Environmental Protection and Other Legislation Amendment Bill (No. 2) 2008

Explanatory Notes

General Outline

Short Title

The short title of the Bill is the *Environmental Protection and Other Legislation Amendment Bill (No. 2) 2008*.

Policy Objectives of the Legislation

The principal objectives of the Bill are to:

1. relocate the current offence provisions in the *Environmental Protection Regulation 1998*, the *Environmental Protection (Air) Policy 1997* and the *Environmental Protection (Water) Policy 1997* relating to environmental nuisance, water pollution, air pollution and fuel quality standards into the *Environmental Protection Act 1994*;

2. simplify administrative procedures by removing the distinction between level 1 and level 2 environmentally relevant activities (except mining and petroleum) in the *Environmental Protection Act 1994*;

3. insert a new chapter into the *Environmental Protection Act 1994* for a new direction notice which will apply to environmental nuisance and minor water pollution matters;

4. insert new provisions into the *Environmental Protection Act 1994* and the *Dangerous Goods Safety Management Act 2001* to provide for clean-up notices and cost recovery measures for contamination incidents;

5. amend the forest reserve sections of the *Nature Conservation Act 1992* to provide for independent scientific assessment of the impacts of horse riding on horse riding trails in forest reserves in south east Queensland; and

6. make minor technical, administrative and grammatical corrections to the Acts listed below to streamline Agency business.

Reasons for the Bill

There is a need for a portfolio Bill to enable a number of miscellaneous amendments to be made to the following Acts:

— *Environmental Protection Act 1994*;

— *Dangerous Goods Safety Management Act 2001*;

— *Environmental Protection and Other Legislation Amendment Act 2007*;

— *Integrated Planning Act 1997*; and

— *Nature Conservation Act 1992*.

This Bill also makes minor consequential amendments to the following Acts:

— *Coastal Protection and Management Act 1995;*

— *Industrial Development Act 1963;*

— *Mineral Resources Act 1989;*

— *State Development and Public Works Organisation Act 1971;*

— *Water Act 2000;* and

— *Wild Rivers Act 1995*.

Estimated Cost for Implementation

The amendments are to be implemented within current budget allocations.

Consistency with Fundamental Legislative Principles

Section 4 of the *Legislative Standards Act 1992* requires that legislation have sufficient regard to the rights and liberties of individuals. Whether legislation has sufficient regard to the rights and liberties of individuals depends on whether, for example:

- the legislation makes rights and liberties, or obligations, dependant on administrative power only if the power is sufficiently defined and subject to appropriate review;
- the legislation does not reverse the onus of proof in criminal proceedings without adequate justification; or

- the legislation adversely affects right and liberties, or imposes obligations, retrospectively.

Who are the prescribed persons for a contamination incident and persons from whom costs are recoverable for a dangerous situation – obligation to comply with notice even if not responsible for the incident (Sections 363G and 363M of the Environmental Protection Act 1994, and section 107 of the Dangerous Goods Safety Management Act 2001)

Owners of contaminants or parent companies are liable for cleaning up an incident or, having failed to do so, paying the costs of cleaning up the incident. There is no issue in placing liability on a person who has a clear nexus to the incident, for example, where an owner of contaminants was also involved in the business on site and has some control over the activities that take place there. However, placing liability on an owner or parent company whose relationship is limited to an arms length commercial arrangement may be inconsistent with fundamental legislative principles in that it impacts on the rights and liberties of individuals. For example, the owner of chemicals may arrange for third parties to transport or mix chemicals on their behalf, yet have no control over chemicals during these procedures.

It is more appropriate for liability for costs for cleaning up following an incident to attach to a person who has derived some commercial benefit from the enterprise, rather than the State being responsible for cleaning up an incident. Proposed sections 363H(6) and 363N(6) of the *Environmental Protection Act 1994* and section 107A(5) of the *Dangerous Goods Safety Management Act 2001* state that a recipient of a notice who pays an amount in compliance with the notice but did not cause or permit the incident may recover the amount as a debt from a person who did cause or permit the incident. Accordingly, an owner or parent company who has no direct responsibility for the incident has legal recourse for any moneys expended in complying with a notice.

In certain limited cases, the State may take emergency action to clean up the incident without any prior notice to the prescribed person (i.e. the person to whom a notice may be issued). This may include, for example, where the prescribed person could not be reasonably found at the time the urgent action was required and the urgency of the action needed meant that the time could not be taken to find the prescribed person. In line with the *Dangerous Goods Safety Management Act 2001*, cost recovery action may still be taken against a prescribed person where an emergency direction or notice was not given to a prescribed person. However, the cost recovery

action will still be commenced by the giving of a cost recovery notice, which has the usual review and appeal provisions attached to it.

It is expected that these provisions will operate to encourage owners of contaminants and parent companies to obtain insurance to cover their risk. However, existing commercial arrangements will have been entered into without considering this risk. Accordingly, commencement of the provisions that attach potential liability to the owners of contaminants will be delayed to allow the owners to obtain appropriate insurance cover or to appropriately amend any commercial agreements.

The intention of including parent companies in this provision is to remedy the situation whereby an industry has restructured itself so that a valueless company is the occupier of the land making it difficult to recover civil costs from the company. The provision is based on section 62A(1AA) of the Victorian *Environmental Protection Act 1970*.

The administering authority will be empowered to issue a clean-up notice to a parent company where its subsidiary, associated entity or related entity is a prescribed person. It is a defence (see section 363I of the *Environmental Protection Act 1994* - Offence not to comply with clean-up notice) for the parent company to show that it did not have requisite control over, and was not aware of, the activities of the subsidiary; and the parent company took all reasonable steps to prevent the activity of the subsidiary, associated entity or related entity.

The issue of a clean-up notice is not intended to imply that a prescribed person caused or was responsible for the contamination incident. The purpose of these provisions is to move further towards the polluter-pays system of liability, whereby all parties connected to an incident would have responsibility to ensure clean-up of environmental damage from an incident before the government becomes involved.

Extension of authorised officers powers – entry onto land (Section 363K of the Environmental Protection Act 1994)

The fundamental legislative principle that legislation take proper account of individual's rights and liberties is raised by section 363K of the *Environmental Protection Act 1994* (Taking action in place of recipient).

Pursuant to this section, if the person to whom the notice is issued fails to fully comply with the notice, the administering authority may take the action itself. This would mean that the administering authority may be undertaking works without the consent of the owner or occupier. The

administering authority would still need to obtain a warrant to enter the land if it cannot enter the land under section 452 of the *Environmental Protection Act 1994*.

This is a permissive power, and the administering authority is not required to take action merely because it is enabled to. The first preference will always be to ensure that the prescribed person takes the action themselves, but the administering authority may consider it desirable to take the action itself, for example, to avoid a possible emergency action being needed in the future.

If the owner and/or occupier of the land have not failed to comply with a clean-up notice, the administering authority must seek the consent of the owner and/or occupier to enter the land. If the administering authority cannot obtain the consent of the owner and/or occupier, the administering authority must obtain an order of the court to do the work under section 458 of the *Environmental Protection Act 1994*.

Consequently, while the fundamental legislative principle is raised by this provision, the checks and balances in place would mean that it is not objectionable.

Entry onto land by recipient of clean-up notice (Section 363J of the Environmental Protection Act 1994)

The fundamental legislative principle that legislation take proper account of individual's rights and liberties is raised by section 363J of the *Environmental Protection Act 1994* (Procedure if recipient is not the owner of land on which action is required).

A person given a clean-up notice will need access to:

(i) the land the subject of a contamination incident

(ii) adjoining affected properties

(iii) any adjoining property that it is necessary to traverse to gain entry to premises in (i) or (ii) above.

Adjoining affected properties may include where the contamination incident spreads from the site of the incident into nearby watercourses or onto neighbouring land.

This section inserts a statutory process to allow for access to that land. This section is based on sections 394 and 409 of the *Environmental Protection Act 1994*.

Consequently, while the fundamental legislative principle is raised by this provision, the checks and balances in place would mean that it is not objectionable.

No potential breaches of fundamental legislative principles have been identified for the remainder of the amendments in this Bill.

Consultation

A wide range of public and private sector stakeholders were consulted on the particular amendments relevant to their interests. All government departments were consulted as part of the Cabinet process in developing the Bill.

Feedback was considered as part of the drafting of the Bill.

Notes on Provisions

Part 1 Preliminary

Short title

Clause 1 states that the Act should be cited as the *Environmental Protection and Other Legislation Amendment Act (No. 2) 2008*.

Commencement

Clause 2 provides that this Bill is to commence on a day to be fixed by proclamation.

Part 2 Amendment of Environmental Protection Act 1994

Act amended in pt 2 and sch 1

Clause 3 states that this part and schedule 1 amend the *Environmental Protection Act 1994*.

Clause 4 Amendment of s 15 (Environmental nuisance)

This clause replaces subsection (a) of the definition of environmental nuisance with an expanded definition to include aerosols, fumes, particles and smoke. The definition of particles, which includes ash and dust, is in the Dictionary.

The responsibility for all environmental nuisance matters under the *Environmental Protection Act 1994* and *Environmental Protection Regulation 1998* (apart from some exceptions which will be outlined in the *Environmental Protection Regulation 1998*) will be devolved to local governments as part of the remake of the *Environmental Protection Regulation 1998*.

In order to give local governments access to the full range of enforcement tools under the Act, the provisions relating to environmental nuisance currently contained in Part 2A of the *Environmental Protection Regulation 1998* are being transferred to the *Environmental Protection Act 1994*.

Under the new arrangements, the definition of environmental nuisance in section 15 of the *Environmental Protection Act 1994* needs to be expanded so it covers the same emissions that are regulated by local government under Part 2A. If the definition was not expanded, some emissions currently regulated (through Part 2A) would not be defined as environmental nuisance, and therefore local government would not have devolved responsibility for them, and the *Environmental Protection Act 1994* enforcement tools would not apply to them.

Noise, dust, odour and light are currently included in the definition of environmental nuisance. Part 2A covered the additional emissions of ash, fumes and smoke. Consultation identified that emissions of aerosols should also be added to the definition to clarify the definition of environmental nuisance.

"Dust" is not defined in the *Environmental Protection Act 1994*, but the Macquarie dictionary defines it as a cloud of finely powdered earth or other matter in the air. Consequently, the inclusion of "aerosols" in the definition of environmental nuisance is not an addition, but a clarification of the current definition.

To avoid confusion, the term "dust" is being replaced by the term "particles", which includes both dust and ash.

Clause 5 Amendment of s 17 (Serious environmental harm)

This clause omits the words "that causes actual or potential harm to environmental values" from subsections (1)(a) and (1)(b) of the definition of "serious environmental harm" in section 17 of the *Environmental Protection Act 1994*.

Duplication with the definition of "environmental harm" in section 14 has caused confusion about whether proof is required of:

(a) potential adverse effects on an environmental value (from section 14); and

(b) potential harm to environmental values (from section 17).

The drafting of section 16 and the Explanatory Notes show that the drafting of section 17 did not match the original intention that the potential affect/harm would only have to be proven once. This amendment corrects that error.

Clause 6 Insertion of new s 17A (Exclusions)

This clause states that a thing stated in schedule 1, part 2 is not environmental nuisance or environmental harm. Note that schedule 1 of the Act is renumbered from schedule 1AA of this Bill by virtue of clause 70 of this Bill. Part 2A of the *Environmental Protection Regulation 1998* contained certain exclusions for non-domestic animal noise (section 6G), audible traffic signal noise (section 6H) and cooking odours (section 6K). If the relevant criteria were satisfied, emissions from these sources could not cause unlawful environmental nuisance and enforcement action could not be taken under the *Environmental Protection Regulation 1998*.

Note that the exclusion in sections 6I (Blasting noise exclusion) and 6J (Outdoor shooting range) of the *Environmental Protection Regulation 1998* are now the specific noise standards under sections 440ZB and 440ZC of

the *Environmental Protection Act 1994* and it is an offence if the criteria are breached.

With the remake of the *Environmental Protection Regulation 1998*, Part 2A of the *Environmental Protection Regulation 1998* will not be retained in the new regulation. Instead, these provisions are being moved to the *Environmental Protection Act 1994* and the exclusions from Part 2A of the *Environmental Protection Regulation 1998* are being continued in the provisions which are now in the *Environmental Protection Act 1994*. Noise and odour will not constitute environmental nuisance under the *Environmental Protection Act 1994* if the relevant criteria are satisfied.

Clause 7 Amendment of s 18 (Meaning of *environmentally relevant activity*)

This clause is consequential to the deletion of section 20 of the *Environmental Protection Act 1994*. This amendment ensures that mining activities and petroleum activities are still maintained within the definition of environmentally relevant activity.

Clause 8 Amendment of s 19 (Environmentally relevant activity may be prescribed)

This clause is consequential to the deletion of section 20 of the *Environmental Protection Act 1994*. This amendment ensures that both mining activities and petroleum activities may be prescribed by the regulation.

Clause 9 Omission of s 20 (Levels for environmentally relevant activities)

This clause omits section 20 from the *Environmental Protection Act 1994* as the classification of environmentally relevant activities as level 1 or level 2 is being removed, except for mining and petroleum activities. Amendments are being made to section 77 to ensure that the distinction for petroleum activities is kept and section 151 already makes the distinction for mining activities.

When the *Environmental Protection Regulation 1998* was made, the level 1/Level 2 distinction was introduced as a means to distinguish between higher and lower impact environmentally relevant activities. Level 1 and level 2 ERAs required different types of approvals and level 2 ERAs did

not pay annual fees. In 2004, amendments were made to the *Environmental Protection Act 1994* to streamline approval processes so that both level 1 and level 2 ERAs require the same types of approvals.

Effectively the only remaining difference between level 1 and level 2 ERAs is that level 2 activities do not pay an annual fee. The EPA consulted through the Regulatory Impact Statement on the *Environmental Protection Regulation 1998* on changes to the fee structure for annual fees including an annual fee of $500 for level 2 ERAs. Accordingly, there is no need to make the distinction, except through the fees schedule, between level 1 and level 2 ERAs.

Mining and petroleum activities will continue to maintain the level 1/level 2 classification system. The approval system for mining and petroleum activities is different to other environmentally relevant activities as these activities are not included in the integrated development assessment system under the *Integrated Planning Act 1997*. The level 1/level 2 classification continues to have relevance as it indicates matters such as whether an activity operates under a code of environmental compliance or whether an environmental impact statement is required.

Clause 10 Amendment of s 57 (EIS assessment report)

This clause amends section 57 of the *Environmental Protection Act 1994* so that the start of the period for preparing the EIS assessment report under section 57 is linked to the issuing of the decision (under section 56A) rather than the receipt of the proponent's response to submissions under section 56.

The EIS provisions in the Act were amended by the *Environmental Protection and Other Legislation Amendment Act 2005* (EPOLA 05). EPOLA 05 provided an additional step in which the EPA makes a decision on whether the proponent's response to submissions on the draft EIS is adequate before the process continues to the next step of the EPA preparing the EIS assessment report. Before the changes in EPOLA 05 the EPA gave the EIS assessment report:

- if no EIS amendment notice is given for the EIS within 30 business days after the submission period ends—10 business days after the end of the 30 business days; or
- if an EIS amendment notice is given for the EIS within the 30 business days—within 30 business days after the notice is given; or

- if the EPA and the proponent have, within the 30 business days, agreed to a longer period—the longer period.

An EIS can be amended by the proponent by submitting an EIS amendment notice under section 66.

The production of the EIS assessment report takes longer than the 30 business days originally provided and there is now no provision to extend the time period with the proponent's agreement. In addition implementation of the Bilateral Agreement (Commonwealth *Environmental Protection and Biodiversity Act 1999),* which started in 2004 made timeframes even tighter for many EIS projects. This is because it requires that the EPA consult with the Commonwealth on the content of the EIS assessment report for accredited EIS processes. That consultation has time delays inherent in the logistics of communicating with an external organisation.

This amendment ties the start of the time period under section 57 to the same action that gives section 57 its application. It also allows the EPA to fulfil its obligations under the Bilateral Agreement to consult with the Commonwealth before issuing the section 56A decision and then provide the necessary time period in which to write the EIS assessment report.

Clause 11 Amendment of s73AA (Development applications in relation to wild river areas)

This clause amends section 73AA of the *Environmental Protection Act 1994* to restructure the exemptions from the wild rivers prohibitions and remove references to specific ERA numbers. The exemptions will now be specified in a regulation.

As part of the remake of the *Environmental Protection Regulation 1998*, the ERA numbers which are currently in schedule 1 of the *Environmental Protection Regulation 1998* are being renumbered and the distinction between level 1 and level 2 ERAs is being removed. Consequently, the ERAs specifically mentioned in this section need to be described differently to be consistent with the new Environmental Protection Regulation.

In addition, for the reasons outlined for the amendments to section 20, all references to level 2 ERAs for Chapter 4 activities needed to be removed and replaced with the current language which refers to aggregate environmental scores prescribed under a regulation.

Clause 12 Amendment of s 73F (Registration Certificates)

This clause amends section 73F of the *Environmental Protection Act 1994* to ensure that multiple-site discounts only apply when the operation complies with the criteria in this section.

Under the *Environmental Protection Regulation 1998*, certain operations were given a multiple-site discount even though they did not comply with the criteria for a single integrated operation in section 73F. Some of these had been carried on from the repealed *Environmental Protection (Interim) Regulation 1995* for integrated environmental management systems even though they were no longer valid under the *Environmental Protection Regulation 1998*. As part of the Regulatory Impact Statement for the Remake of the *Environmental Protection Regulation 1998*, the EPA consulted on the proposal to remove multiple-site discounts that did not comply with section 73F. Most stakeholders who responded to this aspect of the Regulatory Impact Statement supported the removal of multiple-site discounts as it removed the anti-competitive nature of these old discounts.

Consequently, all commercial operations will now have to comply with the criteria in section 73F(3) for a single integrated operation. These criteria have not been changed. However, an exception for local government municipal (i.e. non-commercial) activities has been added. This means that a local government can request that the administering authority (i.e. the EPA) issue a single registration certificate for these activities, even though they may not fall within the criteria for a single integrated operation. This is because some local government "integrated operations" are run by different managers, even though the overall operation of them is under Council. However, the multiple site discounts will not apply to commercial operations of councils or non-municipal activities. These exemptions to the discount include corporatised operations and any other council business activities which are competitive with the private sector.

Where multiple activities are carried out at one site, there will generally be one development approval for these activities. In these cases no particular determination about a single registration certificate will be required as this will have been made at the development approval stage and considerations about integrated environmental management will have been undertaken.

Clause 13 Insertion of new s 73FA (Issue of 2 or more registration certificates in place of single certificate

This clause inserts section 73FA of the *Environmental Protection Act 1994* to ensure that multiple-site discounts only continue to apply when the operation complies with the criteria in section 73F.

Under the *Environmental Protection Regulation 1998*, certain operations were given a multiple-site discount even though they did not comply with the criteria for a single integrated operation in section 73F. Some of these had been carried on from the repealed *Environmental Protection (Interim) Regulation 1995* for integrated environmental management systems even though they were no longer valid under the *Environmental Protection Regulation 1998*. As part of the Regulatory Impact Statement for the Remake of the *Environmental Protection Regulation 1998*, the EPA consulted on the proposal to remove multiple-site discounts that did not comply with section 73F. Most stakeholders who responded to this aspect of the Regulatory Impact Statement supported the removal of multiple-site discounts as it removed the anti-competitive nature of these old discounts.

Consequently, all commercial operations will now have to comply with the criteria in section 73F(3) for a single integrated operation. These criteria have not been changed. This section ensures that, where the administering authority has identified commercial operations which do not comply with the criteria in section 73F, the administering authority can take measures to remove the multiple-site discount.

Clause 14 Amendment of s 73O (Surrendering a registration certificate)

This clause amends section 73O of the *Environmental Protection Act 1994* to remove a reference to the administering authority being required to consider a regulatory requirement when making its decision. There are no regulatory requirements which relate to surrendering a registration certificate, so this requirement is superfluous.

Clause 15 Amendment of s 73T (Offences under s 427 do not apply in certain circumstances)

This clause amends section 73T of the *Environmental Protection Act 1994* to ensure that chapter 4 activities that are newly regulated under the new Environmental Protection Regulation will be required to apply for a

registration certificate within 12 months of the day the activity becomes a chapter 4 activity.

Under the new Environmental Protection Regulation some activities are being regulated which were not regulated before. For example, the ventilation stacks of tunnels will be a new environmentally relevant activity, and the threshold for waste transfer stations will be decreased so that operators who previously fell below the threshold for regulation will now be caught.

Consequently, these operators will now need to apply for a registration certificate, whether they are self-assessable under the *Integrated Planning Act 1997* (because they comply with a code of environmental compliance) or they require a development approval under the *Integrated Planning Act 1997*.

Clause 16 Amendment of s 77 (What is a *petroleum activity,* a *level 1 petroleum activity* and a *level 2 petroleum activity*)

This clause amends section 77 of the *Environmental Protection Act 1994* to be consistent with the new Environmental Protection Regulation.

The classification of environmentally relevant activities as level 1 or level 2 is being removed, except for mining and petroleum activities.

Mining and petroleum activities will continue to maintain a level 1/level 2 classification system. The approval system for mining and petroleum activities is different to other environmentally relevant activities as these activities are not included in the integrated development assessment system under the *Integrated Planning Act 1997*. The level 1/level 2 classification continues to have relevance as it indicates matters such as whether an activity operates under a code of environmental compliance or whether an environmental impact statement is required.

Clause 17 Amendment of s 163A (Application of div 3)

This clause amends section 163A of the *Environmental Protection Act 1994* to insert a reference in subsection (a) to an environmental authority (exploration).

Subsection (a) is about mining activities in a wild rivers area. This section was inserted by the *Wild Rivers Act 2005* as part of the consequential amendments to the introduction of that legislation. Through an oversight, this section did not refer to an environmental authority (exploration).

Note that section 193 of the *Environmental Protection Act 1994* and section 383 of the *Mineral Resources Act 1989* both referred to exploration permits as well as the other permit types referred to in section 163A.

Clause 18 Amendment of s 171 (Deciding application)

This clause amends section 171(2) of the *Environmental Protection Act 1994* to provide that the administering authority must consider any relevant regulatory requirements. The term "regulatory requirement" is defined in the Dictionary in Schedule 3 of the *Environmental Protection Act 1994* as follows:

regulatory requirement means a requirement under an environmental protection policy or a regulation for the administering authority to—

(a) grant or refuse to grant, or follow stated procedures for evaluating, any of the following applications—

(i) an application under chapter 4;

(ii) an environmental authority application;

(iii) an application for approval of a transitional environmental program; or

(b) impose, change or cancel a condition on a development approval for a chapter 4 activity, an environmental authority or an approval of a transitional environmental program; or

(c) consider a matter for issuing an environmental protection order.

The necessity to comply with any relevant regulatory requirement for imposing additional conditions was included in section 170(4), but was not included in section 171 for the considerations to approve or refuse the application. This appears to be an oversight and this amendment corrects that oversight.

Clause 19 Amendment of s 173 (Administering authority may refuse application)

This clause amends section 173(2) of the *Environmental Protection Act 1994* to provide that the administering authority must consider any relevant regulatory requirements. The term "regulatory requirement" is defined in the Dictionary in Schedule 3 of the *Environmental Protection Act 1994* as follows:

regulatory requirement means a requirement under an environmental protection policy or a regulation for the administering authority to—

(a) grant or refuse to grant, or follow stated procedures for evaluating, any of the following applications—

(i) an application under chapter 4;

(ii) an environmental authority application;

(iii) an application for approval of a transitional environmental program; or

(b) impose, change or cancel a condition on a development approval for a chapter 4 activity, an environmental authority or an approval of a transitional environmental program; or

(c) consider a matter for issuing an environmental protection order.

The necessity to comply with any relevant regulatory requirement for imposing additional conditions was included in section 176(2), but was not included in section 173 for the considerations to approve or refuse the application. This appears to be an oversight and this amendment corrects that oversight.

Clause 20 Amendment of s 207 (Administering authority may refuse application)

This clause amends section 207(2) of the *Environmental Protection Act 1994* to provide that the administering authority must consider any relevant regulatory requirements. The term "regulatory requirement" is defined in the Dictionary in Schedule 3 of the *Environmental Protection Act 1994* as follows:

regulatory requirement means a requirement under an environmental protection policy or a regulation for the administering authority to—

(a) grant or refuse to grant, or follow stated procedures for evaluating, any of the following applications—

(i) an application under chapter 4;

(ii) an environmental authority application;

(iii) an application for approval of a transitional environmental program; or

(b) impose, change or cancel a condition on a development approval for a chapter 4 activity, an environmental authority or an approval of a transitional environmental program; or

(c) consider a matter for issuing an environmental protection order.

The necessity to comply with any relevant regulatory requirement for fixing proposed conditions was included in section 210(3), but was not included in section 207 for the considerations to approve or refuse the application. This appears to be an oversight and this amendment corrects that oversight.

Clause 21 Amendment of s 214 (Declaration of compliance)

This clause amends section 214 of the *Environmental Protection Act 1994* to correct the timeframe in which the declaration of compliance must be issued.

Both the *Mineral Resources Act 1989* and the *Environmental Protection Act 1994* (section 211) require the proponent to publish a notice about the application (application notice). It is a requirement of the Act (section 211) that the application notice be given and published in the same way as the certificate of public notice for the relevant mining lease application under the *Mineral Resources Act 1989* (section 252B).

The *Mineral Resources Act 1989* requires the mining registrar to give a certificate to the applicant that establishes the objection period. The last objection day must be at least 20 business days after the certificate is given. Within the 5 business days of receiving the certificate the applicant must carry out the public notification. The notification in the newspaper must take place at least 15 days before the last objection day. The applicant must within 5 business days after the last objection day (unless the mining registrar decides a longer period) give the mining registrar a statutory declaration as to the applicant's compliance with public notification requirements.

Section 214 requires the applicant to give the administering authority a statutory declaration declaring whether or not the applicant has complied with the public notice requirements within 5 business days after the objection period starts. To be effective, the objection period must end on the last objection day under the *Mineral Resources Act 1989* for the application.

Clause 22 Amendment of s 215 (Substantial compliance may be accepted)

This amendment is consequential to the amendment to section 214 of the *Environmental Protection Act 1994*.

As this section currently stands, when the applicant has not complied with the public notice requirements, the administering authority must decide whether to allow the application to proceed before the objection period ends (section 215). This would not allow the administering authority to consider the objections in making his or her decision.

Clause 23 Amendment of s 228 (Grant of application on basis of draft environmental authority)

This clause amends section 228 of the *Environmental Protection Act 1994* to refer to business days instead of days.

All other references to periods of days in the *Environmental Protection Act 1994* specify business days. However in section 228, the environmental authority must be issued within 10 days, not 10 business days. There is no apparent reason why this timeframe was in days and not business days, so it appears to be a drafting error. As it stands, the timeframe is inconsistent with the remainder of the *Environmental Protection Act 1994*.

Clause 24 Amendment of s 240 (Requirements for application)

This clause amends section 240 by deleting subparagraph (c)(i) from the section. Paragraph (c)(i) stated that, if the annual fee for the amended environmental authority would be more than the annual fee currently payable for the authority, the amendment application had to be accompanied by the amount of the next annual fee for the amended authority. Otherwise, the amendment application had to be accompanied by the fee prescribed under regulation (subparagraph (c)(ii)). All fees will now be set by regulation, removing the need for paragraph (c)(i).

Clause 25 Amendment of s 246 (Assessment level and EIS decisions for application)

This clause amends section 246(2) of the *Environmental Protection Act 1994* to provide that the administering authority must comply with any relevant regulatory requirements. The term "regulatory requirement" is

defined in the Dictionary in Schedule 3 of the *Environmental Protection Act 1994* as follows:

regulatory requirement means a requirement under an environmental protection policy or a regulation for the administering authority to—

(a) grant or refuse to grant, or follow stated procedures for evaluating, any of the following applications—

(i) an application under chapter 4;

(ii) an environmental authority application;

(iii) an application for approval of a transitional environmental program; or

(b) impose, change or cancel a condition on a development approval for a chapter 4 activity, an environmental authority or an approval of a transitional environmental program; or

(c) consider a matter for issuing an environmental protection order.

The necessity to consider any relevant regulatory requirement in making an EM plan assessment report was included in sections 192 and 210 of the *Environmental Protection Act 1994*, but was not included in section 246 for EIS decisions. This appears to be an oversight and this amendment corrects that oversight.

Clause 26 Amendment of s 247 (Ministerial decision about assessment level and EIS decisions)

This clause amends section 247(7) of the *Environmental Protection Act 1994* to provide that the Minister must consider any relevant regulatory requirements. The term "regulatory requirement" is defined in the Dictionary in Schedule 3 of the *Environmental Protection Act 1994* as follows:

regulatory requirement means a requirement under an environmental protection policy or a regulation for the administering authority to—

(a) grant or refuse to grant, or follow stated procedures for evaluating, any of the following applications—

(i) an application under chapter 4;

(ii) an environmental authority application;

(iii) an application for approval of a transitional environmental program; or

(b) impose, change or cancel a condition on a development approval for a chapter 4 activity, an environmental authority or an approval of a transitional environmental program; or

(c) consider a matter for issuing an environmental protection order.

The necessity to comply with any relevant regulatory requirement in making an EM plan assessment report was included in sections 192 and 210 of the *Environmental Protection Act 1994*, but was not included in section 247 for EIS decisions. This appears to be an oversight and this amendment corrects that oversight.

Clause 27 Amendment of s 337 (Administering authority to consider draft programs)

This clause amends the timeframe in which the administering authority must consider draft transitional environmental programs.

The public notice period ends at least 10 business days after public notice is given (section 335(3)(c)). Currently however the administering authority has the same 20 business days to assess all the information that relates to the application.

This amendment is to change the timeframe to 20 business days after the due date for submissions. This will ensure that the administering authority has adequate time to consider the submissions before making its decision.

While there were 50 transitional environmental programs approved in 2007, only 3 required public notification so the amendment will not have widespread impact on future transitional environmental programs.

Clause 28 Insertion of new ch 7 pts 5A to 5C

This clause inserts new Parts into Chapter 7 of the *Environmental Protection Act 1994*. These new Parts contain the provisions which specify when and how Direction Notices may be issued, when and how Clean-up Notices may be issued, and when and how Cost Recovery Notices may be issued.

Part 5A Direction notices

This Part inserts a new enforcement tool – the direction notice. This is being introduced to replace the Nuisance Abatement Notice provisions which are currently restricted to unlawful environmental nuisance matters in the *Environmental Protection Regulation 1998*.

The direction notice is consistent with other notices used by local government officers and follows the format of an Improvement Notice under section 209 of the *Food Act 2006*. (Note: this is also similar to a Compliance Notice under section 93 of the *Marine Parks Act 2004*.)

Section 363A Prescribed provisions

This section states the offences which are prescribed provisions for which a direction notice can be issued.

The new direction notice will be available for use when there is, or has been, a contravention of the Act in relation to:

- unlawful environmental nuisance (i.e. a breach of section 440);
- the default specific noise standards;
- a local law that provides a variation from the specific noise standards; and
- minor water pollution matters.

The exemptions from the operation of the environmental nuisance provisions in Schedule 1 apply to direction notices as the offences in sections 440 and 440Q specifically exclude these matters. Note that schedule 1 of the Act is renumbered from schedule 1AA of this Bill by virtue of clause 70 of this Bill.

Section 363B Authorised person may issue a direction notice

This section states the circumstances in which an authorised person may issue a direction notice. These circumstances are limited to those offences which are being devolved to local governments, that is, nuisance (including noise standards) and minor water pollution.

In the context of the direction notice, remedy includes cleaning up, fixing or rectifying any environmental harm (including nuisance) done by the person by contravening the prescribed provision.

Section 363C Matters to consider before issuing a direction notice relating to particular emissions

For unlawful environmental nuisance involving an emission, the general emission criteria and noise emission criteria (if relevant) must be considered before issuing the direction notice.

The current general emission criteria that are considered when making a decision about whether an emission is causing an unlawful environmental nuisance in Part 2A of the *Environmental Protection Regulation 1998* are being retained. If after considering the criteria, it is reasonably believed that an emission is causing a nuisance, a direction notice can be issued.

Additional clarification has also been provided for the general emission criteria considerations involving the characteristics and qualities of the receiving environment, the views of an affected person, and the order of occupancy. These factors include any changes to either place over time, and changes to the activities conducted at either place over the time the complainant has occupied their affected place. This allows investigators to look at the broader picture of the changing environment when considering if a direction notice should be issued.

An additional criterion has been included so that mitigation measures that have been, or could reasonably be, taken in the circumstances must also be considered when deciding whether a direction notice should be issued.

If the emission is noise, the additional noise emission criteria must also be considered. The noise emission criteria are only considered for the general environmental nuisance offence (section 440) and not the offence of breaching a noise standard (section 440Q) because if the noise standards are not complied with, then this is sufficient grounds for issuing a direction notice without considering the general emission criteria. However, if the specific noise standards are complied with, but the noise is still a nuisance, the general emission criteria and noise emission criteria must still be considered prior to issuing a direction notice for a contravention of section 440.

Note that the authorised person must consider the noise measurement if they have measured the noise. Noise measurement may be done in

accordance with the noise measurement provisions in the new Environmental Protection Regulation.

The provisions relating to animal noise in Part 2A of the *Environmental Protection Regulation 1998* have proved ineffective and difficult to apply and have been removed. The remaining general and noise emission criteria will be used to assess whether noise from animal noise is a nuisance. This will provide more flexibility for other considerations to be made in determining whether the noise is causing a nuisance.

Section 363D Requirements of direction notices

This section sets out the information that must and may be included in a direction notice.

The direction notice allows the administering authority to direct a variety of actions, e.g. someone to take action to stop or prevent a continuation of the release / offence, contain / control the release, reduce / clean up the pollution.

Under the proposal to allow direction notices to be issued in relation to noise offences, two scenarios are possible:

- If noise standards are contravened, an on-the-spot fine or direction notice could be issued. If a direction notice was issued, the general emission criteria and noise emission criteria would not be considered, as failing to meet the noise standard would be grounds for issuing the direction notice; or
- If noise standards are not contravened or there is no specific noise standard for the type of noise being emitted, a direction notice could still be issued if an unlawful environmental nuisance is caused after considering the general emission criteria and noise emission criteria.

Review and appeal details and the maximum penalty for failing to comply with the direction notice must appear on the notice.

Section 363E Offence not to comply with a direction notice

This section states that it is an offence not to comply with a direction notice unless the person has a reasonable excuse.

The maximum penalty for not complying with the direction notice has been raised to 300 penalty units. This will provide a better deterrent to offenders; allow better cost recovery through increasing on-the-spot fines under the

State Penalties and Enforcement Regulation 2000 (i.e. to $750 for individuals and $1500 for corporations) and to allow Courts to impose higher fines if there is a prosecution.

To comply with State Penalties Enforcement Registry guidelines the on-the-spot fine can be no more than 10% of the maximum penalty in the corresponding legislation. Therefore, to double on-the-spot fines, the maximum penalties in the *Environmental Protection Act 1994* needed to be increased.

Part 5B Clean-up notices

Division 1 Preliminary

Section 363F Definitions for pt 5B

This section defines "contamination incident" as an incident that causes or is likely to cause serious or material environmental harm and does not include an incident involving only environmental nuisance.

Note that the *Acts Interpretation Act 1954* states that the singular includes the plural, so a contamination incident may in fact be a series of incidents that together or separately caused or are likely to cause serious or material environmental harm.

This section also defines "place" for the purposes of Chapter 7, Parts 5B and 5C.

Section 363G Who are the *prescribed persons* for a contamination incident

A prescribed person in this context is the person who is responsible for complying with the notice. The issue of a clean-up notice is not intended to imply that a prescribed person caused the contamination incident.

This section defines "prescribed person" to include:-

- a person who has caused or allowed or is causing or allowing the contamination incident; or

- an occupier of a place from which a contamination incident has occurred or is occurring; or
- the owner, or person with control, of a contaminant involved in the contamination incident.

If any of the above is a company (the first company), and the company fails to comply with a clean-up notice, then a prescribed person will also include:

- a parent company of the first company; and
- a director of the company.

The occupier of a place is defined in the Dictionary in Schedule 3 of the *Environmental Protection Act 1994* to include the person apparently in charge of the place. This is the place from which the contamination incident arose. Consequently, in the case of mining activities which cause a contamination incident, the occupier would be the mining operator as the occupier, not a person who may also be resident on the land (for example, a farmer) who was not associated with the mining activities.

A place is defined to be broader than just premises (which is defined in the Dictionary in Schedule 3). A place is defined in section 363F of the *Environmental Protection Act 1994* to be premises, another place on land or a vehicle.

In the case of vehicle transport of dangerous goods or dangerous materials warehouses, the actual occupier or operator is acting as temporary custodian of the materials. For example, in the case of a contractor's truck carrying a variety of hydrocarbons manufactured by a petrol company being involved in an incident, it is likely that the petrol company would be in the best position to organise and pay for the clean-up, knowing the details of the materials involved and the size of their operation. It is also intended to cover the situation where the owner of the chemicals has misled the person who is storing them and the chemicals are more toxic than indicated on the drum. Consequently, the notice can also be issued to the owner of the contaminant. This 'prescribed person' provision is not intended to place any liability on local governments for contaminants entering or travelling through the local government's infrastructure such as storm water drains.

This clause also makes a parent company responsible for compliance with a clean-up notice if the subsidiary company has failed to comply. The intention of this provision is to remedy the situation whereby an industry

restructures itself so that a valueless company is the occupier of the land making it difficult to recover civil costs from the company. The provision is based on s 62A(1AA) of the Victorian *Environmental Protection Act 1970*.

The administering authority will be empowered to issue a clean-up notice to a parent company where its subsidiary, associated entity or related entity is a prescribed person. It is a defence (see section 363I(3) of the *Environmental Protection Act 1994* - Offence not to comply with clean-up notice) for the parent company to show that it did not have requisite control over, and was not aware of, the activities of the subsidiary; and the parent company took all reasonable steps to prevent the activity of the subsidiary, associated entity or related entity.

Section 363H Administering authority may issue clean-up notice

This section will enable an administering authority (via the administering executive) to issue a clean-up notice where they reasonably believe a contamination incident has occurred or is occurring.

The intent is that the power to issue these notices will be delegated to a higher level of management than the authorised person (e.g. a manager or director of an area) to ensure that the notices are given appropriate weight of consideration before issue of the notice.

The administering authority for the purposes of the new clean-up and cost recovery provisions in Chapter 7, Parts 5B and 5C may be the Environmental Protection Agency, or a local government or a State entity which has been delegated administration and enforcement of ERAs.

The Environmental Protection Agency may give a notice about any contamination incident, including incidents caused by activities devolved to local government or another State entity.

Local governments will generally not be expected to issue notices or take clean-up actions, but use of these provisions may be delegated to local governments in case they are needed. Once delegated, a local government may give a notice about any contamination incident within their boundaries, including those involving a matter which has not been devolved to them. However, local government may not give a clean-up notice to a State entity or to another local government entity.

A State entity may give a notice about any contamination incident involving a matter which has been delegated to them. For example, the

Department of Primary Industries and Fisheries has been delegated responsibility for feedlots, piggeries, dairy, cattle saleyards; Queensland Health has been delegated responsibility for radiation; and the Department of Mines and Energy has been delegated responsibility for small mines.

Making local governments and State entities (for certain matters) administering authorities in respect of the clean-up provisions will enable them to choose whether to use the clean-up provisions in relation to a particular incident (depending on its nature and location) or to take actions in their own right.

These issues about who will have the authority to issue notices will be dealt with administratively by an instrument of delegation.

The administering authority has the power to issue a clean-up notice to require the prescribed person to:-

(a) prevent or minimise contamination (e.g. action to contain, remove, disperse or destroy the contaminants); or

(b) rehabilitate or restore the environment because of the incident, including by taking steps to mitigate or remedy the effects of the incident; or

(c) assess the nature and extent of the environmental harm, or the risk of further environmental harm, from the incident, including by inspecting, sampling, recording, measuring, calculating, testing or analysing; or

(d) keep the administering authority informed about the incident or the actions taken under the notice, including by giving to the administering authority stated reports, plans, drawings or other documents.

The prescribed person may be required to take actions offsite from the place of origin of the contamination incident – for example, where the contamination incident spreads from the site of the incident into nearby watercourses or onto neighbouring land.

The clean-up notice must state certain things, including the consequences of failure to comply with the notice. This is to ensure that the prescribed person is fully informed of what they must do to comply with the notice.

The notice may include any other information the administering authority considers appropriate. The information may include that the administering authority proposes, at a stated time or at stated intervals, to enter the

premises to check compliance with the notice, or how compliance with the required action is to be demonstrated.

If the person to whom the notice is issued fails to fully comply with the notice, the administering authority may take the action itself (see section 363K of the *Environmental Protection Act 1994* - Taking action in place of recipient).

If the person issued with a clean-up notice complies with the notice but was not the person who caused or allowed the contamination incident, the costs of complying with the notice may be recovered by that person as a debt in a court of competent jurisdiction from the person who caused or allowed the contamination incident. This provision is modelled on the NSW *Protection of the Environment Operations Act 1997*.

The notice is intended to either specify actions to be undertaken, or to specify a standard which must be met. It is the responsibility of the person to whom the notice is given to determine how they reach that standard. For example, a condition may be to ensure that contaminated water does not reach the aquifer but not set out step-by-step what the person has to do to ensure that this does not happen.

The clean-up notice is intended to operate separately from current powers under the *Environmental Protection Act 1994*, including emergency powers and environmental protection orders. The emergency powers under sections 467 and 468 of the *Environmental Protection Act 1994* can only be used for urgent action and cannot be used for longer term clean-up, such as was necessary following the Binary incident. If actions are urgently required, the administering authority may still use the emergency powers in section 467 of the *Environmental Protection Act 1994*. The emergency powers will be used to prevent incidents or for emergency actions needed during incidents (e.g. a direction to install a bund or dam or prevent release of contaminants from a site, or a direction to vent a gas or liquid from a container). Because these powers are for use in an urgent situation, a direction may be issued orally and is not subject to appeal, unlike the clean-up notice. The administering authority may also issue a clean-up notice to the same person for the same incident to ensure that non-emergency actions are undertaken.

Environmental protection orders (sections 358-363 of the *Environmental Protection Act 1994*) are more appropriate where there is a breach of an environmental condition or a need to ensure that an activity is carried out in a way to meet the general environmental duty. The purposes for which an

environmental protection order may be issued are not sufficient to effectively manage clean-up following a contamination incident. For example, an environmental protection order may be used to require hazardous material to be transported in a particular way as transporting the material is an activity and the general environmental duty applies. The environmental protection order cannot be used to require rehabilitation following an incident where the hazardous material has been released because following the release there is no activity being undertaken to which the general environmental duty applies.

The only purpose for an environmental protection order which may cross over with the purposes for a clean-up notice is that an environmental protection order may be issued to secure compliance by the person with the general environmental duty in relation to an ongoing activity. This is a duty on a person not to 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 (see section 319 of the *Environmental Protection Act 1994*). However, if a contamination incident occurs other than from an activity, it is arguable that the general environmental duty cannot apply to permit the issue of an environmental protection order. The clean-up notices may be issued to any prescribed person for a contamination incident, even if they are not undertaking activities or they are complying with the general environmental duty.

To remove any doubt, it is stated that a clean-up notice can be issued to one or more prescribed persons.

Section 363I Offence not to comply with clean-up notice

This section states that a person must comply with a clean-up notice. It is an offence to fail to comply with the clean-up notice, unless there is a reasonable excuse for non-compliance.

A reasonable excuse must be reasonable in the circumstances of the actions required to be taken in the clean-up notice. For example, a reasonable excuse may be that the actions cannot physically be done or that to undertake the works in the way specified would cause more environmental harm than the positive benefits from the clean-up. It would not be a reasonable excuse to claim lack of funds to perform the clean-up, unless every avenue to obtain the funds has been exhausted. In such circumstances, the prescribed person should have taken all reasonable and practicable precautions to prevent or minimise environmental harm being

caused, the risk of death or injury to humans and animals, and loss or damage to property.

This is to be distinguished from cost recovery notices for which there is to be joint and several liability with no opportunity to raise a "reasonable excuse" for failure to comply.

Maximum penalties are designed to be commensurate with the current NSW penalties in the *Protection of the Environment Operations Act 1997* for failure to comply with their clean-up notice.

Current NSW maximum penalties are:

- for a corporation:

  - $1,000,000

  + $120,000 for each day the offence continues.

- for an individual:

  - $250,000

  + $60 000 for each day the offence continues.

The proposed maximum penalties of 4000 penalty units ($300,000) for a corporation and 2000 penalty units ($150,000) for an individual, are approaching this range, but are still less than the NSW penalties.

It is a defence to a clean-up notice for the recipient (as defined in the Dictionary) to prove that the relevant contamination incident was caused by:

(i) a natural disaster (as defined in the Dictionary);

(ii) a terrorist act and reasonable security or preventative measures had been undertaken at the site given the inherent nature of the risk; or

(iii) a deliberate act of sabotage by an external party and reasonable security or preventative measures had been undertaken at the site given the inherent nature of the risk.

This is based on section 319 of the *Environmental Protection Act 1994* which requires taking all reasonable and practicable measures to prevent or minimise harm. The proof of the defence would be on the person who is claiming that defence. Natural disaster is defined in the Dictionary to the *Environmental Protection Act 1994*.

If the notice was issued to a person or company as director or parent company, it is a defence for the parent company to show that it did not have requisite control over, and was not aware of, the activities of the subsidiary, and the parent company took all reasonable steps to prevent the activity of the subsidiary, associated entity or related entity.

The notice is likely to have a number of actions that must be taken and different times by when those actions must be done. Each requirement must be complied with by the time given for compliance. It is not a reasonable excuse to fail to comply with one requirement merely because another requirement has not yet fallen due. The administering authority may enforce the notice if any one of those actions has not been taken in time, even if the time by which other actions must be taken has not yet expired.

Section 363J Procedure if recipient is not the owner of land on which action is required

A person given a clean-up notice will need access to:

(i) the land the subject of a contamination incident

(ii) adjoining affected properties

(iii) any adjoining property that it is necessary to traverse to gain entry to premises in (i) or (ii) above.

Adjoining affected properties may include where the contamination incident spreads from the site of the incident into nearby watercourses or onto neighbouring land.

This section inserts a statutory process to allow for access to that land. This section is based on sections 394 and 409 of the *Environmental Protection Act 1994*.

Section 363K Taking action in place of recipient

If the person to whom the notice is issued fails to fully comply with the notice, the administering authority may take the action itself. This is a permissive power, and the administering authority is not required to take action merely because it is enabled to. The first preference will always be to ensure that the prescribed person takes the action themselves, but the administering authority may consider it desirable to take the action itself,

for example, to avoid a possible emergency action being needed in the future.

The administering authority is able to delegate its powers to undertake such action to an authorised person or to authorise an agent or contractor to undertake such action.

Under section 363K(2), if none of the recipients of a clean-up notice does the work (or any part of the work) set out in the clean-up notice within the timeframe specified in the clean-up notice, an authorised person may undertake the work specified in the clean-up notice. The authorised person has the powers under section 363J to enter land and do the work as if they were a recipient of the clean-up notice. The authorised person does not take the place of the recipient, but acts as if they were also a recipient. For example, if the original recipient of the notice was the owner of the land, the authorised person may still enter the land and undertake the work as a recipient of the notice who does not own the land under section 363J.

This power can also be used if the recipient has sought a stay of the operation of the notice. This is because the administering authority must have the power to do the works where there is a risk of significant damage to persons, property or the environment, whether a stay is in place or not. If the applicant is not successful in appealing the clean-up notice, the administering authority can then recover the costs of doing those works by way of a cost recovery notice.

Section 363J is in addition to any other powers of entry that person may also have under the *Environmental Protection Act 1994*. For example, under section 452, the authorised person may enter a place if it is a public place and the entry is made when the place is open to the public. Another example is the emergency powers in section 467 of the *Environmental Protection Act 1994* which permit both entry to, and works upon, land in an emergency situation. These powers may still be used, despite the additional power of entry and power to undertake the works in section 363J.

It is important to note that if the authorised person chooses to use the procedure set out in section 363J to enter the land and carry out the works, the authorised person will be liable for any compensation for damages that any other person suffers as a consequence of the authorised person's behaviour on that land, as set out in section 363J(6).

This provision does not limit an authorised person's powers under section 467 of the *Environmental Protection Act 1994* (Emergency powers).

Section 363L Obstruction of recipient complying with notice

This provision is designed to create an offence to obstruct an action being undertaken in compliance with a clean-up notice . This is to ensure that the recipient of a clean-up notice, or a person acting under the instruction of a recipient is able to take action without other persons obstructing or delaying those actions.

This provision is based on section 112 of the NSW *Protection of the Environment Operations Act 1997*. The maximum penalty for obstruction is the same as the maximum penalties for obstruction on an authorised officer under section 482 of the *Environmental Protection Act 1994*.

Part 5C Cost recovery notices

Section 363M Who are the *prescribed persons* for a contamination incident

A prescribed person in this context is the person who is responsible for complying with the notice. The issue of a cost recovery notice is not intended to imply that a prescribed person caused the contamination incident.

This section defines "prescribed person" to include:-

- a person who has caused or allowed or is causing or allowing the contamination incident; or
- an occupier of a place from which a contamination incident has occurred or is occurring; or
- the owner, or person with control, of a contaminant involved in the contamination incident.

If any of the above is a company (the first company), and the company fails to comply with a clean-up notice, then a prescribed person will also include:

- a parent company of the first company; and
- a director of the company.

The occupier of a place is defined in the Dictionary in Schedule 3 of the *Environmental Protection Act 1994* to include the person apparently in charge of the place.

A place is defined to be broader than just premises (which is defined in the Dictionary in Schedule 3). A place is defined in section 363F of the *Environmental Protection Act 1994* to be premises, another place on land or a vehicle.

This clause also makes a parent company responsible for the compliance with a cost recovery notice if the subsidiary company has failed to comply. The intention of this provision is to remedy the situation whereby industry restructures itself so that a valueless company is the occupier of the land making it difficult to recover civil costs from the company.

The administering authority will be empowered to issue a cost recovery notice to a parent company where its subsidiary, associated entity or related entity is a prescribed person. The amount is not payable (see section 363N(5) of the *Environmental Protection Act 1994*) if the parent company shows that it did not have requisite control over, and was not aware of, the activities of the subsidiary; and the parent company took all reasonable steps to prevent the activity of the subsidiary, associated entity or related entity.

Section 363N Administering authority may issue cost recovery notice

This section enables the administering authority to issue a cost recovery notice. A cost recovery notice is to be a written notice and will require:-

(i) a person who failed to comply with a clean-up notice; or

(ii) a prescribed person who failed to comply with a written emergency direction; or

(iii) a prescribed person on whose behalf the State took emergency action,

to pay all reasonable expenses the administering authority incurred in relation to the clean-up of the contamination incident.

Under section 363K(2), if none of the recipients of a clean-up notice does the work (or any part of the work) set out in the clean-up notice within the timeframe specified in the clean-up notice, an authorised person may undertake the work specified in the clean-up notice. The authorised person

has the powers under section 363J to enter land and do the work as if they were a recipient of the clean-up notice. The authorised person does not take the place of the recipient, but acts as if they were also a recipient.

This power can also be used if the recipient has sought a stay of the operation of the notice. This is because the administering authority must have the power to do the works where there is a risk of significant damage to persons, property or the environment, whether a stay is in place or not. If the applicant is not successful in appealing the clean-up notice, the administering authority can then recover the costs of doing those works by way of a cost recovery notice.

These parties will be jointly and severally liable for the costs (see section 363O of the *Environmental Protection Act 1994* – Several recipients of a cost recovery notice). Therefore, a person who complies with the cost recovery notice, but was not the person who caused or allowed the contamination incident, may recover the cost of complying with the cost recovery notice from the person who caused or allowed the incident. This reflects the provisions in the *Protection of the Environment Operations Act 1997* (NSW).

The cost recovery notice must state certain things, including the consequences of failure to comply with the notice. This is to ensure that the prescribed person is fully informed of what they must do to comply with the notice.

An exception from liability for costs will apply where the incident was caused by:

(i) a natural disaster;

(ii) a terrorist act and reasonable security or preventative measures had been undertaken at the site given the inherent nature of the risk; or

(iii) a deliberate act of sabotage by an external party and reasonable security or preventative measures had been undertaken at the site given the inherent nature of the risk.

This is based on section 319 of the *Environmental Protection Act 1994* which requires taking all reasonable and practicable measures to prevent or minimise harm. The proof of these exceptions would be on the person who is claiming the exception. Natural disaster is defined in the Dictionary.

Additionally, an exception from liability for costs exists where the recipient can show:

(i) if the recipient is a director of a company that has failed to comply with a notice – it took all reasonable steps to ensure the company paid the costs; or

(ii) if the recipient is a parent company of a company that has failed to comply with a notice – it took all reasonable steps to ensure the original recipient company paid the costs.

This is to ensure that similar exclusions apply for a cost recovery notice as those which apply for a clean-up notice.

Under this notice, the administering authority can recover both external and internal costs if there was non-compliance with a clean-up notice or the clean-up notice could not reasonably be given to a responsible party. This would include the costs of authorised officers time spent in managing the post incident response environmental clean-up, as they would no longer be able to perform their ordinary duties and costs would be incurred in re-allocating such officers and then making alternative arrangements for the carrying out of their usual duties.

Note that a certificate signed by the administering executive stating that the document is a notice, that it was given to a person, and that an amount is payable is evidence of the matter (see section 490(5)(a), (e) and (g) of the *Environmental Protection Act 1994*).

Section 363O Several recipients of a cost recovery notice

This section states that each person to whom a cost recovery notice is given will be jointly and severally liable for the costs. Therefore, a person who complies with the cost recovery notice, but was not the person who caused or allowed the contamination incident, may recover the cost of complying with the cost recovery notice from the person who caused or allowed the incident. This reflects the provisions in the *Protection of the Environment Operations Act 1997* (NSW).

This is to ensure that the administering authority can claim the costs against any recipient, and all of the recipients can take action against each other to ensure that the polluter pays.

This section does not prevent the recipients from taking any other form of action to recover the money. For example, an owner may have a cause of action in contract against an occupier because of the terms of the lease.

Recovery may be made against the recipients regardless of the proportional liability provisions of the *Civil Liability Act 2003*, as the action by the

administering authority is not an action in damages for breach of a duty of care. Nothing in this provision changes the applicability of the *Civil Liability Act 2003* as it would apply between the recipients, or by a recipient against a person who caused or allowed the incident.

Clause 29 Amendment of s 364 (When financial assurances may be required)

This clause amends section 364 of the *Environmental Protection Act 1994* to change the reference to a level 1, chapter 4 activity.

For the reasons outlined for the deletion of section 20 of the *Environmental Protection Act 1994*, all references to level 1 ERAs for chapter 4 activities are being removed and replaced with current terminology which refers to ERAs that have an aggregate environmental score prescribed under a regulation.

Clause 30 Replacement of s 369 (Restrictions on performing waste management works)

This clause replaces section 369 of the *Environmental Protection Act 1994* with a section of similar intent, but different wording.

Several local governments have raised concerns that section 369 does not contain an offence for non-compliance with a condition imposed on the approval.

Local government can impose relevant conditions on the approval under section 369A. As the offence prohibits works unless they are performed under an approval, there is already an offence for breach of conditions. However, in order to place the matter beyond doubt, the offence is being split so that there is a penalty for operating without an approval and separately for breach of conditions.

In addition, an additional permit type is being inserted to cover those operators who are operating under the relevant code of environmental compliance. In these cases, the operators are undertaking self-assessable development (as defined by the *Integrated Planning Act 1997*) and are not required to obtain a development approval. However, as it stands, they still require an approval from the local government to perform waste management works (section 369A). Consequently, this amendment is to remove the red tape of requiring an approval when operating under the relevant code of environmental compliance.

In this section, the reference to a development approval is a development approval relevant to conducting waste management works.

The proposed amendments increase the penalty for section 369 from 100 penalty units to 250 penalty units to bring it in line with other similar offences in the *Environmental Protection Act 1994*. The penalty for contravening a condition of an authority for a level 2 mining or petroleum activity is 250 penalty units (section 430(3)(b) of the *Environmental Protection Act 1994*).

Clause 31 Insertion of new s 369C (Offence of contravening approval)

This clause inserts a new section into the *Environmental Protection Act 1994* which is consequential to the amendments to section 369 above.

Clause 32 Amendment of s 380 (Procedure to be followed if recipient is not owner)

This clause amends section 380 of the *Environmental Protection Act 1994* as a consequence of the amendment of the definition of "building" to include part of the building.

Clause 33 Amendment of s 394 (Procedure to be followed if recipient is not owner)

This clause amends section 394 of the *Environmental Protection Act 1994* as a consequence of the amendment of the definition of "building" to include part of the building.

Clause 34 Amendment of s 409 (Procedure to be followed if recipient is not owner)

This clause amends section 409 of the *Environmental Protection Act 1994* as a consequence of the amendment of the definition of "building" to include part of the building.

Clause 35 Replacement of s 426 (Environmental authority required for mining or petroleum activity)

This clause replaces section 426 of the *Environmental Protection Act 1994* with new sections 426 and 426A as a consequence of the omission of

section 20 and the amendment of section 77 to reflect the current situation regarding level 1 and level 2 authorities. This change is purely cosmetic and is not intended to extend or restrict the offence.

Clause 36 Amendment of s 427 (Only registered operators may carry out chapter 4 activities)

For the reasons outlined for the amendments to section 20 of the *Environmental Protection Act 1994*, all references to level 1 ERAs for Chapter 4 activities are being removed.

As the distinction between level 1 and level 2 ERAs for Chapter 4 activities is being removed, this offence is being rolled into one offence with a maximum penalty of 400 penalty units. This is consistent with the other offences in the *Environmental Protection Act 1994*.

The defences in section 73T will remain.

Clause 37 Omission of s 436 (Unlawful environmental harm)

This clause omits section 436 of the *Environmental Protection Act 1994*, which is being relocated to section 493A as it will now be used more broadly than just the environmental harm offences.

Clause 38 Amendment of s 437 (Offences of causing serious environmental harm)

This clause amends section 437 of the *Environmental Protection Act 1994* to note that the concept of whether a matter is "unlawful" will now be contained in section 493A of the Act.

Clause 39 Amendment of s 438 (Offences of causing material environmental harm)

This clause amends section 438 of the *Environmental Protection Act 1994* to note that the concept of whether a matter is "unlawful" will now be contained in section 493A of the Act.

Clause 40 Amendment of s 440 (Offence of causing environmental nuisance)

This clause amends section 440 of the *Environmental Protection Act 1994* to increase the maximum penalty applying to a person unlawfully causing

an environmental nuisance under section 440(2) from 165 penalty units to 300 penalty units.

This offence for causing environmental nuisance is not suitable for an on-the-spot fine, however, the maximum penalty needs to increase so that it better reflects the seriousness of the problem and aligns with the maximum penalty for breaching a direction notice and causing a noise offence.

The on-the-spot fines applying to breaching a direction notice and causing a noise offence relate to different forms of environmental nuisance with a high level of community concern. To provide a sufficient deterrent and allow for cost recovery, the maximum penalties associated with these offences are also being increased to 300 penalty units.

This section will not apply to the matters listed in schedule 1, part 1 (Environmental nuisance excluded from ss 440 and 440Q). Note that schedule 1 of the Act is renumbered from schedule 1AA of this Bill by virtue of clause 70 of this Bill.

This clause also amends section 440 to note that the concept of whether a matter is "unlawful" will now be contained in section 493A of the Act.

Clause 41 Insertion of new ch 8 pts 3B to 3F

Part 3B Offences relating to noise standards

This part contains the default noise standards for particular types of noise and the offence for breaching those standards. The criteria for the default noise standards are adapted from the specific noise offences in Part 2A of the *Environmental Regulation 1998*.

To remove any doubt, these standards are for existing development and are not planning criteria for assessing development applications.

Division 1 Preliminary

Section 440K Definitions for pt 3B

This section defines technical and frequently used terms for the purpose of the default noise standards. The definitions have been taken from either the *Environmental Protection Regulation 1998* or the relevant Australian Standards.

Section 440L Meaning of audible noise

This section is based on section 6E (Meaning of audible noise) of the *Environmental Protection Regulation 1998*.

This section has been changed to refer to clearly audible noise, rather than just audible noise. The term audible noise may force action in circumstances where the noise is only just audible above the background. The intent is to allow action to be taken where the noise is clearly audible in the circumstances.

This term is restricted to clearly audible noise offences under this Division. It is also restricted to noise that can be heard at an affected building.

Audible noise is one of three "types" of noise described in the regulation. The other two types of noise are background noise and noise caused by certain things such as regulated devices or airconditioners (source noise).

Section 440M Reference to making a noise

This section ensures that there is no confusion about the definition of "making" a noise. Making a noise includes causing a noise to be made.

Section 440N Noise levels measured at an affected building

This section ensures that background levels and levels above background levels are measured at an affected building. The methods of measuring noise will remain in the new Environmental Protection Regulation and will be a guideline only, but background noise and levels above background noise must be measured at an affected building in order to be effective.

Division 2 Application of noise standards

Section 440O Local law may prescribe noise standards

This section ensures that local governments may prescribe their own inconsistent local laws to vary the default noise standards. This is to ensure that local governments can make their own local laws to reflect local amenity requirements while still using the enforcement tools in the *Environmental Protection Act 1994*.

This is not a breach of fundamental legislative principles as the elected representatives of the local government must pass a local law in accordance with the *Local Government Act 1993* in order to vary the default noise standards.

Section 440P Default noise standards under div 3

This section ensures that any local laws varying the default noise standards under section 440O take priority over the default noise standards in this Part.

Section 440Q Offence of contravening a noise standard

This section specifies a single noise offence for breaching a specific noise standard. This removes the need to have maximum penalties specified for each specific noise standard provision.

A noise offence occurs when:

- Noise does not comply with the specific noise standards specified;
- Noise does not comply with a variation to the specific noise standards made through a local law; and
- Noise is unlawful when considering section 493A (the old section 436).

The maximum penalty of 20 penalty units which applied to the noise offences in Part 2A of the *Environmental Protection Regulation 1998* will be increased to 300 penalty units.

Local government and EPA officers have indicated that penalties and fines are too low to provide a sufficient deterrent to offenders and are too low to provide cost recovery for investigating complaints.

The cost of noise attenuation measures is generally higher than paying the on-the-spot fine for breaching the provisions. Increasing fines will make the provisions more effective. However, to increase the on-the-spot fines under the *State Penalties Enforcement Regulation 2000*, the maximum penalty in the *Environmental Protection Act 1994* needs to increase.

Increasing the maximum penalty to 300 penalty units will allow on-the-spot fines to be increased and allow the Courts to impose higher penalties if there are Court proceedings. Court proceedings are generally a last resort after other enforcement actions have failed.

Note: The maximum penalty for the offence of causing unlawful environmental nuisance (section 440(2) of the *Environmental Protection Act 1994*) is also being increased to 300 penalty units. Increasing the maximum penalty for a noise offence to 300 penalty units aligns the penalties for equivalent types of nuisance issues.

This section will not apply to the matters listed in schedule 1, part 1 (Environmental nuisance excluded from ss 440 and 440Q). Note that schedule 1 of the Act is renumbered from schedule 1AA of this Bill by virtue of clause 70 of this Bill.

Division 3 Default noise standards

These default noise standards are for the regulation of existing development. To remove any doubt, the default noise standards are not planning criteria for assessing development applications.

Section 440R Building work

This section is based on section 6W (Building work) of the *Environmental Protection Regulation 1998*.

The intention is to restrict commercial builders, their contractors and owner-builders from carrying out building work during unreasonable hours. It is not intended to capture individuals who carry out these types of works in their own home (unless they have an owner-builder permit). Section 440S (regulated devices) would still apply to these people.

Section 6W of the *Environmental Protection Regulation 1998* was considered too complex, requiring assessment of whether:

- the person is a builder (with reference to the *Queensland Building Services Authority Act 1991*, including owner-builder) or 'building contractor'; and
- whether the work is 'building work' (with reference to the *Queensland Building Services Authority Act 1991* – as the definition of builder relies on the person having the required licence to carry out building work as defined under the *Queensland Building Services Authority Act 1991*); and
- whether the site is a building site (with reference to the *Queensland Building Services Authority Act 1991*).

There are various inclusions and exclusion that apply under the *Queensland Building Services Authority Act 1991* in various circumstances which were not all consistent with the *Environmental Protection Regulation 1998.* For example, moving or demolishing a building is defined as building work under the *Environmental Protection Regulation 1998*, but not the *Queensland Building Services Authority Act 1991*. This means that, although these activities are stated in the *Environmental Protection Regulation 1998*, these activities could not be regulated, as there is no requirement for builders to have a licence for this work under *Queensland Building Services Authority Act 1991*.

Consequently, this provision has been simplified by removing all references to the *Queensland Building Services Authority Act 1991*.

Note: section 36 of the *Acts Interpretation Act 1954* defines a business day to be a day that is not—

(a) a Saturday or Sunday; or

(b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done.

Section 440S Regulated devices

This section is based on section 6X (Regulated devices) of the *Environmental Protection Regulation 1998*.

This section provides specific noise standards that apply to the operation of regulated devices, other than people carrying out building work in accordance with section 440R (Building work).

Note: section 36 of the *Acts Interpretation Act 1954* defines a business day to be a day that is not—

(a) a Saturday or Sunday; or

(b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done.

Section 440T Pumps

This section is based on section 6Y (Spa blowers and pool pumps) of the *Environmental Protection Regulation 1998*, but now includes pumps other than just spa blower and pool pumps. These pumps were regulated under section 6X (Regulated devices) of the *Environmental Protection Regulation 1998*, but feedback during consultation revealed that they were a better fit with this section.

This section provides specific noise standards that apply to the operation of pumps. Specified noise levels must be complied with during nominated hours.

The specified noise levels now reflect local issues more accurately by prescribing a decibel level above the background noise level, rather than a standardised noise level which cannot be exceeded.

Section 440U Airconditioning equipment

This section is based on section 6Z (Airconditioning equipment) of the *Environmental Protection Regulation 1998*.

This section provides specific noise standards that apply to the operation of air conditioning equipment. Specified noise levels must be complied with during nominated hours.

The specified noise levels now reflect local issues more accurately by prescribing a decibel level above the background noise level, rather than a standardised noise level which cannot be exceeded.

Section 440V Refrigeration equipment

This section is based on section 6ZA (Refrigeration equipment) of the *Environmental Protection Regulation 1998*.

This section provides specific noise standards that apply to the operation of refrigeration equipment. Specified noise levels must be complied with during nominated hours.

The specified noise levels now reflect local issues more accurately by prescribing a decibel level above the background noise level, rather than a standardised noise level which cannot be exceeded.

Section 440W Indoor venues

This section is based on section 6ZB (Indoor venues) of the *Environmental Protection Regulation 1998*.

This section provides specific noise standards that apply to indoor venues. Specified noise levels must be complied with during nominated hours.

The specified noise levels now reflect local issues more accurately by prescribing a decibel level above the background noise level, rather than a standardised noise level which cannot be exceeded.

This section clarifies that the exemption applying to educational institutions does not apply to commercial activities that may be held at the institution.

Section 440X Open-air events

This section is based on section 6ZC (Open-air events) of the *Environmental Protection Regulation 1998*.

This section provides specific noise standards that apply to open-air events. Specified noise levels must be complied with during nominated hours.

This section clarifies that the exemption applying to educational institutions does not apply to commercial activities that may be held at the institution.

Section 440Y Amplifier devices other than at indoor venue or open-air event

This section is based on section 6ZD (Amplifier devices, other than at indoor venue or open-air event) of the *Environmental Protection Regulation 1998*.

This section provides specific noise standards that apply to the operation of amplifier devices, other than at indoor venues or open-air events. Specified noise levels must be complied with during nominated hours.

Note: section 36 of the *Acts Interpretation Act 1954* defines a business day to be a day that is not—

(a) a Saturday or Sunday; or

(b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done.

Section 440Z Power boat sports in waterway

This section is based on section 6ZE (Power boat sports in waterway) of the *Environmental Protection Regulation 1998*.

This section provides specific noise standards that apply to power boat sports in a waterway. Specified noise levels must be complied with during nominated hours.

Consultation has indicated that section 6ZE(3) of the *Environmental Protection Regulation 1998* is ineffective and difficult to enforce. Consequently, this subsection has been removed and instead, the noise emissions from power boat sports during the day will be regulated as a general emission through the general emission and noise emission provisions. This provides more flexibility to the regulator to manage the issue.

Note: section 36 of the *Acts Interpretation Act 1954* defines a business day to be a day that is not—

(a) a Saturday or Sunday; or

(b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done.

Section 440ZA Operating power boat engine at premises

This section is based on section 6ZF (Operating power boat engine at premises) of the *Environmental Protection Regulation 1998*.

This section provides specific noise standards that apply to operating a power boat engine at premises. Specified noise levels must be complied with during nominated hours.

To remove any doubt, the "premises" in this section includes a driveway or a backyard.

Note: section 36 of the *Acts Interpretation Act 1954* defines a business day to be a day that is not—

(a) a Saturday or Sunday; or

(b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done.

Section 440ZB Blasting

This section is based on section 6I (Blasting noise exclusion) of the *Environmental Protection Regulation 1998*.

The explanatory notes for the *Environmental Protection Amendment Regulation (No.2) 1999* stated that certain noise from blasting does not constitute unlawful environmental nuisance and an abatement notice can not be issued if noise meets the criteria specified. The exclusion was not limited to noise being heard at an affected building, so reference to an affected building in the provision is being removed.

Section 6I is currently an exclusion from environmental nuisance under the *Environmental Protection Regulation 1998* if the specified criteria are met. However, these are now specific noise standards under the Act and it is an offence if the criteria are breached.

This will provide more flexibility to resolve complaints about these matters. Currently if the levels are exceeded, the general emission criteria and noise emission criteria are considered in deciding whether to issue a direction notice. Under the new arrangements, an on-the-spot fine or direction notice could be issued if the criteria were exceeded. In addition, a direction notice could also be issued if the noise meets the criteria but still causes an environmental nuisance after considering the general emission criteria and noise emission criteria.

Section 440ZC Outdoor shooting ranges

This section is based on section 6J (Outdoor shooting range noise exclusion) of the *Environmental Protection Regulation 1998*.

The explanatory notes for the *Environmental Protection Amendment Regulation (No.2) 1999* stated that certain noise from outdoor shooting ranges does not constitute unlawful environmental nuisance and an abatement notice can not be issued if noise meets the criteria specified. The exclusion was not limited to noise being heard at an affected building, so reference to an affected building in the provision is being removed.

Section 6J is currently an exclusion from environmental nuisance under the *Environmental Protection Regulation 1998* if the specified criteria are met.

However, these are now specific noise standards under the Act and it is an offence if the criteria are breached.

This will provide more flexibility to resolve complaints about these matters. Currently if the levels are exceeded, the general emission criteria and noise emission criteria are considered in deciding whether to issue a direction notice. Under the new arrangements, an on-the-spot fine or direction notice could be issued if the criteria were exceeded. In addition, a direction notice could also be issued if the noise meets the criteria but still causes an environmental nuisance after considering the general emission criteria and noise emission criteria.

Part 3C Offences relating to water contamination

This part is based on sections 31 and 32 of the *Environmental Protection (Water) Policy 1997.* Those sections established offences for release of certain things into a roadside gutter, stormwater drain or water and an offence for build-up of sediment in a roadside gutter, stormwater drain or water. The responsibility for enforcement of minor water pollution matters described by sections 31 and 32 of the *Environmental Protection (Water) Policy 1997* is being devolved to local governments under the new Environmental Protection Regulation.

Section 440ZD Definitions for pt 3C

This section defines certain terms for the purposes of the water contamination provisions.

Section 440ZE Meaning of *deposits* for pt 3C

This section expands the definition of 'deposits' from its meaning in sections 31 and 32 of the *Environmental Protection (Water) Policy 1997*.

These offences were reliant on certain substances being deposited or released. "Deposit" was defined as including drop, leave, place or throw. The existing offences do not cover the potential for certain practices which result in contaminants washing or otherwise escaping to a roadside gutter, stormwater drain or water.

Site disturbance (such as land shaping and earthworks) during the construction phase of land development may result in significant amounts of sediment contaminating waters, if best practice erosion, sediment and drainage control measures are not implemented. Best practice source control starts with clearing only those lands that must be disturbed during the building works, providing barriers around areas where the vegetation is not to be disturbed, and diverting clean stormwater away from disturbed areas.

In this case the sediment itself is not deposited or released into the gutter etc, or deposited in a place where it could be expected to move or be washed into a gutter etc. It is the act of being responsible for poor building and construction site management that then results in foreseeable and preventable run-off of sediment-laden water.

The definition of "deposits" is being amended to include an act or omission that results in the release of a contaminant. This ensures that where measures were not taken to prevent the potential release of a contaminant according to current recommended or industry best practice, but there was no act of depositing or leaving the contaminant, that this is also an offence.

The EPA has released the **EPA Best Practice Urban Stormwater Management - Erosion and Sediment Control** Guideline and has provided guidance in other documents on its website, as have a number of local governments and engineering and professional bodies. It may be a defence if compliance with the EPA's guidelines or an equivalent guideline or standard can be demonstrated.

The expansion of the definition is also intended to address the comments of Howell DCJ in his judgement in the matter of *Brown v. Walsh* [2003] QDC 027 Howell DCJ 18/02/2003 (delivered ex tempore) about the definition of "leaving".

Section 440ZF Prescribed water contaminants

This section states that a regulation may prescribe a contaminant for this part. A new schedule is being inserted into the new Environmental Protection Regulation which will list these contaminants. This list will be similar to the one published in the *Regulatory Impact Statement and draft Public Benefit Test for the Review of the Environmental Protection Regulation* published by the EPA in February 2008.

Section 440ZG Depositing prescribed water contaminants in waters and related matters

This section is based on sections 31 and 32 of the *Environmental Protection (Water) Policy 1997*. The two sections have been combined into one for ease of reference.

The intent of these provisions was to prohibit in certain circumstances the deposit or release of certain things into a roadside gutter, stormwater drain or water, or in a place where they could reasonably be expected to move or be washed into a roadside gutter, stormwater drain or water.

These provisions were primarily intended for small-scale polluters. They have more often been used to issue on-the-spot fines for breaches by industry, including sediment pollution from poor building site management practices (particularly lack of erosion and drainage control).

Section 31 had a maximum penalty of 40 penalty units and section 32 had a maximum penalty of 20 penalty units. The penalties for breaching these provisions have not increased since the laws were first introduced. The low fines have not been a successful deterrent. The cost of the on-the-spot fine must be higher than the cost of complying to be effective.

In addition, the penalties of these offences in the *Environmental Protection (Water) Policy 1997* are significantly lower than for equivalent offences in other jurisdictions.

Under section 120 of the *Protection of the Environment Operations Act 1997* (NSW) a person who pollutes any waters is guilty of an offence with a maximum penalty for a corporation of $1,000,000 and for an individual $250,000 (section 123). On-the-spot fines for section 120 are $750 for an individual and $1500 for a corporation (*Protection of the Environment Operations (Penalty Notices) Regulation 2004* (NSW)).

Increased penalties are justified because there is a well documented overall decline in the health of many of our waterways including those draining to the Great Barrier Reef lagoon and in South East Queensland. This is due largely to increased run-off carrying the pollutants associated with expanded residential areas, roads, and industrial, commercial and recreational activities. Control of sediment from land development, especially during seasonal summer rainfall, represents the single most cost-effective opportunity to arrest the decline in the health of our waterways. The cost of not using effective land management methods is

passed onto purchasers and future ratepayers (in on-going cleanup and maintenance).

To ensure an appropriate penalty for the offence and to ensure a sufficient deterrent, the maximum penalties are being increased to 835 penalty units for wilful contravention of this provision and 300 penalty units for contravention of this provision.

On-the-spot fines for this offence will be increased to 20 penalty units for a corporation and 10 penalty units for an individual.

Sections 31(3) and 32(2) of the *Environmental Protection (Water) Policy 1997* provided that a person does not commit an offence if the deposit or release was authorised in certain ways, and that a person charged with offences created by these sections must prove certain matters in their defence. The list of matters in the existing sections 31 and 32 was more restricted than the similarly drafted defence provisions in the *Environmental Protection Act 1994*. Consequently, the defences specific to this offence have been removed and section 493A (When environmental harm or related acts are unlawful) will apply.

The term "stormwater" or "stormwater runoff" covers runoff from both urban and rural sources.

Part 3D Offences relating to releases from boats into non-coastal waters

This part is based on sections 28, 29 and 30 of the *Environmental Protection (Water) Policy 1997*. These sections established offences for release of certain substances, sewage and rubbish from ships into non-coastal waters.

The intent of sections 28-30 was to ensure that offences for releases into non-coastal waters from ships complemented similar offences under the *Transport Operations (Marine Pollution) Act 1995* for releases to coastal waters.

The penalties under these sections in the *Environmental Protection (Water) Policy 1997* are significantly lower than those for equivalent offences in

coastal waters under *Transport Operations (Marine Pollution) Act 1995*. Under the *Environmental Protection (Water) Policy 1997* a maximum penalty of 40 penalty units is prescribed for releasing oil, a noxious liquid substance or a harmful substance (section 28), and also for releasing sewage from a ship required to have a sewage holding tank installed into non-coastal waters (section 29). Penalties of 20 penalty units are prescribed for releasing sewage from a ship into non-coastal waters at a place of mooring, docking or berthing ships (section 29) and for disposing rubbish from a ship into non-coastal waters (section 30).

These sections are to be transferred to this new part of the *Environmental Protection Act 1994* with an increase in penalty to:

- recognise the seriousness of the offence as reflected in corresponding offences in *Transport Operations (Marine Pollution) Act 1995*;
- ensure clear differentiation from those offences for environmental harm (section 437-438 of the *Environmental Protection Act 1994*, with a maximum penalty range from 835 to 4165 penalty units); and
- align with the changes proposed to the offences relating to water contamination.

Section 440ZH Definitions for pt 3D

This section defines certain terms for the purposes of the offences relating to releases from boats into non-coastal waters.

To clarify that the *Transport Operations (Marine Pollution) Act 1995* applies in coastal waters and these *Environmental Protection Act 1994* provisions apply where the *Transport Operations (Marine Pollution) Act 1995* does not apply (i.e. in non-coastal waters), a definition of "non-coastal waters" is being included, meaning waters other than coastal waters. This includes freshwater impoundments. "Coastal waters" has the same meaning as under the *Transport Operations (Marine Pollution) Act 1995*.

Section 440ZI Release of certain substances from boats into non-coastal waters

This section is based on section 28 of the *Environmental Protection (Water) Policy 1997*. Section 28 established an offence for releasing certain substances (oil, noxious liquid substances or harmful substances) from a ship into non-coastal waters.

The *Transport Operations (Marine Pollution) Act 1995* provides equivalent offences for discharge of oil from a ship into coastal waters (section 26), discharge of noxious liquid substances from a ship into coastal waters (section 35) and discharge of a harmful substance from a ship into coastal waters (section 42). Each section attracts a maximum penalty of 3500 penalty units.

Consequently, the penalty for a breach of this section has been increased to a maximum penalty of 835 penalty units where the offence is a wilful contravention and 300 penalty units where the offence is a contravention.

The defences are consistent with the appropriate defences in the *Transport Operations (Marine Pollution) Act 1995*.

The term "ship" has been replaced with the term "boat" to be consistent with the types of vessels that operate in non-coastal waters.

Section 440ZJ Release of sewage from boats into non-coastal waters

This section is based on section 29 of the *Environmental Protection (Water) Policy 1997*. Section 29 established an offence for releasing sewage from a ship into non-coastal waters.

The *Transport Operations (Marine Pollution) Act 1995* provides equivalent offences for discharge of untreated sewage (section 47) and discharge of treated sewage (section 48) from ships into nil discharge waters. Each section attracts a maximum penalty of 850 penalty units.

Consequently, the penalty for a breach of this section has been increased to a maximum penalty of 835 penalty units where the offence is a wilful contravention and 300 penalty units where the offence is a contravention.

The defences are consistent with the appropriate defences in the *Transport Operations (Marine Pollution) Act 1995*.

The term "ship" has been replaced with the term "boat" to be consistent with the types of vessels that operate in non-coastal waters.

Section 440ZK Depositing rubbish from boats into non-coastal waters

This section is based on section 30 of the *Environmental Protection (Water) Policy 1997*. Section 30 established an offence for releasing rubbish from a ship into non-coastal waters.

The *Transport Operations (Marine Pollution) Act 1995* provides equivalent offences for disposal of garbage into coastal waters with a maximum penalty of 3500 penalty units.

Consequently, the penalty for a breach of this section has been increased to a maximum penalty of 835 penalty units where the offence is a wilful contravention and 300 penalty units where the offence is a contravention.

The defences are consistent with the appropriate defences in the *Transport Operations (Marine Pollution) Act 1995*.

The term "ship" has been replaced with the term "boat" to be consistent with the types of vessels that operate in non-coastal waters.

Part 3E Offences relating to air contamination

Section 440ZL Sale of solid fuel-burning equipment for use in residential premises and related matters

This section is based on section 21 of the *Environmental Protection (Air) Policy 1997*. Section 21 provided for an offence for sale of solid fuel-burning equipment for domestic use in certain circumstances.

Section 30 of the *Environmental Protection (Air) Policy 1997* provided that a contravention of section 21 was a class 2 offence under section 441 of the *Environmental Protection Act 1994*. Under section 441, class 2 offences attracted a minimum penalty of 835 penalty units for wilful contravention and 165 penalty units for a contravention.

In order to maintain consistency with the offences transferred from the *Environmental Protection (Water) Policy 1997* and the *Environmental Protection Regulation 1998*, the maximum penalty for a contravention has been increased from 165 penalty units to 300 penalty units.

Section 440ZM Permitted concentration of sulphur in liquid fuel for use in stationary fuel burning equipment

This section is based on section 23 of the *Environmental Protection (Air) Policy 1997*. Section 23 dealt with permitted concentrations of sulphur and lead in liquid fuel for use in stationary fuel burning equipment. The

provisions relating to the permitted concentrations of sulphur have been replicated in this section. The lead concentration requirements have not been replicated as the sale of lead in fuel oil has now been eliminated by the phase out of leaded petrol in Australia.

Section 30 of the *Environmental Protection (Air) Policy 1997* provides that a contravention of section 23 is a class 2 offence under section 441 of the *Environmental Protection Act 1994*. Under section 441, class 2 offences attract a maximum penalty of 835 penalty units for wilful contravention and 165 penalty units for a contravention.

In order to maintain consistency with the offences transferred from the *Environmental Protection (Water) Policy 1997* and the *Environmental Protection Regulation 1998*, the maximum penalty for a contravention is being increased from 165 penalty units to 300 penalty units.

Part 3F Offences relating to fuel standards

This part inserts the fuel standards from *Environmental Protection Regulation 1998* with some amendments to make them consistent with the *Fuel Quality Standards Act 2000* (Cth), *Fuel Quality Standards Regulation 2001* (Cth) and *Fuel Standard Determinations 2001* (Cth).

The *Environmental Protection Amendment Regulation (No. 3) 2000* inserted Part 3C (Quality standards for petrol and diesel) into the *Environmental Protection Regulation 1998*. The Explanatory Notes for the *Environmental Protection Amendment Regulation (No. 3) 2000* detailed the policy reasons for why the benefits of the reduction of emissions of particulates, lead and hydrocarbons into Queensland's air environment were expected to far outweigh any potential costs to the community.

These provisions were intended to fill a gap in the Commonwealth *Fuel Quality Standards Act 2000*, which does not extend to unincorporated partnerships and individuals.

The *Environmental Protection Regulation 1998* contained fuel quality standards, the breach of which had a maximum penalty of 165 penalty units. This is in excess of the recommended maximum penalty in regulations by the Scrutiny of Legislation Committee of 20 penalty units,

consequently, these provisions are being updated and transferred to the *Environmental Protection Act 1994*.

Division 1 Preliminary

Section 440ZN Purpose of pt 3F

This section is based on section 38ZI of the *Environmental Protection Regulation 1998*.

Section 38ZI states that the purpose is to regulate quality standards for petrol and diesel to reduce emissions to Queensland's air environment.

The purpose is being extended beyond petrol and diesel to include other fuels such as biodiesel and autogas.

This is to be consistent with the *Fuel Quality Standards Act 2000* (Cwth).

Section 440ZO Definitions for pt 3F

This section is based on section 38ZJ of the *Environmental Protection Regulation 1998*.

This section provides definitions for the terms used in this part, to provide clarity of meaning. Terms defined for the purpose of this part include "ASTM", "distribute", "import", "low volatility zone", "manufacture", "Reid vapour pressure", and "summer period".

Division 2 Offences

Section 440ZP Non-application of div 2

This section clarifies that the offences do not apply if an exemption has been given.

Section 440ZQ Supply of fuel that does not comply with Commonwealth fuel standard determinations

This section is based on sections 38ZK to 38ZM of the *Environmental Protection Regulation 1998*.

Section 38ZK stated the permitted concentration of ethers and benzene. Sections 38ZL and 38ZM stated the permitted concentrations of sulphur and lead in petrol and diesel.

Section 38ZK was intended to apply the volumetric average requirements on a rolling basis. That is, the six month volumetric average would have to be met for January to June, February to July, March to August and so on. Similarly, the six batch volumetric average would have to be met for batches 1 to 6, 2 to 7, 3 to 8, and so on.

These sections also provided an exception from sulphur and lead standards for high sulphur marine diesel used in boats and for high lead petrol used in motor racing and aircrafts.

These sections are being updated to harmonise with the Commonwealth Fuel Standard parameters for petrol, autogas, diesel and biodiesel.

In relation to petrol used in aircraft, the Commonwealth Determinations for Petrol excludes avgas. There is therefore no reason to also exclude it in the *Environmental Protection Act 1994*.

In relation to diesel used in marine engines, the Commonwealth Determination for Diesel now covers this issue. Under the Determination, automotive diesel means diesel suitable for use in motor vehicles including automobiles, trucks, aeroplanes and motor boats.

In relation to motor racing, the exception for lead in petrol is being kept.

Commonwealth Fuel Standards do not include provisions for Ethyl tert-butyl ether (ETBE) and tertiary-amyl methyl ether (TAME) because they are not listed on the Australian Inventory of Chemical Substances (AICS). Subsequently, until these chemicals are notified and assessed by National Industrial Chemical, Notification and Assessment Scheme (NICNAS) they are not permitted to be used in Australia. This includes their use in domestically produced and imported petrol blends. Given this ban, it is not necessary to specifically regulate for ETBE and TAME in Qld.

Commonwealth Fuel Standards do regulate for methyl tertiary-butyl ether (MTBE) and Benzene.

Consequently, sections 38ZK, 38ZL and 38ZM of the *Environmental Protection Regulation 1998* are not being replicated in the *Environmental Protection Act 1994*.

Section 440ZR Permitted Reid vapour pressure—fuel with particular ethanol content

This section is based on section 38ZO of the *Environmental Protection Regulation 1998*. Section 38ZO stated the permitted Reid Vapour pressure after 15 November 2002.

This provision is being reproduced from the *Environmental Protection Regulation 1998* into the *Environmental Protection Act 1994* because it is not covered by any relevant Commonwealth legislation.

Vapour pressure is important for managing volatile organic compounds which are precursors in smog formation and contribute to ozone depletion.

Section 440ZS Permitted Reid vapour pressure—other fuel

This section is based on section 38ZO of the *Environmental Protection Regulation 1998*. Section 38ZO stated the permitted Reid Vapour pressure after 15 November 2002.

This provision is being reproduced from the *Environmental Protection Regulation 1998* into the *Environmental Protection Act 1994* because it is not covered by any relevant Commonwealth legislation.

Vapour pressure is important for managing volatile organic compounds which are precursors in smog formation and contribute to ozone depletion.

Division 3 Exemptions

This division is based on section 38ZP to 38ZT of the *Environmental Protection Regulation 1998*. These sections outlined a process for exemptions from existing provisions on the basis of a number of 'state interests'.

These provisions have been reproduced in the *Environmental Protection Act 1994* to keep current exemptions.

Section 440ZT Making applications

This section is based on section 38ZP of the *Environmental Protection Regulation 1998*. This section sets out the application process for an exemption.

Section 440ZU Request for further information

This section is based on section 38ZQ of the *Environmental Protection Regulation 1998*. This section sets out the procedure for the chief executive to request further information from the applicant for an exemption.

Section 440ZV Deciding applications

This section is based on section 38ZR of the *Environmental Protection Regulation 1998*. This section sets out the procedure for the chief executive to decide the application for an exemption.

Section 38ZR of the *Environmental Protection Regulation 1998* specified the process to be followed in deciding applications. It gives the chief executive the power to exempt a person from the need to comply with a provision of the regulation where this is considered necessary to avoid significant supply problems or market distortions, provided certain criteria are met.

Section 440ZW Giving exemptions

This section is based on section 38ZS of the *Environmental Protection Regulation 1998*. This section sets the process by which the chief executive must notify the applicant of the chief executive's decision to grant the exemption.

Section 440ZX Refusing exemptions

This section is based on section 38ZT of the *Environmental Protection Regulation 1998*. This section sets the process by which the chief executive must notify the applicant of the chief executive's decision to refuse the exemption.

Division 4 Record keeping

Section 440ZY Record keeping requirements

This section is based on section 38ZU of the *Environmental Protection Regulation 1998*. This section applies to a person who manufactures or imports fuel that is not subject to Commonwealth Fuel Quality Standards

and also distributes that fuel. This person must keep records in accordance with sections 24, 25, 26 and 28 of the *Fuel Quality Standards Regulations 2001* (Cwth).

Section 38ZU specified the record keeping requirements for a person who manufactured petrol or diesel, or imported petrol or diesel into Queensland after 30 June 2000 and distributed it in Queensland. The section did not set out to specify any particular method for obtaining the information to be recorded. The method for obtaining the information would be a matter for the person to determine, bearing in mind the individual circumstances, but could include—

- measurement using an appropriate method;
- reliance on test certificates supplied by the original manufacturers;
- blending calculations based on test certificates supplied by the original manufacturers and appropriate methods of measuring volumes; or
- quality assurance statements regarding the non-addition of specified materials.

This is intended to ensure that sufficient information is kept so that compliance with all quality requirements of the regulation can be checked.

New record keeping requirements are included to be consistent with those that apply to incorporated entities under Part 6 of the *Fuel Quality Standards Regulation 2001* (Cwth)

Reid Vapour Pressure requirements are being reproduced in the *Environmental Protection Act 1994* as these are not covered by the Commonwealth Fuel Standard.

The length of time records are to be kept is not being reproduced in the *Environmental Protection Act 1994* because this is covered in Commonwealth provisions on record keeping.

The maximum penalty will remain at 50 penalty units.

Clause 42 Omission of s 441 (Offences of contravention of environmental protection policy or regulation)

This clause omits section 441, as this offence will no longer be required.

Section 441 provides for different classes of offences for contravention of provisions of an environmental protection policy. Currently, the only

environmental protection policy which declares that an offence is an offence of that class is the *Environmental Protection (Air) Policy 1997*. These sections have been moved to the *Environmental Protection Act 1994*. Consequently, this section is no longer needed.

The remade environmental protection policies will not have any offence provisions contained within them, but will give guidance to the regulatory standards set by development approvals, environmental authorities, and other tools in the *Environmental Protection Act 1994*.

Most of the offences currently in the *Environmental Protection Regulation 1998* are being transferred to the *Environmental Protection Act 1994*. The remade Environmental Protection Regulation will not refer to classes of offences, but will have specific penalties for those offences which are left in the new Environmental Protection Regulation.

Clause 43 Amendment of s 452 (Entry of place-general)

This clause amends section 452 of the *Environmental Protection Act 1994* consequential to the introduction of the clean-up notices and the amendment to section 458 of the *Environmental Protection Act 1994*.

Clause 44 Amendment of s 453 (Entry of land – search, test, sample, etc, for release of contaminant)

This clause amends section 453 as a consequence of the amendment of the definition of "building" to include part of the building.

Clause 45 Amendment of s 454 (Entry of land – preliminary investigation)

This clause amends section 454 as a consequence of the amendment of the definition of "building" to include part of the building.

Clause 46 Amendment of s 455 (Entry of land for access)

This clause amends section 455 as a consequence of the amendment of the definition of "building" to include part of the building.

Clause 47 Amendment of s 458 (Order to enter land to conduct investigation or conduct work)

This clause amends section 458 of the *Environmental Protection Act 1994* to ensure that authorised officers can obtain a court order to enable them to carry out the functions necessary to investigate or enforce clean-up notices, or to carry out the works under the new section 363K of the *Environmental Protection Act 1994* (Taking action in place of recipient).

Clause 48 Replacement of s 478 (Failure to comply with authorised person's direction in emergency)

This clause amends section 478 of the *Environmental Protection Act 1994* to increase the penalty commensurate with the penalty for failure to comply with a clean-up notice. Section 467 of the *Environmental Protection Act 1994* effectively means that an oral clean-up direction can be given by virtue of an emergency direction. Consequently, the penalty for failure to comply with an emergency direction should be the same as the penalty for failure to comply with a clean-up notice.

The maximum penalties for the clean-up notice are designed to be commensurate with the current NSW penalties in the *Protection of the Environment Operations Act 1997* for failure to comply with their clean-up notice.

Current NSW maximum penalties are:

- for a corporation:

    - $1,000,000

    + $120,000 for each day the offence continues.

- for an individual:

    - $250,000

    + $60 000 for each day the offence continues.

The proposed maximum penalties of 4000 penalty units ($300,000) for a corporation and 2000 penalty units ($150,000) for an individual, are approaching this range, but are still less than the NSW penalties.

The section has also been redrafted to reflect the fact that the person must comply with the general environmental duty in complying with the direction. This section is based on section 479 of the *Environmental Protection Act 1994*.

A reasonable excuse must be reasonable in the circumstances of the actions required to be taken in the clean-up notice. For example, a reasonable excuse may be that the required actions cannot physically be done or that to undertake the works in the way specified would cause more environmental harm than the positive benefits from the required actions. It would not be a reasonable excuse to claim lack of funds to perform the required actions, unless every avenue to obtain the funds has been exhausted. In such circumstances, the person should have taken all reasonable and practicable precautions to prevent or minimise environmental harm being caused, the risk of death or injury to humans and animals, and loss or damage to property.

The notice is likely to have a number of actions that must be taken and different times by when those actions must be done. Each requirement must be complied with by the time stated in the notice. It is not a reasonable excuse to fail to comply with one requirement merely because another requirement has not yet fallen due. The administering authority may enforce the notice if any one of those actions has not been taken in time, even if the time by which other actions must be taken has not yet expired.

Clause 49 Replacement of s 482 (Obstruction of authorised persons)

This clause amends section 482 of the *Environmental Protection Act 1994* to ensure that agents or contractors of an authorised person who perform work under section 363K of the *Environmental Protection Act 1994* (Taking action in place of recipient) are covered under this offence as if they are authorised officers. This means that the offence of obstructing an authorised person in the exercise of their power will also include obstructing people acting under an authorised persons' direction.

This clause also increases the penalty from 100 penalty units to 165 penalty units to facilitate administration of the legislation via the authorised officer's powers. It is imperative that these powers can be relied upon to ensure the administrative authority's statutory responsibilities can be reasonably discharged. The current maximum penalty of 100 penalty units is not considered severe enough to reflect the seriousness of the offence.

An increase in the maximum penalty will reflect the maximum penalties outlined in other legislation for similar offences. For example:

- The maximum penalty for obstruction of an officer under the *Nature Conservation Act 1992* is 165 penalty units or 1 year imprisonment (section 155).
- Under section 340(1)(e) of the *Criminal Code Act 1899*, the assault of a person engaged in the execution of a duty imposed upon them by law attracts a maximum penalty of 7 years imprisonment.

The maximum penalty set out under the *Criminal Code* clearly indicates that the legislature considers this type of behaviour as serious.

An increase in the maximum penalty will provide greater deterrent value in assisting to prevent this type of behaviour, and a penalty similar to that in the *Nature Conservation Act 1992* is appropriate.

Clause 50 Amendment of s 486 (Authorised person to give notice of seizure or damage)

Consequential to the new clean-up provisions, this clause amends section 486 of the *Environmental Protection Act 1994* to provide that an authorised person must give notice of seizure or damage in exercising their clean-up powers under the new section 363K of the *Environmental Protection Act 1994* (Taking action in place of recipient).

Clause 51 Amendment of s 487 (Compensation)

Consequential to the new clean-up provisions, this clause amends section 487 of the *Environmental Protection Act 1994* to ensure that compensation is recovered from the appropriate entity. Sub-section (2)(a) has been amended so that actions authorised by a local government under section 363K of the *Environmental Protection Act 1994* are recovered from the local government, not just those authorised under the emergency powers.

This clause also amends section 487 of the *Environmental Protection Act 1994* to exclude prescribed persons from those who can claim compensation. This is because the purpose of the clean-up notice is to ensure that prescribed persons pay the costs of cleaning up contamination, not the State.

This reflects the provisions in the NSW *Protection of the Environment Operations Act 1997*.

Clause 52 Amendment of s 488 (Administering authority to reimburse costs and expenses incurred)

This clause amends section 488 of the *Environmental Protection Act 1994* to exclude prescribed persons from those who can claim the costs and expenses of complying with an emergency direction from the administering authority. This is because the purpose of the clean-up provisions is to ensure that prescribed persons pay the costs of cleaning up contamination, not the State.

Clause 53 Replacement of s 491 (Special evidentiary provision – environmental nuisance)

This clause replaces section 491 of the *Environmental Protection Act 1994* to combine both the old section 491 and the evidentiary provisions for Court proceedings in relation to environmental nuisance from the *Environmental Protection Regulation 1998* (sections 6ZT and 6ZM).

Section 491 of the *Environmental Protection Act 1994* relates to the offence for causing nuisance in section 440 of the Act.

Section 6ZT of the *Environmental Protection Regulation 1998* related to failing to comply with an abatement notice and causing a noise offence.

Section 6ZM of the *Environmental Protection Regulation 1998* related to proceedings against noise offences that involved audible noise being heard at an affected building. The noise did not need to be measured.

The *Environmental Protection Regulation 1998* evidentiary provisions will continue to apply to the offences for the relevant provisions as transferred to the Act (i.e. sections 363E and 440Q).

The definition of emission in section 491 has been amended to be consistent with the section 15(a) of the *Environmental Protection Act 1994*.

This clause also inserts a new section 491A into the *Environmental Protection Act 1994*. This section is based on section 6ZO of the *Environmental Protection Regulation 1998* (No requirement to measure audible noise).

This section applies to Court proceedings in relation to when noise offences involve clearly audible noise.

Evidentiary provisions applying to audible noise are clarified. The rate of audible noise does not need to be established.

The provisions about the measurement of noise which are in the *Environmental Protection Regulation 1998* are being repeated in the new Environmental Protection Regulation. These provide guidance to regulators about the acceptable method of measuring noise.

Although noise does not have to be measured, if it is measured, it may be measured in accordance with the procedures prescribed by regulation.

Clause 54 Insertion of new ch 10, pt 2A

Part 2A Unlawfulness of particular acts

Section 493A When environmental harm or related acts are unlawful

This section inserts the relocated section 436 of the *Environmental Protection Act 1994*, which is being relocated as it will now be used more broadly than just the environmental harm offences.

Clause 55 Amendment of s 505 (Restraint of contraventions of Act etc)

This clause amends the orders that a court is empowered to make when ordering a restraint order. This is to ensure that costs can be recovered, whether the administering authority orders the works, or the court orders the works.

Clause 56 Amendment of s 514 (Devolution Powers)

The *Environmental Protection Act 1994* currently allows the administration and enforcement of the Act for an environmentally relevant activity below the high or low watermark forming the boundary of the local government's area to be devolved to local government.

These provisions have been expanded so that the administration and enforcement of all devolved matters can occur below the high or low watermark forming the boundary of the local government's area

This is because the administration and enforcement of the Act for environmental nuisance, noise offences and minor water pollution matters

(not necessarily associated with environmentally relevant activities) are being devolved to local governments. Local governments will need powers below the high or low watermark forming the boundary of the local government's area to fully administer these responsibilities.

Clause 57 Amendment of s 520 (Dissatisfied persons)

This clause amends the definition of a dissatisfied person so that the issuing of a clean-up or cost recovery notice will be subject to an appeal to the Planning and Environment Court.

If the amount specified in the cost recovery notice is unpaid after 30 days it may be recovered as a debt in a court of competent jurisdiction.

Under the *Environmental Protection Regulation 1998* rejecting a nuisance complaint and a decision of the administering authority to give an abatement notice are original decisions under the Act. This allows review and appeal provisions under Chapter 11, Part 3 of the Act to apply.

These provisions will continue to apply to the new direction notice and to the relevant provisions that have been transferred to the *Environmental Protection Act 1994*.

Clause 58 Amendment of s 521 (Procedure for review)

This clause amends section 521 of the *Environmental Protection Act 1994* so that the recipient can appeal directly to a court for review of the decision to issue a clean-up notice, and does not have to go through the review process first.

It is envisaged that the clean-up notice will be issued at a senior level and internal review decisions must not be made by the person who made the original decision or a person in a less senior office than the person who made the original decision. Additionally, the review decision must be made by someone who has some knowledge of the issues and is unbiased in their views. This makes it very difficult for an internal review to be done when the original decision is made at a senior level.

Clause 59 Insertion of new s 535A (Stay of decision to issue a clean-up notice)

This clause inserts a new section 535A into the *Environmental Protection Act 1994* to include criteria which the court must have regard to in deciding whether to grant a stay of the operation of a decision for a clean-up notice.

In order to be effective, the actions stated in the clean-up notice need to be taken in a timely manner. Courts have traditionally only considered whether the appeal is frivolous or vexatious in deciding whether to grant a stay of the notice. As the appeal may take years to resolve, this would cause the clean-up notice to be ineffective and recipients of the notice could frustrate the operation of the notice by seeking a stay where this is not appropriate given the level of possible damage to the environment that could occur.

Consequently, while the court's discretion has not been fettered, the criteria in section 535A must be considered by the court in making its decision. As the applicant for the stay must prove that it is appropriate for the stay to be granted, the applicant must also lead evidence of the matters that the court must consider in order to be granted the stay.

Clause 60 Amendment of s 540 (Required registers)

Consequential to the new clean-up and cost recovery provisions, this clause amends what registers are required to be kept by the administering authority so that the register will also include details of these notices.

Clause 61 Amendment of s 575 (Entry orders)

This clause amends section 575 as a consequence of the amendment of the definition of "building" to include part of the building.

Clause 62 Insertion of new ch 12, pt 4B (Protocols and standards)

This clause inserts new sections 579B and 579C which define the terms "protocol" and "prescribed standard" for the *Environmental Protection Act 1994* and subordinate legislation.

Protocols are used by the air offences and the environmental management decisions which have been transferred from the environmental protection policies to the *Environmental Protection Act 1994* and the new

Environmental Protection Regulation respectively. The protocols must be used in a particular order, which is specified in section 579B(2).

As Australian Standards and other standards are updated and replaced from time-to-time and the *Acts Interpretation Act 1954* does not apply to these standards, the standards numbers and titles are being specified in the new Environmental Protection Regulation, which can be more easily updated as cross-references change.

Note: ANZECC have only published one protocol, the 'National Water Quality Management Strategy', which incorporates the 'Australia and New Zealand guidelines for fresh and marine water quality—2000'.

Clause 63 Amendment of s 580 (Regulation-making power)

This clause amends section 580 to ensure that the power to make a regulation about the fees includes the power to make fees by way of the aggregate environmental score.

Clause 64 Amendment of s 593 (Transitional authority taken to be non-code compliant)

This clause amends section 593 to be consistent with the new Environmental Protection Regulation.

The classification of environmentally relevant activities as level 1 or level 2 is being removed, except for mining and petroleum activities.

Mining and petroleum activities will continue to maintain level 1/level 2 classification system. The approval system for mining and petroleum activities is different to other environmentally relevant activities as these activities are not included in the integrated development assessment system under the *Integrated Planning Act 1997*. The level 1/level 2 classification continues to have relevance as it indicates matters such as whether an activity operates under a code of environmental compliance or whether an environmental impact statement is required

Clause 65 Insertion of new ch 13, pt 10

This clause inserts the transitional provisions for this Bill.

Section 645 Accrediting entity for s 440ZL

This section ensures that certificates issued by the Energy Information Centre in South Australia will still be accredited. The Energy Information Centre in South Australia is no longer an accrediting body however was previously an accrediting body. Based on its previous accreditation work, this reference is needed for equipment that was previously accredited by this body.

Clause 66 Insertion of new sch 1AA (Exclusions relating to environmental nuisance or environmental harm)

Note: this schedule is being renumbered to schedule 1 as a result of clause 70 of this Bill.

Part 1 Environmental nuisance excluded from ss 440 and 440Q

Part 1 of this schedule sets out the matters which are excluded from the operation of the environmental nuisance provisions (i.e. the offences in sections 440 and 440Q) in the *Environmental Protection Act 1994*. These exclusions do not extend to planning decisions and administering authorities can still condition proponents in a development approval or environmental approval to manage the environmental nuisance caused by these matters. Indeed, most exclusions in this part are because the environmental nuisance is better managed in another way, for example, via appropriate conditioning of development approvals.

1. Safety and transport noise

Audible traffic signal noise was excluded by section 6H of the *Environmental Protection Regulation 1998*. Queensland Transport has advised that audible traffic signal noise (including noise from railway crossing bells and any transport related safety warning horns) and audible safety signal noise (including whistles, horns, bells and gongs from ships for manoeuvring especially during periods of reduced visibility) should be excluded as these noises are necessary for the safety of transport. Queensland Transport also advised that shipping noise, aircraft noise, busway noise and rail noise should be excluded because it is unavoidable

and best managed by the appropriate location of ports, airports, busways and rail infrastructure. The Department of Main Roads sought similar exemptions for roads for the same reasons.

2. Government activities and public infrastructure

Local governments requested an exemption for 'out of hours' maintenance, repair and emergency works associated with essential community infrastructure or facilities such as roads, bridges, sewerage and water supply (while still requiring compliance with the general environmental duty), to reflect matters such as public and worker safety and the beneficial nature of public works.

People performing a function under the *Disaster Management Act 2003* are exempted to the extent of conflict with the *Environmental Protection Act 1994* by virtue of section 23 of the *Environmental Protection Act 1994*, but may need to take actions under that Act which are not in direct conflict with the *Environmental Protection Act 1994* but could cause environmental nuisance. In these circumstances, the *Disaster Management Act 2003* should prevail.

Note: the *Disaster Management Act 2003* exclusion includes State Emergency Service (SES) officers and local government officers.

Similarly, officers taking action to address a public health risk may cause an environmental nuisance, so the *Public Health Act 2005* should prevail.

If these Acts did not prevail, people acting under them would have limited flexibility or discretion to allow for once-off or emergency works to happen lawfully in some situations (e.g. local government after-hour emergency repairs).

3. Nuisance regulated by other laws

Some matters are not appropriate for regulation under nuisance provisions due to potential conflicts with other laws. The intent is to exclude the operation of the environmental nuisance provisions of the *Environmental Protection Act 1994* from applying to environmental nuisance matters that are authorised under other legislation or where other legislation provides jurisdiction for managing a nuisance matter.

Local governments may regulate environmental nuisance by their own local laws. For example, the Brisbane City Council has a permitting scheme to manage indoor venues and open-air events under their *Amplified Music Venues Local Law 2006* and *Entertainment Venues and Events Local Law 1999*. These local laws have their own offences and their own

enforcement tools. The *Environmental Protection Act 1994* should not apply to the noise emitted in these circumstances, whether the person is in compliance with the Brisbane City Council local law, or in contravention of it.

The *Police Powers and Responsibilities Act 2000* contains jurisdiction for managing amplified noise. The *Environmental Protection Act 1994* should not apply to the nuisance matter in these circumstances.

The *Workplace Health and Safety Act 1995* manages emissions at a workplace where the effects of that emission do not extend beyond the workplace, for the health and safety of the workers. For example, the *Workplace Health and Safety Act 1995* may require the use of vehicle beepers even though they may cause a nuisance. Equally, the *Workplace Health and Safety Act 1995* may require the use of personal protection equipment to manage the potential impact to human health caused by noise, dust or smoke. The *Environmental Protection Act 1994* should not apply to the nuisance matter in these circumstances.

Equally, management of risks to human health may be managed under the *Public Health Act 2005*. The *Environmental Protection Act 1994* should not apply to the nuisance matter in these circumstances.

The *Integrated Planning Act 1997* may authorise environmental nuisance through conditions of a development approval. The *Integrated Planning Act 1997* has its own tools and mechanisms for enforcement and that is the appropriate Act for enforcement in these circumstances, not the *Environmental Protection Act 1994*.

Fireworks are regulated under the *Explosives Act 1999* and fireworks displays are regulated by that Act. The *Environmental Protection Act 1994* should not apply to the nuisance matter in these circumstances.

Smoking cigarettes is regulated by the *Tobacco and Other Smoking Products Act 1998* and the *Environmental Protection Act 1994* should not apply to the nuisance matter in these circumstances.

Part 2 Exclusions from environmental harm and environmental nuisance

Part 2A of the *Environmental Protection Regulation 1998* contained certain exclusions for non-domestic animal noise (section 6G), and cooking odours (section 6K). If the relevant criteria were satisfied, emissions from these sources could not cause unlawful environmental nuisance and enforcement action could not be taken under the *Environmental Protection Regulation 1998*.

These exclusions are being continued in Part 2 of this schedule. Noise and odour will not constitute environmental nuisance under the *Environmental Protection Act 1994* if the relevant criteria are satisfied.

Non-domestic animal noise and cooking odours were excluded by sections 6G and 6K respectively of the *Environmental Protection Regulation 1998*. Feedback from local governments was that these exclusions should continue to apply.

The environmental nuisance provisions of this Act do not apply to noises made by animals from the wild such as wild frogs, wild crows or agricultural animals. A domestic animal is defined in the Macquarie dictionary as "living with man, tame".

Feedback from local governments included that the reference to class 10 buildings for cooking odours should be removed. An example of the cooking odours excluded would include a person who is operating a barbecue at their house.

Clause 67 Amendment of sch 1 (Original decisions)

Note: this schedule is being renumbered to schedule 2 as a result of clause 70 of this Bill.

This clause amends Part 2 (Original decisions for court appeals) of the Schedule to include reference to the decision to issue a direction notice, clean-up notice or cost recovery notice. This will mean that the decision to issue a direction notice, clean-up notice or cost recovery notice is appealable.

There will not be access to internal review of the decision for clean-up notices as it is envisaged that the clean-up notice will be issued at a senior level and internal review decisions must not be made by the person who made the original decision or a person in a less senior office than the person who made the original decision and does not apply to decisions made by the chief executive etc.

Clause 68 Amendment of sch 2 (Notifiable activities)

Note: this schedule is being renumbered to schedule 3 as a result of clause 70 of this Bill.

This clause amends Schedule 2 by deleting Item 10: Defence establishments or training areas - operating a defence establishment or a training area used for handling ammunition in a way that may have caused, or may cause, remnant unexploded ordnance.

There no longer exists a need for the *Environmental Protection Act 1994* to require land affected by unexploded ordnance (UXO) to be treated as a notifiable activity or for it to be recorded on the environmental management register. The EPA will still assess land affected by UXO and the public will still have knowledge of this constraint without UXO being included as contaminated land or a notifiable activity. This amendment will reflect the EPA's assessment process for UXO-affected land and avoid unnecessary confusion for some stakeholders.

UXO-affected land is identified by the Department of Defence and maps are provided to the EPA. The Commonwealth provides advice to the public via a website (http://www.defence.gov.au/uxo/) and the EPA provides a service to the public that enables them to query land to determine if it is contaminated or affected by UXO.

A Memorandum of Understanding with the Department of Defence establishes that the EPA will assess and determine the future management of this land. This is undertaken within the Integrated Development Assessment System in the *Integrated Planning Act 1997*.

When the contaminated land provisions were incorporated into the *Environmental Protection Act 1994* the treatment of UXO-affected land was incorporated within the overall category of contaminated land. There are certain provisions that have not been used where they apply to UXO. The contaminated land provisions in the *Environmental Protection Act 1994* require that a land owner must advise the EPA if they become aware of a notifiable activity or hazardous contaminant on land. The EPA then

must determine whether the land should be on the register. If the owner disagrees with this determination, the owner of the land can then undertake an investigation of the land to refute the EPA's assessment. Further site investigations may be required by the EPA and this could result in management actions to remediate the land being needed.

This process is not used for UXO-affected land. Because UXO is randomly distributed across areas formerly used for military training rather than individual parcels of land, it can be an expensive and potentially unnecessary exercise for a land owner to undertake these investigations.

If a landowner found UXO on their land the procedure they follow is:

- Do not touch or disturb the object.
- Take action, where appropriate, to prevent it being disturbed by another person.
- Note its approximate dimensions and general appearance.
- Note the route to its location.
- Advise the Police as soon as possible.

Land owners who believe their particular lots may actually be affected by UXO may contact the Department of Defence for more detailed information. Anyone who may choose, of their own accord, to subject their lots to further investigation should use a Defence-accredited UXO contractor.

The Commonwealth recommends that all land usage may continue without specific UXO search or remediation. Development and/or land usage re-zoning proposals for land parcels considered to be subject to a substantial level of residual UXO potential should only proceed following the conduct of UXO investigation and remediation.

This is achieved by ensuring that development applications for this land are assessed and determined by the EPA as a concurrence agency where that assessment is triggered via a local planning instrument or Schedule 8 of the *Integrated Planning Act 1997*. Although UXO will no longer be independently triggered via the contaminated land trigger for material change of use in Schedule 8 of the *Integrated Planning Act 1997*, areas that have been identified as having a 'substantial' potential for remnant UXO to exist are recorded on an Area Management Advice which is given to local government. Local governments will ordinarily trigger reconfiguration of a lot in their local planning instruments and may also trigger material

change of use. Pursuant to Schedule 2, Table 2, Item 21(b) of the *Integrated Planning Act 1997*, reconfiguring a lot where all or part of the premises are in an area for which an Area Management Advice has been given for unexploded ordnance will enliven EPA's referral jurisdiction as a concurrence agency. Pursuant to Schedule 2, Table 3, Item 12 of the *Integrated Planning Act 1997*, a material change of use if all or part of the premises is in an area for which an area management advice has been given for unexploded ordnance will enliven EPA's referral jurisdiction as a concurrence agency.

The normal concurrence agency response is to condition the approval to require the land to be further investigated and assessed and, where applicable, the implementation of remedial work or other appropriate land management practices.

Clause 69 Amendment of sch 3 (Dictionary)

Note: this schedule is being renumbered to schedule 4 as a result of clause 70 of this Bill.

This clause amends the Dictionary for the *Environmental Protection Act 1994* to omit or replace the following definitions which are no longer needed with the removal of the distinction between level 1 and level 2 activities:

- level 1 environmentally relevant activity
- level 1 petroleum activity
- level 2 chapter 4 activity
- level 2 environmentally relevant activity
- level 2 petroleum activity.

This clause also omits and replaces the following definitions:

- deposit
- place
- premises
- prescribed person
- unlawful environmental harm.

'Deposit' and 'premises' are being amended to take account of the changes to the water quality offence (Chapter 8, Part 3D).

'Place' is being amended to cross-reference both the new section 363F and section 440A of the *Environmental Protection Act 1994*.

'Prescribed person' is being amended to take account of the new enforcement tools.

'Unlawful environmental harm' is being amended to take account of the change to move section 436 to section 493A.

This clause also amends the following definitions:

- development condition
- environmental requirement
- hazardous contaminant
- notifiable activity
- obstruct
- recipient
- regulatory requirement
- unlawful environmental harm.

'Development condition' is being amended to remove any doubt that a development condition which was imposed when a matter was an environmentally relevant activity remains a development condition as defined by the *Environmental Protection Act 1994* even though the matter may have been deleted as an environmentally relevant activity in the regulation.

'Environmental requirement' is being amended so that an application may be made to the Magistrates Court for an entry order (see amendment to section 575 of the *Environmental Protection Act 1994*).

'Hazardous contaminant' is being amended consequential to the amendment to schedule 2 in clause 68 of this Bill and to correct a spelling error.

'Notifiable activity' is being amended consequential to the renumbering of the schedules in this Bill.

'Obstruct' is being amended to include hinder.

'Recipient' is being amended to include the person to whom a clean-up notice or cost recovery notice is issued.

'Regulatory requirement' is being amended to broaden the reference to approvals under the *Integrated Planning Act 1997* to ensure that proposed changes to the planning regime are captured. It is also being amended to delete the reference to environmental protection orders. There is no requirement in the sections of the *Environmental Protection Act 1994* applying to environment protection orders to consider regulatory requirements, so this reference is superfluous.

'Unlawful environmental harm' is being amended to correct a cross-reference.

This clause also adds the following definitions for the specific noise standards, exclusions from nuisance in schedule 1 (note that schedule 1 of the Act is renumbered from schedule 1AA of this Bill by virtue of clause 70 of this Bill), water contamination offences and direction notices:

- affected building
- aircraft movement
- at
- audible noise
- background level
- building
- building work
- busway
- coastal waters
- contravention
- direction notice
- earth
- educational institution
- harmful substance
- indoor venue
- $L_{A90, T}$

- licensed premises
- light rail
- MARPOL
- natural environment
- noise standard
- nominated section
- non-coastal waters
- noxious liquid substance
- oil
- open-air event
- owner-builder permit
- particles
- peak particle velocity
- power boat
- prescribed provision
- prescribed standard
- prescribed water contaminant
- protocol
- public road
- rail transport infrastructure
- railway
- receiving environment
- sewage
- State-controlled road
- stormwater
- stormwater drainage
- Z Peak
- Z Peak Hold.

This clause also amends the Dictionary to define the following terms used by the new clean-up and cost recovery provisions:

- clean-up notice
- contamination incident
- cost recovery notice
- natural disaster
- parent corporation.

A natural disaster would include a cyclone, flood or lightning.

The remaining definitions are cross-references to matters defined within the body of the *Environmental Protection Act 1994*.

Clause 70 Renumbering of schedules

This clause renumbers schedules 1AA to 3 as schedules 1 to 4.

Part 3 Amendment of Dangerous Goods Safety Management Act 2001

Clause 71 Act amended in pt 3

This part amends the *Dangerous Goods Safety Management Act 2001*.

Clause 72 Amendment of s 107 (Recovery of costs of government action)

Section 107 enables the State or local government to recover costs of action taken or caused to be taken by an authorised officer under section 106 of the *Dangerous Goods Safety Management Act 2001*.

The clause amends section 107 of the *Dangerous Goods Safety Management Act 2001* to provide that these costs are recoverable from:

- a person who caused or permitted the dangerous situation; or
- an occupier of a place where the dangerous situation existed; or

- an owner of or a person in control of the hazardous materials involved in the dangerous situation; or
- where any of the entities listed above is a corporation, an executive officer or parent corporation of that corporation.

In the case of vehicle transport of hazardous materials or hazardous materials warehouses, the actual operator is acting as temporary custodian of the materials. Consequently, the notice can also be issued to a person in control of hazardous materials. This 'prescribed person' provision is not intended to place any liability on local governments for contaminants entering or travelling through the local government's infrastructure such as storm water drains.

This clause also allows cost recovery notices to be issued to parent companies. The intention of this provision is to remedy the situation whereby industry restructures itself so that a valueless company is the occupier of the land making it difficult to recover civil costs from the company. The provision is based on s 62A(1AA) of the Victorian *Environmental Protection Act 1970*.

These costs are recoverable jointly and severally (see section 107B – Cost recovery notice issued to several persons).

Costs are defined to include labour, equipment and administrative costs and expenses.

Under this notice, the State or local government can recover both external and internal costs. This would include the costs of authorised officers' time spent in managing the dangerous situation, as they would no longer be able to perform their ordinary duties and costs would be incurred in re-allocating such officers and then making alternative arrangements for the carrying out of their usual duties.

A definition of parent corporation is included in the Dictionary in Schedule 2.

Occupier, place, and executive officer are defined in the Dictionary in Schedule 2.

Clause 73 Insertion of new ss 107A and 107B

Section 107A Cost Recovery Notice

A cost recovery notice is to be a written notice issued to a person mentioned in section 107(4).

The cost recovery notice must state certain things, including the consequences of failure to comply with the notice. This is to ensure that the prescribed person is fully informed of what they must do to comply with the notice.

An amount specified in a cost recovery notice is not payable if the dangerous situation was caused by:

(i) a natural disaster; or

(ii) a terrorist act or other deliberate act of sabotage by someone other than the recipient of the notice and all measures that it would have been reasonable for the recipient to have taken to prevent the dangerous situation were taken, having regard to all the circumstances.

Natural disaster is to be defined in Schedule 2 of the Act.

An amount specified in a cost recovery notice is not payable if the recipient is a parent corporation under s107(4)(c)(i) and the parent corporation took all reasonable steps to ensure its subsidiary complied with the notice.

An amount specified in a cost recovery notice is not payable if the recipient is an executive officer under s107(4)(c)(ii) and the executive officer took all reasonable steps to ensure the corporation complied with the notice or was not in a position to influence the corporation's compliance with the notice

If the person issued with a cost recovery notice complies with the notice but was not the person who caused or permitted the dangerous situation to happen, the loss or expense incurred by that person in complying with the notice may be recovered by that person as a debt in a court of competent jurisdiction from the person who caused or permitted the dangerous situation.

This is to ensure that the State or local government can claim the costs from any prescribed person and those persons can take action against other parties to ensure that persons causing or permitting the dangerous situation are ultimately held liable.

This section does not prevent the recipients from taking any other form of action to recover the money. For example, an owner may have a cause of action in contract against an occupier because of the terms of the lease.

Recovery may be made against the recipients regardless of the proportional liability provisions of the *Civil Liability Act 2003*, as the action by the State or local government is not an action in damages for breach of a duty of care. Nothing in this provision changes the applicability of the *Civil Liability Act 2003* as it would apply between the recipients, or by a recipient against a person who caused or allowed the incident.

Section 107B Cost recovery notice given to several persons

This section states that each person to whom a cost recovery notice is given will be jointly and severally liable for the costs.

Clause 74 Insertion of new pt 9, div 1A

Division 1A Appeals against decision to issue cost recovery notice

Section 154A Who may appeal

A person issued a cost recovery notice has a right to appeal a decision to issue a cost recovery notice.

Section 154B Court to which appeal may be made

An appeal may be made to the Magistrates Court nearest the place where the dangerous situation existed.

Section 154C Application of ss 150–154 to an appeal under this division

This section applies sections 150-154 to appeals made under this division and requires that any references to chief executive in those sections be read as a reference to the entity whose decision is being appealed against.

Clause 75 Insertion of new pt 13

Part 13 Transitional provision for Environmental Protection and Other Legislation Amendment Act (No. 2) 2008

Section 189 Proceedings started before commencement of this section

This clause confirms that where court proceedings for recovery of an amount under section 107 have been commenced before the commencement day of this provision the State or local government may continue to recover that amount under section 107 and that the Act as in force before the commencement day continues to apply for that purpose.

Clause 76 Amendment of Sch 2 (Dictionary)

This clause amends the Dictionary to define "natural disaster" and "parent corporation" which are terms used in the amended cost recovery provisions.

Some cross references to terms that are defined in the amended and new provisions are also included.

Part 4 Amendment of Environmental Protection and Other Legislation Amendment Act 2007

Clause 77 Act amended in pt 4

This clause states that this part amends the *Environmental Protection and Other Legislation Amendment Act 2007*.

Clause 78 Amendment of s 26 (Amendment of s 514 (Devolution of powers)

This clause omits section 26(2) of the *Environmental Protection and Other Legislation Amendment Act 2007* which amended section 514 of the *Environmental Protection Act 1994*. These matters are now dealt with by section 440O and Schedule 1, item 3 of the *Envrionmental Protection Act 1994*. Note that schedule 1 of the *Envrionmental Protection Act 1994* is renumbered from schedule 1AA of this Bill by virtue of clause 70 of this Bill.

Part 5 Amendment of Integrated Planning Act 1997

Clause 79 Act amended in pt 5

This clause states that this part amends the *Integrated Planning Act 1997*.

Clause 80 Amendment of s 1.3.5 (Definitions for terms used in development)

This clause amends the definition of 'material change of use' in section 1.3.5 of the *Integrated Planning Act 1997*.

Under the new Environmental Protection Regulation some activities are being regulated which were not regulated before. For example, the ventilation stacks of tunnels will be a new environmentally relevant activity, and the threshold for waste transfer stations will be decreased so that operators who previously fell below the threshold for regulation will now be caught.

In addition, deemed approvals under the *Environmental Protection (Interim) Regulation 1995* are being phased out to ensure that these operations will have environmental conditions for their activities.

Consequently, these operators will now need to apply for a development approval under the *Integrated Planning Act 1997*, unless they are self-assessable development because they comply with a code of environmental compliance.

Pursuant to section 6.9.2 of the *Integrated Planning Act 1997* (see clause 82 below), these operators will have 12 months to either apply for a development approval or comply with the code of environmental compliance.

Clause 81 Amendment of s 4.1.28A (Additional and extended appeal rights for submitters for particular development)

This clause amends section 4.1.28A of the *Integrated Planning Act 1997* to remove references to specific ERA numbers. The exemptions will now be specified in a regulation.

As part of the remake of the *Environmental Protection Regulation 1998*, the item numbers which are in Schedule 1 of the *Environmental Protection Regulation 1998* are being renumbered and the distinction between level 1 and level 2 activities is being removed. Consequently, the ERAs specifically mentioned in this section need to be described differently to be consistent with the new Environmental Protection Regulation.

In addition, for the reasons outlined in these Explanatory Notes for the amendments to section 20 of the *Environmental Protection Act 1994*, all references to level 2 ERAs for Chapter 4 activities needed to be removed and replaced with the current language which refers to aggregate environmental scores prescribed under a regulation.

Clause 82 Insertion of new ch 6, pt 9

This clause inserts new sections 6.9.1 (Particular activities not a material change of use) and 6.9.2 (Deferment of application of s 4.3.1 to particular material changes of use) into the *Integrated Planning Act 1997* which are transitional provisions consequential to the amendment to section 1.3.5 in this Bill. This clause gives operators of newly regulated environmentally relevant activities 12 months to comply with the *Integrated Planning Act 1997*.

Clause 83 Amendment of sch 8 (Assessable development and self-assessable development)

This clause amends Schedule 8 of the *Integrated Planning Act 1997* to refer to "a regulation under the *Environmental Protection Act 1994*" rather than specifically to the *Environmental Protection Regulation 1998* to take account of the remake of the *Environmental Protection Regulation 1998*.

This clause also removes references to specific ERA numbers. The exemptions will now be specified in a regulation.

As part of the remake of the *Environmental Protection Regulation 1998*, the item numbers which are in Schedule 1 of the *Environmental Protection Regulation 1998* are being renumbered and the distinction between level 1 and level 2 activities is being removed. Consequently, the ERAs specifically mentioned in this section need to be described differently to be consistent with the new Environmental Protection Regulation.

In addition, for the reasons outlined in these Explanatory Notes for the amendments to section 20 of the *Environmental Protection Act 1994*, all references to level 2 ERAs for Chapter 4 activities needed to be removed and replaced with the current language which refers to aggregate environmental scores prescribed under a regulation.

Clause 84 Amendment of sch 8A (Assessment for development applications)

This clause amends Schedule 8A of the *Integrated Planning Act 1997* to restructure the exemptions and remove references to specific ERA numbers. The exemptions will now be specified in a regulation.

As part of the remake of the *Environmental Protection Regulation 1998*, the item numbers which are in Schedule 1 of the *Environmental Protection Regulation 1998* are being renumbered and the distinction between level 1 and level 2 activities is being removed. Consequently, the ERAs specifically mentioned in this section need to be described differently to be consistent with the new Environmental Protection Regulation.

In addition, for the reasons outlined in these Explanatory Notes for the amendments to section 20 of the *Environmental Protection Act 1994*, all references to level 2 ERAs for Chapter 4 activities needed to be removed and replaced with the current language which refers to aggregate environmental scores prescribed under a regulation.

Clause 85 Amendment of sch 9 (Development that is exempt from assessment against a planning scheme)

This clause corrects a cross-reference.

Clause 86 Amendment of sch 10 (Dictionary)

This clause amends the Dictionary of the *Integrated Planning Act 1997* consequential to the amendments to remove references to specific ERA numbers. The exemptions will now be specified in a regulation.

In addition, the definition of 'environmental nuisance' which was inserted into the *Integrated Planning Act 1997* by the *Integrated Planning and Other Legislation Amendment Act 2006* was mistakenly removed by the *Wild Rivers and Other Legislation Amendment Act 2006*. The sections that this definition related to have now commenced and the definition needs to be reinserted

Part 6 Amendment of Nature Conservation Act 1992

Clause 87 Act amended in pt 6

This clause states that this part amends the *Nature Conservation Act 1992*.

Clause 88 Amendment of s 33 (Amalgamation etc. of protected areas)

Section 33(2)(b) of the *Nature Conservation Act 1992* provides that Parliamentary resolution is not required where land is removed from a protected area in order to be dedicated with a higher level of protection. This clause amends section 33(2)(b) to add that Parliamentary resolution is also not required where the protected area class of the affected land remains the same, for example, if land in one national park is reallocated to another national park.

Clause 89 Amendment of s 36 (Authorities for new national park or national park (recovery))

This clause amends section 36 of the *Nature Conservation Act 1992* to correct a cross-referencing error in respect of the section number of the *Forestry Act 1959* under which sales permits are issued.

Clause 90 Amendment of s 46 (Declaration of protected area)

This clause inserts a new subsection 46(3) into the *Nature Conservation Act 1992* which complements amendments to sections 47 and 48 allowing for a conservation agreement to be replaced by a later conservation agreement. The amendment serves to clarify that, if a conservation agreement is terminated by a later conservation agreement, the reference in the relevant regulation to the duration of the conservation agreement is taken to be the duration of the later agreement.

Clause 91 Amendment of s 47 (Duration and termination of conservation agreements)

This clause amends section 47 of the *Nature Conservation Act 1992* to recognise a situation where, in accordance with section 48, a later conservation agreement replaces and terminates an earlier conservation agreement.

Clause 92 Amendment of s 48 (Variation of conservation agreements)

This clause amends section 48 of the *Nature Conservation Act 1992* to provide that a later conservation agreement can vary and replace an earlier conservation agreement, rather than a conservation agreement being varied by a separate supplementary agreement. The clause also provides that section 45(2) to 45(5) will apply to the later agreement, in order to ensure that the later agreement is subject to relevant requirements applying to an original agreement.

Clause 93 Amendment of s 70B (Definitions for pt 4A)

This clause amends section 70B of the *Nature Conservation Act 1992* to refer to a new definition of "SEQ horse riding trail network" inserted as a new section 70BA.

Clause 94 Insertion of new s 70BA (SEQ horse riding trail network)

This clause inserts a new section 70BA in the *Nature Conservation Act 1992* defining "SEQ horse riding trail network" by reference to maps held by the department (the Environmental Protection Agency) and available for inspection on the department's website and at its head office.

Clause 95 Insertion of new ss 70JA and 70JB

This clause inserts new sections 70JA (Review of impact of horse riding trails) and 70JB (Assessment by independant scientific advisory committee) in the *Nature Conservation Act 1992*. These two new sections require the chief executive to review areas within forest reserves that comprise horse riding trails in the SEQ horse riding trail network. The review must include assessments of horse riding impacts on the trails and adjacent areas, conducted by an independent advisory committee established under section 132 of the Act, with members who have relevant expertise. The assessment of a particular trail can take account of evaluations of other trail sections with similar characteristics. The review must also consider how to address any significant adverse effects identified, for example, in terms of remedial action, or, if necessary, by removing a trail from the network. The review must be completed for all areas by 31 December 2025.

Clause 96 Amendment of s 70K (Designation)

This clause inserts a new subsection 70K(1)(b) into the *Nature Conservation Act 1992* that requires the review of horse riding impacts under section 70JA to have been completed before an area that includes a horse riding trail in the SEQ horse riding trail network can be designated as a proposed protected area.

Clause 97 Amendment of schedule (Dictionary)

This clause amends the definition of "conservation agreement" in the schedule (Dictionary) of the *Nature Conservation Act 1992* to recognise that a replacement conservation agreement can be created under the amended section 48. This clause also inserts definitions of "forest reserve" and "SEQ horse riding trail network" by reference to specified sections of the Act.

Part 7 Amendments of other Acts

Clause 98 Other Acts amended

This clause states that schedule 2 amends the Acts it mentions.

Schedule 1 Minor amendments of Environmental Protection Act 1994

Schedule 1 makes minor technical, administrative and consequential corrections to the *Environmental Protection Act 1994*.

Schedule 2 Consequential and minor amendments of other Acts

Schedule 2 makes minor technical, administrative and consequential corrections to the

- *Coastal Protection and Managment Act 1995*
- *Industrial Development Act 1963*
- *Mineral Resources Act 1989*
- *State Development and Public Works Organsation Act 1971*
- *Water Act 2000*
- *Wild Rivers Act 2005*