

Should breach of the general environmental duty contained in the *Environmental Protection Act 1994* constitute an offence?

/ May 2019

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Introduction to Queensland’s General Environmental Duty

On 1 December 1994, the *Environmental Protection Act 1994* (Qld) (**EP Act**) received Royal Assent. The long title for the EP Act reads “An Act about the protection of Queensland’s environment”.

Section 36(1) of the EP Act as passed stated:

“General environmental duty

36.(1) A person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm (the “**general environmental duty**”).¹

(2) In deciding the measures required to be taken under subsection (1), regard must be had to, for example -

- (a) the nature of the harm or potential harm; and
- (b) the sensitivity of the receiving environment; and
- (c) the current state of technical knowledge for the activity; and
- (d) the likelihood of successful application of the different measures that might be taken; and
- (e) the financial implications of the different measures as they would relate to the type of activity.”

In late 2000, the Queensland Parliament passed the *Environmental Protection and Other Legislation Amendment Act 2000*. This Act significantly amended the EP Act with the consequence that the majority of the provisions in the EP Act were re-numbered. By virtue of the re-numbering, section 36 was renumbered as section 319.

While there was a change to the section numbering, there was no change to the substance of the provision itself. Indeed, aside from amendments to the footnote, section 319 in the current reprint of the EP Act² remains in the same terms as section 36 of the EP Act as passed.

The Explanatory Notes for the Environmental Protection Bill 1994 confirm “no offence is associated with this provision. This provision has another important role in that it provides a defence to the offences relating to causing unlawful environmental harm. If defendants can show that they fulfilled their ‘general environmental duty’, then they cannot be found guilty of causing unlawful environmental harm.”

The role of the general environmental duty (**GED**) in section 319 of the EP Act remains the same to this day.

Pursuant to section 493A(3) of the EP Act, it is presently a defence to a charge of unlawfully doing any of the following acts:

- (a) an act that causes serious or material environmental harm or an environmental nuisance;
- (b) an act that contravenes a noise standard;
- (c) a deposit of a contaminant, or release of stormwater run-off, mentioned in section 440ZG

to prove:

- (a) the relevant act was done while carrying out an activity that is lawful apart from the EP Act; and
- (b) the defendant complied with the general environmental duty.

Further, sections 493A(4) and (5) provides that a defendant is taken to have complied with the GED if the defendant proves:

- (a) an accredited environmental risk management plan (**ERMP**) applied to the doing of the relevant act and to the extent it is

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relevant, the defendant complied with the ERMP; or

- (b) a code of practice applied to the doing of the relevant act and to the extent it is relevant the defendant complied with the code and no accredited ERMP applied to the doing of the relevant act.

Failure to provide a contingency plan from the outset of an operation is an example of how the GED may not be complied with.³

It has been observed that it is unusual that the GED defence does not extend to other offences which do not have unlawful environmental harm as an element because offences not having that element may not be as serious in nature, yet the offender is deprived of that defence.⁴ This observation however was made at a time when the GED only provided a defence to environmental harm or environmental nuisance. When section 493A was inserted in the EP Act⁵, the defence was available to be used more broadly, though its application is still confined to only the relevant acts identified in that section. It is not available as a defence to any offence prescribed in the EP Act.

In addition to its role as a defence, the GED also provides a basis for administrative intervention. Section 358 of the EP Act provides the administering authority with power to issue an environmental protection order to a person to secure compliance by the person with the GED.

Some commentators have likened the GED as an extension of the common law standard of reasonable care (embodied in the law of negligence for damage to people and property) to the environment.⁶

Queensland is not the only jurisdiction with a general environmental duty that provides a defence to charge of environmental harm and which triggers administrative action, but the breach of the duty itself does not amount to an offence.⁷

Further, the EP Act is not the only piece of Queensland legislation with a general duty at its core requiring all stakeholders to take an active role and managing and responding to risks. By way of example, there is a general biosecurity obligation in section 23 of the *Biosecurity Act 2014* (Qld) and the cultural heritage duty of care which appears in section 23 of the *Aboriginal Cultural Heritage Act 2003*.

Both of these Acts however go further than just a statement of a duty and make breach of that duty an offence.⁸

Similar to the EP Act, the *Aboriginal Cultural Heritage Act 2003* sets out key indicia as to how the duty of care may be met⁹ and duty of care guidelines have been published under the legislation stating ways in which the duty of care can be met.¹⁰

It is relevant, and for the reasons set out below, timely, to consider whether breach of the GED contained in section 319 of the EP Act ought to constitute an offence. In other words, should the GED be a sword rather than a shield?

State of the Environment

Unfortunately, the Australian environment is suffering significant degradation. The current problems are cumulative and complex and arise as a consequence of major issues such as invasive species, land degradation, depletion of water resources, waste, population growth and climate change.

In January 2019, the Organisation for Economic Co-operation and Development (**OECD**) released its report on Australia's environmental performance. The OECD report acknowledged that steps had been taken to improve conservation outcomes, however it found overall that:

*"...the pace and scale of progress have not been enough to improve the status and trends of ecosystems and species...Small initiatives and limited investment are insufficient to fully address a legacy of land clearing combined with growing pressures from population growth, expanding development, invasive species and climate change."*¹¹

In April 2019, the Commonwealth Environment and Communications References Committee published an interim report on Australia's faunal extinction crisis after conducting an inquiry in 2018 on the effectiveness of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**). The focus of this inquiry was whether the legislative framework of the EPBC Act is currently fulfilling its objectives in protecting threatened species.

Chapter 4 of this interim report records:

"4.1 Australia is one of the most biodiverse countries in the world, with a rich variety of fauna. Our biodiverse environment is central to

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our wellbeing, the health of our economy and our national identity. While Australia is home to several iconic species known around the globe, we also have many species we are yet to fully understand. Estimates suggest that, at present, there are 250 000 faunal species in Australia, with around 120 000 of these yet to be scientifically document and described.

*4.2 However, against the richness of Australia's natural environment, our damning track record of faunal extinction and decreasing biodiversity is stark.*¹²

The Committee concludes that without new environmental legislation, Australia will continue to struggle to address the current rates of faunal extinction in the future.¹³ The committee ultimately make two recommendations:

- (a) **Recommendation 1** - To limit the drivers of faunal extinction, the Commonwealth develop new environmental legislation to replace the EPBC Act.
- (b) **Recommendation 2** - The Commonwealth establish an independent Environment Protection Agency, with sufficient powers and funding to oversee compliance with Australia's environmental laws.

This is not the first time that recommendations have been made to create a new legislative framework to replace with the EPBC Act or to create a new national body. In late 2018, the Chifley Research Centre released a publication titled "Protecting the Future: Federal Leadership for Australia's Environment". This paper notes that the EPBC Act was much derided as a second-rate solution when it was first introduced by the Howard Government and, twenty years on, it hasn't aged well.¹⁴ One of the reasons this paper considers the EPBC Act to be failing the environment is its focus on development approvals and the triggers being reactive to development proposals rather than comprehensive tools with which to manage and protect the environment.¹⁵

Ultimately the Chifley publication calls for Australia to recommit to protection of the environment and to reinvigorate the key legal instrument as the current EPBC Act is not fit for purpose. The following six recommendations are made:

- (a) Recommendation 1 - scrap the EPBC Act and create a new Act and supporting institutions;
- (b) Recommendation 2 - Commonwealth leadership on the environment including a legal obligation on the Commonwealth to protect Australia's natural environment and its biodiversity;
- (c) Recommendation 3 - new empowered independent institutional structure to deliver the aims of the new laws;
- (d) Recommendation 4 - new pathways to a stronger and clearer development approvals process;
- (e) Recommendation 5 - a National Environment Commission delivering policy and regulatory functions to under the new Act;
- (f) Recommendation 6 - adequate and effective funding to ensure the objectives of the new Act are realised.

The work of the Australian Panel of Experts in Environmental Law (**APEEL**), a group of Australian environmental lawyers, academics and retired judges who have designed and released a blueprint for the next generation of Australian environmental law is noted.¹⁶ APEEL's approach is to focus on the broad features of an environmental law system that should be advocated for as a basis for addressing the serious environmental challenges we face today. Of particular relevance to this paper, is APEEL's key idea relating to general environmental duties. It advocates for legal norms in the form of general environmental duties being imposed on all legal persons, specifically:

"The next generation of Australian environmental law should provide for new norms in the form of:

- *A general environmental duty of care; and*
- *A general duty to restore and rehabilitate harmed environments.*¹⁷

This proposal involves not just a general environmental duty of care that applies to individuals, corporations, other legal business entities and all levels of government, but it goes further and contemplates a general duty to repair and restore damaged environments.

APEEL acknowledges Queensland's recognition of a general environmental duty of care and believes it is appropriate for a general duty of care to be a routine component of the next generation of environmental legislation across all jurisdictions, especially in the absence of a capacity or willingness to impose such a duty constitutionally. Further APEEL sees no reason why a breach of the general environmental

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duty should not constitute an environmental offence.¹⁸

While the recommendations and ideas mentioned above are primarily directed towards a next generation of environmental laws at the Commonwealth level, many are also applicable at State level. For the following reasons, there is no less of a need for environmental laws that are fit for purpose for Queensland.

The Queensland State of the Environment 2017 report published in October 2018 records:

- (a) Poor water quality resulting from land-based run-off is a key pressure on the Great Barrier Reef.¹⁹
- (b) Other pressures on the Reef include the loss of wetlands, coastal habitat changes and reductions in connectivity, direct use and population growth.²⁰
- (c) Queensland is the highest emitter of greenhouse gases in Australia, responsible for producing 29% of national emissions.²¹
- (d) Land clearing and fragmentation are significant pressures on terrestrial ecosystems.²²
- (e) Invasive non-native fauna species are relatively widespread.²³
- (f) Littering and illegal dumping is widespread throughout the State.²⁴

With Queensland having about 85% of Australia's native mammals, 72% of its native birds more than half of the nation's native reptile and frog species and more than 14,000 native plant species²⁵ and with threats to the environment including climate change and rapid population growth expected to escalate over coming years, Queensland also needs to look at the current environmental governance regime and consider whether it is up to the task and the demands of the 21st century. One component of that exercise includes looking at Queensland's GED and whether the greater good necessitates breach of the GED amounting to the commission of an offence.

By being one of the few Australian jurisdictions with a well-developed GED, Queensland is already on the path to having next generation environment protection laws. Is there however a case for going one step further and imposing criminal liability like that recently implemented by Victoria?

Environment Protection Amendment Act 2018 (Vic)

In August 2018, the Victorian Parliament passed the *Environment Protection Amendment Act 2018 (Amendment Act)*. The centrepiece of the legislation is to introduce a general environmental duty for Victoria. In an Australian first, the Amendment Act goes one step further and the incoming general environmental duty is criminally enforceable.

The need for the introduction of a general duty was identified by the Independent Inquiry into the Victorian Environment Protection Authority. The Inquiry felt that a GED needs to be enforceable to be effective, noting that criminal liability for breach of a general duty is well accepted under occupational health and safety legislation.²⁶

The incoming Victorian GED is set out in Section 25 of the Amendment Act. It is in the following terms:

"Part 3.2 - General environmental duty

25 *General environmental duty*

1. *A person who is engaging in an activity that may give rise to risks of harm to human health or the environment from pollution or waste must minimise those risks, so far as reasonably practicable.*

Notes

See section 6 in relation to the concept of minimising risks of harm to human health and the environment.

Section 314 provides that subsection (1) is a civil penalty provision. The penalty for contravention of this civil penalty provision is set out in the table in section 314. See also section 314(3).

2. *A person commits an offence if the person contravenes subsection (1) in the course of conducting a business or an undertaking.*

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Penalty: In the case of a natural person, 2000 penalty units

In the case of a body corporate, 10 000 penalty units.

3. An offence under subsection (2) is an indictable offence.

Note

This offence may be heard and determined summarily (see section 28 of the Criminal Procedure Act 2009)

4. Without limiting subsection (1), a person who is conducting a business or an undertaking contravenes that subsection if the person fails to do any of the following in the course of conducting the business or an undertaking, so far as reasonably practicable -

- (a) use and maintain plant, equipment, processes and systems in a manner that minimises risks of harm to human health and the environment from pollution and waste;
- (b) use and maintain systems for identification, assessment and control of risks of harm to human health and the environment from pollution and waste that may arise in connection with the activity, and for the evaluation of the effectiveness of controls;
- (c) use and maintain adequate systems to ensure that if a risk of harm to human health or the environment from pollution or waste were to eventuate, its harmful effects would be minimised;
- (d) ensure that all substances are handled, stored, used or transported in a manner that minimises risks of harm to human health and the environment from pollution and waste;
- (e) provide information, instruction, supervision and training to any person engaging in the activity to enable those persons to comply with the duty under subsection (1).

...”

Breaches of the incoming Victorian GED could attract civil and/or criminal penalties of up to \$1.6 million, with intentional or reckless breaches attracting penalties of up to five years' imprisonment and \$3.2 million in fines.

Like Queensland, the incoming Victorian GED is focussed on the prevention of harm and arises when a risk of harm exists, not once the harm has occurred.

The Amendment Act inserts new section 6 in the *Environment Protection Act 2017* (Vic) which explains the concept of minimising risks of harm to human health and the environment and which provides that in determining what is (or was) reasonably practicable in relation to the minimisation of risks of harm to human health and the environment, regard must be had to the following matters: -

- (a) The likelihood of those risks eventuating;
- (b) The degree of harm that would result if those risks eventuated;
- (c) What the person concerned knows, or ought reasonably to know, about the harm or risks of harm and any ways of eliminating or reducing those risks;
- (d) The availability and suitability of ways to eliminate or reduce those risks;
- (e) The cost of eliminating or reducing those risks.

Sections 26 and 27 of the Amendment Act deal with multiple contraventions of the general environmental duty (in short, multiple contraventions can be charged as a single offence) and aggravated breach of the general environmental duty respectively.

As can be seen from the quote above, the Amendment Act provides guidance on the minimum standards of conduct expected, such as implementing risk-management procedures and handling and storing substances. For completeness it is noted that the balance of section 25 of the Amendment Act (not quoted above) provides additional guidance regarding the design, manufacture, installation or supply of a substance, plant or equipment.

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The Amendment Act also introduces a transitional duty in relation to material harm. Pursuant to section 28 of the Amendment Act, a person must not engage in conduct that results in material harm to human health or the environment as a result of pollution or waste. A person who complies with the GED will not be liable for contravention of the material harm offence and a person charged with breaching the GED will not also be charged for breach of the material harm provisions.

This transitional duty is to be phased out after four years. The Explanatory Notes to the Amending Act identify the purpose of having this transitional offence is to ensure that the scheme can deal with environmental harm from the first day it commences. To ensure fairness, there is parity between the penalties for breach of section 25 and 28.

The incoming Victorian GED attracts civil or criminal penalties. Breach of the GED is specified to be a civil penalty provision for the purposes of Part 11.5 of the Amendment Act. The most serious offence in the Amendment Act is the offence of aggravated breach of the GED under section 25 and this is reserved for criminal prosecution only. Other breaches of the GED however are part of the civil penalty scheme which enables the Victorian Environmental Protection Agency to apply to a Court, on a civil basis, for an order that a person pay a civil monetary penalty for a contravention. This provides the Agency with an alternative to criminal prosecution. The Amendment Act contains a number of provisions setting out the interaction between civil penalty proceedings and criminal proceedings.²⁷

The Amendment Act will not commence until 1 December 2020. This is said to allow adequate time for the commencement of the significant reforms in the Act, including for the making of new regulations and other subordinate instruments.²⁸

Some Relevant Legal Considerations

There are a range of issues relating to imposing criminal liability for breach of the GED. These include:

Onus of proof

If breach of the GED became an offence, based on the current definition of environmental harm²⁹, it could be prosecuted whether any harm actually occurs. The GED would therefore be a risk-based, not outcome based, offence provision.

The EP Act is silent as to the burden of proof. A core principle of the Australian criminal justice system is that a person is presumed to be innocent unless proven guilty of an offence beyond a reasonable doubt. The prosecution therefore generally has the burden of proof - an accused person does not prove they are innocent of the crime.

Applying the general rules to existing offences in the EP Act, the complainant bears the burden of proving the defendant's conduct is in breach of the Act. For instance, that a person has contravened a condition of an environmental authority or a person has deposited prescribed water contaminants in waters. There are some special evidentiary provisions in Chapter 10 Part 1 of the EP Act in relation to legal proceedings.

To the extent that a defence may be available, it is for the defendant to establish the existence of any defences. The Queensland Planning and Environment Court has considered that under the current EP Act regime with use of the GED as a defence, the Respondent has to show, to the relevant standard of proof, that the GED was complied with.³⁰

Jillian Button, Partner at Allens, Melbourne office suggests that in circumstances of the Amendment Act, where an action is brought alleging a breach of the incoming Victorian GED, the applicant will largely bear the onus of proving the breach, rather than the defendant having to demonstrate its compliance with the GED.³¹

The Hon Justice Brian J Preston, Chief Justice of the Land and Environment Court of New South Wales has examined the structure of Australian environmental laws including the burden of proof.³² His Honour has observed that current approaches in this regard may result in a loaded system, specifically:

“Even in a system with laws regulating the use and exploitation of the environment, the leverage inherently exerted by consuming users of the environment means that they can continue their consumption until they are sued and restrained by Court order. Consuming users will, therefore, be defendants and non-consuming users or persons wishing to preserve the environment will be plaintiffs. In the Australian legal system, plaintiffs bear the burden of proving the defendant's conduct is in breach of the law. In cases of doubt, the plaintiff will not succeed,

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*and the use or exploitation of the environment will prevail.*³³

Is the solution to problems concerning the burden of proof, allocating the burden of proof to those who propose to use, exploit or harm the environment? This may be a bridge too far for many existing EP Act offences, however if breach of the GED became an offence, should the burden of proof should be allocated to the duty holder? In other words, should the onus be on the duty holder to demonstrate that he/she/ it did not carry out an activity that causes, or is likely to cause, environmental harm? Further, that the same duty holder took all reasonable and practicable measures to prevent or minimise the harm.

There is some force to this submission. For the GED, the matters required to be proven will be within the knowledge of the accused. For example, the duty holder is likely to know far more about the circumstances surrounding the alleged activities than the regulator. Further, if the burden was to remain with the regulator, how does one prove that a person/ entity did not take reasonable and practicable measures? Is simply the occurrence or threat of harm sufficient?

Proof as to the adequacy of the measures will require knowledge of the measures themselves and a detailed knowledge of the activity and inherent risks associated not only with the activity itself but the sensitivities of the particular surrounding environment. Given the strong public interest in ensuring protection of the environment, there may be some justifiable basis for imposing an evidential onus on the accused.

It is noted that earlier iterations of the *Vegetation Management Act 1999*³⁴ (**VMA**) contained provisions reversing the onus of proof for determining who is responsible for undertaking unauthorised clearing of vegetation. In effect, this provision presumed the occupier of land to be responsible for the offence in the absence of any evidence to the contrary. There has been at least one unsuccessful attempt to reinstate this since it was removed from the VMA in 2013.³⁵

The Explanatory Notes for the *Vegetation Management Framework Amendment Bill 2013* which proposed to remove the reversed onus of proof from the VMA identified that the presumption of guilt raised issues with fundamental legislative principles and has the potential to see landholders wrongly accused of unlawful clearing where there is no evidence to suggest that it was not their fault.

By contrast, the Explanatory Notes for the *Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016* which proposed to re-insert the reversed onus of proof acknowledged that the provision breached fundamental legislative principles, however it was said to be justified on the basis that the expense of clearing makes it highly improbable that an unknown third party would undertake clearing on someone else's property, without the occupier's invitation or consent.

If the breach of the GED was made an offence, where the onus should lie will be a live issue.

Need for Codes

A current difficulty is how do you know if someone is meeting the GED?

Section 319(1) of the EP Act identifies the following matters as relevant to deciding how to meet the GED:

- (a) nature of the harm or potential harm – for example, how severe is the potential environmental harm?
- (b) sensitivity of the environment you are operating in – for example, are you operating near a protected area, waterway or sensitive habitat?
- (c) current state of technical knowledge for the activity – for example, what is the current best practice for the activity?
- (d) likelihood of possible measures being successful – for example, how successful are different measures likely to be in preventing or minimising environmental harm?
- (e) financial implications of taking different measures – for example, will taking certain prevention measures instead of others mean your activity is not commercially viable?

The GED refers to the duty-holder taking all “reasonable and practicable measures” to prevent or minimise the environmental harm. There is no definition in the EP Act of “reasonable and practicable measures”. In the absence of a statutory definition, case law on the meaning of this phrase, or similar terminology will be relevant.

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It has been queried whether the GED should instead be expressed as needing to satisfy the objectives of ecologically sustainable development so that the limits of “reasonable and practical” would then be subject to fulfilment of the precautionary principle.³⁶ It is noted that the object of the EP Act set out in Section 3 of the Act specifically refers to ecologically sustainable development. In considering the provisions in the EP Act there is a need to be cognisant of the legislative context of the powers which includes the objects of the Act.

In considering whether or not the GED has been met, it is also relevant to have regard to section 21 of the EP Act setting out the considerations relevant to deciding the “best practice environmental management” of an activity.

If breach of the GED became an offence, the administering authority for the EP Act would need to provide leadership. It would be necessary for the GED to be complemented by additional codes of practice and guidance materials to provide greater clarity to duty-holders as to how they can fulfil the duty and to regulatory bodies as to how they can best monitor and test compliance.³⁷

Section 318E of the EP Act allows the Minister to make codes of practice stating ways of achieving compliance with the GED for an activity that causes, or is likely to cause, environmental harm. Where a code exists, compliance with a code is deemed to be compliance with the general duty.³⁸ In Queensland, five industry codes of practice have been developed to help businesses comply with the GED.³⁹ In each case, the environmental codes of practice are a voluntarily adopted standard and complying with the code provides the operator with a defence against a charge of unlawfully causing environmental harm. Compliance with the approved codes of practice is voluntary. If a person does not comply with a relevant code, it is still possible to rely upon the defence of complying with the GED, but it will be necessary to show that the GED is met in another way.

The Duty of Care Guidelines for the purposes of the *Aboriginal Cultural Heritage Act 2003* is an example of a guideline informing a duty of care and where failure to comply with the guidelines may result in prosecution. These guidelines identify reasonable and practicable measures for ensuring that activities are managed to avoid or minimise harm to Aboriginal cultural heritage in a way that meets the duty of care requirements under section 23 of the *Aboriginal Cultural Heritage Act 2003*. There is no offence in not complying with the cultural heritage duty of care guidelines; however complying with the guidelines affords strict compliance with the cultural heritage duty of care. As mentioned earlier, contravening the cultural heritage duty of care may result in prosecution under that Act.

If breach of the GED became an offence, the role of codes of practice and other material will become more prominent. Such codes and material will have more than an advisory role and have greater evidentiary value. Also, it has been noted that while regulators currently have a good understanding of existing regulatory frameworks in relation to environmental harm and pollution, there will be a question as to whether it has the same understanding of industry practices such as compliance systems and risk management sufficient to assess whether there has been a breach of the GED.⁴⁰

Another consideration is whether the approach taken in relation to the GED ought to be flexible depending on scale. For instance, should lower risk businesses be able to satisfy the GED with simple training and higher risk industries require a more sophisticated approach to risk management? Such an approach would be consistent with the court’s consideration that in determining what is “reasonably practicable” regard will be had to:

- (a) the likelihood of the risks eventuating;
- (b) the degree of harm that would result;
- (c) what the person knows, or ought to reasonably know about the harm or risks of harm, and any ways of eliminating or reducing those risks; and
- (d) the availability, suitability and cost of eliminating or reducing the risks.

The Central Offence?

If breach of the GED could lead to criminal penalties, should the existing environmental harm offences in the EP Act be dispensed with after an appropriate transitional period? By attracting penalties, the GED could potentially transition from supporting and complementing the actual harm offences to being the central and general harm related offence.

The Victorian Amendment Act favours this position. For a transitional period after the commencement of the Act, there will be a duty relating to material harm.⁴¹ This provision provides that a person must not engage in conduct that results in material harm to human health or the

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environment from pollution or waste. This additional transitional duty is intended to give industry time to transition to the new approach and allow the regulator to prosecute environmental harm in the meantime. It is clear however that this section is to be repealed no later than four years from commencement of the Amendment Act. This approach therefore favours the consolidation of the harm offences into a GED underpinned by civil and criminal penalties.

That said however it is noted that the *Aboriginal Cultural Heritage Act 2003* retains an unlawful harm offence⁴² in addition to the cultural heritage duty of care offence provision.

It is also relevant to consider here whether the existing offence provisions in the EP Act are adequate? In other words, is there a need for breach of the GED to be an offence?

On my count there are over 95 sections of the EP Act which provide for an offence. Maximum penalties associated with the existing offences range from 5 penalty units to 6,250 penalty units or 5 years imprisonment. It is natural to question, what impact, if any, a GED offence would contribute towards achieving “the greater good” in light of the existing regime.

The ongoing decline of Queensland’s environment is suggestive that the existing regime of offences and enforcement contained in the EP Act can be improved to more adequately contribute towards the achievement of the objects of the EP Act.

All of the existing offences in the EP Act are reactive rather than proactive. Any increases to the maximum penalties associated with existing EP Act offences will not change this. While the imposition of penalties associated with a breach of the GED will also be reactive to a failure to meet the GED, such an offence offers a greater scope to prevent harm from occurring in addition to not just punishing an offender when environmental harm does occur or has the potential to occur. This greater scope presents itself in the following way.

Enforcement action associated with an offence of breaching the GED allows a regulator to step in before environmental harm has occurred or is imminent. At its heart, the GED endeavours to ensure efforts are made to ensure environmental harm does not occur. Such an offence is focussed on the conduct of activities and the implementation of measures to prevent or minimise environment harm.

An offence associated with breach of the GED has the flexibility to fulfil both a punishment and proactive role. Cost cutting and profit making can be key motivators for operators to adopt behaviours that have little regard for existing EP Act offences. Where such deliberate or careless behaviour occurs, the penalties ultimately imposed as a result of breaching the existing EP Act offences are primarily focussed on restoration and deterrence. If breach of the GED was an offence, prosecution of it would not only spotlight the fact that a crime has been committed (which, noted, would also occur with any EP Act prosecution) but an environmental good could be produced by highlighting and necessitating change to poor behaviour and practices before the prospect of environmental harm looms too large.

Too much of a leap?

Currently the GED is not cast as a positive environmental duty. It is cast in terms of what a person must not do. The GED provides that a person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm. This language mirrors other offence provisions in the EP Act, such as a person must not cause environmental harm or must not contravene conditions of an environmental authority. A reactive approach with an associated penalty is therefore not a significant shift to the introduction of sanctions for breach of the GED.

What however may comprise an obstacle is whether community values have shifted towards environmental protection to the extent that an environmental duty of care with criminal sanctions for breach would be broadly acceptable. It may be applauded by environmentalists and regulators but is likely to be opposed by business and rural sectors.

Conclusions

Introducing criminal liability for breach of the GED poses a number of challenges. Given the continued decline of the environment, such a step may prove necessary in order to ensure that environmental protection laws in Queensland are fit for the next generation. Victoria has already taken this step and late last year the Northern Territory Government sought feedback on new draft environmental laws proposing an enforceable general environmental duty.⁴³

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There is a limit to what laws can achieve, but consideration should at least be given to whether the greater good necessitates converting the Queensland GED from a shield to a sword as a measure to move towards more effective protection of the environment.

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1. "A breach of the general environmental duty does not, of itself, give rise to a civil right or remedy - see section 21(3)."
2. The reprint at the time of writing is the one current as at 1 April 2019
3. *Williams v Leiner Davis Gelatin International Limited* (Brisbane Magistrates Court, Murray SM, 19/11/96 unreported)
4. Kelleher, Brian "Major Offences under the *Environmental Protection Act 1994 (Qld)*" (1998) 15 EPLJ 264
5. By the *Environmental Protection and Other Legislation Amendment Act (No. 2) 2008*
6. Gunningham, Neil "Should a general 'duty of care' for the environment become a centrepiece of a 'next generation' environment protection statute?" (2017) 34 EPLJ 198
7. See, *Environment Protection Act 1993* (South Australia) section 25; *Environmental Protection Act 1997* (ACT) section 22(1); *Waste Management and Pollution Control Act 1998* (NT) section 12(1) and *Environmental Management and Pollution Control Act 1994* (Tas) section 23A.
8. Section 24(1) of the *Biosecurity Act 2014* and section 23(1) of the *Aboriginal Cultural Heritage Act 2003*
9. Section 23(2)
10. *Aboriginal Cultural Heritage Act 2003* Duty of Care Guidelines Gazettal Date: 16 April 2004 published by the Department of Aboriginal and Torres Strait Islander Partnerships
11. OECD Environmental Performance Review: Australia 2019 page 170
12. Page 61
13. Page 61
14. Foreword
15. Page 17
16. Australian Panel of Experts on Environmental Law, *Blueprint for the Next Generation of Australian Environmental Law* published August 2017
17. Australian Panel of Experts on Environmental Law, *57 Recommendations for the Next Generation of Australia's Environmental Laws*, Number 1.4 published April 2017
18. Australian Panel of Experts on Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017)
19. Queensland State of the Environment 2017, page 9
20. Queensland State of the Environment 2017, page 9
21. Queensland State of the Environment 2017, page 17
22. Queensland State of the Environment 2017, page 25
23. Queensland State of the Environment 2017, page 30
24. Queensland State of the Environment 2017, page 77
25. Queensland State of the Environment 2017, page 33
26. Independent Inquiry into the Environment Protection Authority (ISBN 978-1-76047-139-2) page 226

Should breach of the general environmental duty contained in the *Environmental Protection Act 1994* constitute an offence?

27. See sections 318-321 of the Amendment Act
28. Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *58th Parliament Alert Digest No. 10 of 2018* page 2
29. Section 14 of the EP Act
30. *Crowther v State of Queensland* [2003] QPELR 346
31. Button, Jillian "*Client Update: Victoria's 'General Environmental Duty': What is it, and what can I do about it?*" published by Allens dated 2 October 2018
32. Preston, Brian J "*The Australian Experience on Environmental Law*" (2018) 35 EPLJ 637
33. Note 22 at pages 651- 652
34. See section 67A of the *Vegetation Management Act 1999* inserted by the *Natural Resources and Other Legislation Amendment Act 2003* section 71 and omitted by the *Vegetation Management Framework Amendment Act 2013* section 56
35. *Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016*
36. Gardner, A "*The Duty of Care for Sustainable Land Management*" (1998) 5(1) *Australian Journal of Natural Resources Law and Policy* 29
37. Gunningham, Neil "*Should a general 'duty of care' for the environmental become a centrepiece of a 'next generation' environment protection statute?*" (2017) 34 EPLJ 198 at 200
38. Section 493A of the EP Act
39. Concrete batching industry code of practice, Mosquito management code of practice, Motor vehicle workshop code of practice, Queensland Murray-Darling Basin Store and Release code of practice and Transport noise management code of practice
40. Freiberg, A "*General Duties as Regulatory Tools in Environmental Protection: Principles, Practice, Problems*" (2019) 36 EPLJ 40
41. Section 28
42. Section 24
43. Draft Environment Protection Bill 2019

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