

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

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, Leanne Linard, Minister for the Environment and the Great Barrier Reef and Minister for Science and Innovation make this statement of compatibility with respect to the Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The primary policy objective of 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 that has occurred.

The Bill contains amendments to enhance the existing powers and penalties under the EP Act to:

- clarify and refine environmental policy principles;
- rationalise statutory notices to ensure compliance with authorities, duties, and obligations and to respond to environmental harm events;
- establish a new duty to restore the environment and associate existing duties or obligations to offences; and
- improve evidentiary provisions relating to court proceedings.

The Bill also makes amendments of an administrative nature to:

- remove an outdated references to First Nations Peoples, and replacing these references with more culturally appropriate language;
- remove unnecessary uses of the terms ‘reasonable’ and ‘reasonably’ from sections of the EP Act; and
- clarify 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.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the human rights under the *Human Rights Act 2019* (HR Act), that are relevant to the Bill are:

- Property rights (section 24 of the HR Act)
- Privacy and reputation (section 25 of the HR Act)
- Rights in criminal proceedings (section 32 of the HR Act).

For the reasons outlined below, I am of the view that the Bill engages and is compatible with each of these human rights.

Section 11 of the HR Act provides that “All individuals in Queensland have human rights” and “Only individuals have human rights”. The note following section 11(2) expressly provides that a corporation does not have human rights. Accordingly, the human rights impact recognised for the Bill is relevant only to individuals.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Property rights (section 24 of the HR Act)

(a) the nature of the right

Section 24 of the HR Act provides that all persons have the right to own property alone or in association with others. Section 24 of the HR Act also provides that a person must not be arbitrarily deprived of their property. This right does not include a right to compensation if a person is deprived of their property. Property is broadly interpreted and includes real and personal property, including contractual rights, leases, shares, patents, and debts. Property may include statutory rights and non-traditional or informal rights, such as licence to enter or occupy land, and other economic interests.

The Bill engages this right through:

- amendments to rationalise statutory compliance notices by combining existing powers under the EP Act to issue environmental protection orders, direction notices and clean-up notices into a single, new statutory notice power known as the environmental enforcement order (EEO), where the EEO expands these existing powers;
- introduction of a duty to restore the environment when a person causes or permits environmental harm; and
- amendments to enable the administering authority to initiate and decide amendments to a transitional environmental program (TEP) rather than require a TEP holder to apply for an amendment.

Each of these amendments may create a limitation on property rights in that the impact of using these powers, imposing duties or enforcing duties may require a person to take action, that they might otherwise not choose to take, on and in relation to their property to prevent, minimise or rectify environmental harm.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Environmental enforcement orders

The EEO is a new compliance tool which consolidates the existing powers of environmental protection orders, direction notices and clean-up notices into one statutory notice. The EEO will incorporate the elements designed to achieve environmental outcomes that presently exist in environmental protection orders, direction notices and clean-up notices. It is the intent that the existing powers provided by the three notices will remain. The amendment does not substantially broaden these administrative powers beyond what is already permitted under the EP Act however, there are some minor expansions to existing powers which may engage property rights, detailed below.

The Bill inserts new section 369E which provides for a procedure for the recipient of an EEO to enter land they do not own to take actions directed of them in an EEO. This power retains but also marginally extends the powers provided under former section 363J which applied to clean-up notices as well as under former section 363AF for environmental protection orders issued to related persons of companies. The provision will apply to an EEO issued on any ground, which means it can now be relied upon in circumstances for which an environmental protection order could have been issued to a person or a direction notice could have been issued, whereas previously the course of action under new 369E would not have been available. This provision engages a person's right to property to the extent that an EEO could allow someone to enter someone else's property and do things to the property to comply with an EEO.

The Bill inserts new section 369F which provides that an authorised person or contractors may take any of the actions stated in an EEO if the recipient fails to comply with it within the period stated, or the decision to issue an EEO has been stayed. This power retains but also 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. The provision will apply to an EEO issued on any ground, which means it can now be relied upon in circumstances for which an environmental protection order could have been issued to a person or a direction notice could have been issued, whereas previously the course of action under new 369F would not have been available. This provision entails a right of entry to a person's land to undertake the actions stated in the EEO.

Duty to restore the environment

The Bill introduces a duty to restore the environment under new section 319C, which entails a positive obligation that affects a person's property rights. The duty is to take appropriate action, as soon as reasonably practicable, to rehabilitate or restore environmental harm they have caused or permitted as far as reasonably practicable to its condition before the harm was caused. The purpose is to ensure that proactive remediation is done by the person responsible for the harm. 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.

The duty is underpinned by the ‘polluter pays’ principle, complements the general environmental duty under the EP Act, and is intended to encourage quicker responses to incidents involving contamination to ensure they are remedied before they cause greater harm.

Transitional environmental programs

The purpose of a TEP is to set out conditions, requirements and timeframes for a person to make changes that will bring them into compliance with the EP Act. It enables them to continue carrying out an activity in ways, or with impacts, that may otherwise be unlawful under the EP Act while they transition under the program. The insertion of the new sections 344AA to 344AH confirms the administering authority has the power to initiate and decide amendments to TEPs, without the TEP holder’s consent.

While a TEP applies in relation to the activity being undertaken by the TEP holder, it may include conditions or required actions that involve the holder’s property (e.g. land, equipment). Therefore, an amendment initiated and decided by the administering authority under this power has potential to impact a person’s property rights.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Environmental enforcement orders

The new EEO provisions which engage property rights are due to the replacement and consolidation of the current functions of environmental protection orders, direction notices and clean-up notices with the overarching purpose to prevent or minimise environmental harm.

With reference to the new section 369E, the purpose of allowing an EEO recipient to access another person’s property to undertake the requirements of an EEO is to ensure the recipient can meet the requirements of the EEO and that the environmental harm is being appropriately addressed. This amendment ensures that action can be taken swiftly.

With reference to the new section 369F, the purpose of allowing the administering authority to access another person’s property to undertake the requirements of an EEO if the recipient of the EEO is not undertaking the requirements themselves is to ensure the relevant environmental harm is being appropriately addressed. This amendment ensures that the administering authority has discretion to act to clean-up or prevent further harm if the person to whom the EEO has been issued to is not taking the action required by the EEO. This ensures that the administering authority can take swift action to prevent or minimise environmental impacts when necessary. The previous clean-up notice provisions (under the repealing section 363K) permitted the administering authority to access property on these grounds.

These provisions can also have the effect of supporting property rights where use of the power prevents or minimises environmental harm being caused to the person’s property and the property of others.

Having regard to the marginal expansion of scope of these powers, this is a necessary consequence of making the amendments to establish the EEO so there can be a simpler process

for notice recipients, as well as a more responsive compliance approach from the administering authority. Powers to enable the fulfilment of requirements of an environmental protection order, direction notice or clean-up notice ought to have been consistent to avoid irregularity of outcomes simply because of the type of notice a person may have been issued. Sections 369E and 369F rectify this potential for inconsistent outcomes as part of combining existing powers into EEO provisions.

Duty to restore the environment

The duty to restore under new section 319C requires proactive remediation of environmental harm by the person responsible for the harm. It makes it clear that a person must not wait for the regulator to issue a notice to require clean-up or remediation. That is, the duty to restore can be enlivened under existing powers of the EP Act through the issuing of a statutory notice, but the intention of the amendment is to replace the issuing of notices by the administering authority with a continuous and proactive obligation.

Holding a person responsible for environmental harm is justifiable having regard to the ‘polluter pays’ principles which is embedded in the EP Act, that is, a person should be held responsible to rectifying harm they have caused. The duty will promote a sense of responsibility towards the environment and will discourage destructive behaviour.

This provision can also have the effect of supporting property rights where compliance with the duty leads to outcomes where environmental harm is rectified, or even prevented or minimised, where it is happening to a person’s property or the property of others.

Transitional environmental programs

The power to make and amend TEPs under the EP Act already exists in a way that balances proprietary interests with necessary actions to bring a person into compliance with their legal obligations under the EP Act as it is designed to give a person time to achieve compliance. The amendments in the Bill to enable the administering authority to initiate and decide amendments to a TEP will not interfere with this existing purpose and balance of interests that applies to establishing a TEP. However, it is necessary and appropriate for the administering authority to be able to initiate amendments to a TEP where it is proving ineffective in addressing environmental harm or risk of harm, but existing provisions in the EP Act leave scope for uncertainty as to whether the administering authority has the power to do so.

The new sections 344AA to 344AH are 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.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

Environmental enforcement orders

There are no less restrictive and reasonably available alternatives to the amendments having regard to the nature of the amendments as relatively minor changes to refine and enhance existing powers in the EP Act. To the extent that introduction of new sections 369E and 369F involve an expansion of powers, existing protections afforded by former sections 363J, 363K,

363AF and 363AG are retained in the new EEO, which means any provisions that ensure limitations on property rights are fair and balanced will also apply to the expanded use of these powers.

Sections 369E and 369F both provide a procedure to be followed whereby the EEO recipient or the authorised person seeks consent of the owner and occupier to enter the land, or gives at least 2 business days written notice before entering the land. This timeframe is consistent with the former section 363AG, and 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. Sections 369E and 369F also expressly state they do not permit the EEO recipient, an authorised person or contractor to enter to enter a building used for residential purposes.

Duty to restore the environment

As stated at paragraph (c) above, the outcomes of the duty to restore could alternatively be achieved through the issuing of a statutory notice requiring clean-up of contamination. However, this would not meet the intent of seeking for persons to take proactive steps to rectify environmental harm they have caused or permitted to happen.

Transitional environmental programs

The administering authority could take the approach of relying on section 24AA of the *Acts Interpretation Act 1954* to enable the initiation of TEP amendments, but it is preferable to provide certainty through the introduction of the new sections 344AA to 344AH which set out a clear procedure for such amendments.

To limit the impacts of new sections 344AA to 344AH on property rights, provision is made for the TEP holder to make a submission on the proposed TEP amendment before a decision is made, as well as access to review and appeal of a decision. This will give the TEP holder the opportunity to explain the limitations the proposed TEP amendments could have to their right to property and give the administering authority the opportunity to consider this information prior to making a decision on the amendments.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The purpose of the Bill is to refine and improve existing powers under the EP Act that facilitate protection of Queensland's environment. The limitations on property rights, noting such limitations already existed in some form in the EP Act, but acknowledging there is a slight expansion of the existing limitations, are reasonable and demonstrably justified in the circumstances. Where powers and obligations under the EP Act have been expanded, this has occurred to meet the policy intent.

Privacy and reputation (section 25 of the HR Act)

- (a) the nature of the right

Section 25 of the HR Act provides that a person has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The right protects privacy in

the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. Section 25 of the HR Act also states that a person has the right not to have their reputation unlawfully attacked. It prohibits attacks on a person's reputation that are unlawful and intentional, based on untrue allegations. Reputation in the context of the right refers to one's appraisal by others.

The Bill engages this right through:

- making certain that confidential information may be shared, where necessary, in the administration of the EP Act, and that information-sharing between agencies may be facilitated by their entry into an information-sharing arrangement; and
- amendments requiring that when an EEO is being issued to two or more recipients that a copy of the notice is given to each recipient, where the EEO expands this existing requirement.

Each of these amendments may create a limitation on privacy and reputation rights in that the use of these powers entails the disclosure of information about a person that may be personal information, as well as information about a person's interactions with a law enforcement agency.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Information-sharing

The Bill will amend section 579D of the EP Act upon its commencement under the *Environmental Protection and Other Legislation Amendment Act 2023* (EPOLA Act 2023). The commencing section 579D is a provision for the protection of confidential information which places a prohibition on persons acting for the administering authority from using or disclosing confidential information unless an exception applies. The amendment is to remedy a potential unintended consequence in the drafting of commencing section 579D as it may unduly limit the sharing of appropriate information with other Queensland Government agencies and law enforcement agencies in other jurisdictions. The amendment makes certain that use or disclosure of confidential information can occur where 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 is otherwise required or permitted under the EP Act or another law. The Bill also inserts new section 579E which permits the exchange of information with other relevant entities if there is an information-sharing arrangement in place. This section is discretionary rather than a prerequisite to sharing information as it is intended to facilitate information-sharing, for example, where having an arrangement in place will make the sharing and exchange of information more expeditious. These amendments engage and limit a person's right to privacy to the extent that it permits the administering authority to share confidential information in prescribed circumstances.

The purpose of the amendment to section 579D and insertion of section 579E is to ensure that authorised officers, while undertaking duties under the EP Act, can share confidential information with other Queensland Government agencies and law enforcement agencies in other jurisdictions (for example, police or co-regulators such as local governments). The purpose of this amendment is to ensure achieving the objects of the EP Act and effective law

enforcement are not hindered by an inability to share information with entities that have a legitimate and lawful need to receive the information. This could limit a person's right to privacy as the information that can be shared is confidential information, which is defined to mean information that identifies the person, their financial circumstances, or would be likely to damage the commercial activities of the person to whom the information relates.

Environmental enforcement orders

The Bill inserts new section 369 into the EP Act which requires that, when an EEO is being issued to two or more recipients, a copy of the notice is given to each recipient. The EEO will contain the name and other details (e.g. address, alleged conduct) of the people to which it is being issued. By providing a copy of the EEO to multiple recipients, the administering authority would be sharing this information with all recipients.

The repealing section 363H(5) of the EP Act already required this process in relation to clean-up notices. As the EEO combines the existing environmental protection order, direction notice and clean-up notice provisions into one statutory notice power, the requirement to give a copy of the EEO to each recipient will be expanded to circumstances where previously an environmental protection order or direction notice was issued.

The purpose of the new section 369 is to ensure that action can be taken to rectify environmental issues identified in a notice. When there are multiple people responsible for the relevant environmental harm or contravention, and the necessary rectification, it is important to achieving the actions under the EEO that each person knows who is responsible for the matter and what their individual requirements are.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Information-sharing

The purpose of allowing for sharing confidential information in the circumstances set out in section 579D is to uphold the law and assist other law enforcement agencies to uphold the law. It protects the wider community by ensuring that the relevant Queensland Government agencies and law enforcement agencies in other jurisdictions can access information necessary to fulfil their regulatory mandates and act on breaches of the legislation which they administer. New section 579E does not create additional permissions for the administering authority to use or disclose of someone's confidential information but rather allows for appropriate mechanisms to be in place for the information to be shared.

Environmental enforcement orders

Having regard to the marginal expansion of scope of the requirement under former section 363H(5), it is a necessary consequence of making the amendments to establish the EEO. Requirements that enable the fulfilment of an environmental protection order, direction notice or clean-up ought to have been consistent to avoid irregularity of outcomes simply because of the type of notice a person may have been issued. Section 369 rectifies this potential for inconsistent outcomes as part of combining existing powers into EEO provisions.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

Information-sharing

There are no less restrictive and reasonably available alternatives to the amendments having regard to the nature of the amendment as a relatively minor change as part of clarifying the scope and ensuring the intended operation of an existing power under the EP Act.

Environmental enforcement orders

There are no less restrictive and reasonably available alternatives to the amendment having regard to the nature of the amendment as a relatively minor change as part of refining and enhancing existing powers in the EP Act. The expansion of an existing power under new section 369 is appropriate for ensuring consistent treatment of EEO recipients given environmental protection orders, direction orders and clean-up notices will cease to exist as distinct instruments.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The purpose of the Bill is to refine and improve existing powers under the EP Act that facilitate protection of Queensland's environment. The limitations on privacy and reputation rights, noting such limitations already existed in some form in the EP Act, but acknowledging there is some expansion of the existing limitations, are reasonable and demonstrably justified in the circumstances. Where powers and requirements under the EP Act have been expanded, this has occurred to meet the policy intent.

Rights in criminal proceedings (section 32 of the HR Act)

- (a) the nature of the right

Section 32 of the HR Act protects the right to certain minimum procedural guarantees in criminal trials. It affirms the right of all individuals to procedural fairness when before a court and sets out a number of minimum guarantees for persons charged with criminal offences. This includes, pursuant to section 32(2)(k), the right not to be compelled to testify against themselves or to confess guilt, which might also be described as the right to privilege against self-incrimination.

The Bill engages this right through the introduction of an offence for contravening the existing general environmental duty (GED) under section 319, in circumstances where the EP Act also holds that compliance with the GED can operate as a defence, pursuant to section 493A, when a person is charged with other offences involving environmental harm.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The Bill inserts a new offence provision under section 319 for failure to comply with the GED where the failure causes or is likely to cause serious or material environmental harm. It is a criminal offence with the maximum penalty being 4,500 penalty units or 2 years imprisonment if the offence is committed wilfully. Otherwise, the maximum penalty is 1,655 penalty units. The purpose of this amendment is to encourage more proactive management to prevent or

minimise environmental harm in line with the duty, and to ensure that people can be held accountable for not complying with their GED.

Existing section 493A(1) of the Act specifies when environmental harm or related acts are unlawful. The section applies to an act that causes serious or material environmental harm or an environmental nuisance, an act that contravenes a noise standard and a deposit of a contaminant, or release of stormwater run-off, mentioned in section 440ZG. Section 493A(3) provides that it is a defence to a charge of unlawfully doing these things to prove the defendant complied with their GED.

The operation of the GED offence provision alongside section 493A(3) could impose a limitation on protection against self-incrimination. For example, a person could be charged with a stand-alone offence of serious or material environmental harm. GED compliance would then be available to the defendant as a defence under s 493A(3). This could put them in a position of producing evidence as to their compliance with the GED, and if the evidence did not prove the defence, then they are exposed to the potential for a charge of contravening the GED offence.

However, the Bill inserts new section 319B which provides protections for someone who has been charged with an offence for which a defence that the defendant complied with their GED is available. It provides two protections for a person who is charged with an offence identified under section 493A(1), which are offences involving environmental harm, and who is intending to rely on the defence that they complied with their GED:

- in a proceeding for an offence, the person may not be charged with an alternative offence against the GED in relation to the same, or substantially the same, conduct; and
- any information obtained from the person in a proceeding for an offence in relation to a defence of GED compliance cannot be used against the person in another proceeding for an offence against the GED that is constituted by the same, or substantially the same, conduct.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The policy intent is to establish an offence for contravening the GED to promote better environmental outcomes through harm prevention and minimisation. The provisions inserted by new section 319B of the Bill are intended to enable the introduction of the offence without interfering with the right of privilege against self-incrimination.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

By including new section 319B, the Bill achieves the purpose of enabling enforcement of the GED through an offence provision without restricting the human rights of defendants in criminal proceedings.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

New section 319B ensures that the Bill does not impose a restriction on rights in criminal proceedings, particularly the right of privilege against self-incrimination.

Conclusion

In my opinion, the Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024 is compatible with human rights under the *Human Rights Act 2019* because it limits a human right only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

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