Queensland Government
Department of Environment and Science

Submitted via email.

10 November 2023

Improving the powers and penalties provisions of the *Environmental Protection Act 1994*

The Australian Energy Council ('AEC') welcomes the opportunity to make a submission to the Queensland Government's *Improving the powers and penalties provisions of the Environmental Protection Act* 1994 Consultation Paper.

The AEC is the peak industry body for electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. AEC members generate and sell energy to over 10 million homes and businesses and are major investors in renewable energy generation. The AEC supports reaching net-zero by 2050 as well as a 55 per cent emissions reduction target by 2035 and is committed to delivering the energy transition for the benefit of consumers.

The energy industry regularly works with regulators to ensure energy assets are managed responsibly and the energy transition is delivered in a sustainable and environmentally responsible way. The AEC notes this energy transition will involve the closure of a relatively small number of large thermal generators, and the connection of a large number of geographically dispersed generation, as well as storage and transmission. The nature of the environmental issues and relationship between the environmental regulators and the energy industry will need to evolve with the energy transition. When strengthening the environmental regulatory framework, it is important that industry and regulators have regular and informed dialogue, as this will lead to better environmental outcomes.

To that extent, the AEC considers the proposed reforms to be mostly reasonable; however, there are some elements that appear to create unnecessary regulatory risk for industry. Shifting towards less prescriptive obligations like a "general environment duty" allows for regulation to evolve over time, but it also creates some uncertainty for otherwise compliant businesses. There is an inherent tension between regulatory flexibility and the clarity of regulatory obligations industry requires to ensure it is compliant.

A key takeaway from the AEC's participation in the development of the Victorian framework (which is being used as a precedent here) is that general duties require environmental regulators to communicate clearly – for example, through the issuing of guidance notes, as well as regular contact with regulated entities.

This does create some challenges in Queensland, where it is still undecided whether an independent Queensland Environment Protection Agency will be established to replace Queensland DES as the environment regulator. The AEC considers that this policy question needs to be clarified before any increase of power or penalties comes into effect.

Recommendation 2

Sections 8 and 9 of the EP Act should be amended to include the concept of "human health, safety and wellbeing" in the definitions of environment and environmental value.

While the AEC understands that the proposed recommendation seeks to formalise the existing intent of the EP Act, the inclusion of 'wellbeing' within the definitions of Section 8 & 9 will likely create obligations that are unable to be prescribed. Wellbeing metrics are inherently subjective, with the use of the term

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creating the potential for uncertainty among otherwise compliant businesses. Moreover, the clearer and more specific policies that require wellbeing to be considered already have the term included.

Although the AEC appreciates the stated importance of maintaining clarity and avoiding duplication or overlap with other Queensland statutes such as the *Public Health Act* 2005 (Qld), it is still uncertain as to how the proposal intends to limit the amendment such that human health is only protected by the EP Act to the extent it is affected by the environment. For instance, it is possible that there still might be confusion with issues such as asbestos or other emerging contaminants which might be difficult to interpret in comparison with the *Public Health Act* 2005 (Qld) requirements.

The AEC asks, therefore, that further clarity is given when it comes to these human health, safety and wellbeing concepts. Further consultation would be recommended to associate these terms with specific environmental values before proceeding further.

Recommendation 3

Section 15 or sections 16 and 17 of the EP Act 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.

While the AEC understands including environmental nuisance within the meaning of material and serious environmental harm, the principle of proportionality should be maintained. There is some mixed messaging between the recommendation and the Report – the recommendation says "nuisance at low levels may also constitute material and serious environmental harm", whereas the Report makes clear the environmental nuisance would need to cause "serious impacts" to meet this threshold.

This type of ambiguity creates regulatory uncertainty, as well as some regulatory risk if environmental nuisance becomes a lesser charge that regulators pursue when they cannot meet the material threshold. To reduce this uncertainty, it will be important that the regulator follows through with the Consultation Paper's suggestion to provide compliance and enforcement guidance about the considerations for establishing material or serious environmental harm, compared to environmental nuisance.

Recommendation 5

Section 319 of the EP Act be amended by omitting the words "reasonable and practicable" and inserting in lieu thereof "reasonably practicable"

This reform will align Queensland with the approach taken in other jurisdictions, namely Victoria. Regulatory consistency across jurisdictions reduces the compliance burden on industry and allows environmental regulators to better learn from each other.

While this change is welcomed, the AEC notes that moving to "reasonably practicable" is a nascent legal concept and not one with much regulatory precedent. It deliberately invites a degree of interpretation and stakeholders will have different understandings of what constitutes "reasonably practicable". During the Victoria stakeholder engagement process, it was agreed that economic efficiency is an important consideration when deciding whether an action or omission from industry was reasonably practicable. The AEC encourages a similar approach here.

Recommendation 6b, 6c, 7a, 7b, 9

The AEC understands that these recommendations will be given effect through the proposal to replace EPOs, DNs and CNs with a single statutory notice, the EEO. While the AEC acknowledges the difficulties the administrative authority faces in issuing the most appropriate type of notice to the circumstances, the creation of an all-encompassing statutory notice raises a different range of concerns. Notably, the

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current range of statutory notices were defined within the EP Act to have a range of different characteristics for a purpose, allowing for the administrative authority to issue the notice that applies the most reasonable conditions. At present, it remains uncertain how nuanced conditions will be developed as part of an EEO.

Moreover, the AEC believes it requires additional information to understand how "restoration" objectives are defined and agreed upon under the duty to restore environmental harm element of the proposed EEO. Specifically:

- Can duty to restore requirements be linked to overall site rehabilitation requirements?
- What timing requirements may be placed on a duty to restore requirement?
- How are baseline conditions understood and agreed to then determine the nature of restoration activities needed? In the absence of baseline information related to a specific environmental value, how are restoration activities agreed so that the environment is restored to the condition it was in before the incident?
- How are cumulative impacts addressed in determining the restoration objectives to be met?
- How will the duty to restore be implemented in situations where contamination has moved beyond site and moved onto private land?
- In the instance of a contamination issue, e.g., PFAS, how will the duty to restore be applied when there are significant limitations in the ability to fully restore the environment to the condition it was in before the incident?
- How is an "incident" defined in the context of the duty to restore environmental harm?
- It is noted that currently CNs don't have the right of internal review; EPOs and DN do have this right. Will the proposed EEO have the right of internal review?

The current EPO process includes the requirement to consider a series of standard criteria before issuing an EPO. The review recommends that these be removed, and in the proposed combined EEO this standard criteria has been removed. However, would it be more appropriate to have a standard with the combined EEO?

Recommendation 10 (a)

"The power to amend a Transitional Environmental Program (TEP) be expanded to:

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

The AEC has concerns around the unintended consequences that may result from this recommendation. An issuing officer or government department may not possess the requisite industry or specific site knowledge to understand the effects of amending a TEP. Equally, without consultation and consent, the duty holder's ability to achieve and comply with any changes might not be understood. It would potentially force the holder of the TEP into the appeal process as opposed to working collaborative with the regulator to arrive at mutually agreeable actions.

The AEC believes that the power to amend should be subject to a requirement to consult. Any power to amend without consent should only be allowed once the administering authority has attempted to reach mutual agreement with the operator through reasonable consultation. This should include the right of the duty holder to comment.

As stated, these reforms should attempt to foster collaboration between the regulator and industry, recognising that businesses often have the best understanding of how their site operates, and the environmental conditions related to that.

Recommendation 12

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"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."

The AEC considers this recommendation invites politicisation into what otherwise is an independent and science-based environmental assessment process. The circumstances for which this power would be used are unclear, but it would create an avenue for stakeholders aggrieved with an environmental regulator's decision to appeal elsewhere. Additionally, it could be argued that amending EA conditions in response to potential environmental harm is not the most proactive option available to the regulator, which is mis-aligned with the overall intent of the proposed changes to the EP Act. EA amendments typically occur after immediate action is taken, which can already be enforced using statutory notices.

This would only serve to create unnecessary instability for businesses, particularly when it comes to the viability of economic activities under EA considerations. Indeed, this is noted by the Report itself which states that 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". Should this power be expanded, it should only be for the Chief Executive with strong additional caveats in place. The AEC notes that the review suggested the need for clear scientific evidence to support the decision for this power being exercised, along with a pre-emptory step in the form of a show cause notice which both clearly identifies the grounds for a decision and gives the operator the right to be heard by way of submissions on the matter.

Regarding the two proposals outlined, further clarification is needed. The Government's response noted that this recommendation is supported in principle, yet the proposals outline alternate changes. The Department should clarify to stakeholders whether it is the Government's intent to provide additional powers to the Chief Executive or the Minister, or to follow through with the two proposals only as alternatives.

Any questions about this submission should be addressed to me by email to braeden.keen@energycouncil.com.au or by telephone on 0422792557.

Yours sincerely,

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