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To: The Secretary, Health, Environment and Agriculture Committee

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

Thank you for the opportunity to provide a submission to the current enquiry regarding the *Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024* ('the Bill').

About the authors

The Environmental and Social Governance Research Group is a research collective at the School of Law, Queensland University of Technology. We are experts in international and domestic environmental law, climate law and human rights. We conduct multidisciplinary research aimed at bringing about institutional, legal and structural change to protect our environment.

This submission was led by Dr Katie Woolaston with the assistance of QUT law student Sarah Enzenhofer. Dr Woolaston is an expert on biodiversity law and has published on 'best practice mechanisms in biodiversity conservation law'. Other contributing authors are Associate Professor Bridget Lewis, Professor Amanda Kennedy, Professor Anna Huggins, Associate Professor Felicity Deane, Dr Fran Humphries, Professor Saiful Karim, Dr Brydon Wang and Professor Rowena Maguire.

Summary

While we welcome the steps which the Bill takes toward ensuring the *Environmental Protection Act 1994* ('EP Act') is 'contemporary and fit for purpose',[1] there remains significant room for improvement to better address existing gaps in Queensland's environmental legislation. We recommend that:

1. Additional efforts be made to '**mainstream'** the principles proposed to be applied to the general administration of the Act, including the polluter pays principle, proportionality principle, principle of primacy of prevention and the precautionary principle.

2. An **independent enforcement body** be established to remedy the current lack of enforcement and monitoring mechanisms (although we note the establishment of a Queensland Environment Protection Authority was the subject of a previous consultation).

[1] Queensland Parliament, *Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024* (Web Page) <https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=0&id=4375#:~:text=About%20the%20bill&text=The%20Bill%20amends%20the%20EP,administration%20of%20the%20EP%20Act>.

3. **The duty to restore includes the duty to regenerate**, and it is ensured that support in the form of appropriate policies, procedures and funding is in place to effectively **monitor and enforce** proposed amendments.

Mainstreaming

We submit that the insertion of a new section 6A is a valuable step in modernising Queensland's environmental law framework.[2] This new section, established under clause 6 of the proposed changes, specifies principles under which the EP Act is to be administered having regard to, including the polluter pays principle, proportionality principle, the principle of primacy of prevention and the precautionary principle.[3] However, **these proposed changes fail to 'mainstream' any of the aforementioned principles**, thereby failing to have any of these principles make a meaningful impact on how the Act operates.

'Mainstreaming' occurs when a specific concern, such as the principles outlined in the proposed section 6A, becomes a fundamental priority for the government.[4] Mainstreaming leads to the restructuring and reorganisation of government processes to include and prioritise addressing these specific issues.[5]

Listing these principles as factors to 'have regard to' in the administration of the Act is insufficient to mainstream them in environmental law.[6] By merely listing them, the current proposed amendments fail to meaningfully enshrine these principles as critical components of Queensland's environmental protection scheme. It is notable that decision-makers, such as courts, rarely consider the overarching purpose or objectives of Acts.[7] This means that the lack of further requirements for decision-maker consideration of these principles throughout the proposed amendments results in said principles merely being present in name and not function.

Other Australian jurisdictions, including those in Victoria and the Northern Territory, take further steps to mainstream environmental principles. Victoria's recent legislative amendments of the *Flora and Fauna Guarantee Act 1988* ('FFG Act') in 2019 may serve as a solid example of mainstreaming environmental considerations.[8] The FFG Act includes environmental principles - namely biodiversity conservation - within its objectives[9] but goes a step further to mainstream said principle by mandating

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[2] *Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024* cl 6 ('*Amendment Bill*').

[3] Ibid.

[4] Anita Foerster and Alice Bleby, 'Climate Mainstreaming: What Role for Legislation?' (IUCN Academy of Environmental Law Colloquium Brisbane, 13 July 2022)

[5] Ibid.

[6] *Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024* (n 2) cl 6.

[7] Rowena Maguire et al, Environmental Planning and Climate Law in Queensland (LexisNexis Butterworths, 2020) 92.

[8] Department of Environment Land, Water and Planning (Vic), *Review of the Flora and Fauna Guarantee Act 1988*; *Consultation, submission and response summary* (2017); *Flora and Fauna Guarantee Act 1988* (VIC) ('*FFG Act*') s 4.

[9] *FFG Act* (n 8) s 4.

that Ministers and public authorities exercise 'proper consideration' of the objectives of the Act when performing any of their functions which may impact biodiversity.[10]

The NT similarly makes further efforts to mainstream environmental principles. Unlike the Victorian method, the NT instead relies on principles - specifically including the requirement to consider the ecological sustainability of the environment - woven throughout the Act in sections such as 'factors relevant to authorisation' - not merely being mentioned once at the start as is the case in the proposed amendments.[11] This embedding of ecologically important principles further into the substance of the Act is also a method of mainstreaming.

We recommend that the proposed amendments be altered to include a clause similar to that in Victoria's *FFG Act*,[12] namely one which states that the principles listed under s 6A need to be 'properly considered' when decisions are made under the Act. This will act as a vital part of the mainstreaming of these principles and ensure that they make a meaningful impact on Queensland's ecological landscape. Amendment of this nature will also ensure that judicial consideration of the legislation includes consideration of key environmental principles.

An independent monitoring and enforcement body

We firmly support the proposed amendment removing the preclusion that environmental nuisances, such as unreasonable interference from the release of aerosols, fumes, light or noise, cannot be classified as being 'serious or material environmental harm'.[13] This expanded recognition of what can cause environmental harm in line with the Independent Review of the Environmental Protection Act 1994 (Qld) Report is an excellent step in expanding environmental consciousness and emphasising the harm of actions which have previously been overlooked in their impact on the environment. These changes will also ensure that where such environmental nuisance takes on the characteristics of serious or material environmental harm, such matters can be managed by the administering authority rather than at the local government level.[14]

We further submit our support for the replacement of environmental protection orders, direction notices and clean-up notices with a singular form of order - the environmental enforcement order.[15] The complexity of Queensland's current legal environmental protection system has been criticised as being a cause of ineffectiveness,[16] and thus this streamlining and simplification is a key point of improvement. The extension of these orders to bolster compliance with transitional environmental programs, temporary emissions licences and the new duty to restore broadens the potential effectiveness of these

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[10] Ibid s 4B.

[11] *Territory Parks and Wildlife Conservation Act 1976* (NT) ('TPWCA') s 21C.

[12] *FFG Act* (n 8) s 4B.

[13] *Amendment Bill* (n 2) cl 28; Queensland Parliament (n 1).

[14] See Richard Jones and Susan Hedge, Independent Review of the Environmental Protection Act 1994 (Qld) Report (1 September 2022) [100].

[15] Amendment Bill (n 2) cl 28.

[16] Nicole Shumway et al, 'Policy Solutions to Facilitate Restoration in Coastal Marine Environments' (2021) 134 *Marine Policy* 104789 <https://www.sciencedirect.com/science/article/pii/S0308597X21004000>

orders. In particular, we support the use of such orders to require a person to clean-up contamination incidents in line with the new duty to restore.

Though both of these amendments are important steps in the right direction, the current lack of integral enforcement and monitoring mechanisms permeating Queensland's environmental protection law results in the impact and effectiveness of said changes being significantly reduced.[17] **There remains a significant need for compliance mechanisms, including a dedicated independent body to monitor and enforce the enforcement mechanisms within the Act.**[18]

The proposed authority should be independent and have the necessary power to consider broader implications of environmental harms, including human rights implications. For large and environmentally risky projects, the authority should have the power to require a strategic environmental assessment (SEA) in addition to an environmental impact statement. The Act should also include a section on SEA.

We submit that it is crucial to, alongside the proposed amendments, establish an independent statutory body to specialise in the monitoring and enforcement of the environmental protection mechanisms within the Act. The Victorian 'Environment Protection Authority' (EPA), which is established as an independent statutory authority, may serve as a helpful template for the establishment of a like body in Queensland. Victoria's EPA's primary foci include checking and enforcing compliance with the Victorian *Environment Protection Act 2017*, as well as preventing pollution and improving environmental quality.[19] Responding to an independent enquiry of the EPA, the government supported recommendations to ensure the EPA was science-based, including having a Chief Environmental Scientist position within the EPA's structure.[20]

These components of the Victorian EPA should be combined with further responsibilities to fill current gaps in ecological protection, such as record data to develop indicators defining if environmental efforts are successful, to guide future development.[21]

Provision of appropriate policy, funding and support

The ESG research group supports the proposed introduction of a 'duty to restore the environment'.[22] This amendment imposes a duty on persons causing or permitting damage environmental harm to

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[17] Best Practice Legislative and Policy Frameworks for Biodiversity Conservation, Report 1 of the Review p. 20.

[18] Antonio Cardesa-Salzmann 'Chapter III.33: Monitoring and Compliance Mechanisms' in Michael Faure (ed) *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing, 2016) 455, 458.

[19] Environmental Protection Authority Victoria, *Who EPA works With* (Web Page, 31 March 2023) <https://www.epa.vic.gov.au/about-epa/who-epa-works-with#:~:text=The%20Environment%20Protection%20Authority%20Victoria,the%20quality%20of%20the%20environment.>; *Environment Protection Act 2017* (VIC).

[20] Department of Environment, Land, Water and Planning (VIC), 'Andrews Labor Government Response to the Independent Inquiry into the Environment Protection Authority' (2017).

[21] Department of Environment and Science (Qld) Queensland's Protected Area Strategy 2020–2030: Protecting our world-class natural and cultural values (2020).

[22] Ibid.

rehabilitate or restore the environment which they damaged.[23] The imposition of such a duty is a vital part of land restoration efforts, that is, restoring land and ecosystems which may have been degraded, damaged or destroyed.[24]

However, if the Government is serious about a transition to a circular economy under its new industry priorities,[25] then it needs to go beyond the existing approach under the EP Act of 'doing less harm' and move towards an approach that is 'restorative and regenerative by design'.[26] This means that the government needs to promote practices that not only require restoration of the environment to its condition before the harm but also ensure that those practices promote regeneration. For example, in cases where the land has been severely degraded by multiple uses over time, it is not sufficient to simply restore it to the degraded condition before the specific activity regulated under the new 319C. A sufficient standard of rehabilitation or restorative action would be needed to ensure that the environment is capable of regeneration and renewal (ensuring ecological systems are self-sustaining over time).

We suggest either broadening this duty to a **'duty to restore and regenerate the environment'** or to define the duty in a way that requires regeneration for a self-supporting ecosystem.

Additionally, land restoration is a notoriously difficult objective to implement meaningfully. This notably includes issues in practically achieving the results sought by ambitious policy instruments. No matter how ground-breaking or novel legislation is in form, a lack of capacity and monitoring of the application and outcome of said legislation will inevitably lead to ineffectiveness. A key example of this gap between ambition and practice is that of the UK and its policy framework of ensuring that lost or degraded environmental features are compensated for by restoring or creating environmental features.[27] While this policy is promising and logical, a lack of monitoring of effectiveness and specific targets has led to otherwise promising programs falling short.[28] Similarly, a lack of definitions of key concepts, vague targets and inadequate credible sanctions have led to performance failures under EU law.[29]

Consequently, we strongly recommend ensuring that the **proposed amendments are accompanied by appropriate supporting policies, procedures and funding to effectively monitor and enforce proposed amendments**, including the duty to restore. In addition, legislation enabling development beyond the Environmental Protection Act needs to also reinforce the duty to restore to ensure mainstreaming of the

[23] Amendment Bill (n 2) cl 16.

[24] Benjamin Richardson, The Emerging Age of Ecological Restoration Law (2016) 25(3) R*eview of European Community & International Environmental Law* 277.

[25] https://www.statedevelopment.qld.gov.au/__data/assets/pdf_file/0027/80766/queensland-new-industry-development-strategy.pdf

[26] https://www.ellenmacarthurfoundation.org/the-circular-economy-in-detail-deep-dive#:~:text=An%20economy%20that%20is%20restorative,and%20rebuilds%20overall%20system%20health

[27] UK Green Building Council, *Insights into Nature and Biodiversity: Industry Trends, Commitments and Best Practice Examples* (Report, UK Green Building Council, 30 January 2019) ('Insights into Nature and Biodiversity').

[28] An Cliquet and Kris Decleer, 'Halting and Restoring Species Loss: Incorporating the Concepts of Extinction Debt, Ecological Trap and Dark Diversity into Conservation and Restoration Law' (2017) 26(2) *Griffith Law Review* 178 ('Halting and Restoring Species Loss').

[29] Ibid.

duty. Literature suggests that best practice involves several components, including setting clear and appropriate goals to ensure restoration efforts are focused and targeted and to establish and fund monitoring efforts to ensure project success.[30] We especially champion the use of monitoring to ensure the proposed amendments' requirements - such as the duty to restore or comply with environmental enforcement orders - are complied with, and that these methods are further supported by robust systems for government involvement if they are not abided by.[31] Adequate resources, accompanying policies and support must be provided to ensure the amendments - and the greater Act - operate to their full potential.

Conclusion and recommendations

This Bill is a much-needed step in the right direction and we endorse these amendments and their overarching goal of modernising Queensland's current environmental protection legislation.[32] However, the ESG also urges legislators to push further to fill legislative gaps which stand between our great state and protecting its most precious resource - our environment. This includes providing the support for the Act's mechanisms - both current and proposed - to fully operate as they are intended, such as through the addition of oversight from an independent body, as well as through adequate funding and support. We also recommend that further efforts be made to mainstream vital environmental principles within the function of the Act. It is crucial that this Bill is not the end of Queensland's ecological protection, but that it instead heralds a renaissance of development in environmental protection law.

If we can be of any further assistance or provide any additional information, please feel free to contact Dr Katie Woolaston via email at katie.woolaston@qut.edu.au.

[30] Benjamin Richardson, The Emerging Age of Ecological Restoration Law (2016) 25(3) *Review of European Community & International Environmental Law* 277.
[31] Ibid.
[32] Queensland Parliament (n 1).