Environmental Protection (Transhipping Activities) Amendment Regulation 2020

Explanatory notes for SL 2020 No. 225

made under the

Environmental Protection Act 1994

General Outline

Short title

Environmental Protection (Transhipping Activities) Amendment Regulation 2020

Authorising law

Sections 19 and 580 of the *Environmental Protection Act 1994*

Policy objectives and the reasons for them

In August 2018, the Queensland Government announced its transhipping policy. The policy was developed to prevent transhipping operations from damaging the Great Barrier Reef and minimise impacts of transhipping on the environmental values of Queensland's marine environment.

Transhipping involves environmental risks related to the potential release of contaminants into the marine environment, possible works to install and maintain offshore mooring infrastructure, and potential damage to the benthic environment from anchorage and propeller movements. The environmental risks of transhipping are relevant to all marine environments; however, the Great Barrier Reef has particular values which are already experiencing multiple pressures from climate change, catchment water quality and existing port and shipping activities. Initiatives that avoid additional pressures on these vulnerable ecosystems will help to protect the Great Barrier Reef's outstanding universal value, natural integrity and cultural values.

The transhipping policy states that transhipping that occurs partly or wholly within the Great Barrier Reef Marine Park will not be permitted. The Queensland Government has also announced that in areas that are outside the Great Barrier Reef Marine Park, but within the Great Barrier Reef World Heritage Area, transhipping will be prohibited unless it is carried out

within port boundaries. This will assist to protect the marine environments of the Great Barrier Reef by focusing transhipping activities in the region to existing ports.

The transhipping policy also provides that transhipping will be regulated as an environmentally relevant activity (ERA) under the *Environmental Protection Act 1994*. This means that those that carry out transhipping activities will be required to have an environmental authority. This is aimed at ensuring that transhipping activities in areas outside the prohibited transhipping areas are subject to appropriate environmental regulation. This aspect of the policy recognises that there are a range of management options available to avoid or reduce the potential environmental impacts from transhipping.

All new proposals for transhipping will be captured by the policy, while all existing transhipping activities carried out in Queensland waters will be required to transition to the new policy arrangements within 12 months of the commencement of the Environmental Protection (Transhipping Activities) Amendment Regulation 2020 (Amendment Regulation).

To minimise adverse impacts from the transhipping policy and ensure essential activities can be sustained, the policy does not apply to:

- activities for the supply of essential services to remote communities;
- refuelling activities;
- marine emergency response activities; and
- transhipping while docked at a port.

The key objective of the Amendment Regulation is to amend the Environmental Protection Regulation 2019 to give legislative effect to the transhipping policy. The Amendment Regulation is also intended to clarify and improve existing provisions related to the regulation of mineral and bulk material handling (ERA 50) in the Environmental Protection Regulation 2019. These additional amendments are made to respond to stakeholder feedback.

Achievement of policy objectives

The Amendment Regulation gives legislative effect to the transhipping policy by:

- clearly prescribing transhipping as an ERA; and
- inserting a 'refusal provision' for environmental authority applications for transhipping within particular areas of the Great Barrier Reef.

The other policy objective, which relates to clarifying and improving the existing regulation of mineral and bulk material handling, is achieved by:

- amending the definitions of 'bulk material' and 'mineral' in ERA 50;
- making other minor changes to drafting for ERA 50; and
- removing a duplication in regulation for the storage of chemicals in connection with operations at a port.

Further details on the amendments are provided below.

Prescribing transhipping as an environmentally relevant activity

The Amendment Regulation replaces schedule 2, section 50 of the Environmental Protection Regulation 2019 to clearly identify transhipping as an activity regulated under this provision.

Transhipping is prescribed as a new threshold under ERA 50 (Mineral and bulk material handling).

Transhipping is defined as the loading or unloading of minerals or bulk materials from one ship to another ship at a rate of 100 tonnes or more in a day.

The Amendment Regulation provides that transhipping does not include loading or unloading materials in association with carrying out dredging activities to which schedule 2, section 16 applies. In some dredging operations, material can be pumped directly from a pump on one barge onto a second barge for transportation to another area. The transfer of dredged material between vessels is not considered transhipping for the purposes of ERA 50.

Under the Amendment Regulation, transhipping also does not include activities for an emergency response, ship refuelling (i.e. supplying fuel to a ship to power its engines), transfer of materials between ships docked (i.e. tied up at a wharf berth) within port limits, and transport of bulk materials to remote areas. The transportation of bulk materials to remote areas of the State is generally for the purposes of development or basic human needs. Examples include the transport of fuel, gravel, sand and other road or building construction materials to remote areas. As transport options for remote areas can be limited, the exclusion for remote areas ensures no adverse impacts on the ongoing development and functioning of these areas.

The storage of minerals and bulk materials for later transhipment, and the storage of minerals and bulk materials following transhipment, is not regulated under the new transhipping threshold. This is because this storage activity is generally regulated under other thresholds in ERA 50.

Similarly, the shore-based loading of materials onto a ship for later transfer to another ship, or unloading of materials from a ship to the shore following transfer from another ship, is not captured within the definition of transhipping. This is because these activities are regulated under other thresholds of ERA 50.

Transhipping has been assigned an aggregate environmental score of 73, as the risk has been assessed to be the same as the existing thresholds 1(a) and 2 of ERA 50.

To support implementation of the amendments, the Amendment Regulation inserts a new section (section 186A) which provides a power for the administering authority to amend an existing environmental authority for ERA 50 to insert the transhipping threshold on it. It also inserts transitional provisions which provide for the following matters:

- existing holders of an environmental authority for ERA 50 are, from commencement, taken to be the holder of an environmental authority for the new ERA 50 (new section 220);
- environmental authority applications made, but not decided, before commencement are to be decided under the new ERA 50 (new section 221);
- amendment applications made, but not decided, before commencement are to be decided under the new ERA 50 (new section 222); and
- operators of activities that were not captured under the pre-amended ERA 50, but are captured under the new ERA 50, have 12 months to obtain an environmental authority. It is considered that most transhipping activities were captured by ERA 50 under the pre-amended regulation, but there may have been limited circumstances where

transhipping did not fall within ERA 50, so if there are any of these activities, the operators will have time to transition (new section 223).

Transhipping in particular areas

The Amendment Regulation includes a new requirement that applies to the administering authority when making a decision related to an environmental authority application for a transhipping activity. The administering authority must refuse to grant an application for a transhipping activity if the activity is to be carried out in an area partly or wholly within the Great Barrier Reef Marine Park. This refusal requirement applies regardless of whether the area is within the port limits of a port under the *Transport Infrastructure Act 1994*.

The Amendment Regulation clarifies that the requirement to refuse an application for transhipping activities to be carried out in the Great Barrier Reef Marine Park includes transhipping activities to be carried out in a 'relevant Great Barrier Reef Marine Park area' as defined under section 19(3) of the *Environmental Protection Act 1994*. This effectively prohibits transhipping undertaken in parts of the Great Barrier Reef Marine Park area that are outside of State waters (provided part of the transhipping activity is also within State waters).

The administering authority must also refuse applications for an environmental authority for transhipping if the transhipping is to be carried out in an area within the Great Barrier Reef World Heritage Area that is outside port limits.

There is no requirement to refuse an application for transhipping if the activity will be carried out in an area which is within the Great Barrier Reef World Heritage Area, wholly outside the Great Barrier Reef Marine Park, and wholly within port limits.

Other amendments related to ERA 50

In addition to inserting a new threshold for transhipping activities, the new schedule 2, section 50 inserted by the Amendment Regulation contains some minor changes from the pre-amended schedule 2, section 50. The activities regulated under ERA 50 are generally the same; however, there are some drafting changes to clarify the intended operation of this provision. Most notably, the definitions of 'bulk material' and 'mineral' have been amended to better reflect the intent.

Bulk materials and minerals that are securely held in a container or other packaging so that they are unlikely to spill, leak or escape are not subject to regulation under ERA 50.

The definition of 'bulk material' is refined to clarify that ERA 50 is intended to apply to solid materials that consist of separate particles or granules. This is designed to capture materials that would, when loaded into the hull of a ship or other container, conform to the shape of the ship or container. The definition of 'bulk material' now also clearly includes liquids and gases.

Examples of materials that are a 'bulk material' or 'mineral' within the definition in ERA 50 include: fertiliser, chemicals, woodchips, grains and cereals, coal, bauxite, sand, cement, ash, stones, seeds, salt, sugar, flour, tallow, iron and steel, scrap metal, molasses, gypsum/limestone, cotton, refined and crude oil, and gas. Materials not regulated under ERA 50 include items such as live animals, motor vehicles and machinery, portable and demountable buildings, seafood products, and household items. ERA 50 also does not apply to ingots of aluminium or other

metals, as these are not considered a mineral, and will generally be securely packaged on a crate or similar.

In determining whether a material is regulated under ERA 50, different factors need to be considered depending upon the nature of the activity being carried out. For bulk materials and minerals that are to be transported, the material needs to be securely stored in a container or other packaging for the duration of the storage or loading and/or unloading process. Materials loaded directly into the hull of a ship without packaging are not excluded from the definition of 'bulk material' or 'mineral'. Liquids, gases or other materials that are loaded onto a ship via a pipeline would not be considered to be securely stored or packaged, and would therefore not be excluded from the definition of 'bulk material' or 'mineral'. Similarly, a product that is loaded onto a ship by a Container Rotainer System (rotainer) is not secure for the duration of the loading so would not be excluded from the definition of 'bulk material' or 'mineral'. In comparison, for bulk materials and minerals that are simply being stored, if the product is stored in a rotainer with its lid on to keep the contents from escaping while stored, the storage activity would not be subject to regulation under ERA 50.

The term 'port' has been replaced with 'port area' and the associated definition has been updated to reflect current drafting practice.

The Amendment Regulation also amends schedule 2, section 8(2). Under the pre-amended regulation, both ERA 8 and ERA 50 could regulate the stockpiling of chemicals at a port. This is an unnecessary duplication in regulation. Therefore, ERA 8 is amended so that it does not include carrying out an activity to which ERA 50 applies. However, this exclusion from ERA 8 only applies where the threshold is 1, 2, 4 or 5. Higher risk chemical storage continues to be regulated under ERA 8.

It should be noted that the transitional provisions outlined above may also be relevant in the context of these additional amendments.

Consistency with policy objectives of authorising law

The Amendment Regulation is consistent with the object of the *Environmental Protection Act 1994*, which is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (ecologically sustainable development).

Inconsistency with policy objectives of other legislation

The Amendment Regulation is consistent with the policy objectives of other legislation.

Benefits and costs of implementation

The Amendment Regulation will implement measures designed to enhance the protection of Queensland's marine environments. The proposals will contribute to achieving the vision of the Reef 2050 Long-Term Sustainability Plan, which is to "ensure Great Barrier Reef continues to improve on its Outstanding Universal Value every decade between now and 2050 to be a natural wonder for each successive generation to come".

The costs of implementing the Amendment Regulation will be met from existing resources. While there will be costs to the Queensland Government associated with regulating transhipping activities, these costs will be partially offset by fees charged to operators. Under the *Environmental Protection Act 1994*, application fees and annual fees must be paid for environmental authorities, and these fees are based on cost recovery principles.

Consistency with fundamental legislative principles

The amendment regulation is considered consistent with fundamental legislative principles.

Consultation

Public consultation was undertaken on a draft transhipping policy from September 2017 for a period of four weeks. A consultation paper was posted online, and the public was invited to make submissions on this paper. During this period, 2,246 submissions were received. This included 2,220 submissions in a template format that called for a prohibition on transhipping in the Great Barrier Reef Marine Park and outside priority port areas in the Great Barrier Reef World Heritage Area.

A consultation draft of the Amendment Regulation was provided to key stakeholders for comment in November 2019 for a period of three weeks. Stakeholders included port operators, resource companies, industry groups such as the Queensland Resources Council and APPEA, and environmental groups such as the Environmental Defenders Office. A total of 11 submissions were received on the draft. Submitters did not raise significant concerns; however, clarity was sought on the transitional provisions and details of implementation plans. A number of submissions raised technical drafting issues, which have been addressed through minor amendments to the draft Amendment Regulation to ensure the policy intent is reflected.

Outside of these formal consultation periods, the Department of Environment and Science (DES) was also contacted by project proponents to discuss how the transhipping policy and Amendment Regulation would affect their proposed transhipping operations. DES has written to, and met with stakeholders, to discuss transhipping options that would be permissible under the Amendment Regulation.

In accordance with *The Queensland Government Guide to Better Regulation* (the guidelines), the Office of Best Practice Regulation was consulted in relation to the regulatory proposals in the Amendment Regulation. A preliminary impact assessment and a request for exclusion was submitted. The Office of Best Practice Regulation advised that no further regulatory impact assessment was required under the guidelines.