

Mineral and Energy Resources (Financial Provisioning) Bill 2018

Explanatory Notes

For

Amendments to be Moved During Consideration in Detail by the Honourable Jackie Trad, Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships

Title of the Bill

Mineral and Energy Resources (Financial Provisioning) Bill 2018.

Objectives of the amendments

The objective of the amendments to the Mineral and Energy Resources (Financial Provisioning) Bill 2018 to be moved during consideration in detail are to ensure that: approval of non-use management areas in Progressive Rehabilitation and Closure Plans (PRC plans) will be subject to a rigorous process through an objective *public interest evaluation*.

Other minor amendments will ensure that assessment of PRC plans for existing sites has due regard to previously approved rehabilitation outcomes, improve administrative processes and correct minor errors contained in the Bill.

Achievement of policy objectives

The policy objective is achieved through:

- introducing a requirement in the *Environmental Protection Act 1994* (EP Act) for the administering authority to require a *public interest evaluation* that evaluates *public interest considerations* for applications for a PRC plan which include a non-use management area justified on the public interest
- ensuring the for the public interest evaluation process includes appropriate timeframes, requirements for recommendations, processes for review, ability for cost recovery and respecting confidentiality

- ensuring that a Progressive Rehabilitation and Closure Plan schedule (PRCP schedule) cannot be approved unless it is consistent with the findings of the public interest evaluation
- ensuring efficiency in the process by integrating the public interest evaluation process with the environmental impact statement (EIS) processes under the EP Act and the *State Development and Public Works Organisation Act 1971*
- providing flexibility in the Coordinator-General's EIS process by ensuring that for coordinated projects, the Coordinator-General is able to require a public interest evaluation at any time and may complete the process before the report on the evaluation is received (new section 136A and amendment to section 205)
- ensuring that if a public interest evaluation report is received and is inconsistent with any Coordinator-General stated conditions, the administering authority can only impose conditions on the PRCP schedule that is consistent with the report (amendment to section 205).

Other minor amendments to the EP Act include:

- clarifying terminology within the PRCP schedule for when land is considered available for rehabilitation to better align the legislation with the Mined Land Rehabilitation Policy
- correcting the location of the minimum decision criteria for the PRCP schedule (moved from 194B to 176A)
- reinserting the annual notice provisions (and de-coupling it from the annual return) and correcting the reference from 'annual report' to 'annual return' as recommended by the Economics and Governance Committee
- ensuring that the public register contains existing financial assurance decisions, any documents relied upon to exempt a holder from justifying a non-use management area and any public interest evaluation reports
- ensuring the process for transitioning existing sites to the PRC plan requirement do not retrospectively breach rights by exempting an environmental authority holder from having to justify a non-use management area if it has been approved in a revised list of 'land outcome documents' (new definition in section 750 and new sections 754(3)-(6))
- providing natural justice in the environmental authority amendment process as a result of a transitional site's approval of a PRCP schedule – this will ensure that the process to amend the environmental authority to remove rehabilitation requirements now in the PRCP schedule has the same appeal and review rights as other environmental authority amendment processes
- ensuring the estimated rehabilitation cost (ERC) transitional process keeps existing FA conditions for applications on foot and the transitional period is not inadvertently extended to 3 years
- inserting the decision to direct a holder to re-apply for an ERC decision as an original decision that is appealable to the Land Court.

Corrections and other minor amendments to the Financial Provisioning Scheme include:

- correcting minor cross-referencing errors to sections of the *Petroleum and Gas (Production and Safety) Act 2004* in clause 63 and the definition of 'abandoned operating plant' and 'remediation activities' in the dictionary schedule 1
- including a reference to section 762(3)(a)(i) of the EP Act in clause 91 that was inadvertently omitted

- changing the amendments to the *Right to Information Act 2009* which operated as exclusion provisions, to instead operate as exemption provisions, in accordance with the preferred approach of the Office of the Information Commissioner.

Amendments to the *State Development and Public Works Organisation Act 1971*

- ensuring the Coordinator-General under the *State Development and Public Works Organisation Act 1971* can make stated conditions for PRCP schedules.

Alternative ways of achieving policy objectives

There are no alternative ways of achieving the policy objectives of the Bill.

Estimated cost for government implementation

There are no additional costs to government in implementing the amendments.

Consistency with fundamental legislative principles

The amendments do not breach fundamental legislative principles. Where fundamental legislative principles are raised by the content of a provision, but not breached, these issues are addressed in the Notes of Provisions for that amendment.

Consultation

The amendments to the Bill are largely in response to the submissions made to the Economics and Governance Committee. For the amendments that relate to the public interest evaluation, consultation has been undertaken with key stakeholder groups, including both industry and environmental/community groups. Consultation has involved ongoing meetings and discussions from May 2018 to November 2018. As a result of the consultation, the public interest evaluation process also includes:

- the ability for the applicant or proponent to review a draft public interest evaluation report
- the ability for the applicant to change their proposed PRCP schedule to reflect the public interest evaluation report without re-starting the environmental authority application process
- the ability for the applicant, proponent or any submitter to request a review of the public interest evaluation report by a different qualified entity.

Notes on provisions

Amendment 1 Clause 63 (Application of subdivision)

Amendment 1 corrects a minor error to correctly refer to section 799D of the *Petroleum and Gas (Production and Safety) Act 2004*.

Amendments 2-4 Clause 79

Amendments 2-4 clarify the scope of information which is regarded as ‘confidential information’. This is necessary as the amendments to the *Right to Information Act 2009* (see amendment 55) are now drafted as exemptions to the Right to Information Act that rely on the definition of confidential information.

Amendment 5 Clause 91 (Initial allocation decision not required until scheme manager gives transition notice)

Amendment 5 corrects a minor error to insert section 762(3)(a)(i) of the *Environmental Protection Act 1994* which was inadvertently omitted.

Amendment 6 After clause 96

Amendment 6 links the Environmental Impact Statement (EIS) process in Chapter 3 of the *Environmental Protection Act 1994* to the public interest evaluation process introduced in Chapter 5 of the *Environmental Protection Act 1994*. These amendments do not apply, or relate to, an EIS process under the *State Development and Public Works Organisation Act 1971*. These amendments ensure:

- the proponent can provide information regarding how proposed non-use management areas are justified having regard to the ‘public interest considerations’ in an EIS
- the Chief Executive must require a public interest evaluation to be received before the end of the submission period for the EIS
- the public interest evaluation report is provided to the proponent together with submissions
- the proponent is able to change the project and EIS to align with any recommendation in the public interest evaluation report
- the Chief Executive can only allow an EIS to proceed to the ‘decision stage’ in Chapter 3 if it is consistent with the public interest evaluation report. An EIS which is inconsistent with the public interest evaluation report will be refused from proceeding under section 56A to the ‘decision stage’ in Chapter 3.

This amendment introduces 5 new Clauses:

- a) New Clause 96A amends section 49 (Decision on whether EIS may proceed) of the *Environmental Protection Act 1994* to require the Chief Executive to request a public interest evaluation if:
 - a terms of reference for the EIS included a proposed PRC plan
 - the PRCP schedule includes a non-use management area justified under section 126D(2)(b) (justified because it is in the public interest not to rehabilitate the land to a ‘stable condition’) and
 - the Chief Executive allowed the EIS to proceed to the notification stage.

Clause 96A is necessary to ensure that if a non-use management area is proposed at the EIS stage, then a public interest evaluation is carried out at the appropriate time to avoid process

duplication and delays. This Clause works with section 136A which ensures that public interest evaluations carried out as part of the EIS process can be used for the environmental authority application process.

- b) New Clause 96B amends the heading of Chapter 3, part 1, division 4, subdivision 2 to include reference to public interest evaluations. This amendment is consequential and is necessary to ensure correct interpretation of the subdivision.
- c) New Clause 96C amends section 56 (Response to submissions) of the *Environmental Protection Act 1994* to ensure that the public interest evaluation report is provided to the proponent with the submissions. This amendment ensures sufficient time is provided to the Chief Executive to receive and forward the public interest evaluation report and the submissions to the proponent, within 10 business days after the end of the submission period or when the report is received, whichever is the latest. The report must also be provided to any submitters (so they are also able to request a review of the report under section 316PC).

Clause 96C also amends section 56 to allow the proponent to respond to the public interest report and amend their EIS to reflect any recommendations made by the evaluation. This section also allows 20 business days for the proponent or submitter to request a review under 316PC.

These amendments are necessary to ensure that the proponent is provided with all the information necessary to change their EIS to address concerns raised by submitters and any alternative option recommended by the public interest evaluation.

- d) New Clause 96D amends section 56A (Assessment of adequacy of response to submission and submitted EIS) of the *Environmental Protection Act 1994* to:
 - a. extend the section to apply if a public interest evaluation has been requested by the Chief Executive
 - b. ensure the Chief Executive may only allow the EIS to proceed if the Chief Executive is satisfied that the EIS is consistent with the recommendations of the public interest evaluation report.

This amendment is necessary to ensure that an EIS can only proceed to the EIS assessment report stage and completion of the process if it is consistent with the public interest evaluation report. The amendment will deliver efficiency in the environmental authority process where a proponent does not change their proposal by allowing the public interest evaluation to not be requested again and the information and notification stages to be skipped.

- e) New Clause 96E makes consequential amendments to section 56AA (Proponent may resubmit EIS) due to the amendments to section 56A to ensure the proponent may re-submit an EIS in response to submissions or a public interest evaluation report.

Amendment 7 Clause 99 (Amendment of s 112 (Other key definitions for ch 5))

Amendment 7 introduces two new definitions in section 112 in Chapter 5 of the *Environmental Protection Act 1994*. The first is 'public interest consideration' which refers to the considerations which must be addressed by the applicant in their proposed PRCP schedule

under section 126D and considered by the person in preparing a public interest evaluation report.

The second is ‘public interest evaluation’ which is the evaluation under section 316PA to be conducted where a non-use management area is identified in a proposed PRCP schedule justified in section 126D(2)(b) as being in the public interest not to be rehabilitated to a stable condition. This amendment is necessary to ensure correct interpretation of Chapter 5.

Amendment 8 Clause 104 (Insertion of new ss 126B-126D)

Amendment 8 corrects the reference from ‘PRC plan’ to ‘PRCP schedule’ in section 126C(1)(j). This amendment ensures correct interpretation of the section as the administering authority may decide whether to approve the PRCP schedule not the PRC plan.

Amendment 9 Clause 104 (Insertion of new ss 126B–126D)

Amendment 9 amends section 126D(2)(b)(ii) to ensure that if any non-use management area is proposed in a PRCP schedule (and PRC plan), it contains sufficient information to support the applicant’s justification of each ‘public interest consideration’.

This amendment is necessary to ensure that in preparing its application, the applicant addresses each of the matters which will be required to be considered by the entity preparing the public interest evaluation. This amendment delivers transparency in the process.

Amendment 10 Clause 104 (Insertion of new ss 126B-126D)

Amendment 10 corrects the term used in section 126D(5)(b) from ‘a resource to be mined’ to ‘a probable or proved ore reserve that is to be mined’. This amendment clarifies that land is available for rehabilitation unless it contains ‘a probable or proved ore reserve that is to be mined’ within 10 years after the land would otherwise have become available for rehabilitation.

The correction to the terminology ensures the Mined Land Rehabilitation Policy will be implemented according to its intent. Given this amended terminology is well understood by industry, the correction provides more certainty when planning the rehabilitation milestones based on when land will be available for rehabilitation.

Amendment 11 Clause 104 (Insertion of new ss 126B-126D)

Amendment 11 amends the definition of available for rehabilitation. It clarifies that if land is required in order to enable the mining of a probable or proved ore reserve, the land will not be considered available for rehabilitation.

This amendment recognises that certain areas may necessarily be required for mining of the reserve but which do not overlay the reserve. To the extent that these areas are necessary to allow part of the mining activity to mine the reserves, they therefore are not available for rehabilitation (for example areas which are parts of spoil dumps that will be disturbed in mining the reserve and tracks necessary to access the reserve).

Amendment 12 Clause 104 (Insertion of new ss 126B-126D)

Amendment 12 includes a definition for the term ‘probable or proved ore reserve’ that is used in 126D(5)(b). This definition links to listing rules made by the Australian Stock Exchange (ASX) Limited. This definition is necessary to support amendment 10, and is defined in a way that is well understood and accepted by industry.

Amendment 13 After clause 109

Amendment 13 inserts a new Clause 109A and a new section 136A to the *Environmental Protection Act 1994* which requires the administering authority to request a public interest evaluation for applications which include a non-use management area justified on the public interest (126D(2)(b)) in the proposed PRCP schedule. The new section will ensure that the public interest evaluation is requested early to avoid delays in the application process; the request is done at the application stage because some applications may be exempt from the information and notification stages. If the information and notification stages apply, there will be no impact on the timing for the public interest evaluation as the report is received in the decision stage under new section 167A.

The section also ensures the evaluation is objective by requiring that a ‘qualified entity’ (a person other than the applicant and the administering authority) will carry out the public interest evaluation and give a report about the evaluation that complies with new section 316PB. In deciding who should prepare a public interest evaluation, the administering authority must consider the matters prescribed in a regulation made under the *Environmental Protection Act 1994* on the suitability of the person to prepare the evaluation – e.g. qualification, experience and degree of independence from the proponent. Considering the matters in the regulation will ensure the administering authority identifies an appropriate entity to prepare a public interest evaluation in the context of the specific proposal and the interests of the impacted community.

This section also ensures that if a public interest evaluation has already been carried out as part of the environmental impact statement (EIS) process under either Chapter 3 of the *Environmental Protection Act 1994* or by the Coordinator-General under the *State Development and Public Works Organisation Act 1971* and remains relevant, then a public interest evaluation is not required unless the proposed non-use management area has changed. The drafting provides flexibility in the Coordinator-General’s process in that it does not provide any restrictions as to when or how the public interest evaluation must be carried out as part of the EIS. Therefore, if the coordinated project undertakes a public interest evaluation by a qualified entity that complies with sections 316PA and 316PB, then a second public interest evaluation will not be required.

This amendment is necessary to ensure that all projects proposing a non-use management area justified on the public interest will be subject to a public interest evaluation for that area. The evaluation is to be objective and therefore will be carried out by a suitably qualified and experienced person that is not the applicant.

Amendment 14 After clause 115

Amendment 14 insert new Clauses 115A and 115B. Clause 115A amends section 165 of the *Environmental Protection Act 1994* to ensure that section 165 does not apply to decisions that relate to site-specific applications for which a public interest evaluation is requested. This amendment is consequential to the insertion of new section 167A by Clause 115B.

Clause 115B inserts new sections 167A and 167B. Section 167A states that the decision stage for a site-specific application for which a public interest evaluation is requested cannot commence until a public interest evaluation report is received. If the public interest evaluation is received before the decision stage would otherwise have started, this section has no effect. This amendment is necessary to ensure in amended section 176A, the administering

authority has all the information to make a decision that is consistent with the recommendation of a public interest evaluation report. This amendment ensures the administering authority has all the necessary information before the decision stage starts and a decision is required to be made on the application.

Section 167A(4)(b) also states that the public interest evaluation report must be given to the administering authority within 30 business days after the day the decision stage would have started. This will provide certainty to industry regarding the normal timeframes associated with finalising the public interest evaluation report. The timeframe of 30 business days is considered appropriate because in an application where the information and notification stages apply, there should be sufficient time for the person to be contracted by the administering authority, for the applicant to provide any necessary information, and for the person to prepare the public interest evaluation report as these stages will take a minimum of 30 business days. The timeframes vary based on the period provided in the information stage for the applicant to respond to requests for additional information and the timeframes in the notification stage depending on the objection day set under the *Mineral Resources Act 1989*.

Section 167A(4)(b) provides flexibility to the administering authority to extend the timeframe where the 30 business days is not sufficient time to finalise the public interest report. The administering authority may give a written notice to the applicant extending the 30 business day period by 10 business days or to a longer period if the agreed to by the applicant. This amendment is consistent with other sections of the *Environmental Protection Act 1994*, for example, section 145 – extending the information request period.

Some applications may relate to an EIS but not have been subject to the public interest evaluation during the EIS process. The information stage and the notification stage may not apply if the application is consistent with the EIS (see triggers in sections 139 and 150). These applications could be of a highly complex nature and could require more than a maximum of 40 business days for completion of the report. Section 167A(3) and (4)(a) allow for scalability in the process by allowing the administering authority to set a stated period for giving the report that is sufficient to allow a proper objective assessment and preparation of the public interest evaluation report. This stated period cannot be more than 12 months unless extended by the administering authority (by a maximum of 6 months).

These timeframes have been inserted to give certainty to industry about the timeframes for preparation of a public interest evaluation report and provide flexibility for the administering authority to ensure sufficient time is available for completion of the objective assessment.

Clause 115B also inserts a new section 167B which allows the decision stage to be suspended if:

- the applicant would like to change their proposed PRC plan to be consistent with the public interest evaluation report – the applicant states the suspension period, which cannot be longer than 18 months from the day the decision stage would have otherwise started. This section clarifies that the change of an application process (which would re-set the application back through the information and notification stages) does not apply to this change.
- a review of the public interest evaluation report is requested under section 316PC.

Amendment 15 Clause 118 (Insertion of new s 176A)

Amendment 15 amends Clause 118 to:

- a) correct the placement of decision criteria from section 194B to section 176A of the *Environmental Protection Act 1994* and
- b) ensure that where an application required a public interest evaluation, the administering authority must not approve a proposed PRCP schedule if the report (including a report that has had a recommendation substituted under section 316PC) found it is not in the public interest to approve the non-use management area.

Two requirements were inadvertently placed in section 194B; that the administering authority must not approve a proposed PRCP schedule unless:

- a) each non-use management area is appropriately identified (i.e. complies with section 126D and 126C(1)(g) and (h)); and
- b) all areas for the PRC plan will either be rehabilitated to a stable condition or maintained as a non-use management area;

The incorrect placement had the unintended consequence that if the PRCP schedule decision was referred to the Land Court, then these essential decision criteria would not have been considered or complied with. This correction is necessary to ensure the administering authority considers the minimum decision criteria for the PRCP schedule before the application may be referred to the Land Court. This correction will also ensure the Land Court is able to fully consider the decision.

This amendment also ensures that the administering authority must only approve the application where a final public interest evaluation report (including any substituted recommendations) recommends that it is in the public interest to approve the non-use management area proposed in a PRCP schedule. This amendment is necessary to deliver credibility and rigour in the public interest evaluation process.

Amendment 16 Clause 122 (Replacement of s 194B (Final decision on application))

Amendment 16 is consequential to amendment 15 and removes the decision criteria from section 194B that is moved to section 176A of the *Environmental Protection Act 1994*. This amendment is necessary to remove duplication and ensure that the PRCP schedule decision process is efficient.

Amendment 17 Clause 127 (Amendment of s 205 (Conditions that must be imposed if application relates to coordinated project))

Amendment 17 amends section 205 of the *Environmental Protection Act 1994* to clarify that if a report for a public interest evaluation makes a recommendation for a non-use management area that is inconsistent with a Coordinator-General stated condition, the conditions imposed by the administering authority must be consistent with the public interest evaluation report. The amendment to this section retains the existing requirement that all other conditions imposed by the administering authority cannot be inconsistent with a Coordinator-General's condition.

This amendment ensures that if a public interest evaluation report recommends that a proposed non-use management area must not be approved, or a different option must be approved, and that area was subject to a stated condition, the public interest evaluation report prevails and the administering authority must not impose the inconsistent condition.

This amendment is necessary because the public interest evaluation will be done administratively through the *State Development and Public Works Organisation Act 1971*. This means that the Coordinator-General will be able to proceed with an EIS regardless of the status and timeframes of the public interest evaluation, which could result in a Coordinator-General condition being inconsistent with the public interest evaluation report.

To provide flexibility in the Coordinator-General's EIS process in not limiting if or when the public interest evaluation will be required, and to achieve the policy intent for the public interest evaluation, this amendment is necessary to give credibility to the public interest evaluation process and ensure transparency for industry and the community regarding public interest decisions.

Amendment 18 Clause 147 (Amendment of s 228 (Assessment level decision for amendment application))

Amendment 18 amends Clause 147 of the MERFP Bill (section 228 of the *Environmental Protection Act 1994*) to clarify the considerations for deciding if an amendment is considered to be minor or major amendment.

Clause 147 of the MERFP Bill states that the administering authority may decide that a proposed amendment that changes the order of at least 2 of the days when rehabilitation will be achieved is a minor amendment if the administering authority is satisfied that (a) the applicant has undertaken adequate consultation and (b) the amendment is unlikely to attract submission. The intention of (b) was that the administering authority would consider whether issues raised during consultation had been adequately addressed by the applicant.

This amendment replaces (b) to ensure the administering authority must be satisfied that the applicant has adequately addressed any matter raised by the community during consultation. This consideration will ensure that the decision on whether the amendment is minor (and will not trigger the Notification Stage) is transparent.

Amendment 19 Clause 148 (Amendment of s 232 (Relevant application process applies))

Amendment 19 amends section 232 of the *Environmental Protection Act 1994* to ensure that the administering authority is also required to request a public interest evaluation if a major amendment to a PRCP schedule includes a new non-use management area justified on the public interest considerations.

If the amendment application is extending the area of an non-use management area, the public interest evaluation report will be in relation to the amendment application (expanded area) only, not the already approved non-use management area.

This amendment is necessary to ensure PRCP schedules amended at a later date to include a new non-use management area justified on the public interest is also subject to the public interest evaluation process.

Amendment 20 Clause 148 (Amendment of s 232 (Relevant applicant process applies))

Amendment 20 amends section 232 of the *Environmental Protection Act 1994* to insert two new criteria for when the notification stage does not apply to major amendment applications for PRCP schedule. The first is where a major amendment application relates to the reduction

of the area of a non-use management area. The second is where a major amendment application is likely to reduce, or cause no change to, the impacts on environmental values previously authorised in the PRCP schedule. The exemption from the notification stage applies only to the extent of the change.

This amendment ensures that although the notification stage does not apply, the application is still a major amendment, and the decision making process, including regulatory requirements and the standard criteria in the *Environmental Protection Act 1994* applies to the decision for the application.

If the amendment application relates to more than one change to the PRCP schedule, this amendment ensures that the notification stage can still apply in relation to the other changes.

Amendment 21 Clause 170 (Amendment of s 278 (Cancellation or suspension by administering authority))

Amendment 21 re-inserts the ability for the administering authority to suspend or cancel an environmental authority if the holder does not comply with an annual notice (and for example does not pay an annual fee). This is a consequential amendment as a result of Amendment 26.

Amendment 22 Clause 173 (Replacement of ch 5, pt 12 (General provisions))

Amendment 22 corrects the reference from ‘written notice’ to ‘information notice’. This amendment ensures that terminology used in section 303 of the *Environmental Protection Act* is consistent with the terminology that is used for Estimated Rehabilitation Cost (ERC) decisions.

Amendment 23 Clause 173 (Replacement of ch 5, pt 12 (General provisions))

Amendment 23 corrects an incorrect reference from ‘this division’ (division 2) to ‘division 3’. This amendment is necessary to ensure that the administering authority is able to request the holder of an environmental authority for an activity other than a resource activity to replenish their financial assurance if it has been claimed partially or in whole under chapter 5, part 14, division 3 of the EP Act. The amendment will ensure correct interpretation of the ERC and financial assurance claiming provisions.

Amendment 24 Clause 173 (Replacement of ch 5, pt 12 (General provisions))

Amendment 24 amends section 316H to ensure that if the administering authority amends a PRCP schedule because of the approval of progressive certification (section 318ZJA), the holder is required (under section 316H) to update the planning part of the PRC plan.

This amendment is necessary because 318ZJA is not under Chapter 5 of the *Environmental Protection Act 1994*, and except for this amendment, the obligation to update the rehabilitation planning part of the PRC plan only applies to Chapter 5. This amendment will ensure the intent of keeping the planning part consistent with the PRCP schedule is achieved in all circumstances.

Amendment 25 Clause 173 (Replacement of ch 5, pt 12 (General provisions))

Amendment 25 is consequential to Amendment 26 and inserts ‘notices’ into the title of chapter 5, part 15, division 2 of the *Environmental Protection Act 1994* to ensure correct interpretation. The title of this division now reads ‘Annual notices, fees and returns’.

Amendment 26 Clause 173 (Replacement of ch 5, pt 12 (General provisions))

Amendment 26 re-inserts the annual notice provisions from the *Environmental Protection Act 1994* and decouples the annual notice from the annual return. Section 316I in the MERFP Bill is replaced with sections 316I (re-inserts the requirement for the administering authority to give environmental authority holders that pay an annual fee an annual notice) and 316IA retaining the annual return requirement introduced by the Bill.

The intent of the annual notice section remains unchanged from the pre-amended *Environmental Protection Act 1994*: to notify the holder of the annual fee amount and timeframe to pay (a stated reasonable time of at least 20 business days after the day the notice is given). The notice must state that if the notice is not complied with, the environmental authority may be cancelled or suspended (refer to amendment 16).

The amendment renumbers section 316I to section 316IA and makes the following changes:

- includes a defence of having a reasonable excuse to not provide the annual return
- provides flexibility to the administering authority in making the request, which could be through the annual notice or another written notice. The new section 316IA requires the annual return to be submitted by a date prescribed by regulation or if no day is prescribed, by 1 March immediately following the year to which the annual return relates. This will ensure that information received via annual returns is point in time data to be able to be analysed and reported. The period to which the annual return relates will be stated in the approved form.
- removes the requirement to be accompanied by an annual fee (now under the annual notice section in 316I).

This amendment also corrects ‘annual report’ to ‘annual return’ as recommended by the Economics and Governance Committee report.

The drafting in section 316J has also been simplified to enhance interpretation.

Amendment 27 Clause 173 (Replacement of ch 5, pt 12 (General provisions))

Amendment 27 inserts a new Division 4A – Public interest evaluations – into Part 12 of Chapter 5 of the *Environmental Protection Act 1994*. Five new sections are created: 316PA, 316PB, 316PC, 316PD and 316PE into

New section 316PA - Public interest evaluations – states the purpose for the public interest evaluation required under new section 136A and lists the public interest considerations which must be addressed by the applicant and evaluated by the qualified entity preparing the public interest evaluation report.

To aid with implementing the policy intent, the new section clearly articulates the purpose of the public interest evaluation: The purpose of a public interest evaluation of a proposed non-use management area identified in a proposed PRCP schedule is to provide a recommendation about whether the approval of a non-use management area is in the public interest.

While all non-use management areas will be supported by management milestones to achieve best practice management and minimise risks to the environment, the public interest evaluation will include a consideration of:

- (a) the benefit (including an analysis of the significance of the benefit) to the community as a result of the project – for example, a project may include benefits such as employment opportunities to the local community
- (b) any impacts, including long-term impacts to the environment or the community, that may reduce the benefits from the project – for example the project with a non-use management area which would result in the loss of productive land and may reduce the ability for the region to have the benefit of long term agricultural activities that would support local employment
- (c) whether there are alternatives to approving the area as a non-use management area (having regard to the costs of the alternative and how it would impact the financial viability of the project) – for example the non-use management area could be reduced in size (and consequently post-mining land uses maximised) at a reasonable cost to the project or other methods of extraction could be substituted for open cut methods
- (d) whether the benefit to the community, compared to the impacts to the environment and to that community, justifies the approval of the non-use management area having regard to all options considered
- (e) another matter prescribed by regulation.

The intent of the public interest considerations is to ensure that the benefits from the project are considered in the context of other activities that provide benefits to the region. In deciding if the project is in the public interest, a regulation may prescribe how the evaluation must be carried out and the matters to be considered in evaluating each public interest consideration listed above. The regulation may include matters such as: the regional economic benefits provided by the project (jobs created), and the long term impacts to the region.

New section 316PA raises a potential fundamental legislative principle because some matters can be prescribed by regulation. Sufficient heads of power are being retained in the Act, with only further detail to be prescribed in regulation. This is to ensure that the matters to be considered are flexible enough for continuous improvement, which will benefit industry applicants and administrators of the process.

New section 316PB - Requirements for report about particular public interest evaluations - states the requirements for a public interest evaluation report, and requires the person carrying out the public interest evaluation to give a copy of the 'proposed' (draft) report to the applicant for an environmental authority or proponent for an EIS, prior to finalising the report. The person preparing the report must invite submissions about the report within 20 business days after the notice is given and must consider the submission prior to finalising the report.

The public interest evaluation report that is given to the administering authority must include a recommendation, and the reasons for the recommendation, about whether it is in the public interest to approve the non-use management area, and a response to, or a statement about, how any submissions were considered.

Section 316PB also ensures that within 5 business days after receipt of the final report, the administering authority must publish the report in the public register and notify the applicant

for the environmental authority or proponent for the EIS and any submitters to the either process that the report has been finalised. This supports the review process included in section 316PC.

Section 316PC provides a review process of the final public interest evaluation report. The process begins with the notification sent by the administering authority under section 316PB and allows 15 business days for the applicant, proponent or submitter to request a review.

The reasons why either party may request a review are due to errors or doubts about the impartiality of the suitable entity preparing the report. If a review is requested and the request satisfies the grounds for requesting a review, the Chief Executive must request a different qualified entity to review the original public interest evaluation report. A request that does not satisfy the strict grounds for review does not constitute a request under this section and therefore does not trigger the obligation on the Chief Executive.

The reviewing entity may either confirm an original recommendation or substitute an original recommendation with a replacement recommendation. The reviewer must notify the Chief Executive and the applicant, proponent or submitter of the outcome of the review. The process does not produce a second report, rather confirms or amends the original report.

A new section 316PD – Costs of public interest evaluations and reviews - enables the administering authority to recover costs in obtaining a public interest evaluation from the applicant. This section also ensures that the costs associated with a review of a public interest evaluation is incurred by:

- the submitter, if the review was requested by the submitter and the reviewer found that the original recommendations should be confirmed
- otherwise the applicant or proponent.

New section 316PE – Confidentiality of public interest evaluation - ensures that confidential information provided as part of a public interest evaluation is not disclosed to any person not directly related to the public interest evaluation. This section is required to protect applicants' confidential information from being disclosed, as the public interest evaluation report will be made available on the public register under section 540 of the *Environmental Protection Act 1994*. The drafting does not limit the administering authority or Chief Executive in providing information to the person carrying out the public interest evaluation. For example, submissions regarding the application that relate to a public interest consideration could be provided to the person preparing the report.

Section 316PE(2) inserts a new offence with a maximum penalty of 100 penalty units if a person discloses or gives access to the confidential information. This offence is appropriate, reasonable and proportionate and relevant to the action to which the penalty is applied. The offence is comparable to similar current offences in other legislation and therefore does not represent a breach of a fundamental legislative principle.

Amendment 28 Clause 201 (Amendment of s 540 (Registers to be kept by administering authority))

Amendment 28 amends section 540 of the *Environmental Protection Act 1994* to correct a reference from section 316I(2) (annual notice) to section 316IA(2) (annual return). This amendment ensures that annual returns are included on the public register, not annual notices.

Amendment 29 Clause 201 (Amendment of s 540 (Registers to be kept by administering authority))

Amendment 29 amends section 540 of the *Environmental Protection Act 1994* to ensure that existing financial assurance decisions for prescribed Environmentally Relevant Activities and resource activities, as well as Estimated Rehabilitation Cost decisions and public interest evaluation reports (without confidential information) are included on the public register.

This amendment is necessary to deliver transparency in the financial assurance, ERC decisions and public interest evaluation process.

Amendment 30 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 30 inserts into section 750 a new definition for ‘assent date’ used in the definition of land outcome documents, to clarify interpretation of the amended transitional provisions.

Amendment 31 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 31 inserts into section 750 a new definition for ‘land outcome document’, used in a number of transitional provisions (amended 754, 755 and 755B). The new definition includes:

- the environmental authority (that is in force at the time)
- a current document required under a condition of the environmental authority that relates to either a residual void or rehabilitation (these vary in names, and could include for example, a ‘residual void management plan’, a ‘final land use rehabilitation plan’, a ‘rehabilitation plan’, ‘a rehabilitation management plan’, etc)
- a report evaluating an EIS under the *State Development and Public Works Organisation Act 1971*
- an EIS assessment report under Chapter 3 of the *Environmental Protection Act 1994*;
- a written agreement between the holder of an environmental authority and the State that is in force on the assent date.

For documents required under a condition of an environmental authority:

- if the administering authority has received the document before the assent date, the administering authority must not have given notice that the document is insufficient in a material particular about the outcome it is used for (e.g. the residual void), and the document must not have been superseded by another document
- if the document is due after the assent date or has no set due date – these must be received within 3 years after assent and the administering authority must not give notice that the document is insufficient within 20 business days of receipt.

Documents required under an Environmental Authority may also constitute a plan of operations or an ‘Environmental Management Plan’ if the condition in the authority explicitly requires rehabilitation or management of a void to be addressed in these documents, the document is consistent with the environmental authority and has not been superseded by another document addressing the same matter.

Amendment 32 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 32 amends the definition of ‘PRCP start date’ to change the day by which the PRCP start date must be prescribed by regulation from 1 July 2019 to 1 November 2019. This amendment ensures that both operators and regulators have sufficient time to prepare for the new PRC plan requirements after commencement of the Bill.

Amendment 33 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 33 corrects section 753 to ensure that plans of operations for mining lease environmental authority holders are continued under the pre-amended Act. The current drafting inadvertently links the transition to an amended Act which does not relate to mining leases and therefore is redundant.

This correction is necessary to ensure that operators and regulators have certainty under which conditions and obligations environmental authority holders are required to comply with before they transition to having an approved PRCP schedule.

Amendment 34 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 34 is a grammatical correction in section 753 to include a semicolon after 'lease' to reflect that a new paragraph has been added to subsection 753(2) by amendment 35.

Amendment 35 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 35 inserts an additional ground on which a plan of operations for a mining environmental authority holder ends into section 753 (the day a new Estimated Rehabilitation Cost (ERC) decision is made) and works with amendment 33 to allow the operator to amend their plan of operations if it does not change the maximum area of disturbance.

This amendment is necessary to avoid non-compliance with the plan of operations that will be discontinued once the PRCP schedule for the environmental authority is approved.

Amendment 36 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 36 amends section 753 to ensure that for sites transitioning into the PRC plan requirement, the PRCP schedule can be refused once, before the offence in section 431A takes effect.

This recognises that for existing sites, there may be complexities that mean it takes more than one attempt to prepare a PRCP schedule that is approved by the administering authority, and it would be unreasonable to prevent the holder from operating in accordance with their environmental authority where the PRCP schedule has been refused.

Amendment 37 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 37 amends section 754's heading to better reflect the intent of the revised section 754. The heading for this section now reads 'Requirement for mining EA holders to give proposed PRC plan'.

Amendment 38 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 38 amends section 754 to insert a minimum timeframe of 6 months to be stated in the transitional notice, setting the minimum timeframe for an environmental authority (EA) holder to prepare and submit a PRCP schedule to the administering authority.

This amendment is necessary to provide certainty to industry that the timeframe in which they have to prepare a PRC plan will not be unreasonably short, and to provide flexibility to enable a longer timeframe to be stated if the transitional site is of complex nature and will require more time to prepare the PRC plan. Where holders would like a shorter transition time, there is nothing that impedes the holder from liaising with the administering authority to submit a proposed PRC plan within a shorter timeframe.

Amendment 39 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 39 amends section 754 of the *Environmental Protection Act 1994* to exempt the holder of an environmental authority from complying with sections 126C(1)(g) or (h) and 126D(2) or (3) for their PRC plan where an outcome for the land has been identified in land outcome document, and that outcome is a non-use management area for the purposes of the PRC plan.

The exemption is from justifying a non-use management area (including a final void in a flood plain) if that outcome has been authorised in a holder's environmental authority or another land outcome document. The exemption will still deliver improved rehabilitation outcomes for a site in that the holder will be required to include the non-use management area in the PRCP schedule with management milestones. If the schedule is approved (see amended section 755), the holder will still be required to manage the area in accordance with the approved milestones. This change from the existing provision removes discretion offered to the administering authority to exempt a holder from having to provide justification for an approved non-use management area. The provision does not retrospectively breach existing rights and provides certainty to industry on the transitional process.

This section reflects the complexity of identifying approved outcomes, by allowing the list of land outcome documents to be used to identify necessary details, such as the location, area or completion criteria for that outcome. Outcome in this section is intended to reflect approved non-use management areas, which can be residual voids or pits. The location component is important to identify if an approved residual void is within the extent of a flood plain.

This amendment provides the process for using the list of 'land outcome documents' to clarify the location or area of a non-use management area that is exempt from justification. The exemption determined from the land outcome documents represents the 'maximum number and area of' non-use management areas allowed without the requirement for a public interest evaluation and/or public notification process. The proponent is able to propose a reduction in size or number of non-use management areas compared to the exemption without triggering a public interest evaluation (section 755A) or the public notification (section 755B).

The provision clarifies that should an environmental authority or another land outcome document not state the area and location of the area, the holder will be required to state in their PRC plan how the total area of the land to which the outcome relates will be minimised, and how the holder will ensure the location of the area minimises risks to the environment. This amendment is necessary because the assessment criteria for non-use management areas will take into account both considerations. The amendment puts the requirement up front for the holder to address in their PRC plan.

This amendment clarifies that when using the list of land outcome documents, the document appearing first in the definition prevails to the extent of the inconsistency. This amendment is necessary because as projects have changed over time, documents prepared may become outdated or inconsistent with the authorising approval – the environmental authority.

The amendment requires the administering authority to keep a register of an extract of any written agreement that relates to identifying the location or area of the land. This amendment provides a transparent outcome for all stakeholders.

The amendment also gives the ability for a regulation to prescribe matters where land is not taken to be available for rehabilitation. This would only capture exceptional circumstances and it is not intended to allow general broadening of exemption from justification beyond the land outcome documents.

The intent of this amendment is also to clarify that due to existing approved outcomes in the holder's environmental authority or other land outcome documents, the PRC plan is not required to contain the justification for the non-use management areas (including final voids in a floodplains).

To ensure transparency, these exempt outcomes are proposed to be stated in the notice sent to holders under section 754. The process will ensure existing rights for transitioning sites are upheld, and holders know prior to developing their PRC plan whether or not an exemption applies.

Amendment 40 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 40 amends section 755 of the *Environmental Protection Act 1994* to ensure the timeframes for the assessment process for transitional PRC plans work, and if the holder is exempt from having to justify a non-use management area under section 754, then the decision criteria in section 176A(3) does not apply to the extent of the exemption.

This amendment is necessary because under section 176A the administering authority is required to refuse a PRCP schedule if all areas aren't properly identified (justified) as a non-use management area. The amendment ensure the administering authority is not required to refuse the schedule where an exemption applies. This amendment ensures that that legislation is not inadvertently imposed retrospectively.

This amendment also deletes subsection (3) because the exemption is now covered in section 754, and deletes subsection (4) because the notification process is now replaced with new section 755B.

Amendment 41 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 41 amends section 755(6) of the *Environmental Protection Act 1994* to correct 'PRC plan' to PRCP schedule', as the PRCP schedule is the statutory instrument to be approved, and to ensure that the administering authority must have regard to the list of land outcome documents in making the decision on whether to approve the PRCP schedule.

Specifically, a reference to section 176A has been inserted to ensure that the correct decision-making provisions in Chapter 5 apply to transitional decisions on PRCP schedules. Paragraph (a) has been amended to change a reference from 'environmental authority' to 'land outcome document' because 'land outcome document' is defined to include 'environmental authority' and reflects other transitional provisions that recognise that the detail relating to approved outcomes for land may be in documents other than environmental authorities.

This amendment is necessary to ensure the administering authority is able to make decisions on transitioning PRCP schedules that do not retrospectively breach operator's rights.

Amendment 42 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 42 amends clause 203 to insert two new sections 755A – Application of requirement for public interest evaluation for application stage and 755B – Application of notification stage - into the *Environmental Protection Act 1994*.

Section 755A clarifies that where a public interest evaluation is required for the assessment of a proposed PRC plan for existing sites an additional consideration (historical approvals) is required. Specifically, section 755A clarifies that a public interest evaluation will be required for a PRCP schedule where the holder proposes a non-use management area that is justified on the public interest that is not exempt under section 754. The section ensures that in conducting the evaluation, if an alternative option to approving the non-use management area was considered, but the mining project would be jeopardised if that option was to be implemented, the public interest evaluation must also consider the stage of, and the land outcome documents relating to, the mining project.

This amendment is necessary because under the existing list of public interest considerations in section 316PA, there is no consideration of historic decisions or the current approval which may have led to planning decisions about a site that make any other options to leaving the non-use management area financially unviable. The intent of the transitional provisions is to not make any existing operation unviable because of historical decisions about the leaving of a non-use management area.

New section 755B clarifies when the notification stage will be required for existing sites. A PRC plan will not be subject to public notification if a land outcome document states an outcome for an area of land and that outcome in the PRCP schedule is:

- the same outcome - e.g. the environmental authority authorised an area to be grazing and that area is proposed to be grazing in the PRCP schedule
- converted to a post-mining land use from a non-use management area - e.g. the area was authorised as a residual void with no other stated use and the area is proposed to be rehabilitated to a water storage facility for agricultural use that is safe and stable, does not cause environmental harm and is able to sustain that use (e.g. meets the water quality objectives for that use) in the long term.

Subsection 755B(3) also clarifies that where public notification is required because an outcome under a land outcome document is different to the outcome for the area under the proposed PRC plan, a submission under section 160 may only relate to the difference in outcome for the area.

Finally, subsection 755B(4) makes it clear that if there is an inconsistency in land outcome documents, the document appearing first in the list shown in the definition of ‘land outcome document’ prevails to the extent of the inconsistency.

Amendment 43 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 43 amends section 756 of the *Environmental Protection Act 1994* to require that the amendment to the environmental authority as a result of approval of a PRCP schedule is made as an administering authority-led amendment under Chapter 5, Part 6 of the *Environmental Protection Act 1994*.

This amendment is necessary to provide natural justice to the environmental authority amendment process and ensure that the environmental authority amendment decision is subject to review and appeal rights.

Amendment 44 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 44 inserts new subsections (3A) and (3B) into section 758 of the *Environmental Protection Act 1994* to capture administering authority led changes to financial assurance under pre-amended section 306 of the Act.

Subsection (3A) ensures that the condition in the environmental authority to pay financial assurance stays in force until the holder has given the financial assurance to the administering authority.

Subsection (3B) has been inserted to clarify that if section 760 of the Act (existing applications for financial assurance) applies, the financial assurance condition imposed under the pre-amended Act continues to have effect for the purpose of section 760.

The insertion of these subsections is intended to cover identified gaps in the transitional provisions that relate to financial assurance. The amendments ensure that financial assurance conditions are kept alive after commencement, until new decisions are made under the pre-amended *Environmental Protection Act 1994*.

Amendment 45 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 45 is a consequential amendment to subsection 758(4) of the *Environmental Protection Act 1994* to change the reference from subsection ‘(2) or (3)’ to ‘this section’. Subsection (3A) was inserted by amendment 44 and provides additional circumstances for when a financial assurance condition is retained after commencement of the Act. This amendment ensures that in those circumstances, the administering authority’s ability to amend the environmental authority to remove the condition is retained.

Amendment 46 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 46 amends subsection 761(3)(b)(ii) of the *Environmental Protection Act 1994* to ensure that the Estimated Rehabilitation Cost (ERC) decision period ends when the plan of operations plan period ends or 3 years from the relevant day, whichever is sooner. This amendment is to ensure that the transitional period is not inadvertently extended to 3 years for all environmental authorities for ineligible petroleum activities.

Amendment 47 Clause 203 (Insertion of new ch 13, pt 27)

Amendment 47 is a minor amendment to the heading of section 763 of the *Environmental Protection Act 1994* to remove ‘if initial ERC period ends’. This amendment clarifies that the section applies to any ERC decision made after commencement where a PRCP schedule is not yet in force, not just ‘initial’ ERC decisions.

Amendment 48 Clause 204 (Amendment of sch 2 (Original decisions))

Amendment 48 removes the reference to section 233(2)(b)(ii) from the list of original decisions in Schedule 2, as the section no longer exists in the *Environmental Protection Act 1994*.

Amendment 49 Clause 204 (Amendment of sch 2 (Original decisions))

Amendment 49 adds section 303 to the list of original decisions in Schedule 2 of the *Environmental Protection Act 1994*. This is to ensure that the decision by the administering authority to require the holder to apply for a new ERC decision is subject to review and appeal rights.

Amendment 50 Clause 204 (Amendment of sch 2 (Original decisions))

Amendment 50 corrects a cross-reference in Schedule 2 (original decisions) of the *Environmental Protection Act 1994* from section 234(2) to section 234.

Amendment 51 Clause 205 (Amendment of sch 4 (Dictionary))

Amendment 51 re-inserts the definition of annual notice into the *Environmental Protection Act 1994* dictionary, required because of amendment 26.

Amendment 52 Clause 205 (Amendment of sch 4 (Dictionary))

Amendment 52 deletes ‘for chapter 5’ from the definition of non-use management area, as non-use management area is used in other chapters of the *Environmental Protection Act 1994*.

Amendment 53 Clause 205 (Amendment of sch 4 (Dictionary))

Amendment 53 inserts the definition of ‘public interest consideration’ and ‘public interest evaluation’ into the *Environmental Protection Act 1994* dictionary for interpretation throughout the Act.

Amendment 54 Clause 205 (Amendment of sch 4 (Dictionary))

Amendment 54 corrects the definition of ‘application documents’ in Schedule 4 to include a report evaluating an EIS under the *State Development and Public Works Organisation Act 1971* and an EIS assessment report under the *Environmental Protection Act 1994*. This is to ensure that these reports can be used in the notification stage in Chapter 5 of the *Environmental Protection Act 1994*.

In addition, these reports will be added to the register to be kept by the administering authority.

Amendment 55 Clauses 217 and 218

Amendment 55 changes the exclusions to the *Right to Information Act 2009* under Schedules 1 and 2, to exemptions under Schedule 3, as this was the preferred approach of the Office of the Information Commissioner.

Amendment 56 After clause 218

Amendment 56 inserts a new Division 5 into the *Mineral and Energy Resources (Financial Provisioning) Act 2018* that amends section 47C of the *State Development and Public Works Organisation Act 1971* to enable the Coordinator-General to impose conditions on a PRCP schedule.

This ensures that the powers the Coordinator General has in relation to environmental authorities to impose conditions relating to rehabilitation, is maintained for environmental authorities that require a PRC plan, and that the correct statutory instrument is being conditioned. These conditions may be in the form of rehabilitation or management milestone, and may relate to both post-mining land uses and non-use management areas.

Amendment 57 Part 8, division 6 (Amendment of Waste Reduction and Recycling Amendment Act 2017)

Amendment 57 removes the amendments to the *Waste Reduction and Recycling Amendment Act 2017* in Clauses 219 and 220 of the MERFP Bill because the change to the

commencement dates for the container refund scheme were made under the *Heavy Vehicle National Law and Other Legislation Amendment Act 2018*.

Amendment 58 Schedule 1 (Dictionary)

Amendment 58 corrects a minor error to correctly refer to section 799C of the *Petroleum and Gas (Production and Safety) Act 2004*.

Amendment 59 Schedule 1 (Dictionary)

Amendment 59 corrects a minor error to correctly refer to section 799D of the *Petroleum and Gas (Production and Safety) Act 2004*.

Amendment 60 Long Title

Amendment 60 adds ‘the *State Development and Public Works Organisation Act 1971*’ and removes the reference to the ‘*Waste Reduction and Recycling Amendment Act 2017*’ to the long title of the Bill in accordance with Standing Rules & Orders, order 151.