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Mr David Ralph
Senior Policy and Project Officer
Operations Policy, State-wide Services
Department of Mines and Energy
PO Box 15216
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By email: David.Ralph@dme.qld.gov.au

Dear Mr Ralph

EDO QLD SUBMISSION INTO THE CARBON CAPTURE AND STORAGE BILL 2008

The Environmental Defenders Office (Qld) Inc (EDO Qld) is a public interest environmental and planning law community legal centre. We advise individuals, community groups and conservation groups on how to use the law to protect the environment. We regularly provide law reform comments on draft policy and legislation to Government and welcome the opportunity to comment on this Bill. A summary of our recommendations is included below, followed by the detailed content of our submission.

Summary of Recommendations

EDO Qld recommends that the Bill:

- a. Include in its Purpose the achievement of ecological sustainable development based on the definition of ESD in section 3A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth);
- b. Be amended in Part 16 so that a serious situation exists when there is “a real possibility that a GHG stream injected in to the reservoir will leak from it” not only when there is “a significant risk” of leakage;
- c. Clarify the nature and extent of property rights in GHG stream;
- d. Allow public comment on the draft terms of the Works Proposal (for exploration permit) and Initial Development Plan (for lease);
- e. Allow a body of independent experts to oversee the Minister’s discretion to approve an application to surrender with opportunity for community to appeal the merits of any decision made in a Court with own costs provisions;
- f. Introduce a mandatory industry funded Queensland government held trust to ensure funds are available for future remediation works in the event that GHG lease holder liable for leakage is no longer in existence or does not have the capacity to remedy any actual or likely risk of leakage;

- g. Allow the public to comment on draft terms and conditions of environmental authority and tenure entitlement and rights to appeal the merits of decisions to grant GHG storage permit or grant or approve surrender of any GHG lease in a Court with own costs provisions;
- h. Be amended by deleting draft section 842 (prohibiting substantial compliance);
- i. Clearly states that liability for monitoring, measurement and verification be at least 60 years after application to surrender has been approved (subject to recommendations of an independent expert panel);
- j. Allows for an independent expert committee, comprising scientists with recognised expertise in CCS and environmental impact assessment, to review the MMV program proposed by an operator prior to the program being open for public comment;
- k. Allow the public to comment on draft terms and conditions of environmental authority and tenure entitlements, and the grant of any such authority or tenure, with an opportunity to appeal to a Court on the merits or to judicially review the decision, both in a Court with own costs provisions;
- l. Allow public enforcement of non-compliance with conditions of GHG permits and leases;
- m. Clearly states that any conditions imposed by Coordinator General for a declared State Significant project must be consistent with the mandatory conditions under the Bill and associated Regulations;
- n. The Bill prescribe minimum mandatory terms of reference for environmental impact statements for GHG storage projects declared ‘state significant’ under *State Development Public Works Organisation Act 1971*, using the EIS criteria in the *Environmental Protection Act 1994*;
- o. Extend the prohibition on GHG storage to cover all areas protected by the *Nature Conservation Act 1992* and prohibit any GHG storage activity from occurring within 2km of any of these areas; and
- p. Clearing of vegetation for GHG storage activities should not be exempt from the *Integrated Planning Act* and *Vegetation Management Act* framework.

Further, EDO Qld recommends that:

- q. The public be given the opportunity to comment on the proposed GHG Regulations and amendments to *Environmental Protection Act 1994* including any proposed standard environmental conditions; and
- r. As part of the *Environmental Protection Act* amendments all draft environmental authorities for GHG storage activities should be Level 1 activities which are required to undertake an EIS under the *Environmental Protection Act* and which are open for public comment with consequential appeal rights (as for Level 1 mining activities).

Introduction

Greenhouse gas (GHG) storage (also known as carbon capture and storage) encourages a “business as usual” approach for Queensland’s energy industry with the ongoing environmental consequences likely to be passed on to future generations. EDO Qld submits that GHG storage is designed to manage a system that is reliant on fossil fuels consumption. We are concerned industry will potentially benefit from the “storage” of emissions despite the fact there is no guarantee of permanency.

The theory of the GHG storage revolves around the permanent retention of GHG emissions that are prevented from entering the atmosphere and contributing to deleterious anthropogenic impacts such as global warming and climate change. EDO Qld therefore submits that the environmental safeguards around testing of permanent GHG retention in an ecologically sustainable manner should be the key focus of the Bill.

Investment in GHG storage is *only* an end of pipe intervention; it is not one that will ultimately address the causes of anthropogenic climate change.

EDO Qld wants to see the proposed *Greenhouse Gas Storage Bill 2008* reflect the Queensland government's primary obligation to implement a legislative framework for GHG storage that incorporates rigorous independent assessment process, an ongoing monitoring regime, and strict adherence to the principles of ecological sustainable development.

This submission addresses the following key concerns of the proposed legislation and makes recommendations to address the inadequacies:

- Absence of fundamental environmental principles in the Purpose of the Act;
- Lack of any certainty with respect to long term rights and responsibilities;
- Emphasis on Ministerial discretion;
- Inadequate long term monitoring, measurement and verification (MMV) of GHG storage sites;
- Absence of public rights to comment and enforce non-compliance or breaches;
- Discretion vested in the Coordinator General under *State Development & Public Works Organisation Act 1971* to avoid the mandatory conditions proposed by the Bill if project is declared 'state significant'; and
- Lack of clarity around the relationship with other legislative regimes, particularly the *Environmental Protection Act 1994*;
- Lack of information about the proposed amendments to the *Environmental Protection Act*, specifically how environmental authorities (GHG storage) will operate, whether all environmental authorities will trigger the EIS process, and whether standard environmental conditions will be imposed.

1. Purpose of the Bill

The main purpose of the Bill is to "help reduce the impact of greenhouse gas emissions on the environment." This purpose is to be achieved through greenhouse gas (GHG) geological storage. There is no requirement for GHG injection and storage operations to be consistent with the principles of ecologically sustainable development (ESD), or recognise community concerns. GHG storage is by no means a proven method through which to permanently store GHGs; this reality alone provides sufficient cause for the Bill to contain the principles of ESD, particularly the precautionary principle and principles of intra-generational and inter-generational equity.

Instead, the Bill emphasises the rights of parties wanting to maintain exploitation of fossil fuels. The Bill does not give sufficient consideration to environmental, social and economic matters which may limit any implementation of this technology and its long term environmental management. Other purposes include carrying out GHG storage activities in "constructive consultation with **people affected** by the activities (our emphasis)". This unfairly limits the voice of the wider community to have a say in activities that are part of wider efforts to reduce or mitigate dangerous climate change; a global dilemma.

We suggest that the Bill's main Purpose be amended to read "The main purpose of this Act is to help reduce the impact of greenhouse gas emissions on the environment, in a way that achieves ecologically sustainable development", adopting the definition of ESD used in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth):

3A Principles of ecologically sustainable development

The following principles are *principles of ecologically sustainable development*:

- (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

- (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
- (c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
- (e) improved valuation, pricing and incentive mechanisms should be promoted.

The amendments to the *Mineral Resources Act 1989* to include a “GHG public interest” definition is welcomed, however the definition overwhelmingly prefers economic concerns (“government policy”, “employment creation”, “overall economic benefit for the State, or a part of the State, in the short and long term”, and “social impacts”) to environmental concerns (“environmental impact” and “impacts on aesthetic, amenity or cultural values”).

EDO Qld recommends that:

- **the achievement of ecological sustainable development be included in the Purpose of the Bill; and**
- **The Bill define ecological sustainable development by adopting using the definition in section 3A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).**

2. Long term rights and responsibilities

Due to the potential adverse effects if GHG storage fails to effectively and safely store greenhouse gases in the long-term, it is essential to have a comprehensive legislative scheme in place, with appropriate environmental safeguards. An inadequate regulatory regime, which operates primarily on Ministerial discretion, greatly enhances the likelihood of inappropriate decisions being made with consequential impacts on environmental, social and economic matters. It is essential therefore to recognise a) the potential effects of leakage, and b) clarify long-term responsibilities and liabilities.

a. Potential effects of leakage

Of primary concern to the community is – what happens if a GHG storage project fails and there is a leak? In addition to increasing CO₂ amounts in the atmosphere and thus defeating the purpose for which the GHG is stored, there is an array of known, and more importantly unknown, consequences which may arise from GHG leakage.

EDO Qld acknowledges that GHG storage projects are being trialled already in Australia and have been in existence overseas for some years. We are not however aware of any truly long-term projects that definitively prove this technology is safe and permanent (ie, trials over a number decades at least).

Management of the various known and unknown risks of leakage are left to the terms of the Works Proposal (for exploration permit), Initial Development Plan (for lease) and surrender report. Scrutiny of these documents is left to the Minister.

Chapter 6, Part 16 goes only some of the way to deal with unexpected risks from carbon leakage during the life of the GHG lease. Chapter 6, Part 16 gives the Minister power to make directions if the Minister is satisfied a serious situation exists (defined as an actual leakage or there is a ‘significant risk’ of leakage) and the GHG tenure holder is in a position to take steps to remedy the situation. EDO Qld has two issues with this part. Firstly, ‘significant risk’ is too high a threshold. The precautionary

principle should require the Minister to act even if there is a real possibility leakage is going to occur. Secondly, it is not clear how the Bill will respond if the tenure holder *does not* have this capacity. Given the unknown and potentially catastrophic impacts of subterranean leakage of CO₂ it is unclear why the Minister's power to make a direction in these circumstances is open to appeal by the GHG lease holder.

EDO Qld recommends that the Bill be amended in Part 16 so that a serious situation exists when there is “a real possibility that a GHG stream injected into the reservoir will leak from it” not only when there is “a significant risk” of leakage.

b. Long term responsibilities and liabilities

The key related concern is – who is liable for ongoing assessment and if a leak occurs?

EDO Qld submits that the Bill, in its attempt to clarify “legal certainty for access and property rights” fails to adequately articulate the liabilities and responsibilities of the potential multiple parties¹ involved in the GHG storage process. The clarification of responsibilities, particularly in regard to long term monitoring, measurement and verification (MMV) of the storage sites once they are sealed and surrendered, is undoubtedly one of the overwhelming concerns that needs to be addressed when attempting to make GHG storage both financially viable and environmentally responsible.

The Bill does not adequately deal with issues of liability when addressing Third Party Storage Rights. Firstly, it is unclear who an existing user is. The definition of “existing user” refers back to section 205(1) which, in turn, says “A GHG lease holder may agree (a ***GHG storage agreement***) with someone else (an ***existing user***) to use a GHG stream storage site in the area of the GHG lease for GHG stream storage.” Secondly, it is not clear who is responsible and liable for the new GHG stream. If a new GHG stream is being proposed the storage site should be reassessed. EDO Qld want to ensure Chapter 5 is not used as a way to avoid the assessment and approval process.

The Bill reiterates the provisions of the *Petroleum & Gas (Production and Safety) Act 2004* that “All GHG storage reservoirs in land in the State are, and are taken always to have been, the property of the State”². On the surrender of a GHG lease the Bill states that “any GHG stream injected into a GHG storage reservoir in the area of the former GHG lease becomes the property of the State”³. EDO Qld are concerned that this provision does not adequately define the property rights in the injected CO₂ prior to surrender. Clear definition of the property rights in the CO₂ is critical understanding the scope and operation of any common law liability arising from loss or damage caused by GHG leakage.

Much of the detail on long term responsibilities and liabilities for GHG streams falls to be determined at the discretion of the Minister on an application for surrender⁴ or an application to deal with a GHG authority⁵. The ecological risks to community and economic burden shouldered by Government (and, possibly community in the future) if leakage occurs after surrender has been approved require that this decision be rigorously assessed by a panel of independent experts.

Scope of liability under the common law is still uncertain.

¹ Parties include participants of the GHG Storage (including their contractors and consultants), the owner of the carbon dioxide, the underlying land owner, governments and regulatory authorities, third parties unconnected with the activities.

² Draft Section 26

³ Page 122, s O Responsibility for Injected GHG streams after decommissioning.

⁴ Draft section 41(2)(b)

⁵ Draft section 573

The reality of this situation is that the long term liability for emissions released by industry from inadequate GHG storage sites will ultimately fall with the public.. Whilst Chapter 5, Part 6 allows the Minister from time to time to require security from a GHG storage proponent the provision is couched in very general terms. The Bill does not clearly show that funds will be available to effectively remediate environmental impacts.

EDO Qld submit that the Bill should establish a mandatory remediation fund, held by the Queensland government, and direct that a proponent to set money aside in trust. The use of this fund should be restricted to future remediation activities should the stored CO2 become unstable, leak and the proponent no longer exists or does not have the capacity.

EDO Qld recommends that the Bill:

- **Clarify the nature and extent of property rights in GHG stream;**
- **Allow public comment on the draft terms of the Works Proposal (for exploration permit) and Initial Development Plan (for lease);**
- **Allow a body of independent experts to oversee the Minister's discretion to approve an application to surrender with opportunity for community to appeal the merits of any decision made in a Court with own costs provisions; and**
- **Introduce an mandatory industry funded Queensland government held trust to ensure funds are available for future remediation works in the event that GHG lease holder liable for leakage is no longer in existence or does not have the capacity to remedy any actual or likely risk of leakage.**

3. Emphasis on Ministerial Discretion

Whilst the Bill provides minimal mandatory considerations that need to be taken into account by the Minister when granting rights associated with the process, from granting of GHG permit (for exploration) to granting of GHG licence⁶ and approving a surrender, there is a distinct absence of public participation, transparency, and accountability throughout the entire GHG storage process.

As a result of the lack of mandatory considerations, transparency, public participation and accountability in this governmental decision making process, EDO Qld submits that these processes should be amended. The decision to grant an exploration permit, GHG lease, or surrender should require the decision maker to have regard to such matters as potential environmental impacts, scientific and public concerns, intragenerational and intergenerational equity, and the precautionary principle. Further, public comment should be sought on draft GHG permits, leases and relevant environmental authorities (**see also part 5 below**). The decision maker should at the very least be advised, if not replaced, by a panel of accredited independent experts with scientific experience in fields related to the CCS process.

The Bill allows the Minister to accept and decide an application if there has been substantial compliance with the various provisions. EDO Qld strongly submits that this part should be deleted. The environmental, social and economic implications arising from the use of this technology are so serious that the application, assessment and approval process should be strictly adhered to.

EDO Qld welcomes the establishment of a GHG Register that can be accessed by the public. Again, as the detail of what information must be contained in the Register will be finalised under Regulation we would like the opportunity to comment on these provisions.

⁶ Section 121

EDO Qld recommends that the Bill:

- **Allow the public to comment on draft terms and conditions of environmental authority and tenure entitlement and rights to appeal the merits of decisions to grant GHG storage permit or grant or approve surrender of any GHG lease in a Court with own costs provisions; and**
- **Be amended by deleting draft section 842 (allowing substantial compliance).**

4. Inadequate long term monitoring, measurement and verification (MMV) of GHG storage sites

The Bill does not stipulate a mandatory period for which MMV should continue, nor prescribe what that MMV should entail. MMV is not a mandatory condition of a GHG permit or lease.

EDO Qld submits that the Bill should be amended to include a mandatory 60 year period of MMV to be conducted by the operator once GHG storage operations have ceased. As highlighted above, concerns exist that following the surrender of a GHG lease, the immediate transfer to the Queensland government of responsibility for long term site monitoring may reduce incentives for project operators to design and implement projects in a safe and reliable manner. The incorporation of a 60 year MMV program conducted by the operator may assist in addressing these concerns and goes some way to protecting the environment for future generations.

EDO Qld suggests that once this 60 year period of MMV has passed, the MMV duties and liabilities pass to the State of Queensland. Financial provisions for this scheme would come in the form of an industry funded State managed trust that accrues interest at a rate to ensure both MMV operations continue, in addition to providing a fund from which remediation works can be conducted should it become necessary to do so.

There will be varying degrees of structural integrity for each of the sites used for GHG storage, and therefore there should be varying degrees of MMV required. To address this fact, EDO Qld submits that the formulation of an independent committee to review the MMV program proposed by an operator prior to public notification of the program, be incorporated into the Bill. Such a committee should consist of a panel of accredited independent experts with scientific expertise in fields related to the CCS process and environmental impact assessments. This would assist in ensuring that the program proposed by the operator is suitable to the individual characteristics of each site. Again, the public should have a right to comment on any draft MMV program proposed by such an independent committee. Incorporating the independent expert committee into the Bill brings independence and scientific credibility to the program proposed by the operator. Allowing the community the right to comment invites a higher degree of public trust and confidence that the serious risks of GHG storage are being managed in strict adherence to principles of ecological sustainable development.

EDO Qld recommends that:

- **Liability for monitoring, measurement and verification be at least 60 years after application to surrender has been approved (subject to recommendations of an independent expert panel); and**
- **An independent expert committee, comprising scientists with recognised expertise in CCS and environmental impact assessment, be formulated to review the MMV program proposed by an operator prior to the program being open for public comment.**

5. Need for public rights to comment and enforce non-compliance or breaches

The Bill does not give the public the right to comment on applications for an exploration permit or a GHG lease (whether by permit holder, results of a competitive tender, or by holder of a petroleum lease) or any decisions of the Minister. There are, also, no rights of appeal available to members of the community to appeal the merits or to review the decision making process of any decisions by the Minister or enforce non-compliance or breaches of the Bill. Given the potential serious environmental, social, and economic consequences flowing from decisions to approve GHG storage activities it is crucial that public rights to comment, appeal and judicially review decisions (in a Court with own costs rules) are incorporated into the proposed Bill.

There is no requirement on the Minister to publish for public comment the proposed work programs (required for the grant of exploration permit), development plans (required for the grant of GHG lease), MMV programs, Surrender report prepared under s 576(2). These documents written by the proponents will contain the site specific management strategies during the life of any GHG storage activities and well into the future. Management strategies used to avoid any adverse environmental, social and economic impacts from GHG storage activities should be open to public comment, and decisions touching these activities should be open to merits review in a Court with own costs provisions. Other legislative frameworks, for example under the Mineral Resources Act for grant of a mining lease, permit this level of public participation.

EDO Qld recommends that the Bill:

- **Allow the public to comment on all applications for GHG permit or GHG lease, draft terms and conditions of environmental authority and tenure entitlement and rights to appeal the merits of decisions and to judicially review the grant of GHG Storage permits or the grant or approval of surrender of any GHG lease, in a Court with own costs provisions; and**
- **Allow public enforcement of non-compliance with conditions of GHG permits and leases.**

6. Role of the Coordinator General under *State Development & Public Works Organisation Act 1971*

The Bill allows the Coordinator General under the *State Development and Public Works Organisation Act 1971* to avoid all the mandatory conditions for GHG permits and leases⁷. EDO Qld is deeply concerned that the wide power to declare a project “state significant” will enable the Queensland government to avoid all environmental safeguards offered by this Bill, and other Queensland laws. Given the potential serious environmental impacts from unsuccessful efforts to permanently store CO₂ underground any possible avenue to avoid the strict adherence to principles of ecological sustainable development should be removed from the Bill.

The Bill should also prescribe minimum mandatory terms of reference for any environmental impact statement or assessment for ‘state significant’ projects. These terms of reference should be adapted to fit GHG storage activities but should be similar to those in the *Environmental Protection Act 1994*⁸ and the federal *Environment Protection and Biodiversity Conservation Act 1999*.

EDO Qld recommends that:

- **Any conditions imposed by Coordinator General for a declared State Significant project be consistent with the mandatory conditions under the Bill and associated Regulations;**

⁷ Section 124(5)

⁸ See Part 1A and Schedule 1AA of the *Environmental Protection Regulation 1998*

- **The Bill prescribe minimum mandatory terms of reference for environmental impact statements for GHG storage projects declared ‘state significant’ under *State Development Public Works Organisation Act 1971*, using the EIS criteria in the *Environmental Protection Act 1994*.**

7. Relationship to other environmental protection legislative regimes

Much of the detail in the current Bill has been deferred to the Regulation.

This Bill proposes a two tier environmental approvals process for securing rights to undertake GHG storage: issuance of permits and licences under this Bill, and issue of environmental authority for GHG storage under the *Environmental Protection Act 1994*. We understand that the amendments to the *Environmental Protection Act 1994* to address the application process, assessment and approval of environmental authorities for GHG storage activities will be drafted later. EDO Qld would like the opportunity to make comments on those amendments, specifically as they relate to the decision on whether GHG storage is a Level 1 and 2 activity, whether EIS is a mandatory requirement, and whether any standard environmental conditions are proposed. We provide preliminary comment on these key issues below.

It is difficult to assess the appropriateness of the legislative framework for GHG storage without knowing how the amendments to the *Environmental Protection Act* will be framed. This is particularly important because the Bill only allows the granting of a GHG permit for exploration and for GHG injection and storage if the relevant environmental authorities have been issued⁹.

Any environmental authority for GHG storage will be delineated under the *Environmental Protection Act* as either a Level 1 or Level 2 activity¹⁰. Without knowing the criteria that will be used to allocate the activity as a Level 1 or Level 2 activity, it is not possible to comment on the environmental safeguards that may apply under the framework. **EDO Qld submits that all GHG storage should be a Level 1 activity which triggers public comment and merits appeal rights (as for Level 1 mining activities) and which always requires an Environmental Impact Statement which should be conducted under the *Environmental Protection Act*.** Standard environmental conditions should be set but these need a high bar for environmental protection.

EDO Qld welcomes the extension of the prohibition on mining in National Parks, Conservation Parks, and forest reserves articulated in sections 27 and 70QA of the *Nature Conservation Act 1992* to GHG storage activities (both exploration and injection). Again, the serious environmental consequences of CO2 leakage require that this prohibition be extended to cover all protected areas¹¹, including privately managed nature refuges, and that GHG storage activities not occur within 2km of any protected area.

We note that development which is the clearing of vegetation for a GHG storage authority is proposed to be exempt from the need for a *Vegetation Management Act* (VMA) permit, through an amendment to the definition of “specified activity” in the *Integrated Planning Act*. EDO Qld strongly opposes this proposed exemption. While we note that the exemption is consistent with the existing VMA exemption for mining and petroleum activities, we are still firmly of the view that the protections provided by the VMA need to be applied to all major resource extraction and infrastructure, including

⁹ See section 41(2)(b)(iii) for GHG Permit and section 121(1)(f) for GHG Lease

¹⁰ See cross reference to s145Y of *Environmental Protection Act 1994* in proposed amendments to *Integrated Planning Act 1997*

¹¹ See s 14 *Nature Conservation Act 1992*

GHG storage. This is an opportunity for the government to start applying the VMA more broadly to resource extraction.

EDO Qld supports the requirement that a holder of a GHG permit or lease seek approval under the Water Act 2000 to take or interfere with water. This requirement should be explicitly extended to underground water as well irrespective of whether the relevant Water Resource Plan includes artesian and sub-artesian water.

EDO Qld recommends that:

- **The public be given the opportunity to comment on the proposed GHG Regulations and amendments to *Environmental Protection Act 1994* including any proposed standard environmental conditions;**
- **As part of the *Environmental Protection Act* amendments all draft environmental authorities for GHG storage activities should be Level 1 activities which are required to undertake an EIS under the *Environmental Protection Act* and which are open for public comment with consequential appeal rights (as for Level 1 mining activities);**
- **All GHG storage activities be prohibited within 2km of any area protected by s 14 of the *Nature Conservation Act 1992*; and**
- **Clearing of vegetation for GHG storage activities should not be exempt from the Integrated Planning Act and Vegetation Management Act framework.**

Conclusion

We ask that EDO Qld be added to the Department of Mines and Energy's register of stakeholders for future policy or legislative initiatives. We were only made aware of this Bill through conservation sector colleagues the day before comments closed. We were surprised by this as EDO Qld regularly submits law reform submissions to other government departments and is a recognised community stakeholder. We were, also, the solicitors who took the first climate change case against coal mining in Queensland.

EDO Qld appreciates the extension given for our comments on the draft Bill. Our recommendations are included throughout this submission and are summarised at the beginning of our submission.

Please do not hesitate to contact EDO Qld on 3211 4466 if you wish to discuss any aspects of our submission further.

Yours faithfully

Environmental Defenders Office (Qld) Inc.



Larissa Waters

Acting Principal Solicitor