Queensland
Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441

Office of the President

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Your ref Environmental Protection (Chain of Responsibility) Amendment Bill 2016

Our ref 767 – 7 - Corporations

Research Director
Agriculture and Environment Committee
Parliament House
BRISBANE QLD 4000

By post and by email: aec@parliament.qld.gov.au

Dear Research Director

Environmental Protection (Chain of Responsibility) Amendment Bill 2016

Thank you for the opportunity to provide comments on the *Environmental Protection (Chain of Responsibility) Amendment Bill 2016.*

This response has been compiled with the assistance of the Queensland Law Society's Corporations Law Committee and Mining & Resources Committee.

Overall observations regarding the bill

The Society is concerned that the Bill may have some unintended consequences. We outline our concerns below:

1. The Bill seeks to allow the administering authority to impose obligations under the Environmental Protection Act (**Act**) on a broad range of "related persons" as the person carrying the primary obligation, rather than those persons only being liable where it is established that the related person contributed to or was aware of conduct which resulted in the company failing to meet those obligations.

2. The Bill extends beyond the scope of the intended objectives, in respect of both the companies captured, and the potential related persons. We are concerned that the definition of related person is too wide, and particularly, that the Bill (a) gives the administering authority arbitrary discretion to determine who has a "relevant connection" and falls within this definition and (b) captures land owners who may have no connection whatsoever with a company's activities. As such, the Bill may have a negative impact on both the cost and supply of credit to mining and resources companies, representing a significant threat to future economic and employment growth in Queensland, and further add to the risk-averse behaviour of directors and undermine entrepreneurial activity.

3. We are particularly concerned about the extension of potential personal liability for directors and executives, and the negative effect this will have on board and executive recruitment and retention, and company decision making, including in relation to governance and compliance matters. The Bill is inconsistent with the approach in the

Council of Australian Governments' Personal Liability for Corporate Fault - Guidelines for applying the COAG principles, agreed to by all states and territories on 25 July 2012. The intention of the Guidelines and underlying principles is to promote a nationally-consistent approach to director liability for corporate fault, which minimises the regulatory burden on directors.

4. The Explanatory Notes to the Bill state that the objectives of the Bill are to facilitate enhanced environmental protection, and minimise the costs borne by the State, where companies are in financial difficulty. However, in effect, the Bill allows the administering authority to transfer the obligations and liabilities of a company to a related person in respect of any company, even without any indication of financial difficulty or where an associated entity may be wound up for unrelated reasons.
5. The introduction of a power to introduce new or increased financial assurance obligations on transfer of an environmental authority has the potential to materially increase transaction uncertainty for parties considering the acquisition of an asset or business that is subject to an existing environmental authority. Under the regime currently proposed in the Bill, there is nothing an acquiring party can do to ascertain its potential liability in advance of an application for transfer.
6. The proposed exclusion of a right of review and appeal against the issuance of a notice seeking information as to whether a person is a "related person" has the potential to give rise to breaches of procedural fairness and natural justice.
7. We consider that a more far reaching study and enquiry, including extensive consultation with relevant stakeholders, should be undertaken to find alternative ways of achieving the policy objectives. The current Bill seems to find its genesis in a small number of recent cases but could have far reaching economic impacts beyond those circumstances.

Specific commentary on provisions

The key area of concern is the introduction of Chapter 7, part 5, division 2:

Primary Obligation on Related Person

1. As currently drafted, related persons may be made accountable for a company's obligations, or liable for a company's financial responsibility, as the person carrying the primary obligation and without it being established that the related person contributed to or was aware of conduct which resulted in the company failing to meet those obligations[1]. The potential liability of a related person is not proportional or relative to any failings of the company. This concern is compounded by the wide scope of the potential related persons under the Bill which may include company officers, shareholders, employees, service providers, financiers, investors and land owners.

Related Person - Scope of "relevant connection" is too broad

2. The Bill seeks to transfer to related persons the obligations of a company undertaking a relevant activity to comply with an environmental protection order, or liability arising as a result of the State bearing the costs for managing and rehabilitating sites.

[1] Sections 363AC and 363AD.

The Bill extends beyond the scope of the intended objectives, in respect of both the companies captured, and the potential related persons. We are concerned that the definition of related person is too wide, and particularly, that the Bill gives the administering authority arbitrary discretion to determine who falls within this definition.

Of primary concern is the concept of a person with a "relevant connection" (under new section 363AB(1)(c)). The Bill extends this concept to include anyone who is capable of benefiting financially, or has benefited financially, from the relevant activities of the company. This captures a wide pool of entities, including shareholders, employees, service providers, bankers, investors and private royalty holders.

We note that in the first reading speech, Hon. Steven Miles stated that it was not intended for the chain of responsibility to extend to genuine arm's length investors; however, this is not reflected in the current drafting. The Bill seeks to limit the scope of potential related persons by setting out factors to be taken into consideration by the administering authority[2]. However, there are no conclusive parameters as to who may be included or excluded, or the extent to which those factors will be relevant in any determination.

For example, to what "extent" does a person need to have a financial interest[3] before the administering authority would consider them as having a relevant connection? These provisions have the potential to adversely affect investment and employment in affected industries as financiers and investors assess potential exposure to liability for relevant activities of companies that they finance.

Given the possibility under the Bill that financiers may be left with the clean-up expenses for the environmental damage caused by a company (again absent the establishment of any fault), the Bill may have a negative impact on both the cost and supply of credit to mining and resources companies, representing a significant threat to future economic and employment growth in Queensland.

To further illustrate, the Bill is demonstrably inconsistent with the Commonwealth Government's National Innovation and Science Agenda (**Agenda**) and the Productivity Commission's Business Set-Up, Transfer and Closure Report (**Report**), both released on 7 December 2015.

The Agenda and the Report refer to the need to promote greater innovation and entrepreneurial activity in the Australian economy, including by reducing excessive director liability that has caused directors to become overly-cautious and risk-averse. A safe harbour from insolvent trading for directors is proposed to be introduced by mid-2017 as part of the implementation of the Agenda and the Report.

The potential for directors to carry primary obligations under the Bill even where they have acted honestly and reasonably is likely to further add to the risk-averse behaviour of directors and to undermine entrepreneurial activity.

3. A key category of otherwise unrelated persons who may be captured as a related person are those receiving private contractual royalties from the operation of a project. Private

[2] Section 363AB(4).

[3] Section 363AB(4)(c).

contractual royalties are very common in the resources sector, and can arise when resources projects are bought and sold or as a means of payment for services provided to the project owner.

The administering authority may decide that a person has a relevant connection with a company if it is satisfied that the person is capable of benefiting financially, or has benefited financially, from the carrying out of a relevant activity by the company.

Financial benefit is defined[4] both broadly and non-exhaustively to mean a "*financial benefit, received by a person, includes profit, income, revenue, a dividend, a distribution, money's worth, an advantage, priority or preference, whether direct or indirect, that is received, obtained, preferred on or enjoyed by the person*".

A person who has a private contractual royalty would fall within the scope of this definition of a related person despite the fact that such a person would usually have no control whatsoever over whether the company carrying out the relevant activity (or any associated company) complies with or intends to comply with its environmental obligations.

4. We are concerned about the extension of potential personal liability for directors and executives, and the negative effect this will have on board and executive recruitment and retention, and company decision making.

   A relevant connection can be established if the person is, or has been at any time during the previous 2 years, in a position to influence the company's conduct in relation to the way in which, or extent to which, the company complies with its obligations under the Act[5].

   Directors and executives will almost certainly be caught by this description.

   We consider that the increased risk of personal liability for directors and executives operating in intensive industries will inhibit the willingness of experienced and qualified directors and executives to undertake leadership and management roles. This will be to the significant detriment of not only business development and employment but decision making in these industries around governance and risk management, including the monitoring of compliance.

   This could have a detrimental effect on compliance by companies which undertake relevant activities.

   The Bill is inconsistent with the approach in the Council of Australian Governments' Personal Liability for Corporate Fault - Guidelines for applying the COAG principles (**Guidelines**). The intention of the Guidelines and underlying principles is to promote a nationally-consistent approach to director liability for corporate fault which minimises the regulatory burden on directors, and provide guidance as to when and how directors should be held personally liable. The Guidelines address personal liability for criminal offences, however it is submitted that a consistent approach in assessing civil penalty provisions should be adopted.

[4] Section 363AB(6)

[5] Sections 363AB(1)(c) and 363AB(2).

In particular, it is stated in paragraph 4.1(5) of the Guidelines that "[c]areful thought should be given to the particular form in which a Directors' Liability Provision is to be drafted, to achieve a result that is equitable and does not impose any unfair burden on the defendant". The first principle of the underlying principles (COAG Principles on Directors' Liability Provisions) provides that where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.

The potential for directors to not only incur liability as a result of the imposition of an environmental protection order under the Bill, but to carry the primary obligation of such an order, even if they have not acted dishonestly or with any awareness of the conduct which caused a company to be unable to meet its environmental obligations, does not strike a fair and equitable balance between the protection of the environment in the public interest and the reasonable expectations of honest, diligent directors.

Related Person - Land Owners

5. The current definition of "related persons" also includes a person who owns land on which the company carries out, or has carried out, a relevant activity[6].

   The Bill provides no other requirements for a land owner being deemed a related person of a company apart from the mere fact that the person owns land on which the company carries out, or has carried out, a relevant activity. This is despite the fact that such landowner may have:

   - no connection to the location at which the activity the subject of the relevant environmental protection order is being, or has been, carried out;
   - no connection whatsoever with the company carrying out the relevant activity;
   - no control over whether the company carrying out the relevant activity complies with or intends to comply with its environmental obligations; or
   - objected to the relevant activity being carried out on the owner's land.

   Such a broad definition of related person captures persons who could not intended to be subject to the increased power of the administering authority to issue environmental protection orders. No justifications for the inclusion of land owners in the definition of related person can be found in either the Explanatory Notes or the Explanatory Speech to the Bill.

   Further there is a potential inconsistency with, and substantial undercutting of, existing resource legislation provisions which provide a statutory exclusion of civil liability in tort for a landholder for the operations on its land of a resource authority holder - see, for example, section 563A of the *Petroleum and Gas (Production and Safety) Act 2004* and section 397 of the *Mineral Resources Act 1989*.

No Limit on Companies Affected

6. The Explanatory Notes to the Bill state that the objectives of the Bill are to facilitate enhanced environmental protection, and minimise the costs borne by the State, where companies are in financial difficulty. To achieve this objective, under the Bill an environmental protection order can be issued to any related person of a company that is

[6] Section 363AB(1)(b)

externally administered (referred to as a high risk company), or an associated entity of a high risk company[7].

The Bill further provides that the administering authority can issue an environmental protection order to a related person of any company to which an environmental protection order has been, or is being, issued. We understand from the supporting material that this provision is intended to allow the administering authority to proactively take action before a company's financial position deteriorates.

However, in effect, this provision allows the administering authority to transfer the obligations and liabilities of a company to a related person in respect of any company, even without any indication of financial difficulty.

The Bill does not limit the potential companies captured to those that are facing financial difficulty, or are in fact, high risk. The inclusion of an "associated entity" in the definition of "high risk company"[8] means these provisions (allowing the administering authority to issue an environmental protection order to a related party) will be triggered where a dormant company, which forms part of a corporate group, is wound up. The provisions will be triggered irrespective of whether the winding-up of an inactive company poses any risk that the obligations of the active company will not be met.

Amendments to Environmental Authorities

7. The Bill (clause 3) would create two new matters upon which an administering authority could justify amending an environmental authority:

   - If another entity becomes the holder of the authority; and
   - The amendment or withdrawal of an environmental protection order.[9]

   The Bill provides that if the administering authority amends an environmental authority because another entity becomes the holder of the authority, such amendment can only be to impose a condition under section 292 of the Act requiring the holder of the environmental authority to give the administering authority financial assurance. Further, the administering authority can only impose a condition requiring financial assurance to be given if it is satisfied having regard to a number of factors listed in section 292(2) of the EPA.

   Further, section 744 of the Bill provides that a reference to an entity becoming the holder of an environmental authority (in section 215(2)(c) of the Bill) includes an entity becoming the holder before the commencement. This provision is aimed at preventing companies from taking action to avoid the operation of the new provision.[10]

   The introduction of a power to introduce new or increased financial assurance obligations on transfer of an environmental authority has the potential to materially increase transaction uncertainty for parties considering the acquisition of an asset or business that is subject to an existing environmental authority.

[7] Section 363AD.

[8] Section 363AA

[9] Environmental Protection (Chain of Responsibility) Amendment Bill 2016 (Qld) cl 3

[10] Explanatory Notes, Environmental Protection (Chain of Responsibility) Amendment Bill (Qld) 13

Under the regime currently proposed in the Bill, there is nothing an acquiring party can do to ascertain its potential liability in advance of an application for transfer.

It is submitted that, if the administering authority is to be given the power to increase existing or impose new financial assurance obligations on the transfer of an authority, then provision should also be included in the legislation for parties to seek indicative approval in advance of any formal application for transfer.

Examples of appropriate indicative approval mechanisms can be found in the Queensland mining and petroleum legislative regimes. These regimes allow the holders of relevant tenures or interests to apply for an indication of whether approval for a transfer is likely to be given and what, if any, conditions will be imposed on such transfer - see Chapter 7, Part 1, Division 3 of the *Mineral Resources Act 1989 (Qld)* and Chapter 5, Division 3, Part 10 of the *Petroleum and Gas (Production and Safety) Act 2004 (Qld)*.

The introduction of a similar regime within the EPA would materially alleviate uncertainty and transaction risk associated with the impact of the proposed new powers on any proposed transfer of an authority.

Natural justice – Amendment of Schedule 2 (Original Decisions)

8. Under section 451 of the *Environmental Protection Act 1994* (Qld), the Department of Environment and Heritage Protection (**DEHP**) may give a notice to a person requiring the person to give it information relevant to the administration or enforcement of the EPA. Such notice may only be given to a person the DHEP suspects on reasonable grounds has knowledge of a matter, or has possession or control of a document dealing with a matter, for which the information is required.

   A person to whom notice is given is generally entitled to internal review and appeal rights for such a decision. However, clause 17 of the Bill amends schedule 2 to exclude internal review and appeal rights for a decision to issue notice under section 451 of the EPA, where such notice relates to a requirement for information relevant to the making of a decision under section 363AB.

   The Explanatory Notes to the Bill justify such exclusion by stating that "*this amendment is necessary to ensure that the administering authority can act to prevent environmental harm under the new section 363AC at the appropriate time, without being delayed in the initial step of gathering information to identify 'related persons'.*

   It is submitted that the proposed exclusion of a right of review and appeal against the issuance of a notice seeking information as to whether a person is a "related person" under section 363AB has the potential to give rise to breaches of procedural fairness and natural justice.

   Section 451 is a broad right to seek information that may be commercially confidential, privileged or otherwise sensitive. Notwithstanding the apparent legislative intent behind the proposed exception (as evidenced by the Explanatory Notes), a section 451 notice may be issued by the administering authority absent any existing risk of environmental harm.

   The proposed removal of a right to an internal review or appeal against the issuance of a notice seeking information as to whether a person may be a related person under section 368AB may deny a person or corporation the opportunity to be heard in respect of a decision by the administering authority affecting its interests.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Ms Liane Degville,

Yours faithfully

Bill Potts
President