Great Barrier Reef Protection Amendment Bill 2009

General Outline

Short Title

The short title of the Bill is the *Great Barrier Reef Protection Amendment Bill 2009*.

Policy Objectives of the Legislation

The principal objective of the Bill is to introduce a regulatory structure to reduce the impact of agricultural activities on the quality of water entering the Great Barrier Reef and contribute to achieving the targets under agreements between the State and Commonwealth. The current agreement is the Reef Water Quality Protection Plan (Reef Plan).

Reasons for the Bill

In 2003, the Queensland and Australian Governments made a 10 year commitment to the Reef Plan to address the diffuse pollution from broadscale land use and to halt and reverse the decline in water quality entering the Great Barrier Reef. The key focus of many actions in Reef Plan has been to assist landholders in adopting best management practices through voluntary and incentive schemes. The Reef Plan also stated that there was a need for regulation 'where there was a risk that voluntary approaches will fail to deliver significant water quality improvements'.

The 2008 Scientific Consensus Statement on Water Quality in the Great Barrier Reef (Consensus Statement) stated that water discharge from rivers into the Great Barrier Reef continues to be of poor quality in many locations and that land derived contaminants, including suspended sediments, nutrients and pesticides are present in Great Barrier Reef waters at concentrations likely to cause environmental harm.

Adopting certain farm management practices are known to reduce the amount of contaminants leaving the farm. As a result, regulation is needed to ensure that farm management practices that impact on water quality are improved. This in turn will improve water quality in the Great Barrier Reef

lagoon. The provisions of the Bill are designed to complement other measures such as the Australian Government's $200 million Reef Rescue that includes water quality grants or incentives for farmers to assist in the adoption of best management practice.

Implementation of the Bill will help deliver State government targets of 50% reduction within four years in the discharge of dangerous pesticides and fertilisers capable of killing the Great Barrier Reef.

Estimated Cost for Implementation

Cost effectiveness has been maximised by tightly targeting the Bill through:

- Limiting the regulatory net to the three highest priority catchments;
- Regulating the two agricultural sectors (cattle and cane) that contribute the highest levels of chemicals and sediment found in Reef waters;
- Adopting standard minimum requirements for all properties where possible;
- Containing the environmental risk management plan (ERMP) requirements initially to the highest priority activities with thresholds based on property size, with a further mechanism to enable ERMPs to be required in other identified hot spots;
- Ensuring the Bill has the least cost impact on producers; and
- Use of the existing provisions of the *Environmental Protection Act 1994*.

Around 4,500 operators are likely to be affected by the Bill. It is estimated that approximately 1,000 operators will initially be required to prepare ERMPs. The level of regulatory impact on individual operators, however, will vary considerably depending on the level of hazard inherent in an individual's land holding and the effectiveness of an operator's current management practices. The cost impacts of the regulatory measures are likely in many instances to be largely offset by cost savings resulting from productivity enhancements and reduced input costs. For example, operators not currently undertaking soil testing to guide fertiliser applications will face additional costs for testing. However, by using the test results to calculate the optimum amount of fertiliser to be applied, the operator may save money from reduced fertiliser input.

The costs to operators required to prepare an ERMP will vary depending on the availability of resource condition information, the size and complexity of the resource base and the operator's management practices (existing or proposed) to manage risks. Low risk operators will not be required to have an ERMP, medium and high risk operators only a simple, menu-driven ERMP at little or no financial cost to the operator. A risk-based evaluation of these initial ERMPs would identify operators who would be required to develop more detailed ERMPs in future years. The Department of Environment and Resource Management estimates that the average cost for an operator to develop a more detailed ERMP is $3,500. This cost is only incurred in the development phase and is not ongoing. No administrative fees will be charged initially for assessment and accreditation of ERMPs.

Those operators who can demonstrate that they are already implementing management practices that adequately address the identified risks of their operation will not incur any additional costs associated with implementing improved practices. For example, a cattle grazing operation with a Land Management Agreement under the Delbessie arrangements for leasehold land are likely to be able to satisfy the ERMP requirements for sediment management on grazing lands without significant additional work. Those operators who have a plan to implement management practices equivalent to an ERMP will not incur additional costs associated with the preparation of an ERMP. Both will, however, bear the minimal administrative costs associated with reporting under the legislation (approximately two to three hours of time per year).

The ERMP approach allows operators to spread their investment in new practices over the life of the ERMP. As it is a planning document, the operator may plan to make different investments or practice changes in different years. It is also up to the operator to choose whether to implement a low cost solution or invest in a more expensive solution. For example, fertiliser losses can be reduced by applying less fertiliser, or not applying near watercourses or in wet weather conditions. This is a low cost solution. Alternatively, fertiliser loss can be reduced through investment in precision fertiliser equipment at a cost of about $30,000. The flexibility of the ERMP model allows operators to control their investment. Operators with better management practices would require less or no investment to implement their ERMP and all operators could reduce capital investment costs by sharing equipment.

Improved management practice can save operators significant costs through reduced input costs, enhanced productivity and maintaining property value. For example:

- The Great Barrier Reef Marine Park Authority estimates that 150,000 tonnes of fertiliser is used annually in the Reef catchments for cane growing. CSIRO estimates that about 32,000 tonnes of fertiliser is lost to the environment each year. At a price of $1,000 per tonne (a figure likely to rise with increased oil prices), this equates to a loss of $32 million. Recent work by the Department of Employment, Economic Development and Innovation's model farms project indicates fertiliser use can be significantly reduced without loss of production.

- For grazing properties, ERMPs would drive increased investment in fencing off erosion hazard areas and vegetation cover management to reduce sediment loss by systematic control of stocking rates. The investment cost will vary greatly but is likely to be much less than $10,000 annually.

- Improved management practices can significantly increase the productive efficiency of primary producers by reducing the waste of water, fertiliser, pesticide and soil. In the Mackay-Whitsunday region, implementation of improved practices in cane has been demonstrated to improve profit by $91 per hectare (Mackay-Whitsunday Water Quality Improvement Plan). For grazing properties, adoption of relatively conservative stocking rates has been demonstrated to increase accumulated cash surplus by $9,000 per 100 hectares after 10 years, with animals on average 50-70 kg heavier (Wambiana Trial 1998-2008).

- Work by the Central Queensland University indicates that graziers who overgraze their land can permanently degrade their land and hence reduce future productivity and income. This will result in a permanent loss of their land's net present value which far outweighs any once off or short term gain in income.

Additionally, the Bill has been designed to complement the Australian Government's investment through the $200 million Reef Rescue initiative. The Reef Rescue package includes a grants pool of $146 million over five years. Operators may be eligible to access these grants to implement key components of their ERMPs such as upgrading plant and equipment.

The cost to the government of implementing the new regulatory requirements is approximately $10 million per year for five years. This includes program development of $1.4 million, extension of around $4.24 million per year, monitoring of $1 million per year and compliance and enforcement averaging $4.5 million per year.

Consistency with Fundamental Legislative Principles

Does the legislation have sufficient regard to the rights and liberties of individuals—LSA, s 4(2)(a)

The Bill affects existing cane growing and cattle grazing activities that are carried out within the three priority catchments. The new provisions do not prevent these activities from being carried out but do place additional requirements on operators who are undertaking these activities. These provisions are necessary to protect the health of the Great Barrier Reef, which is important to Queensland for environmental, social and economic reasons.

The Great Barrier Reef is the world's largest coral reef ecosystem and one of the most complex natural systems on earth. It has high levels of biodiversity and is recognised internationally as a World Heritage Area. Its environmental values support a number of industries including tourism, recreational activity and commercial fishing.

Access Economics estimates that the Great Barrier Reef directly contributes $5.8 billion annually to the Australian economy ($5.1 billion from the tourism industry, $610 million from recreational activity and $119 million from commercial fishing) and supports approximately 64,000 jobs. Agricultural production in Reef catchments also provides a significant but lower contribution to the Queensland economy, with agricultural production of cattle, cane and horticulture in Reef catchments contributing approximately $3.8 billion annually.

The Consensus Statement links a decline in Reef water quality to agricultural activity in the Reef catchments. Voluntary measures have had some effect but in order to ensure a more rapid change in farm management practices to improve the quality of water entering the Reef, regulation is necessary.

To ensure that the rights and liberties of individuals are not unduly affected, the Bill is tightly targeted based on risk. Low risk activities will only be required to record and report data on management practices. Recording this kind of data is good business practice that will assist operators in

making future decisions in relation to their management practices. Operators using fertilisers will be required to undertake soil testing and calculate the optimum amount of fertiliser to be used on the crop. This will prevent over-fertilising, which has the additional benefit of saving operators money through reduced fertiliser costs.

Higher risk operators may also be required to prepare and implement an ERMP to improve their farm management practices. Initially, an ERMP is required of the identified higher risk activities of more than 70 hectares of cane growing in the Wet Tropics catchment and more than 2,000 hectares of cattle farming in the Burdekin Dry Tropics catchment. There is also a mechanism for the Minister to decide that an environmental risk management plan is required for further activities or catchments in order to minimise or prevent further impacts on the Great Barrier Reef. Additionally, an ERMP may be required as a compliance measure. These mechanisms ensure appropriate targeting of regulatory requirements so that lower risk operators are not over regulated.

Any other fundamental legislative principles raised by particular sections of this Act are addressed in the discussion of each of those sections below.

Consultation

The primary vehicle for consultation with industry and other stakeholder groups was through the Reef Stakeholder Advisory Committee (the Committee), chaired by the then Minister for Sustainability, Climate Change and Innovation. This committee included representatives from the peak agricultural organisations (Queensland Farmers Federation (QFF), AgForce, Growcom, Canegrowers, Australian Cane Farmers Association), Conservation groups (WWF-Australia, Queensland Conservation Council (QCC)), Queensland Tourism Council, Regional NRM Groups, Great Barrier Reef Marine Park Authority, Local Government Association of Queensland and CropLife.

A series of small group meetings of Committee members and allied stakeholders were held out-of-session with QFF, Canegrowers and Growcom, QCC, WWF, Australian Marine Conservation Society, Environmental Defenders Office, Wildlife Preservation Society and Queensland Tourism Council, AgForce and Australian Banana Growers Council. The then Minister for Sustainability, Climate Change and Innovation also held four public meetings in Home Hill, Ingham,

Proserpine and Mackay attended by a total of 440 farmers, graziers, community groups and others.

Industry groups including Canegrowers and individual canefarmers do not support any legislative approach and believe that voluntary risk management and incentive based approaches are more effective to reduce agricultural pollution. WWF, other conservation groups and the Queensland Tourism Council support the concept of targeted regulation.

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

Notes on Provisions

Part 1 Preliminary

Clause 1 Short title

This clause states that the Act should be cited as the *Great Barrier Reef Protection Amendment Act 2009*.

Clause 2 Commencement

This clause provides that the Act is to commence on a day to be fixed by proclamation, other than section 19, which will commence on assent. The intention is to commence the remainder of the Act on 1 January 2010.

Part 2 Amendment of Environment Protection Act 1994

Clause 3 Act amended

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

Clause 4 Amendment of s 18 (Meaning of *environmentally relevant activity*)

This clause amends section 18 of the *Environmental Protection Act 1994* to include agricultural ERAs as environmentally relevant activities. The agricultural activities regulated in the new Chapter 4A are classed as environmentally relevant activities. This is because these activities release contaminants, for example agricultural chemicals, nutrients and sediment, into the environment. These contaminants are known to cause environmental harm, notably damage to coral reefs. Section 75 defines 'agricultural ERA' for the purposes of this section.

Clause 5 Amendment of s19 (Environmentally relevant activity may be prescribed)

This clause amends section 19 of the *Environmental Protection Act 1994* to exclude agricultural ERAs from this section. Since the Act makes agricultural ERAs environmentally relevant activities by virtue of the amendment to section 18, it is not appropriate or necessary for the Governor in Council to prescribe these activities as environmentally relevant activities.

Clause 6 Insertion of new ch 4A

This clause inserts a new chapter 4A into the *Environmental Protection Act 1994*.

Chapter 4A Great Barrier Reef protection measures

Part 1 Preliminary

74 Purpose of ch 4A

This section states that the purpose of the chapter is to reduce the impact of agricultural activities on the quality of water entering the Great Barrier Reef and contribute to achieving the targets under agreements between the State and Commonwealth. The current agreement is the Reef Water Quality Protection Plan. Prior to this Act, a combination of voluntary and incentive based programs were used in the Great Barrier Reef catchments to improve and change agricultural management practices in order to improve the quality of water being discharged from agricultural activities into the Reef waters. Despite these actions, water quality in the Reef continues to be poor, much of which can be linked to run off of agricultural chemicals, nutrients and sediment associated with agricultural activities.

75 What is an *agricultural ERA*

This section defines 'agricultural ERA' for the purposes of the *Environmental Protection Act 1994*. This describes the regulatory net, i.e. who will be captured. The activities that are defined as an agricultural ERA are:

- all commercial sugar cane growing; and
- cattle grazing (beef and dairy) on properties carrying more than 100 standard cattle units.

These activities were chosen because they are the predominant agricultural land use in the catchments and cumulatively cause the greatest impact. Other agricultural activities, particularly horticulture, also contribute to run off of agricultural chemicals, nutrients and sediment but given the relatively small area occupied by these activities, the contribution to Reef pollution is comparatively small.

In addition, an activity is only an agricultural ERA if it is carried out in the priority catchments, namely the Wet Tropics, Mackay-Whitsunday and Burdekin Dry Tropics catchments. These catchments are described with reference to a purpose-made map drafted on cadastral boundaries. Other land may be prescribed by regulation if the criteria in subsection (4) are met.

The fundamental legislative principle of equality under the law is raised by the selection of two agricultural sectors (cane farming and cattle grazing) and the priority catchments (Wet Tropics, Mackay-Whitsunday and Burdekin Dry Tropics) to regulate. This is justified because these activities in these catchments carry the greatest pollutant loads and discharge close to coral reef systems.

The fundamental legislative principle of sufficient regard for the institution of Parliament is raised by this section in that it allows an extension of the area of the priority catchments by regulation. Subsection (3)(b) allows a regulation to include land other than the land identified on the map as land to be regulated. However, the limiting criteria in this case are very stringent. Under paragraph (4)(a), the area may only be extended by regulation for the purposes of covering agricultural properties that are only partly in the catchments under the map. Consequently, the extension of the area by regulation will not bring anyone into the regime that is not already included.

Subsections (3) and (4) are similar to section 318ELAA of the *Mineral Resources Act 1989*.

76 Who *carries out* an agricultural ERA

This section clarifies that a person carries out an agricultural ERA if they carry it out personally or employ or engage another person to carry it out on their behalf.

77 Other definitions for ch 4A

This section defines words and phrases which are used throughout chapter 4A.

Part 2 Requirements for carrying out agricultural ERAs

Division 1 Fertiliser application requirements

Subdivision 1 Offence

78 Offence about fertiliser application

This section requires that anyone who carries out an agricultural ERA does so in accordance with the requirements of subdivision 2. However, the person does not have to comply with the requirements of subdivision 2 if they have an accredited ERMP that specifically states an alternative procedure is substituted for the requirements of subdivision 2.

An operator who has an accredited ERMP under Part 3 may have a different method of calculating the optimum amount of nitrogen or phosphorus that may be applied to the land. In these circumstances, best practice environmental management would be to use the method in the ERMP and not the default requirements in subdivision 2.

The maximum penalty for non-compliance with the requirements of subdivision 2 is 100 penalty units ($10,000). This is the same level of penalty for non-compliance with a transitional environmental program (TEP) requirement (section 332 of the *Environmental Protection Act 1994*) or for failure to provide an annual return for a TEP (section 345). Although this offence could be benchmarked against the water contamination offence in section 440ZG of the *Environmental Protection Act 1994* (which is 300 penalty units) or the controlled chemicals offence in section 8 of the *Chemical Usage (Agricultural and Veterinary) Control Act 1988* (which is 600 penalty units), the level of penalty for this offence is lower because it is a very new offence and entering into an area where there has not historically been a lot of environmental regulation.

Note that there is no offence for non-compliance with an accredited ERMP. However, a direction notice may be issued for non-compliance with an ERMP and non-compliance with a direction notice is an offence with a maximum penalty of 300 penalty units ($30,000) or an on-the-spot fine of 10 penalty units ($1000) for an individual and 20 penalty units ($2000) for a corporation.

The fundamental legislative principle that appropriate defences to liability must be provided is raised by this section. While they are not worded as such, the defence to this section is that the person has an accredited ERMP that specifically states an alternative procedure is substituted for the requirements of subdivision 2. The standard Criminal Code defences (i.e. mistake of fact, accident etc) would also apply. The nature of the obligation in this section means that a defence of 'reasonable excuse' is not appropriate. The obligations are not general, but restricted to particular people in particular circumstances, and strict consistent observance is necessary to ensure that the quality of water entering the reef is not affected by over-fertilisation.

Subdivision 2 Conditions to prevent over-fertilisation

79 Application of sdiv 2

This section states that subdivision 2 applies to a person carrying out an agricultural ERA.

The following three sections work in conjunction to prevent over-fertilisation. A person who is applying fertiliser containing nitrogen or phosphorus to the soil must work out how many additional nutrients are required to meet the needs of the plant without over-fertilising. In order to work out the optimum amount, the person will have to do a soil test to determine the characteristics of the soil. Performing these tests and calculations will help prevent over-fertilisation by ensuring that only the necessary amount of fertiliser is applied. This will improve the quality of water leaving a property by reducing run-off of excess fertilisers into the water and seepage into ground water, which can have negative impacts on the Great Barrier Reef.

80 Working out optimum amount

This section requires the person carrying out an agricultural ERA to use the results of the soil test under section 81 to calculate the correct amount of fertilisation to achieve optimum yield without over-fertilisation. Over-fertilisation is defined in section 77 as applying fertiliser at above the needs of the plant being fertilised. A methodology for calculating the optimum rate may be prescribed by regulation and will take into account variables such as soil and fertiliser type. If prescribed, the methodology must be used to calculate the correct amount of fertiliser to use. The Department of Environment and Resource Management intends to develop a calculator-type approach for calculating optimum fertiliser rates.

81 Soil testing

This section requires soil testing before fertiliser (both organic and inorganic) containing nitrogen or phosphorous is applied to the soil. A report must be prepared and the test and reports must be prepared by an appropriately qualified person, such as a laboratory accredited by the National Association of Testing Authorities (NATA). Amendments to the *Environmental Protection Regulation 2008* will specify how frequently the tests must be carried out and the methodology for carrying out the tests.

82 Restriction on application of fertiliser

This section restricts a person carrying out an agricultural ERA from applying more fertiliser than the optimum rate worked out under section 80.

Division 2 Document requirements

Subdivision 1 Documents that must be kept

All persons carrying out an agricultural ERA are required to keep certain records. Since the requirement to keep records for prescribed agricultural provisions is not linked to an environmental authority or development approval, this division lists the main areas about which records must be kept. These are linked to management practices that can affect the quality of water being released from a property.

83 Required record

This section requires anyone carrying out an agricultural ERA to keep certain records unless they have a reasonable excuse. The maximum penalty for non-compliance with the record-keeping requirement is 100 penalty units ($10,000). This is the same level of penalty for non-compliance with a TEP requirement (section 332 of the *Environmental Protection Act 1994*) or for failure to provide an annual return for a TEP (section 345).

A reasonable excuse could be that the documents were destroyed by a natural disaster such as fire or flood. Failure to remember to keep the documents would not be a reasonable excuse.

84 Obligation to keep relevant primary documents

This section requires a person carrying out an agricultural ERA to keep relevant primary records unless they have a reasonable excuse. Primary records are the original documents, not just a record that the document exists (as in section 83). It includes documents such as invoices for the purchase of fertiliser, reports about soil tests and documents calculating the optimum rate of fertiliser under section 80.

A reasonable excuse could be that the documents were destroyed by a natural disaster such as fire or flood. Failure to remember to keep the documents would not be a reasonable excuse.

The maximum penalty for non-compliance with the document-keeping requirement is 100 penalty units ($10,000). This is the same level of penalty for non-compliance with a TEP requirement (section 332 of the *Environmental Protection Act 1994*) or for failure to provide an annual return for a TEP (section 345).

Subdivision 2 Production of documents

85 Power to require production of documents

This section requires a person carrying out an agricultural ERA to produce records or the relevant primary documents upon being served notice. The operator is not required to regularly report the results of soil tests and fertiliser application to the administering authority, but the administering authority can require the operator to produce the records or document at

any time to ensure compliance. An authorised person may also use section 466 for the immediate production of documents, for example, while conducting a site inspection. Section 86 makes it an offence to fail to comply with this requirement unless the person has a reasonable excuse.

86 Offence not to comply with production requirement

This section provides an offence for failure to comply with a production requirement under section 85 unless the person has a reasonable excuse. A reasonable excuse in these circumstances may include that the documents have been destroyed by fire or flood. It would not be a reasonable excuse to claim that another person should have made the record as it is the responsibility of every person who carries out an agricultural ERA to ensure that the relevant records are made. Note that self-incrimination is not a reasonable excuse due to the operation of section 87. The maximum penalty for non-compliance with the production requirement is 100 penalty units ($10,000). This is the same level of penalty for non-compliance with a TEP requirement (section 332 of the *Environmental Protection Act 1994*) or for failure to provide an annual return for a TEP (section 345).

87 Derivative use immunity for production

This section negates the defence of self-incrimination for failure to produce the required records. A defendant cannot claim self-incrimination as a defence for non-compliance with a production requirement. However, the documents or records produced cannot be used in a court case against the individual who could otherwise claim self-incrimination.

The fundamental legislative principle of providing appropriate protection against self-incrimination is raised by this section. The power to require information is similar to the operation of sections 466 and 477 of the *Environmental Protection Act 1994*. However, section 477 provides for the defence of a reasonable excuse and the excuse could include that it might incriminate the individual. This section will remove this excuse for the production of documents under section 86.

This section is required to avoid the situation where an employee of a company can decline to provide information or produce a document thereby making it extremely difficult to obtain sufficient evidence against the corporate entity regarding an alleged offence. In effect, a corporation can currently choose to accept a smaller penalty (failure to provide

information or failure to produce a document) rather than risk prosecution for the original offence.

Additionally, collection of records is important to ensure that there is accurate information about management practices to inform other types of regulatory intervention, for example, a decision to require an ERMP.

A safeguard is provided in that the information or document may not then be used to prosecute the individual required to provide it. Consequently, the individual is protected against the consequences of self-incrimination.

Similar provisions are provided under the *Vegetation Management Act 1999* and *Electricity Act 1994*. It should be noted that the High Court has determined that a corporate entity is not entitled to protect itself against self-incrimination, so the defence of self-incrimination cannot be claimed by a company or a body corporate.

Part 3 Environmental risk management plans

In order to entrench the adoption of best management practices and continuous improvement on higher risk properties, a management plan approach will be implemented, known as the environmental risk management plan (ERMP).

Division 1 General matters

88 When an accredited ERMP is required

This section requires certain operators to have an ERMP. These operators are the larger operators in the identified "hotspots" or those who have been given an ERMP direction. An ERMP may also be voluntarily submitted.

The "hotspots" which were identified by the Department of Environment and Resource Management are:

Activity	Size	Catchment
Sugar cane growing	> 70 ha	Wet tropics
Cattle grazing	> 2000 ha	Burdekin dry tropics

When compared with the thresholds for the agricultural ERA in section 75 (i.e. any commercial operation for sugar cane growing, and 100 standard cattle units for cattle grazing), it is clear that this section is designed to only capture the larger producers in these areas.

There is considerable evidence that it is essential to reduce the pollution load generated across the majority of cane and grazing lands to achieve long term Reef health targets. Because of the variability across individual properties, doing this using a universal approach would be difficult, expensive and inefficient. It is far more efficient to target the larger properties covering large areas of the catchment with fewer actual operators with risk management planning and rely on a prescriptive approach to deal with the smaller properties.

Wet Tropics sugar cane growing

Managing the impacts of Wet Tropics' sugar cane is an important priority to reduce agricultural pollution. In the Wet Tropics area, sugar cane contributes 78% of the dissolved inorganic nitrogen (DIN) anthropogenic load (2800 tonnes). This contribution is spread across some 1,300 operators suggesting an average contribution of 2 tonnes per annum per property (assuming all properties are of similar sizes). Decreasing the load from sugar cane by 50% in line with Reef Plan targets to 1,400 tonnes, would require either a small number of operators to significantly reduce their DIN loads or for at least 50% of operators to moderately reduce DIN contributions across a large area.

The average size of cane farms in the Wet Tropics is 60 to 70 hectares. The aim is for operators of the larger properties to prepare ERMPs, so a threshold of 70 ha was chosen for this purpose. The 70ha threshold will capture a large proportion of the catchment with proportionately fewer producers.

Burdekin Dry Tropics cattle grazing

The Burdekin Water Quality Improvement Plan identifies the need to reduce mean annual sediment load at end-of-Burdekin catchment from ~3,700 kt/yr in 2008 to 2,220 kt/yr and that at least 30% to 50% of landholders would need to adopt improved practices for erosion

management to achieve catchment water quality targets. The roll-out of an ERMP approach will support the meeting of these targets.

The threshold for ERMP targeting for cattle grazing in the Burdekin Dry Tropics is designed to capture most large-scale cattle grazing properties that are the major contributors to nutrient and sediment release in the priority catchments. Dairies and smaller coastal graziers cumulatively contribute much less pollution and will not be captured by the ERMP threshold.

The fundamental legislative principle of equality under the law is raised by this section. However, this is balanced by the need to consider the fundamental legislative principle that legislation should be reasonable and fair in its treatment of individuals and should not impose unnecessary regulation. As indicated above, this section is targeted to the hotspots with the highest risk so that agricultural ERAs generally are not overregulated.

Under section 92, a person who is required to have an ERMP must submit an ERMP which complies with division 2 to the administering authority within 3 months of being required to have the accredited ERMP under this section.

In addition, under section 656 (inserted by clause 18), the application of this section to existing agricultural ERAs is deferred for 6 months to allow operators of agricultural ERAs time to commission or prepare their ERMP for accreditation. Consequently, the operator has 9 months in total from the commencement of this section on 1 January 2010 to submit the ERMP to the administering authority. The relevant operators will be notified via the Department of Environment and Resource Management communications in the media and through stakeholder meetings, and via the Department's extension activities.

89 When ERMP direction may be given

This section provides that the Minister may give an ERMP direction to any person carrying out an agricultural ERA. The Minister must consider that an ERMP is necessary or desirable, for example, where a hot spot has been identified or to improve the practices of an individual property. Consequently, the ERMP direction is both a compliance tool and a proactive tool to assist the administering authority to reduce the impact of the activity on water quality in the reef.

The decision to extend the ERMP requirement will be made based on best available evidence, for example, identifying by remote sensing data

properties with high risk of sediment loss due to areas of low ground cover or catchments with high nutrient impacts based on water quality monitoring. The Minister will be able to direct that those operators prepare an ERMP to target the particular issue identified. While the power to issue an ERMP direction may be delegated to departmental officers, it is anticipated that directions for multiple properties will remain with the Minister and will not be delegated.

The ERMP direction must comply with the content requirements set out in section 90. The usual review and appeal provisions of the *Environmental Protection Act 1994* will apply to the ERMP direction.

90 Form of ERMP direction and what it may require

This section sets out the content requirements for an ERMP direction. The ERMP direction must include the details listed in subsection (1) and may also include the details set out in subsections (2) and (3). Subsection (2) allows the ERMP direction to require a whole ERMP be prepared or a component of an ERMP, depending on the issue that needs to be addressed in a particular area or by a particular property. Subsection (3) allows the ERMP direction to also include other terms of reference which the ERMP must address.

91 Public notice of ERMP directions with multiple recipients

This section requires a notice to be placed in newspapers circulating in the relevant district where a decision is made to extend the ERMP direction to multiple operators. While affected operators will still be notified individually, this will serve as public notice of the extension of the requirements of the legislation in different areas.

92 Obligations if accredited ERMP required

This section creates an offence for failure to prepare and submit the ERMP. A person who is required to have an ERMP under section 88 must prepare the ERMP in accordance with division 2 and submit it to the administering authority for accreditation. The person can claim reasonable excuse as a reason for not submitting the ERMP within 3 months and for failing to prepare the ERMP in accordance with division 2.

The maximum penalty for non-compliance with the ERMP requirement is 300 penalty units ($30,000). This is consistent with the maximum penalty

for non-compliance with a direction notice under the *Environmental Protection Act 1994*.

93 Unaccredited ERMP has no effect

This section makes it clear that an ERMP which has not been accredited has no effect for the purposes of the provisions of the *Environmental Protection Act 1994*. For example, an unaccredited ERMP cannot be used to avoid the duty to notify harm (section 320), or as evidence of compliance with the general environmental duty (section 493A).

Division 2 ERMP content requirements

94 General content requirements

This section sets up the broad matters that must be addressed in an ERMP. This includes the power under subsection (g) to prescribe additional matters under an environmental protection policy or regulation. The Department of Environment and Resource Management intends to prepare a handbook to inform the preparation of ERMPs, which will be called up through the *Environmental Protection Regulation 2008*. Preparation of the ERMP must be in accordance with this handbook by virtue of subsection (g) of this section. It is intended that the complexity of an ERMP will be commensurate with the risks of an operation i.e. low risk operations need only a basic ERMP while higher risk operations need a more complex ERMP.

Failure to prepare an ERMP which meets these required contents is an offence under section 92. However, to ensure that operators are not required to duplicate existing effort, an operator may demonstrate through documentation that they have and are implementing a risk management plan that is the equivalent of an ERMP or part of an ERMP (see section 96).

95 Exceptions for management plan requirement

This section states that section 94(d)(i) does not apply if the operator has been certified as an organic operator by the Australian Quarantine Inspection Service. This is because organic and bio-dynamic producers do not use agricultural chemicals.

This section also states that if the agricultural ERA is cattle grazing, then the requirement to manage nutrients applied to the soil only applies to fertilised pastures on the property. This is because the majority of fertilisers used on cattle grazing properties are used on improved pastures.

96 Documents that may make up ERMP

This section clarifies that the ERMP may be made up of many documents, which may have been prepared for another purpose and which may not be called an ERMP. This is to ensure that operators are not required to duplicate existing effort.

An operator may demonstrate through documentation that they have and are implementing a risk management plan that is the equivalent of an ERMP or part of an ERMP. This will satisfy the requirement to hold an ERMP or that particular part of an ERMP. For example, a cattle grazing operation with a Land Management Agreement under the Delbessie arrangements for leasehold land is likely to be able to satisfy the ERMP requirements for sediment management on grazing lands without significant additional work. Similarly, requirements for land and water use management plans under the *Water Act 2000* may be able to satisfy some of the ERMP requirements.

Division 3 Accreditation of ERMPs

The purpose of this division is to provide an administrative process for accreditation of an ERMP. This provision is modelled on s360ZCD of the *Water Act 2000* about approving water efficiency plans.

97 Application of div 3

This section states that this division applies if a person has submitted an ERMP. This division applies whether the person was required to submit an ERMP as a targeted "hotspot" under section 88(a), required to submit an ERMP because of an ERMP direction, or has submitted the ERMP voluntarily.

98 Request for further information

This section allows the administering authority to request further information from the person submitting the ERMP for accreditation. This is to ensure that the administering authority has sufficient information to decide whether the ERMP should be accredited or not.

Failure to provide the information could lead to the administering authority making a decision to refuse to accredit the ERMP (section 99) and requiring an amended ERMP (section 101).

99 Deciding whether to accredit

This section requires the administering authority to make a decision to either accredit or refuse to accredit the ERMP. The administering authority may only accredit the ERMP if it is satisfied that the ERMP complies with the content requirements in division 2.

100 Notice of decision

This section requires the administering authority to give the person who has applied for accreditation notice of the decision under section 99. The administering authority must give an information notice if it decides to refuse to accredit the ERMP. 'Information notice' is defined in the *Environmental Protection Act 1994* as:

information notice, about a decision, means a written notice stating—

(a) the decision; and

(b) if the decision is a decision other than to impose a condition on an environmental authority, the reasons for the decision; and

(c) the review or appeal details.

The usual review and appeal provisions of the *Environmental Protection Act 1994* apply.

101 Amended ERMP required if accreditation refused

This section applies if the administering authority makes a decision to refuse to accredit the ERMP. When that happens, the recipient of the information notice under section 100 must amend the ERMP to address the deficiencies identified in the information notice and resubmit it to the administering authority within 20 business days of receipt of the

information notice. Failure to do so is an offence, with a maximum penalty of 100 penalty units ($10,000). This is the same level of penalty for non-compliance with a TEP requirement (section 332 of the *Environmental Protection Act 1994*) or for failure to provide an annual return for a TEP (section 345).

The administering authority may extend the 20 business day time limit. It is anticipated that extensions would only be granted if the recipient of the information notice requests an extension and provides reasonable grounds for why such an extension should be granted.

Division 4 Amendment of accredited ERMPs

102 Application of div 4

This section applies to anyone carrying out an agricultural ERA for which there is an accredited ERMP.

103 Voluntary amendment

This section provides the process for amendment of the accredited ERMP at the initiation of the operator of the agricultural ERA.

104 Direction to amend

This section provides the process for amendment of the accredited ERMP at the initiation of the administering authority. This section sets out the grounds upon which the administering authority may require amendment of the accredited ERMP, how the notice is given and the time by which the operator has to comply.

The direction under this section is taken to be a direction notice for the purposes of divisions 1 to 3, so it must comply with section 90. The usual review and appeal provisions of the *Environmental Protection Act 1994* apply.

Division 5 Annual reporting

105 Annual reporting requirement

This section requires anyone carrying out an agricultural ERA under an accredited ERMP to give the administering authority an annual report about the implementation of the ERMP within 2 months after the end of the financial year unless the person has a reasonable excuse.

This section links in with the record-keeping requirements. Annual reporting for the ERMPs is necessary to monitor how the ERMPs are being implemented and to measure the progress of this package of regulation. This is similar to the annual reporting which can be required for other ERAs under section 316 of the *Environmental Protection Act 1994*. There is no offence for non-compliance with an annual notice which requires an annual return under section 316, but if the operator or holder does not comply with the notice, their approval to operate the ERA may be cancelled or suspended.

A reasonable excuse could be that the person has been unable to comply with the requirement due to prolonged hospitalisation, or because their property has been stricken by fire or flood which has destroyed records of implementation.

It is an offence to fail to comply with a maximum penalty of 100 penalty units ($10,000). This is the same level of penalty for non-compliance with a TEP requirement (section 332 of the *Environmental Protection Act 1994*) or for failure to provide an annual return for a TEP (section 345).

7 Amendment of s 320 (Duty to notify environmental harm)

This clause amends section 320 of the *Environmental Protection Act 1994* so that a person acting under an accredited ERMP is not required to notify the administering authority of environmental harm authorised by that ERMP. A person has a duty to advise the administering authority of serious or material environmental harm caused or threatened by their acts or omissions. However, this section does not apply if the harm is authorised to be caused under a development condition of a development approval, an environmental authority, a transitional environment program, an environmental protection order etc. This amendment adds accredited ERMPs to that list of exemptions.

8 Amendment of s 346 (Effect of compliance with program)

This clause amends section 346 of the *Environmental Protection Act 1994* to add accredited ERMPs to the list of approvals affected by transitional environmental programs (TEPs). The terms of the TEP usually override any other form of approval or permit. This concept is to be extended to agricultural ERAs with accredited ERMPs so that a person acting under the TEP may do, or not do, the thing despite what the accredited ERMP says.

9 Amendment of s 358 (When order may be issued)

This clause amends section 358 of the *Environmental Protection Act 1994* to extend the grounds for issuing an environmental protection order (EPO) to non-compliance with accredited ERMPs. The administering authority may issue an EPO if, for example, there is non-compliance with a development approval, environmental authority, or TEP. This amendment allows an EPO to also be issued where there is non-compliance with a person's accredited ERMP.

10 Replacement of s 363A (Prescribed provisions)

This clause amends section 363A of the *Environmental Protection Act 1994* to extend the grounds for issuing a direction notice to include a contravention of an accredited ERMP. There is no offence for failure to comply with an ERMP. This is because an ERMP is designed to be a flexible document that develops as more information and new technologies become available and improvements in management practice are made. However, if a person fails to comply with their accredited ERMP, an authorised person may issue a direction notice requiring them to take action or cease action to meet the conditions of their ERMP. The direction notice is the appropriate tool in these circumstances as it can require action to be taken to meet the standard set by the ERMP, or require that activities be ceased until they meet the ERMP.

The current penalty for non-compliance with a direction notice (300 penalty units ($30,000); on-the-spot fines of 10 penalty units ($1000) for an individual and 20 penalty units ($2000) for a corporation) will apply.

11 Amendment of s 452 (Entry of place-general)

This clause amends section 452 of the *Environmental Protection Act 1994* to extend the power of entry to a place where an agricultural ERA is being

carried out. This section contains a general power of entry where the place is subject to a registration certificate and a Chapter 4 activity is being carried out. This amendment is necessary to ensure that this power applies to agricultural ERAs so that offences under the new Chapter 4A may be enforced.

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

This clause amends section 458 of the *Environmental Protection Act 1994* to extend the power to obtain an order to enter land. An authorised person may enter land to secure compliance with development conditions of a development approval, an environmental authority, a transitional environmental program etc. This amendment permits an authorised person to also enter land to secure compliance with a person's accredited ERMP.

13 Amendment of s 490 (Evidentiary provisions)

This clause amends section 490 of the *Environmental Protection Act 1994* to ensure that the evidentiary provisions apply to the offences in the new chapter 4A.

14 Amendment of s 493A (When environmental harm or related acts are unlawful)

This clause amends section 493A of the *Environmental Protection Act 1994* to extend the defence to accredited ERMPs. Under this section, it is a defence to a charge of unlawfully doing a relevant act (including environmental harm, water contamination) if the defendant was carrying out a lawful activity and complied with the general environmental duty (GED). The defendant is taken to have complied with the GED if the defendant was complying with a relevant approved Code of Practice. This amendment extends this defence to a defendant who was complying with their accredited ERMP. However, there are some circumstances where a code of practice may overlap with an activity required to prepare an ERMP. In these circumstances, an operator may only rely on complying with a code of practice to the extent that it relates to a matter not otherwise covered by an accredited ERMP.

15 Amendment of s 520 (Dissatisfied person)

This clause amends section 520 of the *Environmental Protection Act 1994* to ensure that the review and appeal provisions apply to decisions in the new chapter 4A.

16 Amendment of s 538 (Appeals may be heard with planning appeals)

This clause amends section 538 of the *Environmental Protection Act 1994* to ensure that the review and appeal provisions apply to decisions in the new chapter 4A.

17 Amendment of s 540 (Required registers)

This clause amends section 540 of the *Environmental Protection Act 1994* to require that the administering authority keeps registers of ERMP directions and accredited ERMPs.

18 Insertion of new ch 13, pt 12

This clause inserts transitional provisions into the *Environmental Protection Act 1994* for this Act.

Part 13 Transitional provisions for Great Barrier Reef Protection Amendment Act 2009

657 Deferral of automatic ERMP requirement for existing agricultural ERAs

This section defers the commencement of section 88(a) until 6 months after the commencement of the Act. This will allow operators of agricultural ERAs that were operating before the commencement of the Act time to obtain an accredited ERMP.

658 Provision of appeals for ch 4

This section gives retrospective application to the appeal provisions in relation to this Act so that any decision made about a registration certificate under sections 73F, 73FA, 73L or 73O will, from 23 February 2009, be subject to the review and appeal provisions of the *Environmental Protection Act 1994*. A reprint of the *Environmental Protection Act 1994* on 23 February 2009 accidentally omitted these provisions from the reprint.

While the fundamental legislative principle of retrospectivity would ordinarily be raised by this section, this section does not adversely affect rights and liberties, or impose obligations, retrospectively. In fact, this section is beneficial to members of the community and only adverse to the State, as it cures a defect in the review and appeal rights of operators with respect to registration certificates.

19 Amendment of sch 2 (Original decisions)

This clause amends schedule 2 of the *Environmental Protection Act 1994* to ensure that the review and appeal provisions apply to the new chapter 4A.

This clause also amends schedule 2 to correct an error. A reprint of the *Environmental Protection Act 1994* on 23 February 2009 accidentally omitted these provisions from the reprint. The insertion of section 657 by clause 18 ensures that this amendment has retrospective application back to 23 February 2009.

20 Amendment of sch 4 (Dictionary)

This clause amends the Dictionary in schedule 4 of the *Environmental Protection Act 1994* to define words and phrases which are used throughout the *Environmental Protection Act 1994*.

Part 3 Amendment of Integrated Planning Act 1997

Clause 21 Act amended

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

Clause 22 Amendment of s 1.3.5 (Definitions for terms used in *development*)

This clause amends the definition of 'material change of use' in section 1.3.5 of the *Integrated Planning Act 1997* to ensure that agricultural ERAs are not captured by the *Integrated Planning Act 1997*.

Clause 23 Amendment of sch 8 (Assessable development and self-assessable development)

This clause amends schedule 8 of the *Integrated Planning Act 1997* to ensure that agricultural ERAs are not captured by the *Integrated Planning Act 1997*.

Clause 24 Amendment of sch 10 (Dictionary)

This clause amends schedule 10 of the *Integrated Planning Act 1997* to define 'agricultural ERA' for the purposes of the *Integrated Planning Act 1997* and to ensure that agricultural ERAs are not captured by the *Integrated Planning Act 1997*.