Environmental Protection and Other Acts Amendment Bill 2009

Explanatory Notes

General Outline

Short Title

The short title of the Bill is the *Environmental Protection and Other Acts Amendment Bill 2009*.

Policy Objectives of the Legislation

The principal objective of the Bill is to include conditioning powers to place beyond doubt that environmental offset conditions may be imposed on development approvals, environmental authorities and other approvals for development.

Reasons for the Bill

The following Acts are amended to include conditioning powers to place it beyond doubt that environmental offsets conditions may be imposed on development approvals, environmental authorities and other approvals for development:

- *Environmental Protection Act 1994*;
- *Fisheries Act 1994*;
- *Nature Conservation Act 1992*; and
- *Sustainable Planning Act 2009*.

These conditioning powers are administered through the Queensland Government Environmental Offsets Policy (QGEOP), which commenced on 1 July 2008, and the specific-issue offsets policies which sit beneath the QGEOP. The QGEOP outlines the basic principles behind offsets.

The QGEOP specifies that offsets should only be required as a condition of an approval where there is a specific-issue offsets policy. Specific-issue

offsets policies must be developed in accordance with the guidance and principles of the QGEOP.

The specific-issue offsets policies currently in force are:

- Vegetation Management - Policy for Vegetation Management Offsets, September 2007, Department of Natural Resources and Water;
- Marine Fish Habitat - Mitigation and Compensation for Works or Activities Causing Marine Fish Habitat Loss, 2002, Department of Primary Industries and Fisheries; and
- Koala Habitat - Offsets for Net Benefit to Koalas and Koala Habitat, 2006, Environmental Protection Agency.

The exceptions to this rule are:

- offsets required by the Coordinator-General under the *State Development and Public Works Organisation Act 1971*; and
- the interim arrangements in place until a biodiversity specific-issue offsets policy is developed.

The interim arrangements allow offsets to be used in line with the principles and guidance of the QGEOP in the following instances:

- Permits for the clearing of protected plants under the *Nature Conservation Act 1992*;
- Activities that involve clearing of vegetation in State Forests;
- Environmental authorities for mining, petroleum and greenhouse gas storage activities under the *Environmental Protection Act 1994*; and/or
- Development assessment measures involving the provision of compensatory habitat or resources under the *Implementation Guideline for Development Assessment* for Queensland's Coastal Policy, which is published on the Department of Environment and Resource Management's website at http://www.derm.qld.gov.au/register/p02501aa.pdf

In most cases, the offset must be legally secured prior to the developer undertaking the work that will impact on the environmental value being offset (e.g. the offset for clearing native vegetation must be secured before the vegetation is cleared). How the offset should be legally secured by the developer will depend on the details in the specific-issue offsets policy, but options may include:

- Dedication as a protected area under the *Nature Conservation Act 1992* (e.g. nature refuge or national park);
- Declaration of an area of high nature conservation value under the *Vegetation Management Act 1999*;
- Use of a covenant (with associated management plan) under the *Land Act 1994* or *Land Title Act 1994*;
- Statutory declaration of a Fish Habitat Area or fish habitat inclusions to an existing Fish Habitat Area under the *Fisheries Act 1994*;
- Providing a financial contribution to an environmental offsets trust;
- Providing a guarantee and/or financial assurance; and/or
- Entering into an offsets agreement.

Depending on the specific-issue offsets policy and the nature of the offset, the offset requirements may also be a condition of the development approval, environmental authority, or other approval.

Where an offsets agreement is used to secure the offset, the offsets agreement should be entered into prior to the approval being granted. The offsets agreement will have the detail about what actions must be taken by the developer or another party to complete the offset. For example, where an area is being revegetated to offset the clearing of koala habitat, the offsets agreement may specify what types of vegetation must be planted, when it must be planted, the monitoring required, any fencing requirements, and so on. It will usually be a condition of the approval that the terms and conditions of the offsets agreement must be complied with. This would be enforceable against the developer for on-site offset activities. Off-site activities should be secured through another mechanism such as a covenant and associated management plan, and actions required from a third party would be enforced via the agreement itself.

Full details about the QGEOP and links to the specific-issue offsets policies are available via the Department of Environment and Resource Management website.

This Bill supports the QGEOP by making amendments to the conditioning power for development approvals and environmental authorities. This Bill also amends section 124 of the *Nature Conservation Act 1992* to make the process for amending a conservation plan clear, which will enable amendments to the conditioning power for approvals under conservation plans made under that Act to include offsets. The current ability to

condition development approvals, environmental authorities and approvals under the conservation plans under the *Nature Conservation Act 1992* is sufficient to include environmental offsets conditions, but this amendment places that ability to condition for environmental offsets conditions (including off-site conditions and through offsets agreements) beyond doubt.

As the offsets condition will be a condition of the approval (as with any other condition), the usual review and appeal rights will apply.

Although the QGEOP only applies to Queensland Government decisions on approval for development, local government may also require environmental offsets as outlined in the Regional Plans. For example, the Far North Queensland Regional Plan states:

> Urban development within the urban footprint or rural living area within an area of high ecological significance (see map 3) is located, designed and operated to avoid impacts on ecological values, or where avoidance is not possible, minimise impacts and then offset residual impacts so there is a net gain of the impacted values.

Consequently, the amendments to the *Sustainable Planning Act 2009* have been broadly drafted so that both the Queensland Government and local governments may utilise the conditioning power. Local governments are encouraged to apply the principles and guidelines of the QGEOP when requiring environmental offsets.

This Bill also makes a number of minor amendments to other matters under the *Environmental Protection Act 1994*. This includes amendments to correct cross-references or provide clarity to the clean-up and cost recovery provisions and others such as when registration certificates take effect.

Estimated Cost for Implementation

The amendments are to be implemented within current budget allocations.

While the amendments themselves will not impose any costs on development or an activity, the imposition of an offset condition on an approval or permit may increase the overall costs of the development or operation of the activity. These costs will vary on a case-by-case basis, with some offsets being negligible compared with the full cost of the project, and others more significant. However, for most developments and activities, the imposition of an offset must be reasonable and relevant, which would necessarily include a consideration of the costs of

implementing a requirement under a condition of the approval. Since offsets have been part of the current specific-issue offsets policies for some time, these amendments will not change the status quo.

Consistency with Fundamental Legislative Principles

Section 4 of the *Legislative Standards Act 1992* requires that legislation has sufficient regard to—

(a) rights and liberties of individuals; and

(b) the institution of Parliament.

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill—

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

This Bill has been examined for compliance with these fundamental legislative principles and any issues identified have been addressed through the drafting. Accordingly, this Bill is consistent with the fundamental legislative principles outlined in section 4 of the *Legislative Standards Act 1992*.

Consultation

A wide range of public and private sector stakeholders were consulted on the QGEOP. All government departments were consulted as part of the Cabinet process in developing the Bill.

Feedback was considered as part of the development of regulatory options and drafting of the Bill.

Notes on Provisions

Part 1 Preliminary

Clause 1 Short title

This clause states that the Act should be cited as the *Environmental Protection and Other Acts Amendment Act 2009*.

Clause 2 Commencement

This clause provides that the Act is to commence on a day to be fixed by proclamation.

Part 2 Amendment of Environmental Protection Act 1994

Clause 3 Act amended

This clause states that this part amends the *Environmental Protection Act 1994*.

Clause 4 Amendment of s 73G (When registration certificate takes effect)

This clause amends section 73G of the *Environmental Protection Act 1994* to correct two cross-references.

Clause 5 Amendment of s 154 (General requirements for application)

This clause amends section 154 of the *Environmental Protection Act 1994* and corrects a typographical error where the word 'which' was inadvertently omitted.

Clause 6 Amendment of s 210 (Conditions that may and must be included in draft environmental authority)

This clause amends section 210 of the *Environmental Protection Act 1994* to expressly allow the administering authority to impose a condition about an environmental offset on an environmental authority (mining lease) for a level 1 mining project. The new subsection (3) allows the administering authority to impose an environmental offset condition. Under section 210 the administering authority can impose any condition it considers necessary or desirable. An environmental offset may be necessary or desirable in the context of the project. This subsection is simply to remove any doubt than an environmental offset condition can be imposed. An environmental offset condition may require works or activities to be undertaken, may require that the applicant enter into an offsets agreement, or the applicant may meet their offset requirement by making a financial contribution to an environmental offsets trust (see subsection (5)).

Subsection (3) also restricts the power to impose an environmental offset condition. An environmental offset condition may only be imposed if the administering authority is satisfied that the applicant has demonstrated that

all cost effective on-site measures to avoid and/or minimise any negative impacts of the development on the natural environment are being, or will be, carried out. This reflects the "avoid, minimise, offset" hierarchy in the Queensland Government Environmental Offsets Policy. This subsection was modelled on section 127ZL of the NSW *Threatened Species Conservation Act 1995*.

The new subsection (4) allows an environmental offset condition to be on-site or off-site from the site of the environmental authority. Conditions of an environmental authority generally only apply to the mining tenure to which the environmental authority is attached. However, environmental offset conditions are often off-site from the mining tenure to which the environmental authority attaches. This is because offsets are only required after measures have been taken to avoid (e.g. through careful project design) and minimise (e.g. through selective clearing of vegetation) the impact. Consequently, this subsection removes any doubt that off-site environmental offset conditions can be imposed.

The new subsection (5) allows an environmental offset condition to require a financial contribution to an environmental offset trust. The term ***environmental offset trust*** is defined in the Dictionary to the *Environmental Protection Act 1994* as "the Balance the Earth Trust or another trust established to accept and manage amounts to fund the undertaking of works or activities to counterbalance the impacts of environmentally relevant activities or other activities on the natural environment".

There is no need for a subsection in this section like section 346A(5) of the *Sustainable Planning Act 2009* (as inserted by this Bill) as there is no section in the *Environmental Protection Act 1994* which is like section 347(1)(c) of the *Sustainable Planning Act 2009*. Consequently, a condition can be imposed which requires that works be carried out for a development by an entity other than the applicant or authority holder. No further amendment is necessary.

The new subsections (6) and (9) allow the details of the environmental offset to be worked out in an offsets agreement. These subsections were modelled on section 3.5.34 of the *Integrated Planning Act 1997* or section 348 of the *Sustainable Planning Act 2009*. As mentioned in the Reasons for the Bill (above), offsets agreements are just one way of securing an offset. An offsets agreement which secures the offset would contain the detail about the exact nature of the offset and the actions that must be undertaken as part of the offset agreement. Both the applicant and the

administering authority must be parties to an agreement under this section, but the applicant can also enter into agreements with other entities (e.g. an adjoining local government) to contract out the performance of those actions. The applicant retains the primary statutory responsibility for ensuring that the offset is completed if the offset actions are contracted out, but may require that the third party indemnify the applicant against any enforcement action taken by the administering authority if the offset requirements are not met. If an environmental offsets agreement is used to secure the offset, then the terms and conditions of the environmental offsets agreement must usually be complied with as a condition of the environmental authority.

Subsection (10) defines the terms ***environmental offset*** and ***on-site mitigation measure***. An environmental offset is only used to counterbalance the impacts on the natural environment. This definition is needed because the Queensland Government Environmental Offsets Policy does not extend to amenity, aesthetic, social or economic impacts. ***Natural environment*** is defined in the Dictionary to the *Environmental Protection Act 1994* as:

natural environment—

(a) means living and non-living things that occur naturally at 1 or more places on Earth; and

(b) does not include amenity or aesthetic, cultural, economic or social conditions.

Clause 7 Amendment of s 305 (Conditions that may be made)

This clause amends section 305 of the *Environmental Protection Act 1994* to expressly allow the administering authority to impose a condition about an environmental offset on the environmental authority (mining activities).

The new subsection (2)(d) allows the administering authority to impose an environmental offset condition. Under section 210, the administering authority can impose any condition it considers necessary or desirable. An environmental offset may be necessary or desirable in the context of the project. This subsection is simply to remove any doubt than an environmental offset condition can be imposed.

The new subsection (2)(d) also restricts the power to impose an environmental offset condition. An environmental offset condition may only be imposed if the administering authority is satisfied that the applicant

has demonstrated that all cost effective on-site measures to avoid and/or minimise any negative impact of the development on the natural environment are being, or will be, carried out. This reflects the "avoid, minimise, offset" hierarchy in the Queensland Government Environmental Offsets Policy. This subsection was modelled on section 127ZL of the NSW *Threatened Species Conservation Act 1995*.

The new subsection (5) allows an environmental offset condition to be on-site or off-site from the site of the environmental authority. Conditions of an environmental authority generally only apply to the mining tenure to which the environmental authority is attached. However, environmental offset conditions are often off-site from the mining tenure to which the environmental authority attaches. This is because offsets are only required after measures have been taken to avoid (e.g. through careful project design) and minimise (e.g. through selective clearing of vegetation) the impact. Consequently, this subsection removes any doubt that off-site environmental offsets conditions can be imposed.

The new subsection (6) allows an environmental offset condition to require a financial contribution to an environmental offset trust. The term ***environmental offset trust*** is defined in the Dictionary to the *Environmental Protection Act 1994* as "the Balance the Earth Trust or another trust established to accept and manage amounts to fund the undertaking of works or activities to counterbalance the impacts of environmentally relevant activities or other activities on the natural environment".

There is no need for a subsection in this section like section 346A(5) of the *Sustainable Planning Act 2009* (as inserted by this Bill) as there is no section in the *Environmental Protection Act 1994* which is like section 347(1)(c) of the *Sustainable Planning Act 2009*. Consequently, a condition can be imposed which requires that works be carried out for a development by an entity other than the applicant or authority holder. No further amendment is necessary.

The new subsections (7), (8) and (9) allow the details of the environmental offset to be worked out in an offsets agreement. These subsections were modelled on section 3.5.34 of the *Integrated Planning Act 1997* or section 348 of the *Sustainable Planning Act 2009*. As mentioned in the Reasons for the Bill (above), offsets agreements are just one way of securing an offset. An offsets agreement which secures the offset would contain the detail about the exact nature of the offset and the actions that must be undertaken as part of the offset agreement. The applicant must enter into

this agreement with the administering authority, but the applicant can also enter into agreements with other entities (e.g. an adjoining local government) to contract out the performance of those actions. The applicant retains the primary responsibility for ensuring that the offset is completed if the offset actions are contracted out. If an environmental offsets agreement is used to secure the offset, then the terms and conditions of the environmental offsets agreement must usually be complied with as a condition of the environmental authority.

Subsection (10) defines the terms ***authorised activity***, ***environmental offset*** and ***on-site mitigation measure***. An environmental offset is only used to counterbalance the impacts on the natural environment. This definition is needed because the Queensland Government Environmental Offsets Policy does not extend to amenity, aesthetic, social or economic impacts. ***Natural environment*** is defined in the Dictionary to the *Environmental Protection Act 1994* as:

natural environment—

(a) means living and non-living things that occur naturally at 1 or more places on Earth; and

(b) does not include amenity or aesthetic, cultural, economic or social conditions.

Clause 8 Amendment of s 310O (Conditions that may and must be imposed)

This clause amends section 310O of the *Environmental Protection Act 1994* to expressly allow the administering authority to impose a condition about an environmental offset on an environmental authority (chapter 5A activities). Chapter 5A activities are petroleum activities and greenhouse gas (GHG) storage activities.

The new subsection (3)(b) allows the administering authority to impose an environmental offset condition. Under section 310O, the administering authority can impose any condition it considers necessary or desirable. An environmental offset may be necessary or desirable in the context of the project. This subsection is simply to remove any doubt than an environmental offset condition can be imposed.

The new subsection (3)(b) also restricts the power to impose an environmental offset condition. An environmental offset condition may only be imposed if the administering authority is satisfied that the applicant

has demonstrated that all cost effective on-site measures to avoid and/or minimise any negative impact of the development on the natural environment are being, or will be, carried out. This reflects the "avoid, minimise, offset" hierarchy in the Queensland Government Environmental Offsets Policy. This subsection was modelled on section 127ZL of the NSW *Threatened Species Conservation Act 1995*.

The new subsection (6) allows an environmental offset condition to be on-site or off-site from the site of the environmental authority. Conditions of an environmental authority generally only apply to the petroleum or GHG storage tenure to which the environmental authority is attached. However, environmental offset conditions are often off-site from the petroleum or GHG storage tenure to which the environmental authority attaches. This is because offsets are only required after measures have been taken to avoid (e.g. through careful project design) and minimise (e.g. through selective clearing of vegetation) the impact. Consequently, this subsection removes any doubt that off-site environmental offset conditions can be imposed.

The new subsection (7) allows an environmental offset condition to require a financial contribution to an environmental offset trust. The term ***environmental offset trust*** is defined in the Dictionary to the *Environmental Protection Act 1994* as "the Balance the Earth Trust or another trust established to accept and manage amounts to fund the undertaking of works or activities to counterbalance the impacts of environmentally relevant activities or other activities on the natural environment".

There is no need for a subsection in this section like section 346A(5) of the *Sustainable Planning Act 2009* (as inserted by this Bill) as there is no section in the *Environmental Protection Act 1994* which is like section 347(1)(c) of the *Sustainable Planning Act 2009*. Consequently, a condition can be imposed which requires that works be carried out for a development by an entity other than the applicant or authority holder. No further amendment is necessary.

The new subsections (8) and (9) allow the details of the environmental offset to be worked out in an offsets agreement. These subsections were modelled on section 3.5.34 of the *Integrated Planning Act 1997* or section 348 of the *Sustainable Planning Act 2009*. As mentioned in the Reasons for the Bill (above), offsets agreements are just one way of securing an offset. An offsets agreement which secures the offset would contain the detail about the exact nature of the offset and the actions that must be

undertaken as part of the offset agreement. The applicant must enter into this agreement with the administering authority, but the applicant can also enter into agreements with other entities (e.g. an adjoining local government) to contract out the performance of those actions. The applicant retains the primary responsibility for ensuring that the offset is completed if the offset actions are contracted out. If an environmental offsets agreement is used to secure the offset, then the terms and conditions of the environmental offsets agreement must usually be complied with as a condition of the environmental authority.

Subsection (10) defines the terms ***environmental offset*** and ***on-site mitigation measure***. An environmental offset is only used to counterbalance the impacts on the natural environment. This definition is needed because the Queensland Government Environmental Offsets Policy does not extend to amenity, aesthetic, social or economic impacts. ***Natural environment*** is defined in the Dictionary to the *Environmental Protection Act 1994* as:

natural environment—

(a) means living and non-living things that occur naturally at 1 or more places on Earth; and

(b) does not include amenity or aesthetic, cultural, economic or social conditions.

Clause 9 Amendment of s 363H (Administering authority may issue clean-up notice)

This clause amends section 363H of the *Environmental Protection Act 1994* to provide certainty that a single clean-up notice may require any or all of the actions listed. There was some uncertainty about the interpretation of the section which would, on one interpretation, require that multiple notices be issued for the different actions. This was not the intent of the section and would clearly lead to an undesirable duplicity of paperwork without the clarification provided by this amendment.

Clause 10 Amendment of s 363I (Offence not to comply with clean-up notice)

This clause amends section 363I of the *Environmental Protection Act 1994* to include the same limitations on the defence of 'natural disaster' as applied to the terrorist or acts of sabotage defence. The definition of

natural disaster was always intended to only apply to 'Acts of God' or where human intervention could not have prevented the environmental harm. However, the current definition of 'natural disaster' is limited to only where the disaster itself could not have been prevented and does not take into account where the effects of the disaster could have been mitigated. The terrorist or acts of sabotage defence is currently limited to where the recipient of the notice had taken all measures it would be reasonable for the recipient to have taken to prevent the incident, having regard to all the circumstances including the inherent nature of the risk and the probability of the incident. This amendment applies the same limitation to the 'natural disaster' defence.

Clause 11 Amendment of s 363N (Administering authority may issue cost recovery notice)

This clause amends section 363N of the *Environmental Protection Act 1994* to include the same limitations on the defence of 'natural disaster' as applied to the terrorist or acts of sabotage defence. The definition of natural disaster was always intended to only apply to 'Acts of God' or where human intervention could not have prevented the environmental harm. However, the current definition of 'natural disaster' is limited to only where the disaster itself could not have been prevented and does not take into account where the effects of the disaster could have been mitigated. The terrorist or acts of sabotage defence is currently limited to where the recipient of the notice had taken all measures it would be reasonable for the recipient to have taken to prevent the incident, having regard to all the circumstances including the inherent nature of the risk and the probability of the incident. This amendment applies the same limitation to the 'natural disaster' defence.

Clause 12 Amendment 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 remove the maximum penalty for a corporation. When this penalty was amended by the *Environmental Protection and Other Legislation Amendment Act (No. 2) 2008*, it was always intended to be consistent with the penalty for a clean-up notice in section 363I of the *Environmental Protection Act 1994*. However, when the penalty for the clean-up notice was changed to remove the alternative penalty for a corporation, so that the usual rule of five times the penalty for a corporation would apply, this

section was overlooked and not amended at the same time. This amendment remedies this oversight.

Clause 13 Amendment of s 480 (False, misleading or incomplete documents)

This clause amends section 480 of the *Environmental Protection Act 1994* to correct a cross-reference.

Clause 14 Amendment of s 540 (Required registers)

This clause amends section 540 of the *Environmental Protection Act 1994* to correct a cross-reference.

Clause 15 Amendment of sch 4 (Dictionary)

This clause amends the definition of 'regulatory requirement' in the Dictionary of the *Environmental Protection Act 1994* to provide for decisions by the Minister or a court. Sections 223 and 247 of the *Environmental Protection Act 1994* require the Minister or a court to consider the regulatory requirements, which are specified in the *Environmental Protection Regulation 2008*. However, the current definition of 'regulatory requirement' does not reflect this. This amendment corrects this error.

This clause also inserts a definition of ***Balance the Earth Trust*** and ***environmental offset trust***.

Part 3 Amendment of Fisheries Act 1994

Clause 16 Act amended

This clause states that this part amends the *Fisheries Act 1994*.

Clause 17 Insertion of new s 76IA

This clause inserts section 76IA into the *Fisheries Act 1994*.

76IA Environmental offset conditions

This section provides that environmental offset conditions can be stated on fisheries development approvals. This satisfies the requirements of the Queensland Government Environmental Offsets Policy by ensuring that economic and social development can occur without an overall degradation of our environment via the use of environmental offset conditions on fisheries development approvals. Environmental offset conditions aim to counterbalance the impacts of the development on fisheries resources or fish habitat.

Clause 18 Amendment of s 117 (Fisheries Research Fund)

This clause amends section 117 of the *Fisheries Act 1994* to state that amounts received for environmental offsets to counterbalance the impacts of the development on fisheries resources or fish habitat are to be placed into the Fisheries Research Fund. This fund is used for research, training, dissemination of information, publication of material for or about fisheries resources and fish habitat related activities. The fund may also be used for other activities related to fish habitats such as enhancement, rehabilitation or exchange. An example of fish habitat enhancement would be using funds to plant mangroves to support fisheries resources and assist in tidal land stability.

Clause 19 Amendment of schedule (Dictionary)

This clause amends the Dictionary to insert a definition of ***environmental offset condition***.

Part 4 Amendment of Nature Conservation Act 1992

Clause 20 Act amended

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

Clause 21 Replacement of s 124 (Approval of amendment of plans)

This clause redrafts and amends section 124 of the *Nature Conservation Act 1992* to clarify the process for amending a management or conservation plan.

At present, section 124(1) allows the Governor in Council to approve an amendment of a management or conservation plan by a "subsequent management or conservation plan" if the procedures in Part 7 of the Act (other than sections 113 and 114) are followed. This implies that the "subsequent plan" should be a whole plan incorporating the amendments, rather than just an "amending plan" to amend the original plan.

Consequently, section 124 has been recast to ensure there is no doubt that the process for making an amending plan under Part 7 applies to that amending plan, not the original plan being amended. This means that properly made submissions can only be about the amendments being made to the plan, not to the plan as a whole. This means that properly made submissions should address the amendments being made to the plan, and unrelated matters need not be considered by the Minister

Also, the present section 124(2) exempts plan amendments in certain circumstances from the application of section 124(1). Section 124(1) provides that the Governor in Council may approve an amendment, but only if certain procedures under Part 7 of the Act are followed. The exemption provided by section 124(2) is intended to apply only to the required procedures – it is not meant to imply that the Governor in Council may not approve the amendments.

The redrafted new section 124 removes any potential ambiguity about the approval process and ensures that the specified exemptions from procedures under Part 7 are clearly spelt out.

Part 5 Amendment of Sustainable Planning Act 2009

Clause 22 Act amended

This clause states that this part amends the *Sustainable Planning Act 2009*.

Clause 23 Insertion of new s 346A

This clause inserts the new section 346A into the *Sustainable Planning Act 2009*.

346A Environmental offset conditions

This section expressly allows a concurrence agency or the assessment manager to impose a condition about an environmental offset on a development approval. Under section 345, a concurrence agency or the assessment manager can impose any condition it considers reasonable or relevant. An environmental offset may be reasonable or relevant in the context of the project. This section is simply to remove any doubt that an environmental offset condition can be imposed and the methods by which it can be imposed.

Subsection (1) states that this section applies to an environmental offset condition.

Subsection (2) restricts the power to impose an environmental offset condition. The Minister's foreword to the Queensland Government Environmental Offsets Policy states that environmental impacts from development must first be avoided and if not avoidable then minimised. Environmental offsets may be used to counterbalance any remaining loss of environmental values. This is also outlined in Principle 2 of the Queensland Government Environmental Offsets Policy. The impact could be avoided, for example, by designing the project so that only 3 hectares (ha) of vegetation would be impacted instead of 10 ha of vegetation. The impact on the remaining 3 ha of vegetation may then be minimised by, for example, trimming the vegetation instead of destroying it. The remaining impact on the environmental values of the vegetation by trimming it may then be offset. This subsection states that an environmental offset condition may only be imposed if the concurrence agency or assessment manager is satisfied that the applicant has demonstrated that all cost effective on-site measures to avoid and/or minimise any negative impact of the development on the natural environment are being, or will be, carried out. This reflects the "avoid, minimise, offset" hierarchy in the Queensland Government Environmental Offsets Policy. This subsection was modelled on section 127ZL of the NSW *Threatened Species Conservation Act 1995*.

An environmental offset undertaken to counterbalance the impacts of a development on fisheries resources or fish habitat may include, for example—

(a) works or activities to enhance or rehabilitate a fish habitat; and

(b) the exchange of another fish habitat for a fish habitat affected by the development; or

(c) a contribution to fish habitat research.

The new subsection (3) allows conditions to be imposed on the development approval about an offsets agreement. As mentioned in the Reasons for the Bill (above), offsets agreements are just one way of securing an offset. An offsets agreement which secures the offset would contain the detail about the exact nature of the offset and the actions that must be undertaken as part of the offset agreement. The applicant must enter into this agreement with the administering authority, but the applicant can also enter into agreements with other entities (e.g. an adjoining local government) to contract out the performance of those actions. The applicant retains the primary responsibility for ensuring that the offset is completed if the offset actions are contracted out. If an environmental offsets agreement is used to secure the offset, then the terms and conditions of the environmental offsets agreement must usually be complied with as a condition of the environmental authority.

The preferred approach is that offsets agreements would be entered into prior to the development approval being granted. In this case, subsections (3) and (4) would apply. However, offsets agreements may also be entered into after the development approval is granted to secure performance with the offset condition. In this case, the offsets agreement would fall under section 348 of the *Sustainable Planning Act 2009*.

The new subsection (4) ensures that any condition about an environmental offsets agreement is taken to be reasonable and relevant and complying with the common law tests of finality and certainty. This means that the offsets agreement condition cannot be appealed on these grounds. However, the offsets agreement condition can still be appealed on the grounds of the quality or quantity of the offset required.

Section 347(1)(c) of the *Sustainable Planning Act 2009* restricts conditions which may be imposed so that a condition requiring a third party to take an action cannot be imposed. Offsets agreements may include obligations by third parties to meet the offsets requirement. Consequently, subsection (5) overrides section 347(1)(c) for the purposes of environmental offsets agreements.

The new subsection (6) allows an environmental offset condition (or other condition) to be on-site or off-site from the site of the development approval. Conditions of an development approval generally only apply to the land to which the development approval is attached. However, environmental offset conditions are often off-site from the land to which the development approval attaches. This is because offsets are only required after measures have been taken to avoid (e.g. through careful project design) and minimise (e.g. through selective clearing of vegetation) the impact. Consequently, this subsection removes any doubt that off-site environmental offset conditions can be imposed.

The new subsection (7) allows an environmental offset condition to require a financial contribution to an environmental offset trust. The term ***environmental offset trust*** is defined in subsection (8)

Subsection (8) defines the terms ***Balance the Earth Trust, environmental offset***, ***environmental offset trust***, ***natural environment*** and ***on-site mitigation measure***. An environmental offset is only used to counterbalance the impacts on the natural environment. This definition is needed because the Queensland Government Environmental Offsets Policy does not extend to amenity, aesthetic, social or economic impacts.