Submission No. 42

QUEENSLAND resources COUNCIL

Working together for a **shared future**

31 March 2016

Mr Rob Hansen
Research Director
Agriculture and Environment Committee
Parliament House
George Street
BRISBANE QLD 4000

by email: aec@parliament.qld.gov.au

Dear Mr Hansen,

The Queensland Resources Council (QRC) welcomes the opportunity to provide a submission to the Agriculture and Environment Committee (AEC) on the *Environmental Protection (Chain of Responsibility) Amendment Bill 2016*.

QRC is the peak representative organisation of the Queensland minerals and energy sector. QRC's membership encompasses minerals and energy exploration, production, and processing companies, and associated service companies. QRC works on behalf of members to ensure Queensland's resources are developed profitably and competitively, in a socially and environmentally sustainable way.

While supporting the stated intent of the Bill, QRC is unable to support the Bill in its current form for the reasons set out in our submission and QRC is seeking relevant recommendations for amendments from the Committee that ensure the Bill goes no further than achieving its stated intent.

This Bill is causing an almost unprecedented level of concern for QRC members worried about the apparent implications for joint ventures and future investments and investors. Relationships with landholders may also potentially be severely impacted under the draft framework in the Bill.

QRC would like to express our significant concern with the lack of consultation on the Bill, although we appreciate that a briefing was provided by EHP to QRC following the Bill's introduction. This has been exacerbated by the extremely short timeframe for submissions to the AEC which included the Easter holiday.

As usually occurs whenever legislation is rushed, there are numerous drafting problems that would have severe unintended consequences unless corrected before the Bill is passed. If the Government had paused even for a week before introducing the Bill to consult about the proposals, the unintended consequences would have been noticed immediately and improvements suggested, so that the Bill could have been fine-tuned before being introduced to Parliament.

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At the outset we would point out that the current potential problem for taxpayers would not have arisen in the first place (or at least the extent of the problem) if the State had required a financial assurance for Queensland Nickel, as it had jurisdiction to do for a mineral processing activity, from the time that an environmental licence was originally issued.

Nevertheless QRC is generally supportive of the overarching policy objectives of the Bill, as outlined in the Explanatory Notes, as well as some of the further details about the intent of the Bill as explained by the Minister in his first reading speech. However, probably due to the undue rushing of the Bill without proper consultation, there are numerous ways in which the drafting of the Bill has overstepped the mark, with potentially severe unintended consequences, both for innocent landholders and for investor confidence in Queensland.

In this submission, first we have set out our understanding of the overarching policy objectives, so that the submission can show how the Bill oversteps or contradicts those policy objectives in the balance of the submission.

QRC's key concerns relate to the drafting of provisions about:

- Financial assurance;
- Compulsory amendment of conditions or the provision of a program upon withdrawal or amendment of an environmental protection order;
- Related persons, particularly in relation to landholders and also aspects of the 'relevant connection' test;
- The joint or several liability provision;
- Removal of the privilege against self-incrimination;
- Aspects of the land access provisions.

At its broadest, the Bill could allow the chief executive to pursue any related person with substantial financial resources (even if they had no control of the activities that caused the environmental default, as long as they received a financial benefit) if the holder of the environmental authority has insufficient funds. While this may not be the intent of the legislation, it is open for such an interpretation to be formed.

Unless the Bill's provisions contain a clear signal that the new powers will only ever be capable of being used in respect of avoidance behaviour (and never in respect of business-as-usual) we see significant scope for it to have a material spoiler effect on investment. These clear signals must necessarily sit in the Bill itself rather than be an assurance given separately by Government or the Department of Environment and Heritage Protection.

QRC would be happy to discuss this submission further with the Committee including through appearing at the hearing on the Bill on 5 April. The QRC lead is Frances Hayter – Director, Environment Policy [redacted]

Yours sincerely

[redacted]

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Chief Executive

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QRC Submission

Submission to the Agricultural and Environment Committee – Environmental Protection (Chain of Responsibility) Bill 2016

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Table of Contents

Introduction and Background

The Queensland Resources Council (QRC) welcomes the opportunity to provide a submission to the Agriculture and Environment Committee (the Committee) on the *Environmental Protection (Chain of Responsibility) Bill 2016 (the Bill)* as introduced by the Minister for Environment and Heritage Protection and Minister for National Parks and the Great Barrier Reef, Hon. Steven Miles on 15 March 2016.

QRC is the peak representative organisation of the Queensland minerals and energy sector. The QRC's membership encompasses minerals and energy exploration, production, and processing companies, and associated service companies. The QRC works on behalf of members to ensure Queensland's resources are developed profitably and competitively, in a socially and environmentally sustainable way.

This Bill is causing an almost unprecedented level of concern for QRC members worried about the apparent implications for joint ventures and future investments and investors. Relationships with landholders also have the potential to be severely impacted under the draft framework in the Bill.

We would point out that the current potential problem for taxpayers would not have arisen in the first place (or at least the extent of the problem) if the State had required a financial assurance for the Yabulu Nickel Refinery, as it had jurisdiction to do for a mineral processing activity, from the time that an environmental licence was originally issued.

QRC would once again like to express our significant disquiet with the lack of consultation on the Bill, although we appreciate that a briefing was provided by EHP to QRC following the Bill's introduction and that the department has had some further discussions with QRC on 30 March.

According to the Explanatory Notes (page 3), the reason for the failure to consult before the introduction of the Bill, was 'the urgency of the Bill'. In further detail, the reason for this urgency is explained on page 1 as so that the companies and the related parties responsible for the Yabulu Nickel Refinery, Texas Silver Mine, Collingwood Tin Mine and Mount Chalmers Gold Mine, bear the responsibility for the cost of managing and rehabilitating these sites. While we understand the stated reasons why the Bill was considered to be urgent, the difficulty is that the Bill has gone considerably further than would have been necessary to deal with the problems which were stated to have been urgent.

As usually occurs whenever legislation is rushed, there are numerous drafting problems that would have severe unintended consequences unless corrected before the Bill is passed. If the Government had paused even for a week before introducing the Bill to consult about the proposals, the unintended consequences would have been noticed immediately and pointed out, so that the Bill could have been fine-tuned before being introduced to Parliament.

Executive Summary

QRC is **generally supportive of the overarching policy objectives** of the Bill, as outlined in the Explanatory Notes, as well as to some of the further details about the intent of the Bill as explained by the Minister in his first reading speech. In this regard, we only have some minor reservations about the way that some of the reasoning for the policy objectives was expressed. However, probably due to the undue rushing of the Bill without proper consultation, there are numerous ways in which the drafting of the Bill has overstepped the mark, with potentially severe unintended consequences, both for innocent 'Mums and Dads' and for investor confidence in Queensland.

It is due to these drafting issues that QRC is **unable to support the Bill** in its current form. In the context of expressing our concerns about the drafting issues, we do not mean to be critical of the Office of Parliamentary Counsel, because we recognise that these drafting issues would not be likely to have arisen if there had been sufficient time and an adequate consultation process to identify potential unintended consequences.

In this submission, first we have set out our understanding of the overarching policy objectives, so that the submission can show how the Bill oversteps or contradicts those policy objectives in the balance of the submission.

QRC's key concerns relate to the drafting of provisions about:

- Financial assurance;
- Compulsory amendment of conditions or the provision of a program upon withdrawal or amendment of an environmental protection order;
- Related persons, particularly in relation to landholders and also aspects of the 'relevant connection' test;
- The joint or several liability provision;
- Removal of the privilege against self-incrimination;
- Aspects of the land access provisions.

Generally, this submission follows the same order as the Bill, except where the same topic is addressed in a number of different provisions scattered throughout the Bill, in which case the issues are grouped together.

Policy Objectives

The policy objectives of the Bill are stated in the Explanatory Notes to the Bill (on page 1) as follows:

> *(a)to facilitate enhanced environmental protection for sites operated by* ***companies in financial difficulty****; and*
> *(b) to avoid the State bearing the costs for managing and rehabilitating* ***sites in financial difficulty***.

QRC generally has no objection to those policy objectives.

The Explanatory Notes go on to explain that increasing difficulties have arisen at the Yabulu Nickel Refinery, Texas Silver Mine, Collingwood Tin Mine and Mount Chalmers Gold Mine and that the intent is for the Department of Environment and Heritage Protection (EHP) to be able to impose a '*chain of responsibility so that these companies and their related parties bear the cost of managing and rehabilitating the sites, rather than facing the risk that the State may incur operational and financial responsibility for the sites in financial difficulty*.' QRC also has no objection to that reasoning.

We do have a minor concern about an expression used in the reasoning, where the Explanatory Notes extrapolate the problems at the sites mentioned and conclude that: '*This has emerged as a looming major problem with the downturn in the mining sector.'* That statement is not correct. For example, the Yabulu Nickel Refinery is a mineral processing activity and not a mine. Mines and petroleum activities throughout Queensland have provided financial assurances to EHP (normally bank guarantees) to secure rehabilitation. In contrast, EHP failed to require a financial assurance from the Yabulu Nickel Refinery. The Explanatory Note should not overstate the problem.

QRC was also pleased to see that the Minister, in his first reading speech of the Bill, explained that the intent was that "*the chain of responsibility will not attach itself to genuine arm's length investors, be they merchant bankers or mum-and-dad investors*", However, as explained in detail below, in fact this is not the way the Bill has been drafted. The Bill does target investors, including both financial institutions and mum-and-dad investors.

The Bill therefore goes well beyond the satisfaction of the objectives of the Bill as stated in the Explanatory Notes.

Recommendation 1: that the Bill be amended so as to align with its stated policy objectives.

Financial assurance

QRC supports a robust, transparent and accurate system of financial assurance to secure rehabilitation of not only resource operations, but also other environmentally relevant activities that will require rehabilitation.

For further details on the way the financial assurance system currently works in Queensland, including the fact that financial assurance is required for all mining and petroleum activities in Queensland, refer to the current Financial Assurance Guideline EM1010, available on EHP's website at https://www.ehp.qld.gov.au/assets/documents/regulation/era-gl-financial-assurance-ep-act.pdf For example, at a mine, a financial assurance is required before mining operations can commence and then the financial assurance is also required to be reviewed (increased or decreased) whenever a new or amended plan of operations is submitted. Financial assurance may be increased as the area of disturbance is increased and it may be decreased as progressive rehabilitation occurs, providing an incentive to carry out progressive rehabilitation.

QRC's concerns about the financial assurance provisions in the Bill only relate to unintended consequences of the drafting of the proposed amendments.

Although this submission generally follows the same order as the Bill, there are two provisions in the Bill about financial assurance, which we have grouped together in this section of our submission.

Imposition of financial assurance (Clause 3 – Amendment of Section 215)

Clause 3 proposes to amend section 215 by enabling EHP to impose a compulsory condition on an existing environmental authority 'requiring the holder of the environmental authority to give the administering authority financial assurance' where 'another entity becomes the holder of the authority'.

QRC does not oppose, in principle, the ability for EHP to require a financial assurance because of a transfer of an operation. We agree that there are occasions on which a financial assurance should be required for the first time because of characteristics of a new operator. However, further thought needs to be given to the drafting of the amendments.

Firstly, the time for EHP to be making this decision should be only at the time of transfer and there needs to be a statutory timeframe. The commercial reality is that financiers and investors need to know upfront whether to withdraw from a deal, or whether not to approve finance for a deal, if there is going to be a significant change in the cost of the transaction, such as a requirement for a new or increased financial assurance. It is also standard for contracts of sale to have certain timeframes for approval of finance as a condition precedent. The State would cause havoc to banking and financing decisions involving resource operations and other major

industrial operations by allowing EHP an opportunity to impose retrospective financial assurance requirements merely as a result of a transfer and not as a result of any change in the area of disturbance or change of operation.

Therefore, we will need a transfer process, in which the question of a new or changed financial assurance is considered in the context of the relevant guidelines and a decision made within a statutory timeframe. For prescribed environmentally relevant activities such as mineral processing (eg, Yabulu Nickel Refinery), there is a transfer process under Sections 251 to 256 of the EP Act and there is also a set of provisions in Sections 292 to 293 about the provision of financial assurance by a new holder of an environmental authority. The difficulty for Yabulu Nickel Refinery with the existing provisions appears to be that there is an assumption in Section 293 that there would be an existing condition of the environmental authority requiring provision of a financial assurance and that this simply has to be replaced by the new holder upon a transfer. In the case of Yabulu Nickel Refinery, this statutory assumption was incorrect. Accordingly, it is these sections that need to be amended to deal with any future situation similar to the Yabulu Nickel Refinery example, rather than Section 215.

The normal appropriate time for correct financial assurance to be required is before operations commence. Financial assurance should not be imposed for the first time after an operation has already gone into liquidation or administration, which will only make the job of the liquidators or administrators more difficult. It is suggested that if financial assurance had not been correctly calculated before a company went into liquidation (or if it was not required), the correct financial assurance should be required at the time the operation is sold (or otherwise transferred) by the mortgagee as a going concern.

It is also unclear whether the drafter intended only to permit in this provision a new financial assurance upon transfer or additionally a change in the amount of financial assurance, and whether the drafter had in mind only a transfer from one holder to another or additionally any change in holding, where there are multiple holders (because of the use of the word 'the' instead of 'a').

Note that at a meeting with EHP on 30 March, QRC was assured that the answer to the question of whether the Bill opens up the amount of financial assurance to be changed on transfer was no, but agreed that this needs to be communicated better.

The drafting also appears to have overlooked the point that most transfers of major resource operations and major industrial operations are by way of share sale rather than asset sale, ie, normally the company named on the front of the EA remains the same company, but with different owners of that company.

For the Yabulu Nickel Refinery, the administering authority had jurisdiction to impose a financial assurance requirement under the former Section 115 (When financial assurance may be required) of the original version of the EP Act, ever since the legislation commenced on 1 March 1995. There were other subsequent opportunities when it could have been imposed. Just because the former EPA did not exercise its jurisdiction when it had the opportunity to do so does not mean that the rest of the State needs to be penalised for that error. If EHP needs to correct an error specifically in relation to Yabulu Nickel Refinery, it should do that, rather than introducing general provisions that create investment uncertainty for the rest of the State.

Disputes about financial assurance (Clause 15 - inserting Section 535B Stay of decision about financial assurance)

QRC also has several concerns about Clause 15 (inserting Section 535B Stay of decision about financial assurance).

Most noteworthy are the amendments to stay provisions relating to financial assurance. Currently, a decision by EHP about the amount and form of financial assurance for an environmental authority is an original decision subject to review and appeal rights. It is also a decision for which a proponent may apply for a stay (to secure the effectiveness of any review or appeal decision).

The Bill proposes amendments that prohibit a stay being granted, unless the proponent has given EHP security for at least 85% of the financial assurance amount as decided by EHP (ie at least 85% of the disputed amount). This is clearly an onerous position to take, particularly in cases where a proponents and EHP are far apart in their calculation and assessment of an appropriate financial assurance amount.

Again, while we understand the intent, the setting of the amount that must be paid at 85% assumes that EHP will never be incorrect in their calculations by more than 15%. In our members' experience, that has not been the case. We are aware of instances where numbers have been transposed, or a zero accidentally added. For example, in one instance that we have heard of, numbers were transposed by a dyslexic employee at a mining company and not checked properly by the former EPA.

Another, even more serious example occurred in 2015 where a company was wrongly told that their financial assurance needed to increase threefold because EHP had calculated it on an incorrectly assumed rehabilitation condition that a company did not need to meet ie filling in their final void. The increase was so large that it would have required ASX disclosure. In that instance, the internal EHP review process resulted in a realistic calculation being returned, however this took several days. If this amendment had existed in the EP Act at that time, and if the company had needed to go to the court for a stay, the company would have had to pay the significant increase, and would have had to issue a damaging public disclosure, only because of a government error.

In addition, the financial assurance may not yet be due to be lodged because it is only required to be lodged before the activity covered by the financial assurance is due to commence. Similarly, an increase in financial assurance would normally not be required to be lodged until just prior to commencement of the amended activities (eg, where there is an amended plan of operations for an increased area of disturbance that will be occurring later, not immediately). The reason for the stay may be that the applicant is appealing a number of conditions, of which financial assurance is only one.

When QRC asked about this clause at the post-introduction briefing on the Bill on 15 March 2016, we were told that if a company was using EHP's financial assurance calculator, then there would be no problem and that EHP has allowed a 15% error margin because they recognise that the calculator may not be 100% accurate for everyone. EHP's own Financial Assurance Guideline recognises at p25 that: *'The EA holder may nominate an alternative amount for these components (or variable amounts across each itemised activity). If the non-recommended value is used, quotes must then be attached with the application/information supplied to the department.'* This clause allows companies to 'ground-truth' the actual cost of components of rehabilitation. Some companies have already undertaken this process and have received letters from EHP confirming acceptance of the alternative methodologies put forward by the companies.

QRC is also aware of several companies who are currently in negotiations with EHP about particular components of the calculator and the amounts being sought for financial assurance.

As EHP gathers more evidence from companies about the actual costs of various components of rehabilitation, this evidence can be used by EHP to inform its own revision of its calculator over time, which improves the transparency and robustness of the calculator at no cost to EHP. If EHP ever has to undertake rehabilitation, EHP then also has documentary evidence available about the actual costs of the rehabilitation, rather than having to pay wrongly calculated costs to rogue contractors. In summary, this iterative process leads to continuous improvement in many different ways.

If the operation the subject of the financial assurance or increased financial assurance has already commenced and the financial assurance calculated by EHP has been stayed, the obvious solution is that the Court should be given express jurisdiction to determine an appropriate amount of financial assurance or increased financial assurance that should be provided during the period of the stay. This will allow all of the relevant factors to be taken into account by the Court.

Recommendation 2: the following findings and changes to the Bill are recommended to address the concern regarding the financial assurance sections of the Bill:

- **instead of amending Section 215 in relation to financial assurances, minor amendments should be made to Sections 251 to 256 and Sections 292 to 293, so as to enable an environmental authority to be amended upon an application for transfer to require a financial assurance or changed financial assurance, with the amendment only to take effect if the transfer takes effect (giving the opportunity for a proposed transferee to withdraw if dissatisfied with this decision);**
- **consideration of the additional need for a specific provision to address the historic transfer for the Yabulu Nickel Refinery; and**
- **the Court should be given express jurisdiction to determine an appropriate amount of financial assurance or increased financial assurance that should be provided during the period of any stay of a financial assurance decision, where the operation the subject of the financial assurance (or increased financial assurance) has commenced or will commence during the period of the stay.**

Mandatory change of condition or imposition of program as a result of the amendment or withdrawal of an EPO

Clause 3 – Amendment of Section 215 by inserting subsection (2)(fa) and Clause 4 – Amendment of Section 322 by inserting new paragraph (e)

QRC supports the stated intent set out in the Explanatory Notes, which is that an environmental protection order (EPO) should be able to be withdrawn or amended on the basis that either the environmental authority is compulsorily amended or a transitional environmental program is approved to '*avoid the harm, or risk of harm, that had resulted in the environmental protection order being issued'* (p5) but unfortunately that limitation has not been included in the Bill itself.

The draft clauses of the Bill only provide that compulsory amendments or a compulsory transitional environmental program can be imposed if there has been 'the amendment or withdrawal of an environmental protection order'. There is no reference in the Bill to this being

limited to a situation where this is to '*avoid the harm, or risk of harm, that had resulted in the environmental protection order being issued'.*

Examples of concerns about the drafting of these provisions include the following:

- EHP should not have jurisdiction to amend environmental authority conditions about noise just because there was an EPO about contamination of water, which has been amended or withdrawn.
- EHP should not have jurisdiction to amend environmental authority conditions if an EPO has been withdrawn because EHP has accepted that there was no basis for the EPO to have been imposed in the first place.
- EHP should not have jurisdiction to amend environmental authority conditions because a Court has amended the EPO as a result of the original version of the EPO having been wrong.

Despite assurances from EHP, that the above circumstances would not occur, we do not believe that the current drafting of the Bill provides this guarantee.

Recommendation 3: That Clauses 3 and 4 need to be amended to reflect the intent specified in the Explanatory Notes.

Related persons

Clause 7 – the context in Sections 363AC and 363AD; Sections 363AG-363AI

Before addressing the individual drafting issues with the clauses about 'related persons', it may be useful firstly to outline the context.

Clause 7 Sections 363AC and 363AD contain duplicate provisions in subsections (1) and (2), providing that if an EPO is issued to a company, it can also be issued in the same terms to a 'related person'. In this regard, the provisions do not distinguish between whether the company is 'high risk' or not. ('High risk companies' are defined as externally administered companies or related to externally administered companies under the Corporations Act.) As a matter of drafting practice, it is not clear why these provisions needed to be set out twice.

The main difference is that, in the case of a 'high risk company', there is an additional discretion that EHP can issue an EPO to a related person for the high risk company even where the high risk company has ceased to be a holder of an environmental authority (Section 363AD(3). The drafting issue with this subsection is that it does not allow for the possibility that there is a new holder of the environmental authority who now has control over the operation (eg, where a mortgagee in possession has sold the land to a new owner) and the original high risk company is no longer relevant to the operation. Ongoing liability may also be unintentionally created where a company was not in administration at the time that a site was legitimately sold to a purchaser as a going concern, but has subsequently been placed in administration for unrelated reasons at any time in the future, or a related company is in the future placed in administration. Section 363AD should be amended to clarify that in these circumstances the provisions are not intended to apply.

Subsection (4) of Section 363AD also sets out a list of the types of matters that can be addressed in an EPO to a related person of a 'high risk company'. Most of these matters would appear to be obvious, if the EPO to the related person has already been stated to be the same as would otherwise have been imposed on the high risk company. The existing provisions about the content of environmental protection orders would appear to be sufficiently broad to cover all of the matters listed in subsection (4), with the possible exception of the proposed requirement to provide a security (Section 363AD(4)(c)).

If the work required by the EPO is not carried out, an authorised person can step in and carry out the work and require the related person to pay the cost of the work under Sections 363AG to 363AI. Oddly enough, Section 363AG allows the authorised person to step in if the related person has not done the work, but makes no provision for the possibility that this might be because the holder of the environmental authority itself is doing the work, rather than the related person.

In principle, QRC has no objection to giving EHP power to impose environmental management and rehabilitation requirements on a related person (individual or company) where the holder of the environmental authority has been deliberately set up as a 'straw man' and placed into administration, by a related person who actually has or had control over the relevant decisions not to undertake proper environmental management or rehabilitation. This appears to have been the policy intent, reflected in the Minister's first reading speech as reported in Hansard: "*the chain of responsibility will not attach itself to genuine arm's length investors, be they merchant bankers or mum-and-dad investors'.*

However, this is not what the Bill actually achieves. Instead, in Clause Section 363AB, there are three alternative categories of 'related persons':

- A 'holding company'; OR
- A landowner; OR
- A person with a 'relevant connection' to the company, such as a financial interest or a person with an ability to control the company's conduct.

There is no provision in the Bill which says that a landowner needs to be a person with a financial interest in the company or with an ability to control the company's conduct. A holding company would automatically have a financial interest in the company. A landowner does not automatically have either a financial interest or any influence.

Related Persons – Landowners

Clause 7 – Inserting Section 363AB(b)

This section seems to open up the opportunity for the unfair treatment of innocent underlying landowners. Resource activities are regularly located on rural land that is owned by rural landowners and also often located on State land, such as timber reserves. Similarly, other intensive industrial developments are often located on State land, such as in State development areas on MEDQ land, or timber mills and processing plants on forestry land. The term 'owner' also has an extremely broad existing meaning under the EP Act Schedule 4 and even includes native title holders, Aboriginal Land Act grantees, mortgagees etc.[1]

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[1] ***owner***—

1 The *owner* of land is—

(a) for freehold land—the person recorded in the freehold land register as the person entitled to the fee simple interest in the land; or

(b) for land held under a lease, licence or permit under an Act—the person who holds the lease, licence or permit; or

(c) for trust land under the *Land Act 1994*—the trustees of the land; or

(d) for Aboriginal land under the *Aboriginal Land Act 1991*—the persons to whom the land has been transferred or granted; or

(e) for Torres Strait Islander land under the *Torres Strait Islander Land Act 1991*—the persons to whom the land has been transferred or granted; or

Unfortunately, Section 363AB(1)(b), which is the landowner provision, is expressed in the alternative; it is not cumulative with any qualifications or limitations. The word 'or' appears between each paragraph of this subsection. So, an owner may be completely innocent and unrelated, not having any 'relevant connection' with the holder, and still find themselves in the firing line. In a meeting attended by QRC with representatives of EHP on 30 March 2016, EHP advised that this use of the word 'or' with no qualification, was intentional.

QRC would have no problem with a reference to 'owners' if this was qualified, so that the owners could normally only be liable if they are in a position to control the environmental management of the environmental authority holder (ie if the holders were essentially controlled by the landowner).

Another situation where QRC would have no problem with landholder liability would be where the environmental authority is no longer in existence and the owner has accepted ongoing environmental liability and has either paid a reduced price or been compensated for that. For example, QRC has previously discussed with EHP that the EP Act should be amended to put in place legally binding 'rehabilitation management plans', similar to contaminated land 'site management plans',[2] which would be binding on future successors in title and the local government, so that if new owners acquire rehabilitated land and put it to economic use and the price they have paid for the land reflects this, the future land use needs to be in accordance with binding maintenance conditions and the types of land uses are in accordance with a suitability statement. There are various ongoing maintenance issues that may relate to rehabilitated land, where the land has been restored for purposes such as grazing, in circumstances where the ongoing maintenance requirements are unrelated to contamination, such as maintenance of fencing. QRC's discussions with the former EPA about the need for such a statutory mechanism date back to 2006.

QRC's concern about the Bill's imposition of liability on innocent landowners stems from the obvious reason that no sane rural landholder is ever going to want to enter a compensation agreement with a resource company ever again, for the resource company to operate on their land without acquiring every last scrap of the underlying land title first, if the rural landowner is likely to find themselves unfairly targeted with clean-up costs for an operation that they have nothing to do with. People who have owned rural land for generations and would prefer not to sell it during the temporary period of a resource operation or other ERA, should have the prerogative to be able to negotiate with resource companies about the option of retaining title, rather than have to face such draconian risks if they make that choice.

In an environment where Queensland is working hard to achieve sustainable co-existence between the resources industry and agriculture, the introduction of this provision has the potential to be very damaging. If this Bill is passed in its current form, the exposure for owners will become exponentially larger than before, unavoidably resulting in disruption and possibly the destruction of sustainable co-existence in Queensland.

(f) for land for which there is a native title holder under the *Native Title Act 1993* (Cwlth)—each registered native title party in relation to the land.

2 Also, a mortgagee of land is the *owner* of the land if—

(a) the mortgagee is acting as a mortgagee in possession of the land and has the exclusive management and control of the land; or

(b) the mortgagee, or a person appointed by the mortgagee, is in possession of the land and has the exclusive management and control of the land.

[2] Provisions about site management plans for contaminated land are set out in Chapter 7 Part 8 Division 5 of the EP Act.

The government should not risk inadvertently make the negotiation of conduct and compensation agreements and mining lease compensation agreements more difficult and /or expensive. The relationships between overlapping tenement holders is also very likely to be negatively impacted in many circumstances.

Similarly, if the State or a local government is the underlying landowner, the whole purpose of the Bill in trying to avoid having the taxpayer bear the burden of irresponsible operators would not have been achieved.

QRC has discussed this issue with representatives of EHP on 30 March 2016, who acknowledged that the impact on unrelated underlying landowners was unintentional and that amendments could be considered.

Recommendation 4:

- **In consultation with industry develop a statutory system of rehabilitation management plans with the same binding characteristics, registration on title etc as site management plans, but adapted so as to address ongoing maintenance requirements for rehabilitated land, together with a suitability statement (again similar to site management plans) about the types of land uses that would be appropriate for that land. Anyone who then buys the land would know what risks there are and would need to be satisfied that the economic value of the land outweighs the ongoing maintenance cost**.

Recommendation 5:

- **For land that is still operational, amend Section 363AB(1), so that there is a hierarchy of 'related persons' (similar to the contaminated land hierarchy), the EA holder/polluter liable first (and if more than one holder, then in the proportions of their holdings), then if the polluter is unable to comply (and if more than one holding company, in the respective proportions held by their subsidiaries) the holding company, and if the holding company is not available, another related company or an individual who both has a financial interest in the first company and who has controlled the decisions of the first company which led to the environmental harm or the risk of environmental harm. It is possible that this might coincidentally be a landholder, but that should not be the test for liability**.

Related Persons - Relevant connection and the unintended consequences for banks, other investors and creditors, contractors, employees and administrators

Clause 7 – Section 363AB(1)(c), Section 363AB(2)-(6) and Section 363AA Definitions

In summary, leaving aside holding companies and landowners, other persons can only be decided to be 'related persons' if EHP makes a decision under Section 363AB(1)(c) that the person has a 'relevant connection' with the company. The term 'relevant connection' is defined in subsection (2) as either:

> *(a) the person is capable of benefiting financially, or has benefited financially, from the carrying out of a relevant activity by the company; or*
> *(b) 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 this Act.*

The term 'financial interest' is then defined in Section 363AA as follows:

> ***financial interest****, in a company, means a direct or indirect interest in—*
> *(a) shares in the company; or*
> *(b) a mortgage, charge or other security given by the company; or*
> *(c) income or revenue of the company.*

(a) <u>*How has the Bill over-stepped the mark in relation to 'financial interest'?*</u>

Part of the problem with the definition of 'relevant connection' is that Section 363AB(2) is expressed in the alternative, rather than providing two cumulative requirements, ie, the word 'or' appears between the two paragraphs rather than 'and'. However, in a meeting attended by QRC with representatives of EHP on 30 March 2016, EHP advised that this was intentional.

This means that it is only necessary to prove a 'financial interest'. The person with the financial interest may have had no control whatsoever. There is also no threshold proportion of financial interest specified. The definition of financial interest specifically 'a direct or indirect interest in':

- 'shares in the company' – which clearly includes mums-and-dads shareholders;
- *'a mortgage, charge or other security given by the company'* – which includes not only mortgagees and any other financial investors, but even unpaid creditors;
- '*income or revenue of the company'* – which would include anyone else who gets paid by the company at all – which could potentially include employees and contractors. It might also include native title holders, the State government (which may receive rent or royalties) or local governments (rates and other levies). It might include former landholders whose land has been purchased for the operation, or who have received compensation. It may include the administrators personally, for a company in administration.

The situation is exacerbated because a person does not need to have received any actual financial benefit, but only to have been 'capable of benefiting'. So, it might include unpaid creditors, which would really add insult to injury. Similarly, administrators of companies in financial difficulties have a hard enough job as it is, without having to face the risk of personal liability for previous decisions of the companies they have been appointed to try to dig out of the chaos created by those companies.

The mere capability of a financial benefit, or even an actual financial benefit, is a factor too far removed from the chain of responsibility to constitute a "relevant connection". The scope of this provision needs to be limited to a person who bears some element of influence, input or control over the activities of the relevant company.

(b) <u>*Influencers*</u>

The alternative to 'financial interest' is *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 this Act.*

These provisions appear to be intended to capture 'shadow directors'. The term 'shadow director' is not defined or specifically referenced in the *Corporations Act 2001* (Cth), but the definition of 'director' in Section 9 includes persons who have not validly been appointed as directors but who nevertheless either act in that position or the directors are accustomed to act in accordance with the person's instructions or wishes (commonly known as de facto directors and shadow directors respectively). Section 9 then specifically goes on to state that a person is not a de facto or shadow director just because the company acts '*on advice given by the person in the proper performance of functions attached to the person's professional capacity, or the person's business relationship with the directors or the company or body'.* This would

mean that professional advisors such as lawyers, accountants and financial advisors are not accidentally captured by the definition.

The Corporations Act also gives some specific examples of activities which do not, in themselves, make a person a de facto or shadow director:

> *Examples of provisions for which a person referred to in paragraph (b) would not be included in the term "director" are:*
>
> - *section 249C (power to call meetings of a company's members)*
> - *subsection 251A(3) (signing minutes of meetings)*
> - *section 205B (notice to ASIC of change of address).*

There are also some other situations in which people would not be deemed directors of a company:

- A third party who exercises bargaining power in commercial dealings with a company, such that it is commercially imperative for the company to comply.
- Other corporations. Only natural persons can be directors.
- Persons whose control over the dealings of the company are of a degree which is less than what would be given to a director of that particular company. This is a question of fact which needs to be looked at on a case-by-case basis.

In addition there is case law about persons who are not regarded as 'shadow directors', for example, it is possible for a creditor to become the controlling force behind a company (and therefore a 'shadow director') but not merely if the directors of the company feel obliged to comply with the creditor's wishes in its commercial dealings with the company: *Buzzle v Apple Computer* [2010] NSWSC 233.

Unfortunately, the classes of people who are protected under the Corporations Act and also the more nuanced examples that have been considered in case law relating to the Corporations Act are not given the same protection from liability in the Chain of Responsibility Bill and this is something that needs to be corrected. Instead of trying to create a completely new class of 'influencers' under the Chain of Responsibility Bill, it would have been enough just to use the existing terms in the Corporations Act, in order to deal with situations such as the alleged 'shadow director' situation at Queensland Nickel.

While it is acknowledged that the factors listed in the proposed section 363AB(4) attempt to limit the scope of people who may be determined to have a "relevant connection", it is noted that those factors are not mandatory considerations for the administering authority and the list is not exhaustive.

QRC suggests that the Bill be amended to reflect the intention stated in the Explanatory Notes, namely, that to have a "relevant connection", the person must '*bear some responsibility for the environmental harm caused, or likely to be caused, as a result of a company's activities...*'.

To invest in, advise or work for companies, people should have certainty about their potential liabilities.

(c) Too much subjective administrative discretion

More generally, there is considerable subjective discretion afforded to the administering authority pursuant to the proposed section 363AB(1)(c), creating uncertainty for landowners, investors (including mums-and-dads), employees and anyone who has commercial dealings with holders of environmental authorities, in determining their potential exposure to environmental liability under the EP Act. The impact of this uncertainty is heightened after taking into account the severity of the exposure proposed by the Bill. There should be an objective hierarchy of liability, similar to the position for contaminated land (for example, under Section 376 of the EP Act). Any criteria for determining liability should be objective and measurable.

Recommendation 6: QRC would prefer to see the provisions relating to relevant connection and the unintended consequences for banks and other investors completely re-written. As a minimum, we recommend:

- In relation to the risks to innocent landholders, there should be a hierarchy of 'related persons' (similar to the contaminated land hierarchy), with the EA holder or polluter liable first (and if more than one holder, then in the proportions of their holdings), then if the holder/polluter is unable to comply, the holding company (and if more than one holder is not available, their respective holdings, in the same proportions) , and if the holding company is not available, another related company or an individual who both has a financial interest in the first company and who has controlled the decisions of the first company which led to the environmental harm or the risk of environmental harm.
- That instead of trying to create a completely new class of 'influencers' under the Chain of Responsibility Bill, the Committee recommends the use the existing terms in the Corporations Act, which ought to be sufficient to deal with any similar future situation to the alleged position at Queensland Nickel as reported in media articles.
- The provisions about financial interest and influence should be joined by the word 'and' rather than 'or'.
- There should be a threshold proportion of financial interest in the definition of financial interest..

Joint and several liability and the unintended consequences for joint ventures and investors

Clause 7 – Insertion of Section 363AE

The Bill will almost certainly have unintended consequences for joint ventures. The existing position under the EP Act is bad for joint ventures (particularly for holders with small minority holdings), but this Bill will make it even worse.

Imagine this scenario: Two companies entered a joint venture to operate a mine in the shares of 20% and 80%, with the 80% holder being the operator. The financial assurance is found to be inadequate and both holders go into liquidation or administration, but in both cases their parent companies are solvent. So EPOs can be issued to both parents. Surely, this ought to be on the basis that they share in the clean-up 20/80, rather than the 20% holder being issued with an EPO to undertake 100% of the work? Yet Section 363AE makes the 20% parent of the non-operator company liable for 100% of the work. This approach is not going to be very encouraging towards investors undertaking minority investments in an undertaking, secured by a minority holding in the tenements.

QRC acknowledges that Section 363AE could be seen as a logical extension of the existing position under the Environmental Protection Act 1994, which, unlike resources tenements under resources legislation such as the Mineral Resources Act 1989, fails to recognise the proportions of holdings. However, we should make it clear that QRC has previously raised concerns with EHP about the unintended consequences of that existing position, so we do not accept that it should now be made worse**.**

Recommendation 7: QRC suggests that the Committee propose a hierarchy of liability, similar to the position for contaminated land, starting with the environmental authority holder or polluter (and if there is more than one holder, in the proportions of their holdings). Only if the work is not done by the holders should EHP have recourse to the holding company or other person who controls the relevant decisions of the company and has received a financial benefit also in the relevant proportions of their respective subsidiaries' holdings.

Failure to answer questions on the basis of self-incrimination

Clause 10 – Amendment of Section 476

The primary amendment introduced by this clause is as follows:
For subsection (2), it is not a reasonable excuse for an individual to fail to answer a question that complying with the requirement might tend to incriminate the individual.

This refers to the existing Section 476(2) of the EP Act which requires a person to answer a question 'unless the person has a reasonable excuse for not complying with it.' In turn, this relates to the existing Section 465, which authorises 'an authorised person' to require answers if the authorised person suspects on reasonable grounds that 'an offence against this Act has happened; and a person may be able to give information about the offence'.

As acknowledged in the Explanatory Notes (p13): 'It is currently a reasonable excuse that the answer to the question might tend to incriminate the person'.

As explained in considerable detail in the Principles of Good Legislation: OQPC Guide to FLPs – Self-Incrimination,[3] '*Legislation that impacts on the common law protection against being compelled to self-incriminate may interfere with the rights and liberties of the individual under section 4(3)(f) of the Legislative Standards Act… The common law and the International Covenant on Civil and Political Rights recognise that an individual should be protected from incriminating themselves… The privilege against self-incrimination is considered to be 'deeply ingrained in the common law' and has been recognised by the High Court as a human right.*[4] *The privilege is 'based upon the deep-seated belief that those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself'.*[5]

[3] Available at https://www.legislation.qld.gov.au/Publications/OQPC/FLP_Self_incrimination.pdf
[4] See Rochfort v Trade Practices Commission (1982) [1982] HCA 66; 153 CLR 134
[5] Environmental Protection Authority v Caltex Refining Co Pty Limited [1993] HCA 74 per Deane, Dawson and Gaudron JJ at [23]; (1993) 178 CLR 477 at 532 ('Caltex')

The Guideline goes on to explain that the former Scrutiny of Legislation Committee had '*a general position on whether legislation abrogating the privilege still provided sufficient protection. Abrogation of the privilege may be justifiable if:*

(a) the questions posed, or the information required, concern matters which are peculiarly within the knowledge of the person to whom the requirements are directed, and which would be difficult or impossible for the Crown to establish by any alternate evidentiary means; and
(b) the bill prohibits the use of the information obtained in prosecutions against the person; and
(c) in order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming the right).'

One of the examples given in the Guideline of a situation where information may be peculiarly within the knowledge of the person to whom the requirements are directed and which may be otherwise impossible for the Crown to establish by alternative methods was information about the regulation of a trust account from individuals in a law firm under the Legal Profession Act 2007.

The only attempt at justification of this breach of an FLP given in the Explanatory Notes (on p13) was that the existing limitation: *'has created unnecessary difficulties in investigating suspected offences under the EP Act.'* With respect, that is a grossly inadequate attempt at justification for removing a human right.

It is possible to imagine some very limited circumstances in which the only possible way that EHP could obtain information against a company would be by forcing an individual to self-incriminate. This might include otherwise secret information about a 'relevant connection', perhaps in the nature of bribery or criminal conspiracy. If the legislation is amended so as only to remove the privilege against self-incrimination in those limited circumstances, and if a detailed justification is provided in the Explanatory Notes, based on the analysis in OQPC's own guideline, QRC may be able to countenance that, but not a general removal of this entire human right for the purposes of the EP Act. In general, if EHP is finding their questioning process difficult, that would be a problem with the competence or diligence of the investigating officers and not a justification for removing this right.

Recommendation 8: QRC would prefer that the right against self-incrimination is not removed at all; however, if it is considered that there is evidence of particular limited circumstances in which removal of the right is justified, the removal of the right should be limited to those specific circumstances and proper justification for this breach of an FLP should be provided in the Explanatory Notes.

Procedure if related person is not the owner of land on which action is required.

Clause 7 – Section 363AG

It is noted that there is some similarity between the proposed sections 363AF to 363AG (authorising access to land that the related person does not own either for the related person (or its contractor) or EHP for the purpose of carrying out the work under an EPO) and the existing sections authorising access to carry out the work under a clean-up notice, starting at Section 363J. Please note that QRC was not consulted about the existing clean-up notice access

provisions and that we would have expressed concern about those provisions if we had been consulted.

In the context of the resource industry, even the existing provisions about access for clean-up work do not make sense. If the clean-up work is on land for which the recipient of the clean-up notice already has a resources tenement (ie, if the recipient already has a right of access), the existing provisions still absurdly require the resource tenement holder to go off and try to obtain the consent of all underlying landholders (defined so as to include native title holders etc). The existing clean-up provisions allow those owners or occupiers 5 business days to respond.

Sections 363AF to 363AG similarly fail to make sense in the context of resource tenements where there is an existing tenement holder who has full rights of access. The related person and EHP should only need to try to get the consent of the tenement holder, rather than having to give notices to underlying landholders, native title holders etc.
The related person, EHP and their contractors should all be subject to the relevant workplace health and safety requirements that are applicable to the type of land use and there should be statutory procedures to ensure that this occurs. For example, there would be practical health and safety issues for a related person to attempt to send in a contractor without the consent of a mining tenement holder and without any procedure to ensure that mine safety is observed. It is suggested that DNRM should be consulted in relation to possible additional provisions that would be necessary to make this workable (eg, accompanied by the relevant DNRM inspectors), if indeed DNRM considers that there is a way to make these provisions workable.

In addition, it is noted that the period for an owner or occupier to consider whether to consent has been reduced from 5 business days (in relation to clean-up notices) to 2 business days in relation to an EPO. The rationale for this discrepancy has not been explained.

Recommendation 9: QRC considers that these sections need to be completely re-written, after proper consultation with DNRM in relation to the full range of health and safety legislation that may be applicable to different types of environmentally relevant activities in Queensland.

Fundamental legislative principles

As explained in further detail above, QRC has some serious concerns about fundamental legislative principles, particularly in relation to removal of the right of an individual not to self-incriminate (amendments to Section 476).

We would have a concern about removal of the right to review and appeal in relation to a requirement to provide information, in circumstances where the right to require information excludes the privilege against self-incrimination generally. If EHP is instead only authorised to override the privilege against self-incrimination in very limited circumstances that are in accordance with the FLP Guideline (eg, secret information about a 'relevant connection'), QRC may be prepared to re-consider this concern.

QRC also has concerns about retrospectivity, which is an FLP issue discussed in the Explanatory Notes. However, in relation to the situation that has arisen at the Yabulu Nickel Refinery specifically, we acknowledge that there may be some justification for an element of retrospectivity, but only if adequate amendments are made so as to ensure that a wide range of innocent parties are not unintentionally caught in the net of this legislation.

List of Recommendations

The QRC submits to the Committee the following recommendations as detailed in the body of this submission:

Recommendation 1: that the Bill be amended so as to align with its stated policy objectives.

Recommendation 2: the following findings and changes to the Bill are recommended to address the concern regarding the financial assurance sections of the Bill:

- instead of amending Section 215 in relation to financial assurances, minor amendments should be made to Sections 251 to 256 and Sections 292 to 293, so as to enable an environmental authority to be amended upon an application for transfer to require a financial assurance or changed financial assurance, with the amendment only to take effect if the transfer takes effect (giving the opportunity for a proposed transferee to withdraw if dissatisfied with this decision);
- consideration of the additional need for a specific provision to address the historic transfer for the Yabulu Nickel Refinery; and
- the Court should be given express jurisdiction to determine an appropriate amount of financial assurance or increased financial assurance that should be provided during the period of any stay of a financial assurance decision, where the operation the subject of the financial assurance (or increased financial assurance) has commenced or will commence during the period of the stay.

Recommendation 3: that Clauses 3 and 4 regarding the mandatory change of a condition or imposition of program as a result of the amendment or withdrawal of an EPO need to be amended to reflect the intent specified in the Explanatory Notes.

Recommendation 4: in consultation with industry develop a statutory system of rehabilitation management plans with the same binding characteristics, registration on title etc as site management plans, but adapted so as to address ongoing maintenance requirements for rehabilitated land, together with a suitability statement (again similar to site management plans) about the types of land uses that would be appropriate for that land. Anyone who then buys the land would know what risks there are and would need to be satisfied that the economic value of the land outweighs the ongoing maintenance cost.

Recommendation 5: for land that is still operational, for related persons – landowner amend Section 363AB(1) , so that there is a hierarchy of 'related persons' (similar to the contaminated land hierarchy), the EA holder/polluter liable first (and if more than one holder, then in the proportions of their holdings), then if the polluter is unable to comply, the holding company, and if the holding company is not available, another related company or an individual who both has a financial interest in the first company and who has controlled the decisions of the first company which led to the environmental harm or the risk of environmental harm (it is possible that this might coincidentally be a landholder, but that should not be the test for liability).

Recommendation 6: QRC would prefer to see the provisions relating to relevant connection and the unintended consequences for banks and other investors completely re-written. As a minimum, we recommend:

- In relation to the risks to innocent landholders, there should be a hierarchy of 'related persons' (similar to the contaminated land hierarchy), with the EA holder or polluter liable first (and if more than one holder, then in the proportions of their holdings), then if the holder/polluter is unable to comply, the holding company, and if the holding company is not available, another related company or an individual who both has a financial interest in the first company and who has controlled the decisions of the first company which led to the environmental harm or the risk of environmental harm.

List of recommendations continued

Recommendation 6 (cont):

- that instead of trying to create a completely new class of 'influencers' under the Chain of Responsibility Bill, the Committee recommends the use the existing terms in the Corporations Act, in order to deal with the situation at Queensland Nickel.
- The provisions about financial interest and influence should be joined by the word 'and' rather than 'or'.
- There should be a threshold proportion of financial interest in the definition of financial interest.
- The Bill to have a provision inserted which clearly constrains the use of the new powers to circumstances where DEHP has clear evidence of avoidance behaviour. These clear constraints must necessarily sit in the Bill itself rather than be some assurance given separately by the Government or EHP.
- These decisions must be subject to review and appeal.

Recommendation 7: in regards to joint and several liability and the unintended consequences for joint ventures and investors QRC suggests that the Committee propose a hierarchy of liability, similar to the position for contaminated land, starting with the environmental authority holder or polluter (and if there is more than one holder, in the proportions of their holdings). Only if the work is not done by the holders should EHP have recourse to the holding company or other person who controls the relevant decisions of the company and has received a financial benefit also in the relevant proportions of their respective subsidiaries' holdings.

Recommendation 8: QRC would prefer that the right against self-incrimination is not removed at all; however, if it is considered that there is evidence of particular limited circumstances in which removal of the right is justified, the removal of the right should be limited to those specific circumstances and proper justification for this breach of an FLP should be provided in the Explanatory Notes.

Recommendation 9: QRC considers that these sections need to be completely re-written, after proper consultation with DNRM in relation to the full range of health and safety legislation that may be applicable to different types of environmentally relevant activities in Queensland.

Conclusion

In conclusion, QRC again emphasises our serious concerns with the unintended consequences of the Bill as currently drafted.

While supportive of the stated intent, QRC feels that the Bill significantly overreaches its corporate chain of responsibility to the extent that it has the potential to actively discourage investment in Queensland and QRC is therefore **not** in a position to support the Bill.

We are also concerned that a number of associated provisions that have been included in the Bill which do not apparently relate to the stated objectives, such as the removal of the privilege against self-incrimination and the statutory imposition on the courts of a specified minimum payment of financial assurance where a stay is granted, create unnecessary and unacceptable risks for commercial dealings including all investment in Queensland's industrial and rural sectors.

A number of these issues could have been overcome simply by adopting the normal position under the Corporations Act and other issues could be overcome if the Bill adopts statements that appear in either the Explanatory Notes or the Minister's first reading speech but which do not actually currently appear in the Bill.

QRC would be happy to discuss this submission further with the Committee. The QRC lead is Frances Hayter – Director Environment Policy at (07) 3316 2517 or at francesh@qrc.org.au.