Independent Review of the *Environmental Protection Act 1994* (Qld) Report

Independent review into the adequacy of existing powers and penalties

Disclaimer

In a number of respects, the recommendations and observations made in this report are based on information provided by a number of sources, in circumstances where the authors of the report were not in a position to verify the accuracy of such information. Accordingly, the authors bear no responsibility for any errors or reasoning contained in the report, where such errors are a consequence of the inaccuracy of information provided.

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Abbreviations

Title	Abbreviation
Queensland Department of Environment and Science	DES
Queensland Minister responsible for the *Environmental Protection Act 1994 (Qld)*	The Minister
General Environmental Duty	GED
Environmental Authority	EA
Environmentally Relevant Activity	ERA
Environmental Management and Pollution Control Act 1994 (Tas)	*EMPCA (Tas)*
Environment Protection Act 1993 (SA)	*EPA (SA)*
Environment Protection Act 2017 (Vic)	*EPA (Vic)*
Environmental Protection Act 1994 (Qld)	*EPA (Qld)*
Environmental Protection Act 2019 (NT)	*EPA (NT)*
Environmental Protection Order	EPO
Per- and poly-fluoroalkyl substances	PFAS
Progressive Rehabilitation and Closure Plan	PRCP
Protection of the Environment Administration Act 1991 (NSW)	*PEAA (NSW)*
Protection of the Environment Operations Act 1997 (NSW)	*PEOA (NSW)*
Public Health Act 2005 (Qld)	*PHA (Qld)*
Terms of Reference	TOR
Transitional Environmental Program	TEP
Waste Management and Pollution Control Act 1998 (NT)	*WMPCA (NT)*
Work Health and Safety Act 2011 (Qld)	*WHSA (Qld)*
Vegetation Management Act 1999 (Qld)	*VMA (Qld)*

Introduction

1. The effective operation of environmental legislation, with adequate powers and penalties for regulators, is essential to the protection of our natural environment and human health. In a State such as Queensland, home to varied and important flora and fauna and numerous significant environmental areas, and with its focus on tourism and an outdoor lifestyle, the protection of the environment and people is of obvious importance.

2. Any review of legislation such as this must be mindful of the need for there to be a recognition that the protection of the environment is a goal, not separate from but inextricably linked with the necessity of maintaining a strong and healthy economy. An overly regulated economy is not one that will be able to satisfactorily meet the economic and social needs of Queenslanders. That said, legislation concerned with the environment must be premised on the understanding that all relevant parties have a shared responsibility and duty of care to the environment.

3. It is important to keep in mind when reading this report that the review of the *Environmental Protection Act 1994* (Qld), and consequently the scope of this report, was not concerned with a review of the entirety of the *EPA (Qld)*. The scope of this review was prescribed by the following Terms of Reference:

> "*1. The adequacy of existing legislative powers for ensuring timely environmental performance through the use of appropriate enforcement tools in Queensland, including by reference to other jurisdictions, and with respect to:*
>
> *a. the suitability of the suite of statutory tools presently available;*
>
> *b. the adequacy of existing powers and tools for ensuring timely environmental outcomes;*
>
> *c. the extent to which the powers and tools are effective in preventing and/or minimising environmental harm, including persistent nuisance;*
>
> *2. The adequacy of existing legislative powers and penalties for investigating and prosecuting operators and deterring environmental offending, including by reference to other jurisdictions and other Queensland legislation, and with respect to:*
>
> *a. the investigative powers, particularly in relation to the collection of evidence;*
>
> *b. whether there are any special evidentiary challenges in prosecuting particular offences which need to be considered;*
>
> *c. the utility and effectiveness of penalties, including penalty infringement notices;*

d. the adequacy of existing maximum penalties, particularly as compared with other jurisdictions;

e. whether changes to current legislative provisions concerned with legal proceedings, or additional legislated alternatives to prosecution, should also be considered."

4. The Background to the Terms of Reference identified complex regulatory challenges which face the Department of Environment and Science (DES) including persistent nuisance, odour issues, illegal dumping (including of tyres) and unlicensed operators. The particular issues relating to odour in the Ipswich area near a number of waste management operations has been the subject of action by DES in recent times.[1]

5. Key provisions of the *EPA (Qld)* are included in Appendix B.

6. Insofar as the comparison of the provisions of the *EPA (Qld)* with environmental legislation in other jurisdictions is concerned, the review primarily focused on the provisions of the *Environmental Protection Act 2017* (Vic), *Environmental Protection Act 2019* (NT), *Waste Management and Pollution Control Act 1998* (NT), the *Protection of the Environment Administration Act 1991* (NSW) and the *Protection of the Environment Operations Act 1997* (NSW). To a lesser extent, some regard was also had to legislation of other states.

7. The Victorian and Northern Territory legislation were chosen by reason of their being relatively modern pieces of legislation. The legislation of New South Wales was chosen predominantly for the reason that it has been, and remains, a long-standing example of environmental legislation.

8. Other material considered included:
   (a) policy and guidelines produced by DES or its predecessors;
   (b) policy documents and government reports published by other jurisdictions;
   (c) a review of a number of case studies identified by DES;
   (d) three non-environmental regulatory Acts in Queensland to consider issues relating to investigation and prosecution: the *Work Health and Safety Act 2011* (Qld), the *Vegetation Management Act 1999* (Qld) and the *Public Health Act 2005* (Qld).

9. Submissions were invited and received from the Bar Association of Queensland (BAQ), the Queensland Law Society (QLS), the Queensland Environmental Law Association (QELA) and the Local Government Association of Queensland (LGAQ). Insofar as submissions from the LGAQ were concerned, they were to be limited to those matters that might arise out of the

[1] See, for example, Media Release "Odour at Ipswich", 1 April 2022, available at Odour at Ipswich | Department of Environment and Science, Queensland (des.qld.gov.au).

Terms of Reference affecting local government. Where appropriate, the issues raised in these submissions are addressed below. To a significant extent, the submissions made on behalf of the BAQ and QELA endorsed and adopted those of the QLS. Where separate issues were raised, they are addressed in the body of this report.

10. Given the time constraints surrounding the preparation and completion of this report, it was decided that wider consultation was not practicable. That said, it was considered that many, if not most, of the relevant committee members of the BAQ, QLS, and QELA would have a reasonable understanding of the issues to be considered under the TOR.

11. It is also the expectation of the authors of this report that the issues raised and recommendations contained therein will be the subject of wide public consultation before implementation.

12. We approached our consideration of the *EPA (Qld)* and other material in relation to five broad areas:
    (a) Philosophy and principles expressed in the legislation;
    (b) Key definitional matters;
    (c) Statutory notices;
    (d) Investigation;
    (e) Offences and prosecution.

Summary of Conclusions

13. The recommendations of this review are set out in some detail in Appendix A of this report. However, by way of summary, to a very significant extent, our review established that the *EPA (Qld)* contains adequate powers and penalties to, in most instances, enforce environmental obligations and reduce the risk of environmental harm. That said, we identified two fundamental issues which limit, or have been thought to limit, the powers of DES. Namely that the concepts of human health, wellbeing and safety are only vaguely referenced in respect of fundamental concepts in the *EPA (Qld)*, such as the definitions of the "environment" and "environmental value", and the confining of material and serious environmental harm to exclude nuisance. Resolving those two issues by minor amendments should allow the DES' response, in particular to matters relating to persistent nuisance such as odour, dust and gas, to be more effective.

14. Otherwise, the DES has a range of suitable statutory tools to use for enforcement, investigation and prosecution. Our review did not expose serious shortcomings or substantial differences to other jurisdictions. We have recommended some changes to the provisions relating to EPOs, TEPs, notification regimes and identified the possibility of show cause notices. These features

will increase effectiveness of those tools, without making fundamental change to the statutory scheme.

15. We have also recommended that consideration be given to creating a new offence for breach of the GED, to emphasise the primacy of prevention rather than reaction, and focus on steps that can be taken to prevent or minimise environmental harm.

16. Finally, we have made two recommendations to the regulatory tools to deal with ineffective environmental authority conditions – a greater power to amend, and clarification of the conditions which continue to apply after cancellation or suspension. Those amendments will assist in enabling EA conditions to represent current best practice in a field which changes with science and technology, and to ensure cancellation or suspension of an EA does not represent a release from environmental obligations.

Case Studies

17. As part of the review process, a number of case studies were considered. These studies were selected because they involved a number of complex environmental issues and revealed a number of difficulties faced by relevant officers of DES in attempting to resolve contamination incidents.

18. Before going on to address specific issues and matters revealed by the case studies, it is worth noting at this stage, that none of the officers of DES interviewed were of the opinion that, save in some limited areas, there were fundamental gaps or deficiencies in the statutory tools and powers available under the *EPA (Qld)*.

19. Insofar as the suite of enforcement tools available under the *EPA (Qld)* are concerned, the submission received from the QLS was materially to the same effect, where it was said in part:

> *"It is also noted that the* Environmental Protection Act 2017 (Vic) *was recently significantly amended[22] but that legislation seems to keep powers that are comparable to the Queensland provisions. Overall, an examination of legislative provisions in New South Wales and Victoria, and similar legislation in Queensland tends to suggest the suite of statutory tools in Queensland, in the EPA, is comparable to or better than interstate examples and comparable Queensland examples. Whilst not discounting the need for some refinement of the existing powers, the view of the Queensland Law Society is that the current statutory enforcement tools are appropriate to achieve the objects of the EPA."*

20. Those observations were supported by the BAQ and QELA.

21. The case studies did, in many cases, expose the difficulty in regulating environmental compliance when the EA conditions were not adequately drafted or considered in the first place. Many DES officers expressed the view, which we share, that the most significant moment for the protection of the environment is in the drafting of the original conditions, given their impact on enforcement powers available and proof of offences. The DES has done work in this space with the preparation of model conditions, but is affected by legacy conditions in existing EAs. While largely outside the TOR, the case studies identified:
    (a) the need for consistency in the conditions attaching to EAs authorising the same or sufficiently similar activities;
    (b) the desirability of, wherever practicable, EA conditions being expressed in quantitative rather than qualitative terms;
    (c) the need for a high standard in the drafting of EA conditions and statutory notices.

22. In terms of enforcement, the case studies revealed, first, in some instances, indecisiveness arising out of the current definition of environmental nuisance and material and serious environmental harm, and whether the types of contaminants listed in the definition of nuisance (odour, gas et cetera) could ever constitute material or serious environmental harm.

23. Second, difficulties in situations where there may be a number of potential sources for airborne contaminants such as aerosols, dust and odour, both in deciding whether to issue statutory notices and how to successfully prosecute operators.

24. Third, there was significant emphasis put on delay often associated with achieving an environmental resolution because of internal reviews, stays and court appeals, particularly where the operator responsible for the contamination incident continues to operate without the problem being satisfactorily addressed.

25. Fourth, the difficulty of deciding on an appropriate course of action to deal with emerging contaminants such as PFAS, both in enforcement and prosecutions.

26. Fifth, DES has had difficulty in being able to adequately address environmental harm caused by unlicensed operators and illegal dumping, in particular because of the inability to identify the culprit.

27. Finally, there was emphasis on the minor differences in powers and conditions of different statutory notices, including clean-up notices and TEPs, and consideration of whether all the notices in the *EPA (Qld)* were necessary in circumstances where EPOs were the notice used most often and were considered to be generally effective.

28. The case studies also revealed a number of internal administrative and cultural matters that affected the decision-making processes in deciding what course of action ought be adopted in

any given situation. In particular, that officers of DES were influenced by the assumed practice of the Department or the Courts in terms of which notices were to be issued and when, rather than the words of the legislation. Those administrative-type issues are largely beyond the scope of this report and will not be considered in further depth.

Philosophy and principles

Human health and wellbeing

29. The *EPA (Qld)* identifies its object and principles as follows:

> **3** "***Object***
>
> *The object of this Act is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (**ecologically sustainable development**)."*
>
> **8** "***Environment***
>
> ***Environment** includes—*
>
> *(a) ecosystems and their constituent parts, including people and communities; and*
>
> *(b) all natural and physical resources; and*
>
> *(c) the qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and*
>
> *(d) the social, economic, aesthetic and cultural conditions that affect, or are affected by, things mentioned in paragraphs (a) to (c)."*
>
> **9** "***Environmental value***
>
> ***Environmental value** is—*
>
> *(a) a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety; or*
>
> *(b) another quality of the environment identified and declared to be an environmental value under an environmental protection policy or regulation."*

30. Notwithstanding one of the fundamental objects of the *EPA (Qld)* is to improve "*the total quality of life*", which must include human health and wellbeing, those concepts hardly bear a mention in the rest of the legislation. In total, only four direct references to human health could be found within the *EPA (Qld)*.[2] Indirectly, health is addressed in the definition of

[2] *EPA (Qld)* ss 357D, 363D(2), 389(4), 466B.

environmental nuisance when referring to an unhealthy condition predominantly arising from contamination as defined in sections 10 and 11 of the *EPA (Qld)*.

31. The relevance and importance of human health is a matter which is dealt with in an indirect way within the *EPA (Qld)*. By way of example, the definition of environment "*includes people*" and "*social… conditions*" and, by virtue of the interaction between sections 8 and 9, the "*ecological health*" within the definition of environmental value, may include the health of people.

32. The reference to public amenity within the definition of environmental value in section 9 does not necessarily include either human health or wellbeing. Typically, amenity is something that provides comfort, convenience and enjoyment. Wellbeing is the state of being comfortable, healthy or happy. Those concepts are different, with amenity likely to present a lower threshold than wellbeing. Within the *EPA (Qld)* itself, when concerned with the exercising of emergency powers, section 466B(a) speaks of human safety and human health as two distinct concepts.

33. Environmental harm is defined in section 14 of the *EPA (Qld)* to be:

> "*(1)* ***Environmental harm*** *is any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an* ***environmental value, and includes environmental nuisance*** (emphasis added).
>
> *(2)* ***Environmental harm*** *may be caused by an activity—*
>
> *(a) whether the harm is a direct or indirect result of the activity; or*
>
> *(b) whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors*."

34. The concept of environmental harm is incorporated into two of the most significant parts of the *EPA (Qld)* insofar as this review is concerned: sections 16 and 17, concerned with material and serious environmental harm. Neither of those sections make express reference to human health and wellbeing.

35. The relevance of human health in the *EPA (Qld)* can be contrasted with the *EPA (Vic)* where human health, wellbeing and safety are dominant themes.[3]

36. Two of the purposes in section 1 of the *EPA (Vic)* are "*to set out the legislative framework for the protection of human health and the environment from pollution and waste*" and "*to provide for a general environmental duty to minimise risks of harm to human health and the environment from pollution or waste*". Section 4 of the *EPA (Vic)* defines harm, the

[3] See also *EPA (SA)* s 5(3); *EMPCA (Tas)* s 5(2).

fundamental definition for the Act as "***harm**, in relation to human health or the environment, means an adverse effect on human health or the environment (of whatever degree or duration)…*". Human health is identified with the environment in many significant sections of the *EPA (Vic)* including the principles of environment protection (sections 14-17, 20-23). The principle of conservation underlying the *EPA (Vic)* is that "*biological diversity and ecological integrity should be protected for purposes that include the protection of human health*".

37. The *PEOA (NSW)* has as one of its objects in section 3 "*to reduce risks to human health and prevent the degradation of the environment by…*". "Harm to the environment" is defined in the Schedule as "*includes any direct or indirect alteration of the environment that has the effect of degrading the environment and, without limiting the generality of the above, includes any act or omission that results in pollution*". One of the bases for the issue of a prohibition notice under section 101 is if, in the Environment Protection Authority's opinion the emission or discharge of pollutants "*is or is likely to be so injurious to public health*".

38. In the *EPA (NT)*, one of the objects of the Act in section 3 is "*to promote ecologically sustainable development so that the wellbeing of the people of the Territory is maintained or improved without adverse impact on the environment of the Territory*". However, "environment" is defined in section 6 as "*all aspects of the surroundings of humans including physical, biological, economic, cultural and social aspects.*" "Environmental harm" is defined in section 7 as "*direct or indirect alteration of the environment to its detriment or degradation, of any degree or duration, whether temporary or permanent*".

39. It is a balance for each jurisdiction how matters that may impact on human health are regulated. The *Public Health Act 2005* (Qld) does provide for an "*environmental health event*", which involves "*human exposure to a substance or other thing that is known to have, or is reasonably suspected of having, an adverse effect on human health"* (section 47). The Chief Executive of the Department administering the *PHA (Qld)* has powers, including to keep a register to monitor and analyse the effects on human health (section 48), or make regulations to prevent or control public health risks (section 61).

40. It is our view that, given the scope of the *PHA (Qld)* and the relevance of human health to the objects and definitions of the *EPA (Qld)*, it would be desirable to incorporate the concepts of human health and wellbeing more directly into the definitional sections of the *EPA (Qld)*.

41. Section 8 could be amended by simply inserting a new sub-section (b) which might read as follows "*8(b) the health, safety and wellbeing of people*". Section 9(a) might be amended by inserting the words "*health and wellbeing …"* after the word "*public*".

42. Such amendments would at least identify public health and wellbeing, as well as safety, as critical elements of the definition of what constitutes an "*environmental value*". That change would flow through to adverse effects on human health, safety and wellbeing being incorporated in environmental harm (section 14), environmental nuisance (section 15), material environmental harm (section 16) and serious environmental harm (section 17).

43. The discussion concerning human health and wellbeing ought not be seen as a matter of semantics. First, it makes clear that the protection of human life and wellbeing are fundamental objectives of the *EPA (Qld)*. In this regard, the Environmental Protection (Air) Policy 2019 republished by DES from 1 September 2019, expressly identifies human health and wellbeing as being "*environmental values*" to be "*enhanced or protected*". It is no coincidence that the policy, when speaking of health and wellbeing, was concerned with the contaminant often difficult to quantify in any meaningful scientific way, namely odour. In most, if not all cases, the only discernible impact caused to the environment will be the impact on human health and wellbeing.

44. Placing greater emphasis on human health and wellbeing would also bring the *EPA (Qld)* more in line with the more recent environmental laws enacted in Victoria. Finally on this topic, it is considered that these proposed amendments provide for a broader view of the term "environment", where humans exist as an integral part of the natural environment rather than the more anthropocentric philosophy embraced by section 6 of the *EPA (NT)*, where humans are at the centre of the definition of what constitutes the environment.

Concept of Polluter Pays and the General Environmental Duty

45. It is also the opinion of the authors that the *EPA (Qld)*, as currently drafted, fails to make sufficiently clear the responsibilities of those who, without excuse or defence, carry out activities that risk environmental harm. Section 319 creates a positive obligation on a person to avoid carrying out an activity that causes or is likely to cause environmental harm. The principles underpinning the *EPA (Qld)*, however, do not have the same emphasis on the prevention of environmental harm rather than on what should be done after that harm has occurred.

46. This can be contrasted with the other legislation reviewed where the responsibilities of those who unlawfully contaminate the environment are more clearly spelt out.

47. Under the heading "*Principles of environment protection*", section 17 of the *EPA (Vic)* provides:

> "**17** ***Principle of Polluter Pays:***

Persons who generate pollution and waste should bear the cost of containment, avoidance and abatement"

48. To a similar, if almost not identical effect, are section 24(2) of the *EPA (NT)* and section 6(2)(d)(i) of the *PEAA Act (NSW)*.[4]

49. In this regard it is also recommended that to reinforce the more proactive elements of the *EPA (Qld)*, consideration be given to adopting the principles of proportionality and primacy of prevention of harm, which are set out in sections 14 and 15 of the *EPA (Vic)*. Those sections provide:[5]

> *"**14 Principle of proportionality***
>
> *A decision, action, or thing directed towards minimising harm or a risk of harm to human health or the environment should be proportionate to the harm or risk of harm that is being addressed.*
>
> ***15 Principle of primacy of prevention***
>
> *Prevention of harm to human health and the environment is preferred to remedial or mitigation measures."*

50. This focus on prevention rather than reaction raises two further issues. First, the duty to notify of environmental harm. Second, whether criminal sanction should attach to a failure to meet the environmental obligations under the GED.

51. As to the first of those matters, it is readily understood why DES would not want to be notified about every incident of environmental harm, regardless of how trivial. No doubt that is why the obligation to notify under section 320A is limited to events or threatened events of serious or material environmental harm. However, as will be dealt with below, the current definitions of environmental nuisance and serious and material environmental harm are problematic in defining the proper scope of each of those terms. That issue is dealt with at length in the definitional aspects section of the report.

52. Turning then to the second matter. Bearing in mind the definition of environmental harm in section 14 of the *EPA (Qld)*, there are express provisions concerned with offences relating to causing environmental nuisance,[6] material environmental harm[7] and serious environmental harm.[8]

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[4] See also *Environmental Protection Act 1997* (ACT) s 3D(2).
[5] If adopted, each of the abovementioned concepts would seem to be readily able to be included in Chapter 1, Part 2 of the *EPA (Qld)*.
[6] *EPA (Qld)* s 440.
[7] *EPA (Qld)* s 438.
[8] *EPA (Qld)* s 437.

53. Those provisions providing for sanctions for causing environmental harm are generally reactive rather than proactive in nature. While the definition of environmental harm in section 14 does include "*potential adverse effect*" on an environmental value, it does not focus on the particular steps that should be taken to prevent harm. The provisions do not, in any meaningful way, reinforce the general environmental duty placed on a person under the *EPA (Qld)*. Currently, no criminal sanction flows directly from an unlawful breach of the GED. A failure to meet the standard required pursuant to section 319 may trigger the issuing of a statutory notice, which if not complied with, might then result in punitive sanctions. One way to reinforce the duty is to attach criminal liability to its breach.

54. A variety of approaches has been taken in the other jurisdictions considered as part of this review. The *WMPCA (NT)* prescribes in section 12(1), a GED in terms broadly similar to section 319 of the *EPA (Qld)*. Section 12(3) of the *WMPCA (NT)* prescribes that a failure to comply with section 12(1) does not of itself constitute an offence, but may result in a "*pollution abatement notice*" being issued. Pursuant to section 79, a pollution abatement notice may require a number of things to be done:

> *"(1) A pollution abatement notice may require a person, within a specified time:*
>
> *(a) to comply with a code of practice or to otherwise comply with the general environmental duty specified in section 12;*
>
> *(b) to comply with a requirement of a provision of this Act, other than such a provision that the person is not required to comply with under a compliance plan;*
>
> *(c) to prevent an action occurring or continuing to occur, where that action has caused, is causing or may cause pollution resulting in environmental harm; or*
>
> *(d) to take remedial action to return polluted land as far as possible to a specified condition that the NT EPA thinks appropriate for the protection of the environment or the use of the land.*
>
> *(2) A pollution abatement notice may require a person:*
>
> *(a) to perform an action that is not otherwise permitted to be performed by or under this Act; or*
>
> *(b) to cease to perform an action that the person is otherwise required to perform by or under this Act."*

55. A failure to comply with the pollution abatement notice may lead to the relevant person being prosecuted for committing an "*environmental offence – level 4*".

56. The approach adopted in the legislation of the Northern Territory is of a similar philosophical approach to that adopted in many of the other pieces of legislation considered. That approach can be contrasted with the approach adopted in Victoria, where a breach of the GED does result in civil penalties and, if done in the course of a business or undertaking, criminal penalties.

57. Section 25 of the *EPA (Vic)* provides:

> *"**25 General environmental duty***
>
> *(3) A person who is engaging in an activity that may give rise to risks of harm to human health or the environment from pollution or waste must minimise those risks, so far as reasonably practicable.*
>
> ***Notes***
>
> *See section 6 in relation to the concept of minimising risks of harm to human health and the environment.*
>
> *Section 314 provides that subsection (1) is a civil penalty provision. The penalty for contravention of this civil penalty provision is set out in the table in section 314. See also section 314(3).*
>
> *(2) A person commits an offence if the person contravenes subsection (1) in the course of conducting a business or an undertaking.*
>
> *Penalty: In the case of a natural person, 2000 penalty units;*
>
> *In the case of a body corporate, 10 000 penalty units.*
>
> *(3) An offence under subsection (2) is an indictable offence."*

58. Pursuant to section 27 of the *EPA (Vic)*, more serious penalties arise when there are circumstances of aggravation. That is, when the conduct involves intentional or reckless contraventions of the GED which results in, or is likely to result in, material harm to human health or the environment.

59. Bearing in mind that the primary objective of environmental legislation ought be to prevent harm, it is recommended that consideration be given to making it an offence not to comply with the GED in the course of a business or undertaking, as in section 27(2) of the *EPA (Vic)*. This would tend to offer support for more proactive management in the prevention or minimisation of environmental harm. That is particularly so when coupled with the duty to notify under section 320A of an event that causes or threatens to cause serious or material environmental harm. An additional benefit would also be the potential for the extended scope of operation of section 505 in remedying or restraining a threatened, anticipated, or actual offence under the *EPA (Qld)*. That consideration should include balancing issues of deterrence and encouraging proactive behaviour with the creation of criminal liability for breach of duty which has not caused a consequence to which criminal liability attaches. Any such amendment should, of

course, be consistent with existing provisions within the *EPA (Qld)* dealing with environmental offences both in respect of penalty and prosecution. In respect of the latter issue, most offences within the *EPA (Qld)* are dealt with summarily and not by indictment.

60. In the event that it was decided not to create a GED offence, consideration was given to how the GED might otherwise still play a more proactive role under the *EPA (Qld)*. In that regard, consideration was given to amending the *EPA (Qld)* to incorporate injunctive relief to either require an act to be done or prohibit the occurrence of an act that causes, or is likely to cause environmental harm in the absence of a lawful defence or excuse.[9] That is, to prevent a breach of the GED.

61. However, such an approach would not only require a suite of substantive amendments, but also raise issues concerning the jurisdiction of the Planning and Environment Court of Queensland. Pursuant to Schedule 4 of the *EPA (Qld)*, the relevant court, if not the Land Court, is the Planning and Environment Court. While a judge of that court retains the jurisdiction of a judge of the District Court,[10] the jurisdiction of a judge of the District Court to grant injunctive relief is limited. Section 69(2) of the *District Court Act 1967 (Qld)* limits the jurisdiction to grant injunctive relief to situations where a "proceeding" within the jurisdiction of that Court is on foot.[11]

62. On balance, it has been decided not to recommend amendment of the *EPA (Qld)* to create the power to seek injunctive relief to force compliance with the GED.

63. Also, in the event that a GED offence did not exist, section 505 of the *EPA (Qld)*, concerned with restraint orders, would be of no effect for breaches of the GED. That section is limited to those proceedings where there is an offence or a threatened or anticipated offence. That said, consideration might be given to including the GED within the scope of operation of section 505 of the *EPA (Qld)*. That might be achieved by introducing the words "*a contravention of the general environmental duty or…*" after the words "*or restrain*" and "*or anticipated*" and before the word "*offence*" in section 505(1).

64. There is one further matter concerning section 319 of the Act that we consider ought be addressed. Section 319(1) effectively imposes an obligation on a person carrying out an activity to take all reasonable **and** practicable measures to prevent or minimise environmental harm. Section 319(2) then prescribes a number of examples of the types of matters that must be taken into account in deciding whether or not a measure taken is reasonable and practicable.

[9] By way of an example, see *Environment Protection and Biodiversity Act 1999* (Cth) s 475.
[10] *Planning and Environment Court Act 2016* (Qld) s 8.
[11] *Startune Pty Ltd v Ultra Tune Systems (Aust.) Pty Ltd* [1990] QSCFC 5.

65. The present wording of section 319(1) seems to envisage a two-tiered test. First, it must be established that the measure is a reasonable one and then second, that it is also a practicable measure. In the context of what section 319 is trying to achieve, to a significant extent the words are synonymous. That is, if a measure is a reasonable one it is unlikely to also be impracticable. And, if practicable, it is unlikely to be unreasonable.

66. Such an awkward and unnecessary test is undesirable. The wording in section 319(1) can be contrasted with the wording used in other legislation both in Queensland and interstate. For example, section 19 of the *Work Health and Safety Act 2011* (Qld) requires that a relevant person "*must ensure so far as is* ***reasonably practicable***[12] *the health and safety*" of identifiable classes of persons. Section 18 of that Act prescribes a meaning to the phrase "reasonably practicable" and, like section 319(2) of the *EPA (Qld),* then sets out a number of matters that ought be considered when deciding what might or might not be reasonably practicable. Section 18 of the *WHSA (Qld)* provides:

> *"**18 What is* reasonably practicable *in ensuring health and safety***
>
> *In this Act,* **reasonably practicable***, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including—*
>
> *(a) the likelihood of the hazard or the risk concerned occurring; and*
>
> *(b) the degree of harm that might result from the hazard or the risk; and*
>
> *(c) what the person concerned knows, or ought reasonably to know, about—*
>
> *(i) the hazard or the risk; and*
>
> *(ii) ways of eliminating or minimising the risk; and*
>
> *(d) the availability and suitability of ways to eliminate or minimise the risk; and*
>
> *(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk."*

67. In this regard, we would also observe that section 25 of the *EPA (Vic)* provides in respect of its GED:

> *"**25 General Environmental Duty***

[12] Similar terminology can be found in a raft of other legislation in Queensland including the *Police Powers and Responsibility Act 2000* and the *Mental Health Act 2016*. Additionally in *EPA (Vic)* ss 6, 25; *Occupational Health Act 2004* (Vic); *Migration Act 1958* (Cth).

> *(1) A person who is engaging in an activity that may give rise to risks of harm to human health or the environment from pollution or waste must minimise those risks, so far as* ***reasonably practicable.***
>
> *Notes:*
>
> ***See section 6*** *in relation to concept of minimising risks of harm to human health and the environment."* (emphasis added)

68. It is worth noting that the reference back to section 6 in the Note identifies a raft of matters to which regard must be had, much in a similar vein to those set out in section 18 of the *WHSA (Qld)* and section 319(2) of the *EPA (Qld).* Subsection 6(2) of the *EPA (Vic)* provides:[13]

> "*(2) To determine what is (or was at a particular time) reasonably practicable in relation to the minimisation of risk of harm to human health and the environment, regard must be had to the following matters-*
>
> *(a) the likelihood of those risks eventuating;*
>
> *(b) the degree of harm that would result if those risks eventuated;*
>
> *(c) what the person concerned knows, or ought reasonably to know, about the harm or risks of harm and any ways of eliminating or reducing those risks;*
>
> *(d) the availability and suitability of ways to eliminate or reduce those risks;*
>
> *(e) the cost of eliminating or reducing those risks."*

69. We are unaware of any judicial consideration of the phrase "reasonable and practicable". On the other hand, given the more frequent usage of the phrase "reasonably practicable" in Queensland legislation, it is likely that there would be some judicial consideration in the Queensland Courts of the meaning and effect of that phrase. In any event, it was the subject of observation by Gaudron J in *Slivak v Lurgi (Australia) Pty Ltd*[14], where her Honour said:

> *".....The words "reasonably practicable" are ordinary words bearing their ordinary meaning. And the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgment in the light of all the facts. Nevertheless, three general propositions are to be discerned from the decided cases:*
>
> - *the phrase "reasonably practicable" means something narrower than "physically possible" or "feasible";*
> - *what is "reasonably practicable" is to be judged on the basis of what was known at the relevant time;*

[13] Identical wording can be found in section 20(2) of the *Occupational Health and Safety Act 2004* (Vic).
[14] *Slivak v Lurgi (Australia) Pty Ltd* [2001] 205 CLR 304 [53]–[54].

- *to determine what is "reasonably practicable" it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk."*

70. On balance, we recommend that section 319(1) of the *EPA (Qld)* be amended by deleting the words "reasonable and practicable" and replacing them with "reasonably practicable". There are a number of benefits that would flow from this amendment. First, it would eliminate the apparent unnecessary two-tiered test and replace it with the single and more widely recognised test of deciding whether or not a measure is reasonably practicable. Second, it would introduce a level of consistency with the legislative approach adopted to address similar issues both in Queensland and interstate. Third, the terminology proposed is likely to be much more familiar to the judiciary. In this regard, we strongly suspect that a decision-maker would be likely to treat the words "reasonable and practicable" as having the same meaning and effect as "reasonably practicable".

71. Finally on this topic, we would make two further observations. First, the proposed amendment would have no flow on consequences for section 319(2) of the *EPA (Qld)*. Second, the Victorian government, in September 2020, published a guideline intended to give guidance in determining what is reasonably practicable for the purposes of the GED imposed under the *EPA (Vic)*.[15] Some benefit might be gained from reading that publication in considering this recommendation.

Recommendation
Section 319 of the *EPA (Qld)* be amended by omitting the words "reasonable and practicable" and inserting in lieu thereof "reasonably practicable".
Recommendation
Consideration should be given to creating an offence for breaching the general environmental duty.
Recommendation
In the event that a general environmental duty offence was not preferred, consideration might be given to including the general environmental duty within the scope of operation of section 505 of the *EPA (Qld)*, by way of example, by introducing the words "*a contravention of the general environmental duty or…*" after the words "*or restrain*" and "*or anticipated*" and before the word "*offence*" in section 505(1).

[15] Obtained from the Environmental Protection Agency Victoria Website, available at https://www.epa.vic.gov.au/about-epa/publications/1856

The Precautionary Principle

72. In both *EPA (Vic)*[16] and *EPA (NT)*,[17] the precautionary principle is not only defined but given an apparent level of strategic importance in the operation of those Acts. That can be contrasted with the situation under the *EPA (Qld)*. Not only is the principle not defined, but it is relegated to being but one of the "standard criteria" that must be considered in deciding to issue an EPO.[18]

73. The precautionary principle has been described in various ways, but the fundamental principle remains the same. To use the Victorian description:

> *"If there exist threats of serious or irreversible harm to human health or the environment, lack of full scientific certainty should not be used as a reason for postponing measures to prevent or minimise those threats."*[19]

74. At first glance, it might be thought that the application of the precautionary principle might provide a useful tool when dealing with emerging contaminants such as PFAS and microplastics and, in extreme cases perhaps, even odour emissions, where the existing science may not permit meaningful quantification of the nature and extent of the environmental harm that might be caused. However, we will not delve into this issue in any great detail. This review has revealed that, even in those cases where emerging contaminants are having to be dealt with, the precautionary principle is rarely relied on by DES as a basis to act.

75. The submissions made by the LGAQ observed that, in respect of emerging contaminants such as PFAS, in some local government areas, reliance on the precautionary principle could, in many instances, result in severe financial ramifications. Not only for the local government authorities but also for businesses operating within the local government area. The LGAQ submission said in this context:

> "*As shown through the current escalating situation with per- and polyfluoroalkyl substances (PFAS), such specific tools might be appropriate to regulate emerging contaminants. While local government acknowledges the importance of utilising the precautionary principle when potentially harmful substances are involved, reactive and potentially spontaneous introduction of thresholds for specific compounds puts a significant financial and administrative burden on both local governments and industry to treat their effluent to the desired degree. The inability to retrofit equipment in the restricted timeframes often puts operators in the unfavourable situation of being unable to remain compliant.*

[16] *EPA (Vic)* s 20.
[17] *EPA (NT)* s 19.
[18] *EPA (Qld)* s 359; sch 4 (definition of 'standard criteria').
[19] *EPA (Vic)* s 20.

> *As it is expected that an increasing number of novel contaminants will emerge in the coming decades, a proactive, long-term oriented and balanced approach to regulating these would be welcomed by local governments."*

76. It is nonetheless recommended that consideration be given to introducing the precautionary principle, including a description thereof, into the *EPA (Qld)*, perhaps within Chapter 1, Part 2. This recommendation is made primarily for two reasons. First, it seems not a too remote possibility that when dealing with, in particular, emerging contaminants where currently there are scientific difficulties in identifying what the nature and extent of the harm might be, reliance might have to be placed on the application of the precautionary principle in an emergent situation involving a threat to human health or safety.[20]

77. Second, while not used in a proactive way, the application of the precautionary principle might provide a useful tool in deciding applications for an EA where there is a level of scientific uncertainty surrounding the ability to ensure, as far as is necessary in any particular case, that acceptable environmental outcomes can be achieved and maintained.

Recommendation

The principles underpinning the *Environmental Protection Act 1994* (Qld) should be amended to include:

(a) The principle of polluter pays;
(b) The proportionality principle;
(c) The principle of primacy of prevention; and
(d) The precautionary principle.

Definitional issues

Environmental nuisance

78. The second fundamental issue that has arisen in our review is the difficulties that arise out of the current definition of environmental nuisance. Section 15 of the *EPA (Qld)* provides:

> "***Environmental nuisance*** *is unreasonable interference or likely interference with an environmental value caused by—*
>
> *(a) aerosols, fumes, light, noise, odour, particles or smoke; or*
>
> *(b) an unhealthy, offensive or unsightly condition because of contamination; or*
>
> *(c) another way prescribed by regulation*."

[20] *EPA (Qld)* s 466B(a)(i).

79. At common law the concept of nuisance has been described as:[21]

> "*118. Nuisance protects a claimant's interest in the beneficial use of land. It is not confined to the actual use of the soil but extends to the pleasure, comfort and enjoyment which a person normally derives from occupancy of land. Thus, nuisance covers physical damage to property and non-physical damage.* ***To constitute a nuisance, the interference must be unreasonable****. In making that judgment, regard is had to a variety of factors including: the nature and extent of the harm or interference; the social or public interest value in the defendant's activity; the hypersensitivity (if any) of the user or use of the claimant's land; the nature of established uses in the locality (eg residential, industrial, rural); whether all reasonable precautions were taken to minimise any interference; and the type of damage suffered.*" (emphasis added)

80. "Environmental nuisance" is included in the definition of "environmental harm" in section 14, but expressly excluded from the meaning of what constitutes material and serious environmental harm in sections 16 and 17. Further, "environmental nuisance" regulation is devolved in large part to local authorities and is excluded from the operation of section 363F, concerned with clean-up notices.

81. A tension arises also between the obligations under section 319 concerned with the GED and sections 320 and 320A of the *EPA (Qld)* concerned with the duty to notify of "environmental harm". The GED under section 319, is concerned with "environmental harm" which, by virtue of the operation of section 14(1) includes environmental nuisance. However, section 320A limits the obligation to notify to events involving material or serious environmental harm, which by definition excludes environmental nuisance.

82. The difficulties arising because of the current definitions of environmental nuisance and material and serious environmental harm was clearly revealed in recent events in the Swanbank and Collingwood Park areas.

83. In excess of 4,600 complaints from residents were recorded. A significant number of those complaints recorded people being subjected to odours of intensity up to "*very strong*" and "*extremely strong*". The nature of the odour included smelling like rotten egg gas, faecal matter, sewage, and chemicals. A not insignificant number of the complaints referred to a number of consequences including adverse impact on sleep, coughing, breathing difficulties, and headaches. These are serious consequences impacting on a community's health and wellbeing. No reasonable person would describe such impacts as amounting merely to a nuisance. In this

[21] *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* [2012] WASCA 79 [118]. Cited with approval in *Uren v Bald Hills Wind Farm Pty Ltd* [2022] VSC 145 [17].

regard, no material was brought to our attention which might suggest that the complaints were anything other than genuine.

84. Despite these serious impacts, no doubt at least in part because of the definitions contained in sections 15, 16 and 17, important internal DES documents reflected a degree of uncertainty about how to accurately describe such events.[22]

85. For example, internal documents generated within DES concerned with odour, while recognising that odour impacts can include intensity values of "*very strong*" and "*extremely strong*", nonetheless spoke of those impacts as falling under the meaning and scope of environmental nuisance.[23] To a similar effect, in the Procedural Guide for odour investigation it is stated that "*noxious odours are harmful or injurious to health or physical wellbeing. Offensive odours… are disagreeable to the senses, disgusting, nauseous or repulsive. Noxious and offensive odours are not smells that are trivial, negligible, or minor in nature*".[24] Those observations are clearly correct, yet they are contained in that part of the document headed "Odour nuisance".

86. Some of the case studies revealed that DES officers thought that certain statutory options might not be available to them because they would be met with the argument that, no matter how widespread the impact of odour, dust or fumes et cetera, the environmental harm caused was environmental nuisance which is expressly excluded from the operation of sections 16 and 17. While we have reservations that such an argument would be successful, it is a concern that can be readily addressed and should be to remove any uncertainty.

87. A more recent example of this is in the DES Cleanaway New Chum odour issues – air quality monitoring results, where one of the two "key findings" was:

> *"Hydrogen sulfide results measured in the community between 15 April and 5 July 2022 are below the Environmental Protection (Air) Policy health and wellbeing objectives.* ***However, the Environmental Protection (Air) Policy odour nuisance objective has been exceeded which explains why community members are reporting odour issues****.*

[22] For example, Procedural Guide – Odour investigation tools, Part 4; Odour Impact Assessment from Developments Guideline; Cleanaway New Chum air quality monitoring results - https://www.qld.gov.au/environment/management/monitoring/air/air-programs/cleanaway-new-chum-odour-issues/results.

[23] Procedural Guide – Odour investigation tools; Odour Impact Assessment from Developments Guideline.

[24] Reference to the descriptors trivial and negligible in nature are contained in section 16(a) concerned with material environmental harm.

Generally, the results show elevated levels of hydrogen sulfide late evening and early morning, which coincides with community reports received through the pollution hotline." (emphasis added)

88. As the following tables reveal, odour can have impacts ranging from the virtually innocuous to the very serious:[25]

Table 1: German VDI 3882 odour intensity scale and its description

Intensity Scale	Descriptor	Effect on Receptor
0	*Not perceptible*	Odour is not detectable, cannot be perceived by the sense of smell.
1	*Very weak*	Odour is just detectable in the outdoor air and activates the sense of smell.
2	*Weak*	Odour is detectable in the outdoor air, but is not clearly distinguishable, noxious or offensive.
3	*Distinct*	Odour is present in the outdoor air, easily activates the sense of smell, very distinct and clearly distinguishable.
4	*Strong*	Odour is present in the outdoor air and would be noxious or offensive and cause a person to attempt to avoid it completely.
5	*Very strong*	Strong odour present in the outdoor air, which is so strong it is overpowering and intolerable for any length of time.
6	*Extremely strong*	Extremely strong odour in the outdoor air, which is immediately intolerable.

[25] Procedural Guide – Odour investigation tools.

Table 3: Offensiveness Scale and its description for rating adverse effects*

Offensiveness Scale	Descriptor	Effects on Receptor
0	*Pleasant*	Odour perceived as pleasant to some degree.
1	*Neutral*	Odour is not perceived as pleasant, but is also not even slightly unpleasant.
2	*Slightly Unpleasant*	Faintly unpleasant, but easily bearable even for prolonged exposure.
3	*Offensive*	Causes recognisable displeasure to sense of smell, may be bearable for short exposure, but reluctance to submit oneself to longer exposures is likely. For a 'chemical' smell caused by substances hazardous to humans at relatively low levels, a response of worry is reasonably elicited (e.g. due to it being not practicable to avoid), but without any other physiological responses. Long-term exposure may cause stress-like symptoms.
4	*Strongly Offensive*	Repulsive. Disgusting. Strongly displeasurable to sense of smell. Would soon elicit attempts to avoid exposure. OR Causes slight physiological effects following exposure e.g. headaches, slight nausea.
5	*Noxious*	Causes almost immediate attempts to avoid. OR Causes noticeable physiological effects following exposure e.g. pronounced nausea, feeling faint headed.
6	*Extremely offensive or noxious*	Unbearable Effects. Immediately intolerable. Extremely strong effects such as retching, fainting or other adverse effects on physical wellbeing caused by exposure.

** Note: Use of this table assumes an odour is detectable to olfactory sense*

89. To adopt the language used in the last table, it would be unlikely in our view that the consequences of "*strongly offensive*" to "*extremely offensive or noxious*" odour events would not constitute material or even serious environmental harm. Retching and fainting could not be considered to be trivial or negligible in nature (as for material environmental harm), and could be considered high impact or widespread depending on the time and extent of the impact (as for serious environmental harm). In any event, regardless of the categorisation of the level of impact, it would be an inaccurate description to describe it as being merely a nuisance and treat it as such in other parts of the *EPA (Qld)*, such as those concerned with civil remedies (e.g. statutory notices or restraint orders) and criminal penalties.

90. Another concern regarding the definition of environmental nuisance is that an environmental event that would fall within the meaning of environmental nuisance is excluded from the operation of section 363F of the *EPA (Qld)* concerned with clean-up notices. Pursuant to section 363H, the administering authority may issue a clean-up notice to "*a person whom the administering authority reasonably believes to be a prescribed person for a contamination incident…*". Section 363F defines a contamination incident to mean:

> "***contamination incident*** *means—*

> *(a)* *an incident involving contamination of the environment that the administering authority is satisfied* ***has caused or is likely to cause serious or material environmental harm****; or*
>
> *(b)* *the carrying out of an activity on contaminated land, the happening of an event on contaminated land, or a change in the condition of contaminated land that the administering authority is satisfied has caused or is likely to cause other land to become contaminated land; or*
>
> *(c)* *a combination of matters mentioned in paragraph (a) or (b).*"
>
> (emphasis added)

91. That the contamination incident must cause serious or material environmental harm excludes incidents or activities that fall within the meaning of environmental nuisance. That is so despite the operation of sections 10 and 11 of the *EPA (Qld)* which prescribe that the release of, among other things, a gas or odour could amount to a contamination of the environment.

92. Further, having regard to the nebulous nature of gas, fumes and odour, clean-up notices might provide a useful tool in dealing with the releases of such contaminants in more extreme cases. To take odour and fumes as examples, their impacts might be serious but intermittent in respect of a particular location or locations. That might be because of a number of factors such as wind direction and strength, cloud cover and humidity. Another difficulty is that airborne contaminants, particularly odour, will typically not impact on other elements of the environment (in contrast to, for example, fish kills or on-site waste contamination). The source of pollutants such as dust and odour may also be difficult to identify, particularly in an area where there are a number of potential sources which might be operating at the same time.

93. Pursuant to section 363H, provided there is sufficient evidence to cause a reasonable belief that a prescribed person is responsible for a contamination incident, a clean-up notice may be issued. Such a notice can require, among other things, the prescribed person to "*prevent or minimise contamination*" (section 363H(a)). In this context, it is also relevant that pursuant to section 14, environmental harm includes adverse or potentially adverse effects on an environmental value even if *"…temporary … and of whatever magnitude, duration or frequency."*

94. In situations where there is a need to act quickly and decisively, that clean-up notices are not subject to the internal review process may be significant.[26] This review has revealed the internal review process is one of the causes of delay when reliance is placed on other notices and directions available under the *EPA (Qld)*. More will be said about the issue of delay below.

[26] *EPA (Qld)* s 521(14).

95. For the reasons given, it is recommended that amendments be made to the *EPA (Qld)* so that the definition of environmental nuisance does not unreasonably interfere with the operation of sections 16 and 17 of the *EPA (Qld)* in circumstances where material if not serious environmental harm is being caused.

Suggested amendments

96. This issue could be addressed in a number of ways. First, by amending section 15 to make clear that the definition of what might constitute an environmental nuisance does not include circumstances where there has been, or there is the potential, to interfere with an environmental value to the extent that it would constitute material or serious environmental harm.

97. The second option would be to delete the exclusion from the operation of environmental nuisance from sections 16 and 17 of the *EPA (Qld)* to make clear that a contaminant listed in the definition of environmental nuisance "*that is not trivial or negligible*" et cetera constitutes material environmental harm for the purposes of section 16. A similar amendment to section 17 of the *EPA (Qld)* would make that clear for a contaminant listed in section 15 but which causes environmental harm which is "*irreversible, of a high impact or widespread*", constitutes serious environmental harm for the purposes of section 17.

98. Section 16 would then read:

> *"**16 Material environmental harm***
>
> *(1) Material environmental harm is environmental harm that:*
>
> *(a) is not trivial or negligible in nature, extent or context; or*
>
> *(b) that causes actual or potential loss or damage ….*
>
> *(2) …..* "

99. Section 17 would read:

> *"**17 Serious environmental harm***
>
> *(1) Serious environmental harm is environmental harm that:*
>
> *(a) is irreversible, of a high impact or widespread;*
>
> *(b) or caused to ...*
>
> *(c) that causes …*
>
> *(d) …*
>
> *(2) …* "

100. In this regard, whichever strategy addressing the current definition of environmental nuisance is adopted ought not, or at least not to any material extent, adversely affect the operation of the

relevant provisions of section 440 of the *EPA (Qld)*, nor the devolution of responsibilities to local government authorities.

101. It is acknowledged that the suggested amendment to section 17 introduces a greater degree of overlap with section 466B concerned with describing what constitutes an emergency. That said, overlap already exists as section 466B also references the concepts of material and serious environmental harm. More importantly though, the function and purpose of sections 16 and 17 are obviously quite different from those that flow from the operation of sections 466A to 467 of the *EPA (Qld)*.

Recommendation
Sections 8 and 9 of the *EPA (Qld)* should be amended to include the concept of "human health, safety and wellbeing" in the definitions of environment and environmental value.
Recommendation
Section 15 or sections 16 and 17 of the *EPA (Qld)* should be amended to make clear that environmental harm that may constitute a nuisance at low levels, may also constitute material and serious environmental harm if it meets the definitions of those terms.

Threshold amounts

102. It is understood that the threshold amounts in the *EPA (Qld)* for material environmental harm ($5,000) and for serious environmental harm ($50,000) have not been the subject of change by regulation.

103. Threshold amounts are also used in some of the interstate legislation we considered. The Victorian and NSW legislation defined only one level of harm, being material environmental harm. The *EPA (Vic)* uses a threshold amount of $10,000 for material harm (section 5). The *PEOA (NSW)* includes in its definition a threshold amount of $10,000 (section 147). The *WMPCA (NT)* defines material environmental harm including by reference to harm that results in not more than $50,000 of remedial action.

104. The *EPA (NT)* has two levels of environmental harm as in Queensland, but sets a monetary amount only for the definition of significant environmental harm (the higher of the two levels of harm under that legislation). It is set at $50,000 by section 4 and the Environment Protection Regulations 2020 (NT), section 9.

105. It is considered that both threshold amounts ought be increased. It is understood that consideration is being given to increasing the threshold amount for serious environmental harm to $100,000 and for material environmental harm to $10,000. Both thresholds are also to be index linked on an annual basis. Such increases are recommended.

Recommendation

The threshold amounts for material and serious environmental harm should be reviewed and increased.

Statutory Notices

106. As mentioned above, the case studies and interviews with DES officers did not reveal any fundamental shortcomings in respect of the tools available under the *EPA (Qld)* to achieve sound environmental outcomes. On that basis it was considered unnecessary to undertake a detailed comparison of the various statutory notices available under other legislative regimes. That said, it is considered that some amendments would result in even more effective means of achieving those outcomes. Another consideration in this regard is that the existing statutory notices in their operation are familiar to officers of DES and those likely to be affected by such notices or their agents.

107. Before proceeding further, we would also observe that, as is the case concerning the drafting of EA conditions, it is vitally important that statutory notices are drafted in such a manner as to clearly identify what the problem or problems are that need to be addressed and what steps need to be taken to address the problem or problems. Poorly drafted notices will almost inevitably result in delay, unsatisfactory outcomes and, in some cases, unsuccessful litigation.[27]

Environmental Evaluations

108. Section 321 describes the purpose of an environmental evaluation (which includes both an environmental investigation and an environmental audit). Section 322, concerned with environmental audits, and section 326B, concerned with environmental investigations, identify specifically how the tool may be triggered by the administering authority.

109. The DES officers interviewed indicated this tool was extremely useful for determining the way to rectify an environmental risk or harm if that was not able to be promptly determined by DES due to resources or the complexity of the problem. In addition, officers emphasised the appropriateness of the cost of the evaluation being on the person responsible for the risk or harm.

110. We do not consider there is any need for change in these arrangements.

[27] For example, *Hungtat Worldwide Pty Ltd v Chief Executive of the Department of Environment and Heritage Protection* [2017] QPEC 62.

Direction Notices

111. There seems to be three elements involved in the issuing of a direction notice; first, the class of activities that might be the subject of such a notice, is relatively limited.[28] Second, they are issued in circumstances where the contravener can be readily identified. Third, they are issued in circumstances where the notice, if followed, will likely remedy the problem.[29]

112. Perhaps unsurprisingly, this review has revealed that direction notices are, in many instances, directed to unlicensed operators, including directions to cease an activity. That seems appropriate, otherwise the issuing of direction notices to those who hold an EA might result in the situation where there are de facto conditions (directions) operating in addition to those conditions attaching to the EA. That would be an undesirable outcome.

113. Nevertheless, in respect of direction notices, two recommendations are made. First, it is recommended that section 363D(1) be amended to make clear that the remedying of the contravention (section 363B(2)) includes the obligation to carry out any remedial work that might be required to remedy the contravention of the relevant provisions of the *EPA (Qld)* and, in the event that the recipient of the notice fails to do that work, DES has the power to step in and have those works done and recover the costs thereof.[30]

114. The second recommendation is that the prescribed provisions for the purpose of section 363A be expanded to include other offences in which environmental harm is caused or that risk arises (for example, sections 437, 438) and a breach of the GED in section 319.

115. Finally on this topic, as already identified, the scope of operation of a direction notice seems to be more effective in those situations where there is confidence in the fact that a remedy exists to address the contravention of the Act. That will often not be the case where there are more complex environmental issues at play.

Recommendation

Direction notice provisions should be amended as follows:

(a) amend section 363D(1) to make clear that the remedying of the contravention of a prescribed provision includes the obligation to carry out any remedial work that might be required to remedy the contravention;

(b) provide powers for the administering authority to undertake remedial works and recover the costs thereof;

[28] *EPA (Qld)* s 363A.
[29] *EPA (Qld)* s 363B(1)(b).
[30] See by way of examples of this, *EPA (Qld)* ss 363K–363N.

(c) include as a prescribed provision for the purposes of section 363A offences involving the causing or risk of environmental harm or the contravention of the general environmental duty in section 319.

Environmental Protection Orders

116. It is tolerably clear that the most used statutory notice, particularly in more complex cases, is the EPO. In part, that may have been as a result of the confusion concerning environmental nuisance discussed above, but that would seem likely to represent only a small proportion of cases.

117. Before going on to discuss this matter in more detail, a number of observations can be made. First, given that actual 'non-compliance' for the purposes of section 358(a) and (b) and that an investigation has identified environmental harm or the threat thereof for the purpose of section 358(c), or the contravention of an offence provision in 358(e) are all capable of triggering an EPO, there seems little scope or reason for the application of the standard criteria as is required pursuant to section 359.

118. Unless there are reasons we are not aware of that make the application of the standard criteria a necessary element of the decision making process applicable to the operation of section 358(a)-(c) and (e), we suggest those matters should be exempt from the application of section 359. That ought make the process of deciding whether to issue an EPO more straight forward. In this regard it is noted that the standard criteria does not play a role in the decision making process concerned with clean-up notices.

119. Second, this review has not been able to identify why it is that the possible triggers for issuing an EPO under section 358(e) are as restrictive as they are. In our view, an EPO should be available when a person is or has been contravening other offence provisions in the *EPA (Qld)* which relate to acts that have caused or might cause environmental harm (for example sections 437, 438 and 440). Such an amendment would, in the event of a contravention, widen the scope for the issuing of an EPO without the need for an environmental evaluation or TEP as is required in sections 358(a)-(c).

120. A further matter that should be addressed is that EPOs can be issued against two classes of recipients. A "person" for the purposes of section 358 or a "related person" for the purposes of sections 363AC and 363AD.

121. Pursuant to section 361 it is an offence not to comply with an EPO. However, there is a considerable discrepancy in respect of the consequences that might flow in the event of non-

compliance apart from penal sanctions, in the event that non-compliance falls at the feet of a "person" for the purposes of section 358.

122. In the event of non-compliance, pursuant to section 363AG, an authorised person has the ability to step in and take action to give effect to the EPO. And, pursuant to section 363AI, the administering authority may seek recovery of associated costs. However, both sections 363AG and 363AI are only operative in respect of EPOs issued to related persons and not those issued pursuant to section 358.

123. It might be the case that in respect of EPOs issued pursuant to section 358, reliance is placed on the ability to step in and carry out works and recover the costs thereof, under section 363N of the *EPA (Qld)* concerned with clean-up notices.

124. If that is the case it would not seem to be a desirable situation, particularly in circumstances where not all EPOs will involve related persons for the purposes of the *EPA (Qld)*. It might be in some cases that the person issued an EPO under section 358 might also have an association with a related person for the purposes of section 363AB, because of the involvement of a company. However, not all holders of EAs will be a company. In this regard we have been advised that currently DES regulates in excess of 9,000 EAs, not all of which are held by corporations. It would seem highly desirable to have all matters concerned with EPOs self-contained within Chapter 7, Part 5 of the *EPA (Qld)*.

125. Accordingly, unless there are sound reasons we are not aware of not to do so, it is recommended that both the power to step in and carry out works and the power to recover the costs thereof in respect of EPOs issued pursuant to section 358 be incorporated into Chapter 7, Part 5 of the *EPA (Qld)*.

126. We would also observe that unlike the situation concerning obstruction of a recipient of a clean-up notice (section 363L), section 363AH of the *EPA (Qld)* concerned with obstruction of a recipient of an EPO, is limited to only those EPOs issued to a "*related person*" as defined in section 363AB. Unless this matter is addressed elsewhere in the *EPA (Qld)*, we would recommend that consideration be given to including an offence provision which would also capture the recipient of an EPO issued pursuant to section 358 or a provision that captures both.

127. Those matters aside, this review has revealed no sound reason that would warrant further amendment of those provisions of the *EPA (Qld)* concerning the operation and effect of EPOs. In this regard, considerable comfort was drawn from the fact that none of the submissions received or views expressed by DES officers suggested to the contrary.

128. Other issues associated with the recovery of costs are dealt with separately below.

Recommendation

The Environmental Protection Order provisions should be amended to:

(a) remove the need to consider the standard criteria in deciding whether to issue an EPO under section 358(a)-(c) and (e) of the *EPA (Qld)*;

(b) extend the power to issue an EPO for contravention of an offence under section 358(e) to all offences under the *EPA (Qld)* which relate to acts that have caused or might cause environmental harm;

(c) rationalise the powers to step in to undertake remedial works and recover the costs thereof in respect of EPOs issued pursuant to section 358 of the *EPA (Qld)*.

Recommendation

Unless dealt with elsewhere in the Act, consideration be given to introducing an offence provision to capture obstruction of compliance with an EPO issued pursuant to section 358 of the *EPA (Qld)* or an offence provision that captures both related persons and persons issued an EPO pursuant to section 358.

Clean-up Notices

129. It seems that clean-up notices are an under-utilised tool available to DES. It is clear that the issues associated with the definitions of environmental nuisance and material and serious environmental harm have resulted in some hesitancy in the use of such notices. Other factors however, seem to be more cultural in nature and beyond the scope of this review.

130. Before proceeding further, some comment concerning the absence of a right to have a clean-up notice internally reviewed, is warranted. It seems tolerably clear that the original rationalisation had little if any merit.[31] That said, it can readily be appreciated that a clean-up notice might be required to deal with a contamination event that has occurred on the sudden and requires immediate action.

131. While a clean-up notice might still be the subject of appeal and a stay, that an internal review is not available reduces at least one avenue of potential delay. As a matter of practice though, it would seem unlikely that a sudden serious contamination event would be likely to trigger an appeal.

132. Accordingly, it is recommended that the current arrangement concerning clean-up notices be left as it is.

[31] The relevant explanatory note to the *Environmental Protection and Other Legislation Amendment Bill (No. 2)* 2008 observed that as it would be expected that clean-up notices would only be issued by more senior and knowledgeable officers, it would not be appropriate to have their decision reviewed by a more junior officer.

133. The second matter is that, unlike section 360(2) concerning EPOs, the powers in respect of clean-up notices do not expressly provide for the power to stop an activity being the cause of the contamination incident. Section 360(2), concerning EPOs provides:

> *"(2) Without limiting subsection (1)(c), an environmental protection order may—*
>
> *(a) require the recipient to not start, or stop, a stated activity indefinitely, for a stated period or until further notice from the administering authority; or*
>
> *(b) require the recipient to carry out a stated activity only during stated times or subject to stated conditions; or*
>
> *(c) require the recipient to take stated action within a stated period."*

134. In circumstances where, pursuant to section 363F, it is envisaged that a contamination incident might involve the situation where an activity is still be being carried out, it is recommended that similar powers to those provided for pursuant to section 360(2)(a) of the *EPA (Qld)* ought also be included in the raft of requirements that might be contained in a clean-up notice.

135. An obvious difficulty in respect of clean-up notices is the ability to address large scale static and historical contamination incidents. The term static is used because, in situations where contamination is ongoing, a prescribed person for the purposes of section 363G of the *EPA (Qld)* would usually be able to be identified. However, in cases of static historical contamination, there would likely be serious problems in identifying the nature and extent of the contribution of the prescribed person at the time to the contamination incident and, what would be a proportionate allocation of responsibility in respect of that incident.[32]

136. Notwithstanding difficulties of the type just referred to, the *EPA (Qld)* as currently drafted does permit the issuing of a clean-up notice to address historical and ongoing contamination.

137. A more fundamental problem arises where the contamination incident occurred years, if not decades ago. That is, where the current owners and/or occupier of the land is not a prescribed person for the purposes of section 363G(a) or (b) nor a prescribed responsible person for the purposes of section 363G(ba) of the *EPA (Qld)*.

138. The definition of a prescribed person could of course be extended to capture such a situation. However, that might result in consequences that are not only unreasonable but also unjust. Accordingly, it is not recommended that any such amendment be made.

[32] For an example of this refer to *Hungtat Worldwide Pty Ltd v Chief Executive of the Department of Environment and Heritage Protection* [2017] QPEC 62.

139. That of course does not mean that the *EPA (Qld)* should not seek to deal with both known and unknown contaminated sites as comprehensively as is reasonably possible. Indeed, the *EPA (Qld)* has attempted to do so. However, as presently drafted, the responsibilities of participants[33] and the consequences of failing to meet those responsibilities[34] are spread throughout the Act. And, in respect of the obligation to notify, very specific as to the obligations of particular individuals.

140. Another complication is that Chapter 7, Part 1, Division 2 of the *EPA (Qld)* concerned with the duty to notify of environmental harm is, pursuant to section 320A, restricted to circumstances including the "*carrying out of an activity*",[35] or an owner or occupier etc. of land becoming aware of the "*happening of an event*" or a "*change in the condition of the land*" or a "*notifiable activity*".[36]

141. Section 320DA prescribes that it is an offence for an owner or occupier of land not to notify the administering authority without a reasonable excuse. However, that duty is limited to knowledge of an "*event or change mentioned in section 320A(2)(b)(i) or (ii) …*".

142. In our view section 74B of the *EMPCA (Tas)* might provide a more straight forward and effective obligation to notify of contamination which would likely cover the majority of situations. That section provides:

> ***"74B Action by owner or occupier on becoming aware of contaminated site***
>
> *(1) If the owner or occupier of any area of land knows, reasonably believes or should in the circumstances reasonably believe that the area of land is or is likely to be a contaminated site, the owner or occupier –*
>
> *(a) must not commence or continue any activity that may directly or indirectly further cause or continue the exposure, escape, discharge, emission or release of the pollutant that the owner or occupier knows, reasonably believes or should reasonably believe has made the area of land a contaminated site; and*
>
> *(b) must notify the Director of the details, if known, of the pollutant concerned, the circumstances in which the pollutant escaped or was discharged, emitted or released and any action that has been or is being taken to remedy the pollution –*

[33] For example, duties of employee to notify (s 320B); duty of "other persons" to notify "particular" owners and occupiers (s 320C); duty of employers (s 320D); duty to notify DES of owner or occupier of land (s 320DA).
[34] For example, *EPA (Qld)* ss 442, 443, and, depending on the circumstances, 437 and 438.
[35] *EPA (Qld)* s 320A(1).
[36] *EPA (Qld)* s 320A(2).

(i) within 24 hours after the owner or occupier becomes aware, first reasonably believes or should first reasonably believe that the area of land is likely to be a contaminated site, if he or she became aware, first reasonably believed or should first reasonably have believed that the area of land is, or is likely to be, a contaminated site after the commencement of this section; or

(ii) within 6 months after the commencement of this section if the owner or occupier, at the time this section commenced, was aware, reasonably believed or should reasonably have believed that the area of land was, or was likely to be, a contaminated site.

Penalty: In the case of –

(a) a body corporate, a fine not exceeding 1 200 penalty units; or

(b) a natural person, a fine not exceeding 600 penalty units.

(2) An owner or occupier is not required to give notice under subsection (1)(b) if the person has reasonable grounds for believing that the fact that the area of land is likely to be a contaminated site has already come to the notice of the Director.

(3) An owner or occupier of an area of land is required to notify the Director under subsection (1)(b) despite the fact that to do so might incriminate him or her or make him or her liable to a penalty."

143. Significantly, the duty to notify is based on the knowledge alone of the owner or occupier rather than the becoming aware of potential consequences as result of carrying out an activity as prescribed in section 320A.

144. Accordingly, it is recommended that Chapter 7, Part 1, Division 2 of the *EPA (Qld)* be amended to incorporate a provision of similar effect to that of section 74B of the *EMPCA (Tas)*. Changes might be necessary to ensure that the penalties imposed are consistent with and proportionate to the existing penalty provisions of the *EPA (Qld)*.

145. The issue of cost recovery notices in the event that a clean-up notice is not complied with is dealt with as a separate issue below.

Recommendation
The raft of requirements that are provided for pursuant to section 360(2) be included in the requirements that might be contained in a clean-up notice (section 363H).
Recommendation
The duty to notify of environmental harm provisions (Chapter 7, Division 2) be amended to include a duty to notify to a similar effect, as that provided for in section 74B of the *EMPCA (Tas)*.

Transitional Environmental Programs

146. The case studies reviewed revealed a number of issues surrounding the use and effectiveness of TEPs.

147. Pursuant to Chapter 7, Part 4 of the *EPA (Qld)*, the giving of a program notice by the relevant person creates a privilege against the use of material provided,[37] and may render that person immune from prosecution in respect of whatever activity caused or threatened to cause environmental harm.[38]

148. Pursuant to section 355, the administering authority may apply to the Court seeking orders setting aside immunity from prosecution.[39] That of course raises the potential for delay. In any event, the use of a TEP can have a material impact on the course of action that may be taken in respect of an act or omission causing or threatening to cause environmental harm. Further, the mere process of putting a TEP into place is complex in its operation and likely to be the cause of unnecessary delay.

149. Another apparent defect concerning TEPs is that, while the administering authority has the discretion to approve an amendment to a TEP,[40] it has no express power to cause an amendment to it. That right resides solely in the hands of the holder of the TEP approval. What this means is that, notwithstanding how ineffective a TEP may turn out to be, absent the holder agreeing to amendments proposed by the administering authority, currently its only option would be to cancel the approval. Even then, the grounds for cancellation are restrictive.[41]

150. In respect of the approval of an amendment of a TEP, section 344(3) in its current form is considered to be inadequate. It appears to lose sight of what the primary purpose of a TEP is, namely to achieve compliance with the *EPA (Qld)*.

[37] *EPA (Qld)* ss 350–351.
[38] *EPA (Qld)* s 353.
[39] *EPA (Qld)* ss 355–356.
[40] *EPA (Qld)* s 344(3).
[41] *EPA (Qld)* ss 344E–344G.

151. Section 330 envisages that a TEP might achieve compliance with the *EPA (Qld)* by doing one or more of the matters addressed in subsections (a) to (c). As it stands, the caveat placed on the discretion of the administering authority only addresses the matter identified in subsection (a) of section 330.

152. That would seem to lend itself to the situation where the proposed amendment, while maintaining the status quo regarding environmental harm is nonetheless unlikely to achieve compliance with the *EPA (Qld)*. In such circumstances, it would seem advantageous to amend section 344(3) along the following lines:

> *"Also, the administering authority may approve the amendment only if:*
>
> *(a) It is reasonably satisfied that the amendment would be likely to achieve advancement of compliance with this Act; and*
>
> *(b) It is reasonably satisfied it will not result in increased environmental harm…"*

153. Further, it would not be an unlikely situation where an officer of DES might know of an amendment to the TEP that would add to the achievement of a desirable environmental outcome in circumstances where the holder of the TEP is not prepared to agree to the amendment as proposed. That seems to be an unacceptable situation, particularly in those cases where circumstances have materially changed since the TEP was approved.

154. Accordingly, it is recommended that the Act be amended to give DES the power to at least try to seek amendment absent the consent of the holder. The introduction of a new section would appear to be the most appropriate way of incorporating such an amendment. The use of the term "try" is intentional, as it is expected that any attempt to amend on the part of DES without consent would likely be the subject of an appeal.[42]

155. In respect of the cancellation of TEPs, the case studies have revealed that in a number of significant cases TEPs have been allowed to remain in place, via amendment of time limitations or otherwise, regardless of their lack of impact on solving the problem at hand. That would seem to be the consequence of in-house decision making but, in any event rather than progressing matters, has proved, in a not insignificant number of cases, to be a hindrance.

[42] Note: section 24AA of the *Acts Interpretation Act 1954* (Qld) provides "*If an Act authorises or requires the making of an instrument or decision— (a) the power includes power to amend or repeal the instrument or decision; and (b) 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*". It is at least arguable that that power would be sufficient to authorise amendment of a TEP by DES. However, it is considered that section 344 in its current form might complicate the application of section 24AA. To avoid the possibility of any argument about the extent of the operation of that section, it is considered that any power to amend on the part of DES ought be expressly provided for in the *EPA (Qld)*.

156. On balance, even with the proposed amendments in place, effective use of TEPs would seem to require at least four prerequisites to be in place. First, that the cause of the harm is capable of fairly exact identification. Second, a likely solution to the problem is identifiable. Third, the parties have at least a reasonable degree of confidence in the proposed solution. Fourth, and importantly, there is a genuine goodwill on the part of all parties involved. Those features may be usefully considered for inclusion in the DES' enforcement guidelines.

157. Finally on this topic, it bears emphasising that the case studies indicate that TEPs have often been largely ineffective in the more complex cases including those involving emerging contaminants and the more nebulous contaminants such as odour. In any event, at the very least, the *EPA (Qld)* ought be amended to give the administering authority the power to, where necessary to prevent ongoing environmental harm, refuse amendments to the TEP.

Recommendation

The power to amend a Transitional Environmental Program be expanded to:

(a) allow the administering authority to amend without consent of the operator;

(b) allow the administering authority to refuse an amendment of a TEP if it is not also satisfied that the amendment would be likely to achieve advancement of compliance with the Act.

Cost Recovery Notices

158. At present the *EPA (Qld)* provides for the recovery of costs but only in respect of those situations where an EPO[43] or a clean-up notice[44] has been issued.

159. As has already been addressed, the *EPA (Qld)* is deficient, or at least unnecessarily complicated in respect of the power of DES to step in and carry out works and recover the costs thereof in respect of EPOs issued pursuant to section 358 of the *EPA (Qld)*. Not only would that make Chapter 7, Part 5 of the *EPA (Qld)* more self-explanatory and contained, it might also address the potential for confusion concerning the wording of sections 358 and 363G of the *EPA (Qld)*.

160. Pursuant to section 358 an EPO is issued to a "person". While a person is defined for the purposes of Chapter 3, Part 1 of the *EPA (Qld)*,[45] it is not otherwise defined. Pursuant to the *Acts Interpretation Act 1954 (Qld)* a person is defined to include an individual and a corporation. In the event that amendments were made to Chapter 7 of the *EPA (Qld)* to empower DES to step into the shoes of the recipient of the EPO to carry out the necessary

[43] *EPA (Qld)* s 363AI.
[44] *EPA (Qld)* s 363N.
[45] *EPA (Qld)* s 39.

works and recover the costs thereof, presumably the relevant notices would be issued to the same relevant person under section 358.

161. If however, in respect of an EPO issued under section 358, reliance was had to the powers concerning clean-up notices there is a potential conflict.

162. Section 363K empowers DES to take action in place of the "recipient" of a clean-up notice. Section 363N gives the power to issue a cost recovery notice in respect of works undertaken. Section 363N like section 363K refers to the recipient of a clean-up notice. However, in both cases the recipient of a clean-up notice must also be a prescribed person for the purposes of section 363G of the *EPA (Qld)*.

163. It does not necessarily follow that a "person" who is issued an EPO pursuant to section 358 will be the same entity as a "prescribed person" for the purposes of sections 363K and 363N of the *EPA (Qld)*.

164. These matters reinforce, in our view, the benefits of the amendments to Chapter 7, Part 5 of the *EPA (Qld)* as recommended above.

Rationalisation of Notices

165. While it is beyond the scope of this review, given the time constraints involved, to make a final recommendation on the matter, it might be possible that a notice could be created that would permit the incorporation of elements designed to achieve environmental outcomes that presently exist but in separate notices.

166. This is a matter that was raised on a number of occasions during the course of this review. Such a notice would permit flexibility and the opportunity to issue one notice that could be used to address a wider number of issues over a wider variety of circumstances.

167. In this regard, the case studies revealed that in a number of cases multiple notices were issued and that was not an infrequent occurrence.

168. Of course in some cases multiple notices are unavoidable. By way of examples, where there are multiple causes of environmental harm and the passage of time or where different legal entities are involved. That can be accepted. However, it is tolerably clear that in many instances considerable time is spent on deciding which is the most appropriate notice to issue and, in the case of doubt, deciding to issue multiple notices.

169. As has already been referred to, the different notices involve different prerequisites or requirements to be in place before they can be issued. Different considerations might also have to be dealt with. An example of this is that the standard criteria must be considered before issuing an EPO.

170. It is envisaged that such a notice would have at its focus the key elements of the EPO, the environmental evaluation and clean-up notices. While it is recommended that thought be given to devising a separate notice of this type, it is immediately acknowledged that this might prove too difficult a task. Our investigations have revealed that other jurisdictions, like Queensland, have resorted to using separate forms of statutory notices.

Show Cause Notices

171. The decision to issue any of the statutory notices involves the exercising of a discretion. At present, the *EPA (Qld)* does not prescribe a process to foreshadow the issuing of a statutory notice. In a similar context, section 167 of the *Planning Act 2016* (Qld) (*Planning Act*) provides for a show cause notice to be issued by a local government before an enforcement notice is issued.

172. In respect of show cause notices, the QLS made the following observations:

> *"The EPA does provide for a show cause notice process in some contexts but unlike the enforcement notice under* Planning Act 2016*, it is not a prerequisite to the giving of an EPO. The experience of members is that the procedural fairness process that exists under the* Planning Act 2016 *through the show cause notice procedure tends to work well. It gives the administering authority a different perspective that they may not have known about and could avoid the need to issue an enforcement notice. It has also prompted the lodgement of development applications in order to achieve compliance. The merits of such a show cause prerequisite do not appear to have been adequately explored for an EPO. It can create a dialogue between the recipient and the regulatory agency which may establish a set of agreed procedures to achieve compliance. There could be some exceptions much like section 167(5)(a) and (b) of the* Planning Act 2016 *which could allow an administering authority to proceed straight to the giving of an EPO.*
>
> *The current system seems to be quite formal with an EPO issued, followed by formal review processes which may not avoid litigation as recipients apply to courts for stays. It encourages parties to entrench their positions and leads to larger costs of litigation. However, a show cause notice procedure before the giving of an EPO (and potentially other enforcement tools like clean up notices), can be beneficial. It affords procedural fairness and may allow for a range of flexible options rather than entrenching the parties into a litigious and costly process."*

173. Those observations were expressly endorsed by the BAQ who submitted:

> *"Secondly, we specifically endorse the comments by the QLS in relation to the introduction of a show cause notice procedure into the* Environmental Protection Act,

> *similar to what is in the* Planning Act. *The Association agrees with the observation that often EPOs are issued in circumstances where unrealistic and unreasonable requirements are made without a proper understanding of the recipient's business and likely impacts of the EPO. We agree that the introduction of a show cause notice procedure is likely to allow the provision of relevant information to the Department so as to ensure that any subsequent EPO issued is appropriately targeted and measured."*

174. In some instances, the issuing of a show cause notice prior to issuing a statutory notice might avoid the need for an internal review or litigation. There will of course be other cases where the offender or potential offender is of a character where the issuing of a show cause notice would not be appropriate, if not a complete waste of time and resources.

175. Clearly the authors of the QLS and BAQ submissions are speaking of the benefits of show cause notices based on experiences about which we are not in a position to comment on.

176. On the other hand, the *Planning Act* procedure does not allow for internal review. If a show cause procedure was introduced into the *EPA (Qld)* and the internal review process retained, there would be processes both before and after the issuing of a notice, in addition to court appeals, which could add to cost and delay. Second, the DES officers interviewed indicated they did, at times, use an informal "show cause" type procedure where they sent a draft EPO or other statutory notice to an operator for comment. The officers reported good results with this approach for operators who were conscientious and co-operative.

177. For these reasons, we do not consider a show cause process should be included in the legislation. However, consideration could be given to including an informal show cause regime or process in the enforcement guideline to be used by officers when appropriate.

Restraint orders

178. The following discussion concerning restraint orders is only concerned with proceedings by the Minister or the administrating authority and not with those provisions identified in sections 505(1)(c) and (d) of the *EPA (Qld)*. Section 505(1) empowers the persons nominated therein to commence proceedings in Court to remedy or restrain an offence against the *EPA (Qld)*, or a threatened or anticipated offence against the *EPA (Qld)*. The relevant Court for this relief is the Planning and Environment Court. The power to act in respect of an anticipated offence provides for a potentially wide scope of operation. As identified above, the creation of an offence in

respect of the GED would further widen the scope of the operation of the powers of the Court in respect of restraint orders.[46]

179. Provided the Court is satisfied about the matters identified in section 505(5), pursuant to section 505(6), the Court has wide powers to act:

> *"An order—*
>
> *(a) may direct the defendant—*
>
> *(i) to stop an activity that is or will be a contravention of this Act; or*
>
> *(ii) to do anything required to comply with, or to cease a contravention of, this Act; and*
>
> *(b) may be in the terms the Court considers appropriate to secure compliance with this Act; and*
>
> *(c) must specify the time by which the order is to be complied with; and*
>
> *(d) may include an order for the defendant to pay the costs reasonably incurred by the administering authority in monitoring the defendant's actions in relation to the offence."*[47]

180. Sections 505(7) and (8) and section 506 also give the Court considerable scope for when restraint orders may be made.

181. The powers of the Court pursuant to section 505 are similar to those embodied in sections 180 and 181 of the *Planning Act* concerned with enforcement orders to refrain a person from committing a development offence and/or to remedy the effect of a development offence. Sections 180 and 181 of that Act also envisage situations where it might be appropriate to make interim orders. Pursuant to section 180(5) of the *Planning Act* an enforcement order, interim or otherwise, may direct the respondent to:

> *"(a) to stop an activity that constitutes a development offence; or*
>
> *(b) not to start an activity that constitutes a development offence; or*
>
> *(c) to do anything required to stop committing a development offence; or*
>
> *(d) to return anything to a condition as close as practicable to the condition the thing was in immediately before a development offence was committed; or*
>
> *(e) to do anything to comply with this Act.*
>
> *Examples of what the respondent may be directed to do—*
>
> *• to repair, demolish or remove a building"*

[46] In the event that a GED offence is not created, the amendment to the *EPA (Qld)* addressed above in paragraph 63 above contemplates restraint orders being available for contravention of the GED.
[47] Refer also to *EPA (Qld)* s 505(9).

182. While sections 505 and 506 of the *EPA (Qld)* would seem to be capable of addressing actual, threatened or anticipated offences in its present form, it is considered that, with appropriate changes, a statutory regime that more closely resembled that under the *Planning Act* might be beneficial.

183. That would provide for a more consistent approach in the law dealing with very similar issues. Most practitioners, solicitors and barristers, who regularly appear in the Planning and Environment Court, would be more familiar with the relevant sections of the *Planning Act*. The Judges of that Court are more familiar with the enforcement provisions under the *Planning Act* than with the restraining provisions under the *EPA (Qld)*.

184. Those benefits however, are not of themselves sufficient to warrant amendment in our view.

Particular issues raised by case studies and submissions

Delay and internal and court review

185. There was a common theme in the DES case studies that the current legislative scheme tended to cause unacceptable delays in achieving environmental outcomes. The thrust of the concerns of officers of DES was that the number of steps required to achieve an outcome were numerous, namely:

Step 1: identifying that environmental harm has been caused
Step 2: deciding upon which appropriate statutory notice or notices ought be issued
Step 3: issuing of the statutory notice or notices
Step 4: an internal review of the notice or notices is requested by the recipient
Step 5: a stay or stays are sought staying the operation of the notices pending the outcome of the internal review
Step 6: the notice or notices are re-issued in their original or amended form
Step 7: if not already filed, the recipient files a notice of appeal appealing the issue of the notice or notices
Step 8: pending the hearing of the appeal stays are also sought suspending the operation of the notice/notices
Step 9: a hearing of a merits-based appeal.

186. With the notable exception of clean-up notices,[48] other statutory notices are able to be the subject of a request for an internal review. Another potential source of delay is that appeals to the Land Court are by way of a rehearing.[49] And, by virtue of the operation of sections 536 of

[48] *EPA (Qld)* s 521(14).
[49] *EPA (Qld)* s 527.

the *EPA (Qld)* and section 43 of the *Planning and Environment Court Act 2016* (Qld), an appeal to the Planning and Environment Court is by way of a hearing anew.

187. That is, appeals to both the Land Court and the Planning and Environment Court typically involve a thorough investigation and decision concerning the merits of the proceeding. This can be contrasted with the much more narrow scope for enquiry concerning a decision of a decision-making body by way of judicial review.

188. On balance, the authors are in favour of retaining the current legislative regime concerned with internal reviews. It must be accepted that an internal review will, almost inevitably cause delay. However, the positives of retaining the status quo concerning internal reviews outweigh the negatives.

189. Statistics taken out by DES between 1 February 2020 and 30 June 2022, revealed vastly different results in respect of internal review outcomes for EPOs and direction notices.[50]

190. 205 direction notices were issued during that period and only nine were the subject of an internal review. Of those nine, seven notices were amended and reissued and two were revoked. Only one of the notices went on to appeal. That is, of 205 direction notices issued, less than 5% were the subject of internal review and less than 1% was not finalised without recourse to litigation.

191. On the other hand, 92 EPOs were issued and approximately 7% of those were the subject of internal review and of that 7% approximately 85% of the EPOs were re-issued, either as amended or in their original form. However, unlike the situation in respect of direction notices, notwithstanding the internal review process, all of the internally reviewed and re-issued EPOs went on to appeal.

192. The difference in these sets of statistics, the small sample size of cases that were internally reviewed (six EPOs and nine direction notices) and the time period over which statistics were provided (20 months) does not support or detract from the internal review process. Also, while those statistics reveal vastly different success rates, that is not entirely surprising. Section 363B of the Act contemplates that direction notices are to be issued when both the problem and the remedy are able to be identified. That can be contrasted with the situation where the environmental issues are often far more complex and the stakes of the recipient of an EPO are typically much higher.

193. The positives of the internal review process include allowing the recipient of a notice to be heard in a non-adversarial environment, providing DES the opportunity to reflect on its

[50] Emergency directions and clean-up notices are exempt from internal review.

decision with the benefit of the information provided by the recipient including expert evidence, providing for an opportunity for both sides to reach a mutually acceptable outcome without resort to legal proceedings, and the narrowing of issues before appeal. It is likely that matters that are internally reviewed will by those with more complex or more onerous conditions, and so their appeal is more likely than simpler matters.

194. Before proceeding further on this topic, three additional matters ought be addressed. First, the concerns raised that in complicated matters, the time allowed for the consideration of the review application might not be enough. Second, the role stays play in the delaying of achieving environmental outcomes. Third, the concerns raised about the cost of and the time associated with merits appeals to the Courts.

195. As to the first of those matters, pursuant to section 521(15)(a), twenty days are allowed if submissions are made by the recipient. Otherwise, pursuant to section 521(15)(b), fifteen days. The concern was that these timeframes could only be extended in "special circumstances". This concern is unwarranted as special circumstances can be contrasted with the requirement of "exceptional circumstances". That more time might be needed to address complex issues raised during the internal review process could readily fall within the meaning of special circumstances.

196. Turning to the second matter. Neither the requesting of an internal review nor the filing of a notice of appeal automatically suspends the operation of a notice. Pursuant to section 539A(1) of the *EPA (Qld)*, the recipient of a notice would need to apply to a Court for a stay.

197. It is for the recipient of a notice to satisfy the Court that a stay ought be granted. And, pursuant to section 539A(2) the Court may **only** grant a stay when it is considered desirable to do so having regard to the matters specified in subsections (a), (b) and (c). It is also relevant in this context that a stay may be subject to conditions.

198. Finally, in this discussion is the nature of appeals to the Land Court and the Planning and Environment Court. Speaking generally, there are two means of reviewing a decision of an administrative body such as DES. First, as is the current situation, in most cases by way of a full hearing of the merits of the case. The second method is by way of judicial review, where the grounds of review are much narrower. Typically, grounds for judicial review revolve around there being a breach of the rules of natural justice and/or want of jurisdiction or authority on the part of the decision-maker and/or a failure to observe the procedures required by law to be observed in connection with the reaching of the decision.

199. There is no consistent approach to the review of administrative decisions in the interstate legislation considered in this review. For example, in the Northern Territory, a review of a

relevant decision is by way of a judicial-type review heard, not by a court, but by a Tribunal.[51] On the other hand, in New South Wales the proceeding is by way of an appeal heard by the Land and Environment Court of that State.[52] In Victoria, not all decisions are reviewable and those that are may be on limited grounds only and are heard by the Victorian Civil and Administrative Tribunal.[53]

200. While again it can be accepted that an appeal of a notice issued by DES by way of a hearing anew will typically be the source of further delay in the final determination of the matter, on balance, it is considered that the existing legislative regime ought not be disturbed.

201. That is so for a number of reasons. First, it has to be recognised that only a very small proportion of the matters dealt with by DES get to the internal review stage, let alone to the appeal stage. Second, in complicated matters, the ability to dispose of the matter in a truly competent manner may simply not be achievable by way of judicial review.

202. For the reasons given, it is considered that the issue of delay ought not be addressed by changing the existing internal review and appeal arrangements under the *EPA (Qld)*.

Action in emergencies

203. The review considered the possibility of giving the Minister or the Chief Executive the power to issue a statutory notice in more extreme situations where it was necessary to take swift action. Particularly in situations involving real and not insignificant risk to human health and safety. It was considered that the issuing of any such notice could be exempt from internal review and appeal. Any review of the decision would be restricted to judicial review under the *Judicial Review Act 1991* (Qld).

204. Our view is that, provided that the proposed amendments to sections 16 and 17 are adopted, the existing emergency powers would achieve an effective outcome without the need for the creation of a new source of power to act.

205. Section 17 as proposed, incorporates within the meaning of serious environmental harm "*actual or threatened harm to human health and safety*". Accordingly, for the purposes of section 466B, provided the "authorised person" is satisfied on reasonable grounds[54] that serious or material environmental harm has occurred or there is a threat thereof, the only remaining

[51] *EPA (NT)* ss 276, 277.
[52] *PEOA (NSW)* ss 287–292.
[53] *EPA (Vic)* ss 430–436.
[54] *EPA (Qld)* s 466A.

prerequisite to be determined before issuing an emergency direction, is whether urgent action is necessary to achieve the objectives of section 466B(b).[55]

206. The decision to issue an emergency direction is already exempt from internal review and the operation of a stay under the *EPA (Qld)*. Further, insofar as appeals are concerned, section 531(4) relevantly limits the right to appeal to that against an "original decision". By virtue of the operation of section 519 and Schedule 2 of the *EPA (Qld)*, the decision to issue an emergency direction is not an appealable "original decision".

207. Such a decision would be a reviewable decision by way of judicial review pursuant to section 4 of the *Judicial Review Act 1991* (Qld). However, as already mentioned, the grounds for reviewing a decision by way of judicial review are typically significantly narrower than in a merits appeal.

208. There are significant advantages in adopting this course of action. First, it avoids the need for substantive amendments to the *EPA (Qld)*. Second, by virtue of the operation of Schedule 4 of the *EPA (Qld)*, the definition of an "authorised person" provides for more flexibility in the decision-making process. Finally, any emergency direction issued pursuant to section 467(1) is likely to be capable of, where necessary, incorporating appropriate elements from the existing suite of statutory notices.

209. By way of observation, by virtue of the operation of section 466B(a)(ii), at least in theory, material environmental harm might be sufficient to trigger an emergency direction. That would seem to be an unlikely situation save perhaps in the most extreme of cases. However, it is not being recommended that the reference to material environmental harm be deleted from section 466B(a)(ii).

210. The proposed amendments to section 17 would make section 466B(a)(i) largely, if not entirely redundant, as human health or safety or the threat thereto, is already incorporated into the proposed definition of serious environmental harm. Nonetheless, it is considered that no amendment is necessary to the section.

Amendment of Environmental Authorities

211. It became apparent when reviewing the case studies, that some operators carrying out materially the same activities under their respective EAs in similar locations, were operating under a significantly different set of EA conditions. And, in some instances, the existing conditions were inadequate to address the risks that a serious contamination event might occur. These

[55] Insofar as material environmental harm is concerned, by virtue of the operation of sections 15 and 16, as intended to be amended, would capture the concept of threatened environmental harm.

issues seemed to have particular significance in respect of contamination incidents involving odour and PFAS and, more recently, microplastics.

212. The conditions attached to each EA will speak for themselves. The real issue is what, if anything, can be done to address ongoing environmental problems by amending existing conditions in the absence of consent on the part of the operator.

213. Before proceeding further on this topic, two observations can be made. First, the power to amend EA conditions clearly has the potential to provide a useful tool to achieve acceptable environmental outcomes in certain circumstances. Second, while beyond the scope of the TOR, it cannot be emphasised enough just how important is the role of ensuring at first instance that EA conditions are adequate and appropriately drafted to address activities authorised by the issuing of an EA. Inadequate and ambiguous conditions have the potential to immediately place DES on the back foot in securing acceptable environmental outcomes and to cause avoidable uncertainty for the holder of an EA.

214. In this regard, particular care needs to be taken in making it clear exactly what the nature of the activity being authorised is, and, where necessary, the physical boundaries of or limits to the extent of the site over which the activity is to occur. There should also be, as far as is practicable, uniformity and consistency in the conditions imposed on EAs authorising particular classes of activities. By way of topical examples, landfill and composting. The case studies have revealed that is not the case and that, understandably that is causing a degree of dissatisfaction among some operators.

215. The submissions received from the QLS revealed a number of other issues concerning the conditioning of EAs. These included the use of a range of different descriptive qualitative conditions and an absence of quantitative conditions. In this regard, in the submission made by the QLS it was said that:

> *"…typical conditions of environmental activities are broad and general and do not adopt measurable criteria, which is a feature that inevitably adds to the difficulty in enforcing conditions of environmental authorities."*

216. The desirability of using quantitative rather than qualitative criteria when setting conditions attaching to EAs was also a matter QELA specifically addressed. While the policies that might drive the drafting of conditions is beyond the scope of the TOR, it is considered that it is a matter that also should be bought to the attention of DES.

217. Section 213 of the *EPA (Qld)* provides for amendments to reflect new standard conditions. Nothing more needs to be said about that. Section 215(1) provides:

> ***"215 Other amendments***

> *(1) The administering authority may amend an environmental authority or PRCP schedule at any time if—*
>
> *(a) it considers the amendment is necessary or desirable because of a matter mentioned in subsection (2) and the procedure under division 2 is followed; or*
>
> *(b) the holder of the authority or schedule has agreed in writing to the amendment."*

218. Leaving aside the procedure to be followed, subsection (2) proceeds to identify the "matters" that might trigger the administering authority's powers to amend conditions. Save for section 215(2)(a), those matters are generally prescriptive in character. That is, they require the occurrence of prescribed events. Subsection 2(a) identifies that a relevant matter includes "*a contravention of this Act or an environmental offence committed by the holder*".

219. In section 215(2)(a), the requirement that there be a contravention of the *EPA (Qld)* is of much broader import than the commission of an environmental offence as the former may be established by, for example, a contravention of the GED. Sub-section (2) also allows the administering authority to propose an amendment considered necessary or desirable because of an environmental audit or investigation (sub-section (2)(i)), or a recognised entity report (sub-section (2)(l)), or because of a significant change in the way in which, or the extent to which, the activity is being carried out (sub-section (2)(n)).

220. There is no provision which allows an amendment to be swiftly proposed because of a lack of appropriate mitigation or avoidance of environmental harm.

221. In that vein, section 106 of the *EPA (NT)* provides in respect of an environmental approval:

> ***"106 Amendment of environmental approval***
>
> *(1)* ***The Minister may amend an environmental approval:***
>
> *(a) at the request of the approval holder; or*
>
> *(b) on the recommendation of the NT EPA as a result of an environmental impact assessment of a significant variation of an action or strategic proposal – in accordance with the regulations; or*
>
> *(c) if the Minister becomes aware of information that was not available to the Minister at the time of granting the environmental approval and the Minister would have imposed different conditions on the environmental approval if the information had been available; or*
>
> *(d)* ***if, as a result of the monitoring of compliance with or enforcement of this Act or the environmental approval, the Minister considers that***

> ***the environmental impact of an action under the environmental approval or the approved strategic proposal:***
>
> ***(i) is not being appropriately avoided, mitigated or managed; or***
>
> ***(ii) is not being appropriately offset by an environmental offset.***
>
> *(2) The Minister must make a decision on a request from an approval holder within the required time. …"* (emphasis added)

222. It is recommended that consideration be given to broadening the scope of the power to amend to include a power similar to section 106(1)(d) *EPA (NT)*.

223. To amend an EA holder's existing conditions has, of course, the potential to have significant adverse impacts on the economic viability of an activity. As such, it is considered necessary that there be caveats placed on the exercise of such a power. Some potential caveats that could be placed on the power are that:

(a) such a step is only to be taken by the Minister or the Chief Executive and not pursuant to any delegated power or authority;

(b) any such power should be limited to those situations where there is clear scientific evidence which supports the decision of the Minister or Chief Executive;

(c) there should be a pre-emptory step in the form of a show cause notice, clearly identifying the reasons that ground the decision and giving the operator the right to be heard by way of submissions on the matter.[56]

(d) save perhaps situations involving grave risks to human health and safety and emergency situations, such decisions ought be subject to existing rights of appeal and the granting of stays. However, in circumstances where the decision is one made by the Minister or Chief Executive, it is not considered appropriate that such decisions should be the subject of internal review.

Recommendation

The power to amend Environmental Authority conditions be expanded to allow the Chief Executive or the Minister to amend conditions where the Minister or Chief Executive considers the environmental impact of the activity is not being appropriately avoided, mitigated or managed.

[56] By way of example refer to Chapter 5, Divisions 2 and 3 of the *EPA (Qld)* concerned with the cancellation or suspension of an EA; ss 279–284.

Cancellation or Suspension of Environmental Authority

224. Section 278 of the *EPA (Qld)* might provide, if not an additional, then an alternative tool to address circumstances where there are identifiable serious adverse environmental outcomes occurring. Section 278(1) gives the administering authority the discretion to cancel or suspend the operation of an EA in the event that one or more of the events in subsection (2) have occurred. This discretion is in addition to the operation of section 360(2) of the *EPA (Qld)* concerning the form and content of an EPO.

225. Subsections (2)(a) to (i) of section 278 provide for a number of specific prescriptive events that must have occurred before the discretion pursuant to section 278(1) is enlivened. Those events include the conviction for an environmental offence after the EA was issued: sub-section (2)(d). That reflects the fact that the cancellation or suspension of an EA is likely to be a step taken after other steps have not been able to effectively deal with any actual or risk of environmental harm. That is, after a person has failed to comply with an EPO or other statutory notice and has been convicted of one of the main offences in the *EPA (Qld)* (for example, sections 437, 438, 440).

226. The need for wider powers to cancel or suspend an EA was not proposed by any DES officer or in any case study or submission. In our view, it is not necessary to extend these powers.

227. However, the legislation could be improved to make clear that the EA holder's obligations under the conditions attached to the EA remain operative notwithstanding suspension or cancellation. In this regard, existing provisions concerning the ongoing obligations of a holder of an EA which has been cancelled or suspended are both complex and confusing.

228. By contrast, section 113 of the *EPA (NT)* makes the obligations plain. It provides:

> *"**113 Obligations under approval continue***
>
> *(1) This section applies if an environmental approval for an action is revoked or suspended.*
>
> *(2) The person who was the approval holder of the environmental approval must continue to:*
>
> *(a) comply with any obligations under the environmental approval to manage the site to which the approval applies to minimise or remediate the environmental impact of the action; and*
>
> *(b) comply with any obligations under the environmental approval that relate to rehabilitation of the environment.*
>
> *(3) The person required to comply with subsection (2) may apply to the Minister to waive the requirement to comply with that subsection.*

(4) The Minister may waive compliance with any of the requirements of subsection (2) if the Minister considers it appropriate to do so."

229. It is recommended that the ongoing obligations of the holder of an EA that has been cancelled or suspended be spelt out in a clearer fashion than that which currently exists under Chapter 5 of the *EPA (Qld)*. In that regard, we consider that section 113 of the *EPA (NT)* might provide a useful model for achieving that outcome.

Recommendation

The provisions regarding continuing obligations under cancelled or suspended Environmental Authorities be clarified to ensure that an operator must continue to comply with conditions regarding management of the site to reduce environmental risk and rehabilitation.

Registered Suitable Operators

230. Pursuant to section 318K, the Chief Executive may suspend or cancel a person's registration as a suitable operator for the carrying out of an ERA. One of the grounds that might trigger suspension or cancellation is that "*a disqualifying event has happened*..."

231. Schedule 4 prescribes that a disqualifying event includes a conviction for an environmental offence. Schedule 4 defines an environmental offence to mean:

"(a) an offence against any of the following provisions—

- *section 260*
- *section 295(3)*
- *chapter 7, part 2*
- *section 357(5)*
- *section 361*
- *chapter 8; or*

(b) an offence against a corresponding law, if the act or omission that constitutes the offence would, if it happens in the State, be an offence against a provision mentioned in paragraph (a)."

232. That list does not include contravention of a direction notice (section 363E) nor contravention of a temporary emissions licence condition (section 357I). There does not appear to be any apparent reason why those events ought not be included as environmental offences and, as a consequence, potentially amount to a disqualifying event for the purposes of Chapter 5A, Part 4 of the *EPA (Qld)*.[57]

[57] A comparison of the penalty units associated with each offence reveals no basis for excluding offences under *EPA (Qld)* ss 363E or 357I.

233. Accordingly, absent sound reasons not to do so, it is recommended that the necessary amendments be made.

Recommendation
Schedule 4 of the *EPA (Qld)* be amended to include a contravention of sections 357I and 363E as disqualifying events for the purposes of section 318K of the *EPA (Qld)*.

Investigation powers

234. The *EPA (Qld)* provides a suite of investigative tools to authorised officers, including powers to require information, produce documents, answer questions and enter premises and vehicles.[58] The interstate legislation considered included broadly similar powers, with some differences as to when and how powers could be exercised.[59]

235. None of the case study material provided by DES suggested any enforcement or prosecution action was stymied by a lack of investigative powers, although there were difficulties with how powers were exercised to obtain evidence sufficient to prove offences (particularly nuisance and odour offences). That issue will be dealt with further in relation to evidentiary provisions.

236. Also, none of the submissions received identified any deficit in investigative powers. In those circumstances, while the powers have some minor differences to the comparative legislation, interstate and intrastate, those differences do not seem to be causing practical difficulties with enforcement and prosecution. Accordingly, there seems to be no significant impetus for immediate change in this area.

237. We would, however, make one observation. Section 452 of the *EPA (Qld)* is concerned with the powers of authorised persons to enter places and vehicles. Leaving aside matters such as public places and consent to entry, section 452 is otherwise focussed on those places where EAs, ERAs or where a PRCP relates. There is no power in section 452 to enter other premises, even in urgent circumstances. That power does exist in "emergencies" under section 467(5), which allows entry and exercising of other powers. The definition of emergency in section 466B confines this power to occasions where urgent action is necessary for particular purposes. In non-urgent circumstances, such an entry may be effected under a warrant issued under section 456.

238. In the light of the existing powers, it would appear that the only gaps that might exist in respect of the powers of entry without consent or a warrant would be where, on reasonable grounds an

[58] See Chapter 9, Parts 1 to 3 of the *EPA (Qld)*.
[59] See for example *EPA (Vic)* ss 246–247; *PEOA (NSW)* s 196.

authorised person believed that immediate intervention was required to prevent a serious environmental offence from occurring or, to prevent evidence of an offence being concealed or destroyed.

239. In respect of the first matter, if sufficiently serious, the description of what constitutes an emergency pursuant to section 466B would likely be sufficient to justify entry without a warrant or consent.

240. Accordingly, it would appear that the only gap is in respect of the matter of evidence. On balance, in the absence of any material pointing to this issue having caused any significant difficulties to officers of DES in the past, we do not consider it necessary to expand the existing powers of entry in Chapter 9, Part 2 of the *EPA (Qld)*.

Prosecutions

Offences and maximum penalties

241. The *EPA (Qld)* creates a range of offences. The most significant offences in terms of causing environmental harm are created by sections 437, 438 and 440 of the *EPA (Qld)*, for serious and material environmental harm, and environmental nuisance, respectively. In each case, there is a separate offence and higher penalty for wilfully and unlawfully causing the harm or nuisance, and a lower penalty for unlawfully causing the harm or nuisance.

242. "Wilfulness" is a concept well known to the general criminal law. The Court of Appeal held in *R v Lockwood; ex parte Attorney-General (Qld)* [1981] Qd R 209 that "wilfully" required proof the person either had an actual intention to do the particular kind of harm that was done, or deliberately did an act, aware at the time of doing the act that the result charged was a likely consequence of the act and recklessly did the act regardless of the risk.[60]

243. The NSW and Victorian legislation considered also provided different "tiers" of offences depending on the offender's state of mind, although they rely on proof of "intentionally" and "recklessly"[61] rather than wilfully.

244. In terms of maximum penalties for the fundamental offences, the *EPA (Qld)* sits comfortably with the interstate legislation: see Appendix C, Table of maximum penalties. Similarly, the penalty infringement notice (PIN) fine amounts available for offences against the *EPA (Qld)* are comparable to the interstate legislation. In this regard, the authors understand that a review of the relevant regulation was undertaken in 2014,[62] which included consideration of penalties

[60] *R v Lockwood; ex parte Attorney-General (Qld)* [1981] Qd R 209.
[61] For example, *EPA (Vic)* s 27 (aggravated breach of GED if intentionally or recklessly contravened); *PEOA (NSW)* ss 115, 116 (acting intentionally or recklessly).
[62] The remade State Penalties Enforcement Regulation 2014 came into effect on 1 September 2014.

available in other jurisdictions. None of the submissions or case studies indicated any inadequacies with the PIN regime. Given the size of the maximum penalties, we do not think it necessary to introduce a continuing penalty regime, whereby the maximum penalty increases for each day the offence continues.

245. The *EPA (Qld)* also provides a number of specific offences, including for example the depositing of a contaminant in water or breach of a noise standard. At first blush, these offences may appear to be in need of rationalisation, but that structure is similar to the offences in Victoria and the Northern Territory. Some of those specific offences assist in establishing an offence to ground a prosecution or the issue of a statutory notice without proof of some of the more difficult elements of the higher-level offences, for example causation.

246. The compliance and prosecution officers of DES consulted as part of the review did not consider the *EPA (Qld)* regime to be lacking relevant offences for environmental harm. Rather, difficulties in prosecuting the offences were related to proof of the elements of the offences that existed, in particular to proving:

(a) causation of the relevant harm, or nuisance, by a singular defendant including because of the need to exclude the hypothesis that other nearby operators may be the cause;

(b) identification of the offender, particularly in relating to unlawful dumping cases in public spaces.

247. DES officers did identify difficulty in proving breach of EA conditions, if those conditions were drafted broadly and without specific requirements. That issue must be addressed through the drafting and amendment of EA conditions. Further, there was concern expressed about whether fines imposed would be a deterrent and with the recording of convictions against companies. There being no concern about maximum penalties, the obtaining of a deterrent penalty in a particular case will depend largely on the evidence or agreed facts before the Judge or Magistrate, including for example profits obtained from undertaking the activity which caused harm. The recording of convictions against companies, and the appropriateness of the considerations in section 12 of the *Penalties and Sentences Act 1992* (Qld) to that situation are issues that would apply across a wide range of legislation, and should be considered by the policy division with responsibility for the criminal law.

248. Finally, in respect of the discussion concerning offences, it is noted that section 439 of the *EPA (Qld)* provides that in respect of a proceeding for an offence of causing serious environmental harm, in the event that the court is not satisfied that that offence has been proved, the court may, in the alternative, find the defendant guilty under section 438, namely of causing material environmental harm. Unless there are reasons for not doing so, of which we are unaware, we

recommend that consideration ought to be given to amending the Act to provide that in respect of offences under section 437 or 438, environmental nuisance is a further alternative.

249. More will be said about these evidentiary issues in the section on evidentiary aids.

Alternatives to prosecution

250. The *EPA (Qld)* provides for DES to accept an "enforceable undertaking" in relation to a contravention of the legislation if the authority reasonably believes the undertaking will secure compliance with the *EPA (Qld)* and enhance the protection of the environment. Such an undertaking prohibits the commencement of criminal proceedings and does not constitute an admission of guilt.[63]

251. Similar provisions exist in Victoria, New South Wales and the Northern Territory.[64]

252. Informal alternatives exist through the use of the statutory notices and discussions between operators and DES. The prosecution and enforcement guidelines of DES place an emphasis on proportionality in terms of what actions should be taken. In our view, that discretion and the enforceable undertaking regime provide sufficient alternatives to prosecution to enable DES to avoid prosecution where it is not warranted.

Evidentiary aids

Criminal matters

253. As indicated above, the ability to gather evidence sufficient to prove the main offences in the *EPA (Qld)* was a matter raised a number of times in case studies and by DES officers.

254. The *EPA (Qld)* does contain a number of provisions to assist with proving documents, permits and analysis, among other things.[65] More directly relevant to the issue identified by DES is section 491, which applies in relation to an offence against section 440 (environmental nuisance) or section 440Q (contravention of a noise standard) and permits an authorised person to give evidence, without the need to call further expert evidence that he or she formed the opinion based on their senses that:

(a) the emission was made from the alleged source and travelled to another place; and

(b) for an offence of environmental nuisance, that the level, nature or extent of the emission was an unreasonable interference with an environmental value.

[63] See *EPA (Qld)* ss 507, 508.
[64] See *EPA (Vic)* ss 303, 305; *EPA (NT)* ss 215, 220, 222.
[65] *EPA (Qld)* s 490.

255. Evidence about noise emissions may be given without measuring the noise,[66] or rating its audibility.[67]

256. While we are not aware of any published case considering section 491, the provision should be sufficient to deal with a number of the issues of causation that were raised in the case studies, namely:

(a) proof that dust landing on areas around a site, and tested to be of the same composition as dust on the site, was from the site; and

(b) proof that odour was emanating from particular premises when there are a number of similar operating premises in a relatively small area.

257. Those provisions would not be sufficient in all circumstances. First, they would not be able to be used to prove the element of causation where an authorised officer was unable to identify where an odour or other nuisance was emanating from, for example if there are a number of premises emitting a similar smell at the same time. However, causation should be able to be proved with appropriate evidence in accordance with the ordinary test of causation in the criminal law: that the act or omission of the defendant was a substantial or material cause of the harm: see *Royall v The Queen* (1991) 172 CLR 378 at [18]-[19].

258. Second, the provisions may be of little assistance for matters of temporary nuisance if an authorised officer cannot attend the site, or nearby locations during the causing of the nuisance. Finally, the evidentiary provision would not assist in prosecutions for the offence of breach of an EA condition which, in many cases, prohibits the causing of a nuisance at nearby sensitive receptors.

259. None of the current interstate legislation considered as part of this review have provisions which would negate the need to prove causation in nuisance or noise offences. Some include averments or presumptions, but none remove the need to prove causation.[68]

260. In our view, the issue raised by DES is better addressed by the inclusion of quantitative standards at the site boundary (or other particular locations, for example a window or chimney) for the emission of dust, odour and other temporary contaminants, and monitoring conditions, in EA conditions, to allow prosecution under section 430 for contravention of EA conditions. Proof of causation is a fundamental tenet of result crimes and should not be readily presumed if there are other avenues to resolve the problem.

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[66] *EPA (Qld)* s 491A(5).
[67] *EPA (Qld)* s 491A(6).
[68] See for example *EPA (SA)* s 5C; *POEA (NSW)* s 257; *EPA (NT)* ss 263, 264; *EPA (Vic)* s 348; *EPA (Vic)* 1970 (repealed) s 62C.

261. Finally on this topic, the provisions relating to executive officer and corporate liability and the attribution of liability and states of mind are similar to interstate legislation, and do not require amendment.

Civil matters

262. As presently drafted, the evidential aids provided pursuant to sections 491 and 491A are limited to criminal prosecutions where guilt must be proved beyond reasonable doubt.

263. In civil proceedings, where the standard of proof is on the balance of probabilities, we can see no reason why the evidentiary aids provided for in those sections, should not also be available. Such proceedings might include, by way of examples, seeking restraint orders pursuant to section 505, appeals concerned about the issuing of a statutory notice and proceedings about the granting of a stay.

264. Accordingly, it is recommended that Chapter 10, Part 1 of the *EPA (Qld)* be amended to make those evidentiary aids available in civil proceedings.

265. In this regard, we would also observe that while section 490 of the *EPA (Qld)* is concerned with "*a proceeding under or in relation to this Act*", section 490(7) would, at face value, appear to be intended to apply to prosecutorial proceedings. Unless there are policy grounds we have not been made aware of, the words "*by the prosecutor*" should be deleted from section 490(7).

Recommendation
Chapter 10, Part 1 of the *EPA (Qld)* be amended to expand the evidentiary aids limited to criminal proceedings to be available in civil proceedings.
Recommendation
The words "*by the prosecutor*" be deleted from section 490(7).

Appendix A – Recommendations

Principles

1. The principles underpinning the *Environmental Protection Act 1994* (Qld) should be amended to include:
   (a) The principle of polluter pays;
   (b) The proportionality principle;
   (c) The principle of primacy of prevention; and
   (d) The precautionary principle.

Definitions

2. Sections 8 and 9 of the *EPA (Qld)* should be amended to include the concept of "human health, safety and wellbeing" in the definitions of environment and environmental value.

3. Section 15 or sections 16 and 17 of the *EPA (Qld)* should be amended to make clear that environmental harm that may constitute a nuisance at low levels, may also constitute material and serious environmental harm if it meets the definitions of those terms.

4. The threshold amounts for material and serious environmental harm should be reviewed and increased.

5. Section 319 of the *EPA (Qld)* be amended by omitting the words "reasonable and practicable" and inserting in lieu thereof "reasonably practicable".

Statutory notices

6. Direction notice provisions should be amended as follows:
   (a) amend section 363D(1) to make clear that the remedying of the contravention of a prescribed provision includes the obligation to carry out any remedial work that might be required to remedy the contravention;
   (b) provide powers for the administering authority to undertake remedial works and recover the costs thereof;
   (c) include as a prescribed provision for the purposes of section 363A offences involving the causing or risk of environmental harm or the contravention of the general environmental duty in section 319.

7. The Environmental Protection Order provisions should be amended to:
   (a) remove the need to consider the standard criteria in deciding whether to issue an EPO under section 358(a)-(c) and (e) of the *EPA (Qld)*;

(b) extend the power to issue an EPO for contravention of an offence under section 358(e) to all offences under the *EPA (Qld)* which relate to acts that have caused or might cause environmental harm;

(c) rationalise the powers to step in to undertake remedial works and recover the costs thereof in respect of EPOs issued pursuant to section 358 of the *EPA (Qld)*;

8. Unless dealt with elsewhere in the Act, consideration be given to introducing an offence provision to capture obstruction of compliance with an EPO issued pursuant to section 358 of the *EPA (Qld)* or an offence provision that captures both related persons and persons issued an EPO pursuant to section 358.

9. The raft of requirements that are provided for pursuant to section 360(2) be included in the requirements that might be contained in a clean-up notice (section 363H).

10. The power to amend a Transitional Environmental Program be expanded to:
    (a) allow the administering authority to amend without consent of the operator;
    (b) allow the administering authority to refuse an amendment of a TEP if it is not also satisfied that the amendment would be likely to achieve advancement of compliance with the Act.

Restraint Orders

11. In the event that a general environmental duty offence was not preferred, consideration might be given to including the general environmental duty within the scope of operation of section 505 of the *EPA (Qld)*, by way of example, by introducing the words "*a contravention of the general environmental duty or…*" after the words "*or restrain*" and "*or anticipated*" and before the word "*offence*" in section 505(1).

Environmental Authority conditions

12. The power to amend Environmental Authority conditions be expanded to allow the Chief Executive or the Minister to amend conditions where the Minister or Chief Executive considers the environmental impact of the activity is not being appropriately avoided, mitigated or managed.

13. The provisions regarding continuing obligations under cancelled or suspended Environmental Authorities be clarified to ensure that an operator must continue to comply with conditions regarding management of the site to reduce environmental risk and rehabilitation.

Registered Suitable Operators

14. Schedule 4 of the *EPA (Qld)* be amended to include a contravention of sections 357I and 363E as disqualifying events for the purposes of section 318K of the *EPA (Qld)*.

Offences

15. Consideration should be given to creating an offence for breaching the general environmental duty.

16. The duty to notify of environmental harm provisions (Chapter 7, Division 2) be amended to include a duty to notify to a similar effect, as that provided for in section 74B of the *EMPCA (Tas)*.

Civil Matters

17. Chapter 10, Part 1 of the *EPA (Qld)* be amended to expand the evidentiary aids limited to criminal proceedings to be available in civil proceedings.

18. The words "*by the prosecutor*" be deleted from section 490(7).

Appendix B – Key provisions of the *Environmental Protection Act 1994* (Qld)

3 "***Object***

*The object of this Act is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (**ecologically sustainable development**).*"

8 "***Environment***

***Environment** includes—*

(a) ecosystems and their constituent parts, including people and communities; and

(b) all natural and physical resources; and

(c) the qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and

(d) the social, economic, aesthetic and cultural conditions that affect, or are affected by, things mentioned in paragraphs (a) to (c)."

9 "***Environmental value***

***Environmental value** is—*

(a) a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety; or

(b) another quality of the environment identified and declared to be an environmental value under an environmental protection policy or regulation."

10 "***Contamination***

***Contamination** of the environment is the release (whether by act or omission) of a contaminant into the environment.*"

11 "***Contaminant***

*A **contaminant** can be—*

(a) a gas, liquid or solid; or

(b) an odour; or

(c) an organism (whether alive or dead), including a virus; or

(d) energy, including noise, heat, radioactivity and electromagnetic radiation; or

(e) a combination of contaminants."

14 *"Environmental harm*

*(1) **Environmental harm** is any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value, and includes environmental nuisance.*

*(2) **Environmental harm** may be caused by an activity—*

(a) whether the harm is a direct or indirect result of the activity; or

(b) whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors."

15 "***Environmental nuisance***

***Environmental nuisance** is unreasonable interference or likely interference with an environmental value caused by—*

(a) aerosols, fumes, light, noise, odour, particles or smoke; or

(b) an unhealthy, offensive or unsightly condition because of contamination; or

(c) another way prescribed by regulation."

16 "***Material environmental harm***

*(1) **Material environmental harm** is environmental harm (other than environmental nuisance)—*

(a) that is not trivial or negligible in nature, extent or context; or

(b) that causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than the threshold amount but less than the maximum amount; or

(c) that results in costs of more than the threshold amount but less than the maximum amount being incurred in taking appropriate action to—

(i) prevent or minimise the harm; and

(ii) rehabilitate or restore the environment to its condition before the harm.

(2) In this section—

maximum amount *means the threshold amount for serious environmental harm.*

threshold amount *means $5,000 or, if a greater amount is prescribed by regulation, the greater amount*."

17 "***Serious environmental harm***

(1) ***Serious environmental harm*** *is environmental harm (other than environmental nuisance)—*

(a) *that is irreversible, of a high impact or widespread; or*

(b) *caused to—*

(i) *an area of high conservation value; or*

(ii) *an area of special significance, such as the Great Barrier Reef World Heritage Area; or*

(c) *that causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than the threshold amount; or*

(d) *that results in costs of more than the threshold amount being incurred in taking appropriate action to—*

(i) *prevent or minimise the harm; and*

(ii) *rehabilitate or restore the environment to its condition before the harm.*

(2) *In this section—*

threshold amount *means $50,000 or, if a greater amount is prescribed by regulation, the greater amount*."

319 "***General environmental duty***

(1) *A person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm (the* ***general environmental duty****).*

Note—

See section 24(3) (Effect of Act on other rights, civil remedies etc.).

(2) *In deciding the measures required to be taken under subsection (1), regard must be had to, for example—*

(a) *the nature of the harm or potential harm; and*

(b) the sensitivity of the receiving environment; and

(c) the current state of technical knowledge for the activity; and

(d) the likelihood of successful application of the different measures that might be taken; and

(e) the financial implications of the different measures as they would relate to the type of activity."

437 "***Offences of causing serious environmental harm***

(1) A person must not wilfully and unlawfully cause serious environmental harm.

Maximum penalty—6,250 penalty units or 5 years imprisonment.

(2) A person must not unlawfully cause serious environmental harm.

Maximum penalty—4,500 penalty units.

(3) In a proceeding for an offence against subsection (1), if the court is not satisfied the defendant is guilty of the offence charged but is satisfied the defendant is guilty of an offence against subsection (2), the court may find the defendant guilty of the offence against subsection (2).

Note—

See section 493A (When environmental harm or related acts are unlawful)."

438 *"**Offences of causing material environmental harm***

(1) A person must not wilfully and unlawfully cause material environmental harm.

Maximum penalty—4,500 penalty units or 2 years imprisonment.

(2) A person must not unlawfully cause material environmental harm.

Maximum penalty—1,665 penalty units.

(3) In a proceeding for an offence against subsection (1), if the court is not satisfied the defendant is guilty of the offence charged but is satisfied the defendant is guilty of an offence against subsection (2), the court may find the defendant guilty of the offence against subsection (2).

Note—

See section 493A (When environmental harm or related acts are unlawful)."

440 "**Offence of causing environmental nuisance**

(1) *A person must not wilfully and unlawfully cause an environmental nuisance.*

Maximum penalty—1,665 penalty units.

(2) *A person must not unlawfully cause an environmental nuisance.*

Maximum penalty—600 penalty units.

(3) *This section does not apply to an environmental nuisance mentioned in schedule 1, part 1.*

(4) *In a proceeding for an offence against subsection (1), if the court is not satisfied the defendant is guilty of the offence charged but is satisfied the defendant is guilty of an offence against subsection (2), the court may find the defendant guilty of the offence against subsection (2).*

Note—

See section 493A (When environmental harm or related acts are unlawful)."

Appendix C – Table of maximum penalties

Offence (as defined in Qld)	Type of defendant	Queensland	Victoria	Northern Territory	NSW
Environmental nuisance (simpliciter)	Individual	600 penalty units ($86,250)		77 penalty units[69] ($12,474)	
	Corporation	$431,250		385 penalty units ($62,370)	
Environmental nuisance (wilfully)	Individual	1665 penalty units ($239,343.75)			
	Corporation	$1,196,718.75			
Material environmental harm (simpliciter)	Individual	1,665 penalty units ($239,343.75)	2000 penalty units[70] ($369,840)	770 penalty units ($124,740)	
	Corporation	$1,196,718.75	10 000 penalty units ($1,849,200)	3,850 penalty units ($623,700)	
Material environmental harm (wilfully)	Individual	4,500 penalty units ($646,875) / 2 years imprisonment		1,540 penalty units[71] ($249,480) (fault element – intentional)	
	Corporation	$3,234,375		7,700 penalty units ($1,247,400)	
Serious environmental harm (simpliciter)	Individual	4,500 penalty units ($646,875)		1,540 penalty units[72] ($249,480)	
	Corporation	$3,234,375		7,700 penalty units ($1,247,400)	
Serious environmental harm (wilfully)	Individual	6,250 penalty units ($898,437.50) / 5 years imprisonment		3,850 penalty units[73] ($623,700) (fault element – intentional)	
	Corporation	$4,492,187.50		19,240 penalty units ($3,116,880)	

[69] *WMPCA (NT)* s 83(5).
[70] *EPA (Vic)* s 25.
[71] *WMPCA (NT)* s 83(3).
[72] *WMPCA (NT)* s 83(2).
[73] *WMPCA (NT)* s 83(1).

Offence (as defined in Qld)	Type of defendant	Queensland	Victoria	Northern Territory	NSW
Unlawfully deposit contaminant in water (simpliciter)	Individual	600 penalty units ($86,250)			$250,000 + $60,000 for each day the offence continues[74]
	Corporation	$431,250			$1,000,000 + $120,000 for each day the offence continues
Unlawfully deposit contaminant in water (wilfully)	Individual	1,665 penalty units ($239,343.75)			All conduct covered by simpliciter offence
	Corporation	$1,196,718.75			All conduct covered by simpliciter offence
Contravene noise standard (simpliciter)	Individual	600 penalty units ($86,250)			$250,000 + $60,000 for each day the offence continues[75]
	Corporation	$431,250			$1,000,000 + $120,000 for each day the offence continues
Contravene noise standard (wilfully)	Individual	1,665 penalty units ($239,343.75)			All conduct covered by simpliciter offence
	Corporation	$1,196,718.75			All conduct covered by simpliciter offence
Breach of duty to notify	Individual	500 penalty units ($71,875)	240 penalty units ($44,380.80)[76]	77 penalty units ($12,474)[77]	$500,000 + $120,000 for each day the offence continues[78]
	Corporation	$359,375	1200 penalty units ($221,904)	385 penalty units ($62,370)	$2,000,000 + $240,000 for each day the offence continues

*accurate as at 24 August 2022

[74] *POEA (NSW)* s 123.
[75] *POEA (NSW)* s 141.
[76] *EPA (Vic)* s 32(4).
[77] *EPA (NT)* s 228(4). Also requires proof of material environmental harm.
[78] *POEA (NSW)* s 152.