# MinterEllison

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Research Director
Agriculture and Environment Committee
Parliament House
BRISBANE QLD 4000

Dear Sir/Madam

**Submission regarding the personal liability of executive officers and others under the *Environmental Protection (Chain of Responsibility) Amendment Bill 2016***

Thank you for the opportunity to make a submission in relation to the *Environmental Protection (Chain of Responsibility) Amendment Bill 2016* (**Bill**) which if passed will amend the *Environmental Protection Act 1994* (Qld) (**Act**).

This submission is concerned with the provisions imposing liability on related persons under this Bill.

In recent years, one of the biggest issues of concern for company directors and officers (described as executive officers in Queensland legislation) has been the explosion in the number of Commonwealth, State and Territory laws which impose personal liability on directors and officers as a result of a statutory breach by a company. Many of those laws reversed the usual onus of proof so that directors and officers were deemed liable irrespective of whether or not they were to blame – unless they could prove the availability of a statutory defence. At its peak there were well over 100 such laws in Queensland, which created a minefield of risk for those holding office as executive officers.

Queensland has been at the forefront of reforming laws which impose personal liability on executive officers as a result of a statutory breach by a company through the passage of the *Directors' Liability Reform Amendment Act 2013*. Having achieved so much with these reforms, it is disappointing to see that this Bill proposes amendments to the Act to include provisions which will enable the issue of environmental protection orders to executive officers without the need to first determine that the executive officer was somehow involved in a contravention of the Act or a failure of a company to take action which may lead to environmental harm. If passed, this Bill will set Queensland back substantially in the area of executive officer liability reform as compared with other states and territories.

In addition, the broad scope of 'related persons' and 'relevant activity' under the Bill, coupled with the retrospective nature of some aspects of the Bill, mean that many persons who would not usually be considered to be related persons of a defaulting company, and who have no control in any real sense over a company's actions, may be faced with responsibility for the remedying environmental defaults. Ordinary commercial transactions, such as financing arrangements, professional advisory services and arms-length landlord tenant relationships all have the potential to create a necessary 'relevant connection'.

## 1. Overview of provisions imposing liability on related persons under the Bill

The Bill will enable the administering authority to issue an environmental protection order (**EPO**) to:

(a) a 'related person' of a company when issuing an EPO to the company or if an EPO issued to a company is in force (section 363AC(1)); or

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(b) a 'related person' of a high risk company, whether or not an EPO is being issued, or has been issued, to the high risk company (section 363AD(1)).

Through the definition of 'related person' in section 363AB, it is possible for the EPOs to be issued to executive officers of the company to whom an EPO is being issued or has been issued, executive officers of high risk companies and executive officers of other companies. The application of this section to executive officers will be considered further in section 3.1 below.

An EPO can impose a range of requirements including the following:

(a) the EPO may impose any requirement on the related person that could be imposed on the company or high risk company respectively as if the person was the company or high risk company respectively (sections 363AC(2) and 363AD(2));

(b) if a high risk company has stopped holding an environmental authority, the EPO can also include any requirements that could be imposed if the company still held the environmental authority and impose those requirements on the related person (section 363AD(3));

(c) if the person is a related person of a high risk company, the EPO may order the related person to (section 363AD(4)):

  (i) take action to prevent or minimise the risk of serious or material environmental harm from a relevant activity or from contaminants on land which the high risk company carries out, or has carried out, a relevant activity (whether or not the contaminants are the result of a relevant activity);

  (ii) take action to rehabilitate or restore land because of environmental harm from a relevant activity or from contaminants on land which the high risk company carries out, or has carried out, a relevant activity (whether or not the contaminants are the result of a relevant activity); or

  (iii) give the administering authority a bank guarantee or other security for the related person's compliance with the order;

(d) if a requirement is made of two or more related persons of a company, the EPO or EPOs issued to them may provide that the related persons are jointly and severally liable for complying with the requirement, including for the costs of compliance (section 363AE).

The Bill further provides the administering authority with the capacity to recover the costs or expenses reasonably incurred in taking an action stated in the EPO or monitoring compliance by the related person who received the EPO and to claim that amount as a debt (section 363AI).

In this manner, significant liability can be imposed on the recipient of an EPO.

## 2. Broad concerns regarding the scope of the Bill generally

We have various broad concerns about the scope of the Bill, including:

(a) The lack of consultation before the Bill was introduced means that it is almost inevitable that there will be many unintended consequences arising under the Bill, if it becomes law. There has been no industry or market testing of the concepts or process in the Bill. This is usually a critical part of the legislation development process for environmental regulation, as the regulation needs to apply to so many different fact situations. Recent Queensland experiences with strategic cropping land, regional planning and offsets have demonstrated that refinement by engagement with industry groups can help to make the legislation workable.

(b) In general terms, the Bill does not attempt to ensure that the related person is in any way at fault. A person could become a related person of a defaulting company, and hence responsible for significant environmental liabilities, almost by accident. The holding company and landowner components of the related person definition in section 363AB(1)(a) and (b) are particularly arbitrary. There is no requirement for these entities to have any degree of control or culpability in relation to the defaulting company or the environmental harm caused. This is particularly harsh in relation to landowners of land on which resources activities are conducted (particularly CSG activities).

(c) After an EPO is issued to a related person, there is no requirement for the regulator to pursue the defaulting company or any other responsible persons. This is contrary to the usual pollution hierarchy contained in the EP Act and in most environmental regulation in Australia, where related parties who were not 'on the ground' are generally responsible only as a 'last resort'.

(d) There is no statutory right of contribution if the related person complies with the EPO but some other person is really responsible – compare this with the EP Act provisions in relation to clean-up notices.

(e) The criteria and process for the administering agency's determination under section 363AB are broad and may lack certainty. For example, potentially a person who has ever received any profits (no matter how small) from a resources activity such as a mine could become a related person to the owner of the mine, if the owner is a company which is sold from time to time.

(f) The decision made by the administering authority appears to be arbitrary and the list of factors in section 363AB(4) is not even expressed to be mandatory.

(g) The retrospective operation of the Bill is unclear. For example, is it intended that the relevant connection was in existence at the time when the EPO issues, or when the default occurred (in respect of which the EPO has issued), or at some other time? Section 363AB(5) seems to suggest that a person might have had a relevant connection to a defaulting company in the past, yet still be a related person for that company now, even if the relevant default occurred after the connection ceased.

## 3. Issues with the provisions imposing personal liability on executive officers under the Bill

### 3.1 The circumstances in which personal liability can be imposed on executive officers

Section 363AB(1)(c) provides that a person can be a related person of a company if the administering authority decides that the person has a relevant connection with the company. The administering authority may decide that a person has a relevant connection with a company if it is satisfied that:

(a) the person is capable of benefiting financially, or has benefited financially, from the carrying out of a relevant activity by the company (section 363AB(2)(a)); or

(b) the person is, or has been at any time during the previous two years, in a position to influence the company's conduct in relation to the way in which, or extent to which, the companies complies with its obligations under the Act (section 363AB(2)(b)). Sections 363AB(3) provides that being in a position to influence a company's conduct includes a person being in that position:

  (i) whether alone or jointly with an associated entity of the company; and

  (ii) whether by giving a direction or approval, by making funding available or in another way.

In deciding whether a person has a relevant connection with a company (the **first company**) the administering authority may consider the following (section 363AB(4)):

(a) the extent of the person's control of the first company;

(b) whether the person is an executive officer of:

  (i) the first company; or

  (ii) a holding company or other company with a financial interest in the first company;

(c) the extent of the person's financial interest in the first company;

(d) the extent to which a legally recognisable structure or arrangement makes or has made it possible for the person to receive a financial benefit from the carrying out of a relevant activity by the first company, including (but not limited to) a structure or arrangement under which:

  (i) the person is not entitled to require a financial benefit; but

  (ii) it is possible for the person to receive a financial benefit because of a decision by someone else or the exercise of a discretion by someone else;

(e) any agreements or other transactions the person enters into with a company mentioned in paragraph (b)(i) or (ii);

(f) the extent to which dealings between the person and a company mentioned in paragraph (b)(i) or (ii) are:

(i) at arm's length; or

(ii) on an independent, commercial footing; or

(iii) for the purpose of providing professional advice; or

(iv) for the purpose of providing finance, including the taking of a security;

(g) the extent of the person's compliance with a requirement under section 451 of the Act for information relevant to the making of a decision under this section.

There is no requirements for the administering authority to determine that the that the executive officer was somehow involved in a contravention of the Act or a failure of a company to take action which may lead to environmental harm before issuing an EPO to an executive officer. An EPO can be issued to executive officers of a the company to whom an EPO is being issued or has been issued, executive officers of high risk companies and executive officers of other companies without establishing any such involvement.

Similarly there is also no mechanism for an executive officer to avoid the need to comply with an EPO on the basis that the executive officer was not involved in a contravention of the Act or a failure of a company to take action which may lead to environmental harm or took reasonable steps to avoid the contravention or potential environmental harm.

Accordingly executive officers are exposed to significant personal liability simply because of their position and either the receipt of some financial benefit from the relevant company or the ability to influence the company's conduct in relation to complying with its obligations under the Act. The threshold requirements for imposing such significant personal liability on executive officers through the issue of an EPO are far too low. The administering authority should be required to determine that the executive officer has some form on involvement in a contravention of the Act or a failure of a company to take action which may lead to environmental harm before issuing an EPO to an executive officer

### 3.2 Comparison with other Queensland laws imposing personal liability on executive officers

In recent years, Queensland has been at the forefront of reforming laws which impose personal liability on executive officers as a result of a statutory breach by a company through the passage of the *Directors' Liability Reform Amendment Act 2013* (**Amendment Act**). With the exception of some 29 Queensland Acts which imposed personal liability on executive officers, the Amendment Act amended executive officer liability provisions to include as an element of the executive officer liability provision either:

(a) for Type 1 provisions that the officer failed to take all reasonable steps to ensure that the company did not engage in the conduct constituting the offence; or

(b) for deemed liability provisions that:

(i) the officer authorised or permitted the company's conduct constituting the offence; or

(ii) the officer was, directly or indirectly, knowingly concerned in the company's conduct.

Both types of executive officer liability provision require the executive officer to have some degree of involvement in the company's offence or conduct. Unlike these provisions, the provisions of this Bill will enable an administering authority to issue an EPO to an executive officer without the officer having any connection to the actual conduct of the executive officer with respect to compliance with the Act. If passed, this Bill will set Queensland back substantially in the area of executive officer liability reform as compared with other states and territories.

At the time the Amending Act was passed, the then Queensland Government stated that environmental legislation was outside of the scope of the COAG reforms which resulted in the passage of the Amendment Act and accordingly environmental legislation was not amended by the Amendment Act (see section 3.3 below). Nonetheless, it is submitted that executive officer liability provisions in environment

legislation (including those which enable the administering authority to issue EPOs to executive officers), should contain elements requiring the establishment of some degree of involvement in a company's offence or conduct before imposing personal liability.

### 3.3 Comparison with other provisions in the Act imposing personal liability on executive officers

Section 493 of the Act contains the following executive officer liability provision:

> **493 Executive officers must ensure corporation complies with Act**
>
> (1) The executive officers of a corporation must ensure that the corporation complies with this Act.
>
> (2) If a corporation commits an offence against a provision of this Act, each of the executive officers of the corporation also commits an offence, namely, the offence of failing to ensure the corporation complies with this Act.
> Maximum penalty—the penalty for the contravention of the provision by an individual.
>
> (3) Evidence that the corporation committed an offence against this Act is evidence that each of the executive officers committed the offence of failing to ensure that the corporation complies with this Act.
>
> (4) However, it is a defence for an executive officer to prove—
> (a) if the officer was in a position to influence the conduct of the corporation in relation to the offence—the officer took all reasonable steps to ensure the corporation complied with the provision; or
> (b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.

Although the above provision was not amended by the Amending Act, it still contains defences which enable an executive officer to avoid personal liability being imposed under this provision if the officer can establish that:

(a) the officer was in a position to influence the conduct of the company in relation to the offence and the officer took all reasonable steps to ensure the company complied with the provision; or

(b) the officer was not in a position to influence the conduct of the company in relation to the offence.

At least under this provision, an executive officer can avoid personal liability being imposed if the officer can establish that the officer took all reasonable steps to ensure compliance by the company. Consistent with this approach under the same Act which the Bill proposes amendments, there should at least be some mechanism for an executive officer to whom an EPO is issued to avoid personal liability by establishing that the officer took all reasonable steps to ensure compliance by the relevant company and avoid the contravention or potential environmental harm.

### 3.4 Why administrative review is not a sufficient remedy?

The Bill proposes to extend internal review rights and appeal rights to decisions made by the administering authority under section 363AB that a person is a related person of a company, in relation to the issuing of an EPO to the person. This is not sufficient to address the concerns set out in this submission. Without the inclusion of further provisions which will require the administering authority to first determine that the executive officer was somehow involved in a contravention of the Act or a failure of a company to take action which may lead to environmental harm before being able to issue an EPO, it will be difficult to challenge the decision solely on the basis that the officer was not involved. In any case, an executive officer should not need to incur the expense of pursuing an internal review or an appeal in order to avoid personal liability being imposed under an EPO if the officer is not involved in a contravention of the Act or a failure of a company to take action which may lead to environmental harm.

## 4. Recommendation

Generally, we recommend that the scope of the Bill be carefully considered, with a view to restricting the Bill's operation to persons who have a genuine connection with both the relevant environmental default and the defaulting company. The Bill's potential to catch parties to legitimate arms length transactions, and expose them to potential environmental liability for indefinite periods should be reconsidered, so that

investors, advisors, financiers and others who are involved in a legitimate way with companies may continue that involvement without fear of becoming responsible for environmental rectification.

More specifically, we recommend that the provisions of the Bill which enable an EPO to be issued to an executive officer be amended to require the administering authority to first determine that the executive officer was somehow involved in a contravention of the Act or a failure of a company to take action which may lead to environmental harm before being able to issue an EPO.

In the alternative, we recommend that there should at least be some mechanism for an executive officer to whom an EPO is issued to avoid personal liability by establishing that the officer took all reasonable steps to ensure compliance by the relevant company and avoid the contravention or potential environmental harm.

Yours faithfully
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