

# **ENVIRONMENTAL LEGISLATION AMENDMENT BILL 2003**

## **EXPLANATORY NOTES**

### **GENERAL OUTLINE**

#### **Short Title**

The short title of the Bill is the *Environmental Legislation Amendment Bill 2003*.

#### **Policy Objectives of the Legislation**

The principal objectives of the Bill are to:

- amend the *Nature Conservation Act 1992* (NC Act) to extend standing provisions and clarify the scope and application of certain provisions to improve the effectiveness of the NC Act in conserving nature
- ensure that the NC Act and the *Recreation Areas Management Act 1988* (RAM Act) contain adequate powers to provide for the safety of children in respect of dangerous animals; and
- amend the *National Environment Protection Council (Queensland) Act 1994* (NEPC Act) to simplify statutory procedures and to make minor amendments in accordance with the national agreement.

#### **Reasons for the Bill**

The proposed amendments to the NC Act and the RAM Act relate to important conservation protection matters and to matters of child safety in protected areas and recreation areas. The proposed amendments to the NEPC Act are to ensure that Queensland continues to honour the commitment it made to NEPC processes when it signed the Intergovernmental Agreement on the Environment in 1992.

## **Achieving the Objective**

The objective of the Bill will be achieved by amendments to the NC Act to provide for:

- third party standing in relation to court declarations, enforcement orders and judicial review;
- extension of the territorial application of the NC Act to allow uniform regulation for wildlife conservation;
- clarification of the Chief Executive's powers regarding uses that may be permitted in national parks and national parks (recovery); and
- the terms 'national park' and 'conservation park' to be lawfully used in marine park zone names.

The Bill also amends the NC Act and the RAM Act to confirm the power to act for children's safety in all protected areas and recreation areas, and in regard to any kind of dangerous animal.

The Bill amends the NEPC Act to reflect a review of the operation of the Commonwealth mirror legislation. The review found that it would be beneficial to simplify statutory procedures established by the legislation, and resolve uncertainty and inconsistency with other Commonwealth legislation. State and Territory Ministers have agreed to amend legislation to mirror the Commonwealth amendments resulting from the review.

The Bill makes minor amendments to several pieces of environmental legislation to clarify that certain offences are misdemeanours and makes minor corrections.

## **Alternatives to the Bill**

Legislative amendment was considered to be the most effective and efficient way to achieve the foregoing objectives. The NC Act, the RAM Act and the *Coastal Protection and Management Act 1995* (CPM Act) already contain a core regulatory framework for achieving conservation outcomes. The proposed amendments should complement, enhance and strengthen existing process and enforcement provisions, to achieve greater efficiencies and environmental outcomes for the community. The legislative amendments to the NEPC Act will make Queensland's NEPC legislation consistent with that of the Commonwealth and other States and Territories.

**Administrative costs and savings to Government**

The legislative amendments to the NEPC Act should improve administrative functions thereby making the environment protection output of the NEPC more efficient and cost-effective.

The legislative amendments to the NC Act should save the community the cost of expensive litigation and improve administrative efficiency through:

- clarification of certain sections of the Act that may be ambiguous to improve administrative efficiency in decision-making and management of protected areas and wildlife, and reduce resources required to assist clients by clarifying the application and operation of the legislation; and
- amendments regarding court proceedings for a declaration or an enforcement order under the Act will ensure that judicial proceedings regarding environmental matters are dealt with expeditiously and without the need for judicial review action to be taken against the Queensland Government at a later stage, thereby making the process more cost-effective.

The legislative amendments to the NC Act allow early intervention to conserve nature. Currently, the remedies are largely confined to prosecutions that result in penalties. Penalties do not for example, protect or prevent the destruction of endangered habitat. In many cases, people will comply with the law if the law is made clear. Declarations will assist in resolving disputes between parties and enhance compliance with the law. Parties such as large corporations and government bodies will be assisted by having a clear statement of the law. Enforcement orders may be necessary if the activity of concern is not suspended. Declarations also allow persons with legitimate interests to go to the courts to seek a declaration of whether their proposed conduct (e.g. eco-tours) will contravene the Act. This security should encourage greater investment in industry that complements the need to conserve nature.

The legislative amendments to the RAM Act clarify that the Government can regulate to ensure that a child's safety is not compromised at designated public recreation places, thereby limiting the government's liability should an incident occur.

### **Consistency with Fundamental Legislative Principles**

New sections 173I-173J provide the Court with the discretion to attach enforcement orders for rehabilitation or restoration to the land. Section 4(2)(a) of the *Legislative Standards Act 1992* requires that legislation have sufficient regard to the rights and liberties of individuals. The Bill therefore raises a fundamental legislative principles issue because of the potential effects on a land owner's ability to deal freely with his or her property, as an enforcement order requiring the rectification of damage caused by an offence against the NC Act may lower the saleability of the affected land.

### ***Recording of enforcement order on title of land***

These provisions ensure the ongoing effectiveness of an enforcement order by ensuring that it survives a change in title. Without these provisions, on a change in title it becomes impracticable for the original offender to comply with the order, while the new title-holder has no obligation to continue the rehabilitation or restoration. The provision is necessary because rehabilitation of an area of critical habitat for example, takes a period of years to decades to re-establish, and consequently, rehabilitation is often a long-term process.

The person retains the right to deal with the property. However, the provision may result in the value of the land being adjusted to reflect the costs of rehabilitation. As a consequence the provision will prevent persons who have cleared critical habitat illegally from benefiting from the increase in land value that may be created by the illegal activity. It also prevents individuals from circumventing the enforcement order by selling the land to another family member or company.

### ***Regard for rights and liberties of individuals***

The draft Bill makes quite extensive provision for removal of the enforcement order from the registrar's records. A person who has an interest in the land the subject of the order may apply to the chief executive for the order to be removed if—

- (a) the order has been cancelled by the court; or
- (b) the order has been substantially complied with; or
- (c) the person proposes alternative measures (for example, a registered covenant) ensuring the land will be restored or rehabilitated.

This process provides for the flexibility to adapt to changing technology and circumstance, whilst ensuring the rehabilitation or restoration outcomes are achieved. For example, the landholder may propose more effective and efficient means of rehabilitating an area of critical habitat and enter into an agreement to this effect. The landholder may also propose to register a covenant on the title to protect the area of critical habitat.

Where the request to remove the order from title is refused, or the application is approved subject to conditions, the Bill provides for the landholder appeal to the Court, thereby providing a means of review of the administrative decision.

### **Consultation**

The provisions of the Bill have been developed following over twelve months of consultation with Government Departments, the Queensland Conservation Council and the Environmental Defenders Office. All stakeholders have indicated support for the proposed amendments.

## **NOTES ON PROVISIONS**

### **PART 1—PRELIMINARY**

#### **Clause 1 Short title**

*Clause 1* sets out the short title of the proposed Act.

#### **Clause 2 Commencement**

*Clause 2* provides for concurrent commencement of Part 2 of the Bill with mirror Commonwealth, State and Territory legislation. All other parts of the Bill will commence on assent.

**PART 2—AMENDMENT OF NATIONAL  
ENVIRONMENT PROTECTION COUNCIL  
(QUEENSLAND) ACT 1994**

**Clause 3 Act amended in pt 2**

*Clause 3* provides that Part 2 amends the *National Environment Protection Council (Queensland) Act 1994* (NEPC Act).

**Clause 4 Amendment of s6 (Interpretation)**

*Clause 4* amends section 6 (Interpretation) of the NEPC Act to include a definition for “Ministerial Council” and “Minor Variation”.

**Clause 5 Amendment of s13 (Powers of the Council)**

*Clause 5* amends section 13 (Powers of the Council) of the NEPC Act by providing an additional power to the Council to provide assistance and support to other Ministerial Councils through the Service Corporation.

**Clause 6 Amendment of s20 (Variation or revocation of measures)**

*Clause 6* amends section 20 (Variation or revocation of measures) of the NEPC Act by inserting an additional subsection that states that subsections (2) to (4) do not apply to a minor variation of a national environment protection measure made under the newly created Division 2A (Minor variation of national environment protection measures) of the Act (refer to *Clause 7* below).

**Clause 7 Insertion of new pt 3, div 2A**

*Clause 7* adds a new Division 2A (Minor variation of national environment protection measures) to Pt 3 of the NEPC Act. This clause also adds 3 new sections:

- s22A (Minor variation of measures);
- s22B (Public consultation for minor variation); and
- s22C (Council to have regard to submissions etc).

Subsection 22A(1) sets out the conditions under which the Council can determine whether a variation to a national environment protection measure is minor. This subsection requires the variation to be supported by a unanimous resolution of the Council that must state that the variation will not significantly change the measure. If the Council makes such a resolution the variation is taken to be minor. Subsection 22A(2) then requires the Council to prepare a draft of the proposed variation and a statement that explains the reasons for the proposed variation, the nature and effect of the proposed variation, and the reasons why the Council is satisfied it is minor.

Section 22B provides for public consultation before a minor variation is made so that the public is aware that the Council is intending to vary a measure and have the opportunity to make submissions to the Council on the proposed variation or the explanatory statement relating to the proposed variation.

Section 22C provides that when making a minor variation the Council must have regard to any submissions it receives, the consistency of the measure with the principles of environmental policy set out in section 3 of the Intergovernmental Agreement on the Environment, any relevant international agreements to which Australia is a party and any regional differences in Australia.

### **Clause 8 Amendment of s36 (Functions of the Service Corporation)**

*Clause 8* inserts an additional paragraph within subsection 36(1) (Functions of the Service Corporation) of the NEPC Act to provide for the Service Corporation to provide assistance and support to other Ministerial Councils when directed by the Council. This amendment is consistent with clause 5.

### **Clause 9 Amendment of s43 (Leave of absence)**

*Clause 9* amends section 43 (Leave of absence) to reflect changes to Commonwealth legislation, in relation to the replacement of the *Public Service Act 1922* (Cwlth) with the *Public Services Act 1999* (Cwlth).

**Clause 10 Amendment of s49 (Public Service staff of Service Corporation)**

*Clause 10* amends section 49 (Public Service staff of Service Corporation) to omit the words “appointed or employed under the *Public Service Act 1922* (Cwlth).” of the NEPC Act and replace with the words “engaged under the *Public Services Act 1999* (Cwlth)” to reflect changes to Commonwealth legislation.

This Clause also replaces the existing subsection 49(2) with a new subsection 49(2) to reflect changes in Commonwealth legislation by providing that the NEPC Executive Officer and any Australian Public Service employee assisting the NEPC Executive Officer together constitute a Statutory Agency; and that the NEPC Executive Officer is the head of the Statutory Agency.

**Clause 11 Amendment of s51 (Staff seconded to Service Corporation)**

*Clause 11* amends subsection 51(1) (Staff seconded to Service Corporation) to omit the words “officers and employees of Departments of the Australian Public Service” and replace with the words “persons engaged under the *Public Service Act 1999* (Cwlth),” to reflect changes in Commonwealth legislation.

**Clause 12 Amendment of s56 (Application of money of Service Corporation)**

*Clause 12* amends section 56 (Application of money of Service Corporation) to insert a new subsection 56(2) to provide that subsection (1) does not prevent investment of surplus money of the Service Corporation under section 18 of the *Commonwealth Authorities and Companies Act 1997* (Cwlth), in relation to the application of that Act under section 59 of the NEPC Act.

**Clause 13 Amendment of s59 (Special provisions relating to reports etc. prepared under the Audit Act 1901 (Cwlth))**

*Clause 13* amends section 59 to reflect changes in Commonwealth legislation in relation to the commencement of the *Commonwealth Authorities and Companies Act 1997* (Cwlth).



**Clause 14 Amendment of s64 (Review of operation of Act)**

*Clause 14* changes the heading of section 64 (Review of operation of Act) of the NEPC Act to “Initial review after fifth anniversary of commencement of Act” due to the insertion of subsequent 5 yearly reviews under clause 15.

**Clause 15 Insertion of new s65**

*Clause 15* amends the NEPC Act to insert a new section 65 (Subsequent 5 yearly reviews). The new section reflects the agreement that the Council will undertake a further review of matters every 5 years following the review provided for under subsection 64(1) as soon as possible after the end of the 5 year period. The Bill states that a report on the further review must be tabled by the Minister at the Legislative Assembly within 1 year after the end of the period to which it relates.

**PART 3—AMENDMENT OF NATURE CONSERVATION ACT 1992****Clause 16 Act amended in pt 3**

*Clause 16* provides that Part 3 amends the *Nature Conservation Act 1994* (NC Act).

**Clause 17 Insertion of new s3A**

*Clause 17* inserts a new provision 3A to ensure the NC Act has sufficient extra-territorial powers to allow uniform regulation for wildlife conservation. This amendment will ensure the NC Act can provide protection for wildlife in areas adjoining Queensland’s jurisdiction, for example in waters off the Queensland coast where protection under the NC Act is currently doubtful or deficient due to jurisdictional technicalities.

**Clause 18 Amendment of s35 (Chief Executive's powers about permitted uses in national parks or national parks (recovery))**

*Clause 18* amends section 35 to clarify the scope of the permitted uses that may be authorised under this provision by inserting a new paragraph in 35(1) to provide that a use may only be authorised by the Chief Executive if the use is a service facility. This amendment will reflect the original intent of the provision, as expressed in the second reading speech and the explanatory notes, that uses which may be permitted are restricted to facilities that are required for an essential public purpose, mainly in the areas of communication, safety, and water and energy supply. The definition of a 'service facility' is included in the Dictionary (refer to clauses 19 and 25).

**Clause 19 Amendment of s 36 (Authorities for new national park or national park (recovery))**

*Clause 19* omits the definition of a 'service facility' from section 36 of the NC Act, which has been relocated to the Dictionary under clause 25.

**Clause 20 Amendment of s 70 (Unlawful use of certain words)**

*Clause 20* amends section 70 of the NC Act to insert a penalty for subsection 70(1) and ensure that the provision does not prevent the use of the words 'national park' and 'conservation park' in the name of marine park zones that are established under the *Marine Parks Act 1982* and the *Great Barrier Reef Marine Park Act 1975* (Cwlth).

**Clause 21 Insertion of new pt 10, div 1 hdg**

*Clause 21* provides for the insertion of a heading for a new Division 1 of Part 10 of the NC Act '*Division 1—Proceedings and offences generally*' which includes existing provisions 160 to 173.

**Clause 22 Amendment of s 164 (Indictable and summary offences)**

*Clause 22* amends section 164 of the NC Act to state that an indictable offence against the NC Act is a misdemeanour. Section 164 currently states that an offence against the NC Act for which the maximum penalty is two years imprisonment or more is an indictable offence.

This amendment reflects current legislative drafting practices to state whether an indictable offence is a crime or a misdemeanour. The maximum penalty applied for any provision under the NC Act is currently two years imprisonment and therefore all such offences are classified as misdemeanours.

Similar amendments are made to the CPM Act, the *Environmental Protection Act 1994* (EP Act), and the *Wet Tropics World Heritage Protection and Management Act 1993* under clause 28. Generally only serious offences of or exceeding maximum penalties of 5 years imprisonment, such as the offence of causing serious environmental harm under the EP Act, are classified as a 'crime'.

### **Clause 23 Insertion of new pt 10, divs 2 and 3**

*Clause 23* inserts a new 'Division 2 – Proceedings for declarations and enforcement orders' in Part 10 of the NC Act. The new Division 2 includes a number of new provisions to provide for a third party to bring civil proceedings to seek a declaration, order relating to a declaration or enforcement order from the Planning and Environment Court. The procedural requirements in relation to court proceedings in the Planning and Environment Court are set out in the *Integrated Planning Act 1997*, including in relation to costs, privileges, protections and immunities and the payment of witnesses under Chapter 4, Part 1 of that Act.

### **Declarations and enforcement orders**

Statutory declarations and enforcement orders are to be used for the purpose of conserving nature. They are not and should not be regarded as punitive. Whilst in theory these remedies have been available at common law, the obtaining of declarations or injunctions that a person has contravened the law is exceptional. Similarly requirements by the courts that applicants for injunctions provide undertakings as to damages are prohibitive in many cases. The Bill provides that an undertaking about damages cannot be required under an interim enforcement order. The Bill also provides that parties bear their own costs of proceedings for a declaration or enforcement order. However the Court has the discretion to make orders in relation to costs where, for example, the court considers the proceeding (or part of the proceeding) to have been frivolous or vexatious.

The amendment changes the law in that it makes those remedies available where they otherwise would not be. Declarations and enforcement orders will however closely follow the common law. The

main distinctions will arise out of the fact that they are not for the protection of individual proprietary interests, but are for the purpose of conserving nature. Examples of how the declarations and enforcement orders will follow the common law are that they will be determined according to the civil standard of proof and will not bind a subsequent court considering the same facts under the criminal rules of evidence and procedure.

To ensure that declarations and enforcement orders are effective, the Planning and Environment Court has been given very broad powers to make such orders as are necessary, including ancillary orders to give effect to the primary order. It may also be appropriate for the Court to make orders to prevent these new remedies being abused for illegitimate purposes. In so far as is practicable, the procedure in the Planning and Environment Court will be the same as that normally followed by that court for civil applications. The amendment does not create a standing requirement and gives the Minister and the chief executive a right of election to be a party. A party that commences action unreasonably may be required to pay the legal costs of the other parties.

Non-compliance with an enforcement order attracts the largest current penalty contained in the Act including up to 2 years imprisonment. During criminal proceedings for non-compliance with an enforcement order, a person charged might have legitimate concerns about the extent of the obligation created by the order and whether they have complied with the strict terms of the order. These issues could be raised in the criminal proceedings, but the opportunity to challenge the merits of the decision to make the order will remain with the Planning and Environment Court and appellate courts. In other words, respondents to enforcement orders must take the proceedings in the Planning and Environment Court seriously and cannot seek to argue the merits of the order in the criminal arena.

A limited number of activities of a non-commercial nature are excluded from the provision regarding court declarations, including recreational keeping of wildlife, camping in protected areas and caring for and rehabilitating wildlife that is sick, injured or orphaned, or whose habitat has been destroyed.

New section 173G includes provision for enforcement orders to require a person to rehabilitate or restore a protected area, the habitat of protected wildlife, critical habitat or an area of major interest. However if the affected area is not capable of being rehabilitated or restored, the Court may require the planting and nurturing of cultural or natural resources, wildlife or the habitat of protected wildlife in a stated area of equivalent size to the

affected area. The provisions relating to orders for rehabilitation and restoration are not exhaustive and the Court may determine that an alternative order for rehabilitation or restoration is appropriate. For example, a Court may decide that due to the unique or high qualities of the cleared habitat, including maturity of vegetation, it is necessary to order that a larger area of lesser quality habitat be rehabilitated to compensate for the loss. Alternatively the Court may find that protection of other areas or types of critical habitat might be considered.

The agency administering the legislation utilises the Biodiversity Assessment Mapping Methodology (BAMM) to provide a consistent approach for assessing biodiversity values at the landscape scale in Queensland using vegetation mapping data. Biodiversity values used by the BAMM include ecosystem value, habitat for vulnerable, endangered and critically endangered wildlife, size and condition of an area of remnant vegetation. BAMM may provide a useful reference tool for the Court and parties to court proceedings in considering biodiversity values in this context.

New sections 173I-J provide the Court with the discretion to attach enforcement orders for rehabilitation or restoration to the land. These provisions raise issues relating to fundamental legislative principles under the *Legislative Standards Act 1992*, section 4(2)(a), which require that legislation have sufficient regard to the rights and liberties of individuals. The provisions in the Bill may affect the ability of a person to deal with the person's property, as an enforcement order requiring the rectification of damage caused by an offence against the NC Act may lower the saleability of the affected land. However, the object of enforcement orders will be the conservation of nature and it will be difficult for individuals to use them for personal gain.

This provision ensures the ongoing effectiveness of an enforcement order by ensuring that it survives a change in title. Without the provision, on a change in title it becomes impracticable for the original offender to comply with the order, while the new title-holder has no obligation to continue the rehabilitation or restoration. The provision is necessary because rehabilitation of an area of critical habitat for example, takes a period of years to decades to re-establish, and consequently, rehabilitation is often a long-term process.

The person retains the right to deal with the property. However, the provision may result in the value of the land being adjusted to reflect the costs of rehabilitation. As a consequence the provision will prevent persons who have cleared critical habitat illegally from benefiting from the increase

in land value that may be created by the illegal activity. It also prevents individuals from circumventing the enforcement order by selling the land to another family member or company.

Important features have been incorporated in the Bill to minimise the effect on the ability of a person to deal with their property. The new section 173M contained in the Bill provides a clear process for the landholder to apply to the Chief Executive to have the order removed from the title of the land, where the order has been effectively complied with, or where the Chief Executive is satisfied the objectives of the order will be achieved through alternative means that are acceptable to relevant parties.

This process provides for the flexibility to adapt to changing technology and circumstance, whilst ensuring the rehabilitation or restoration outcomes are achieved. For example, the landholder may propose more effective and efficient means of rehabilitating an area of critical habitat and enter into an agreement to this effect. The landholder may also propose to register a covenant on the title to protect the area of critical habitat.

Where the request to remove the order from title is refused, or the application is approved subject to conditions, the Bill provides for the landholder to appeal to the Court, thereby providing a means of review of the administrative decision.

### **Judicial Review**

Clause 23 also provides for extended standing for third parties under the *Judicial Review Act 1991* (Qld) in relation to administrative decisions under the NC Act to include persons or organisations with an interest in the environment.

### **Clause 24 Amendment of s 175 (Regulation-making power)**

*Clause 24* amends section 175 of the NC Act, which provides for the power to make regulations, to ensure the Act contains clear powers to act for children's safety in all protected areas.

### **Clause 25 Amendment of sch (Dictionary)**

*Clause 25* amends the Dictionary of the NC Act to refer to new definitions included in the extended standing provisions under clause 23, relocate the definition of a 'service facility' from section 36 as referred to in relation to clause 19, and amend the definition of 'CITES' to remove the

reference to the repealed Commonwealth *Wildlife Protection (Regulation of Exports and Imports) Act 1982*.

## **PART 4—AMENDMENT OF RECREATION AREAS MANAGEMENT ACT 1988**

### **Clause 26 Act amended in pt 4**

*Clause 26* provides that Part 4 amends the *Recreation Areas Management Act 1988* (RAM Act).

### **Clause 27 Amendment of sch 3 (Subject matters for by-laws)**

*Clause 27* amends schedule 3 of the RAM Act, in relation to the subject matters for by-laws, to ensure the RAM Act contains clear powers to act for children's safety in all recreation areas.

## **PART 5—AMENDMENT OF ACTS**

### **Clause 28 Other amendments of Acts**

*Clause 28* and the *Schedule* make a number of minor amendments to the CPM Act, the EP Act, the NC Act and the *Wet Tropics World Heritage Protection and Management Act 1993*, including clarification of whether indictable offences under these Acts are crimes or misdemeanours in accordance with clause 22 of the Bill.

## **SCHEDULE**

### **AMENDMENT OF ACTS**

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