to ‘environmental enforcement order’ to reflect the consolidation of statutory notices into the environmental enforcement order, some with references to the ground the order has been issued under so as to avoid expansion of scope of the notices under the pre-amendment EP Act in certain circumstances; and
- section number cross-referencing amendments are made due to the replacement of chapter 7, part 5, division 1 made through the Bill for the consolidation of statutory notices into the environmental enforcement order.