Submission

regarding

Environmental Protection (Chain of Responsibility) Amendment Bill 2016

prepared by

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Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. Funded by donations and independent of government and corporate funding, our legal team combines a passion for justice with technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

While we seek to give the community a powerful voice in court, we also recognise that court cases alone will not be enough. That's why we campaign to improve our legal system. We defend existing, hard-won environmental protections from attack. At the same time, we pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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Submitted to

Research Director
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Dear Committee Members

Submission on *Environmental Protection (Chain of Responsibility) Bill 2016*

We welcome the opportunity to make this submission on the *Environmental Protection (Chain of Responsibility) Bill 2016* (**the Bill**).

Environmental Justice Australia (**EJA**) is a not-for-profit legal organisation advocating for better environmental outcomes. EJA commends the Bill to the Committee. It encompasses powers which constitute a welcome and positive step towards environmental protection and rehabilitation. We welcome any opportunity to appear before the Committee in their hearing into this inquiry. We commend the Bill's objectives and generally its content.

We support the Bill's aims, particularly the need to avoid liability for rehabilitating environmental damage falling on taxpayers or the possibility that damaged sites are simply not rehabilitated at all. The reforms, if introduced, will create a significant incentive for holders of environmental authorities and related persons to ensure adequate financial assurance is provided and adequate rehabilitation is performed.

The problem that needs to be addressed by this Bill is not simply the absence of financial assurances, but the inadequacy of assurances that are in place. Our interpretation of the Bill is that the reforms will extend to any short-fall of financial assurance as Environmental Protection Orders (**EPO**s) can be issued for non-compliance with rehabilitation conditions in the environmental authority.

We note comments by the Queensland Audit Office (2014) that '[a]s the financial assurance is often insufficient to cover the estimated cost of rehabilitation, the state is left with an increasing legacy of sites that are not rehabilitated'.[1]

With respect to the urgency of the Bill, we highlight the precarious financial situation of many resource companies operating in Queensland. One such sector under financial stress is coal producers owing to the structural decline in the sea-borne thermal coal market. One example is Peabody Energy Inc, a US-listed company facing bankruptcy, that owns six operating coal mines in Queensland.

Another sector that may cause environmental damage beyond any financial assurance is the unconventional gas sector. We note proceedings on foot against Linc Energy Ltd with respect to obtaining documents under warrants that allege Linc had wilfully and unlawfully caused serious and material environmental harm in contravention of its environmental authority.[2]

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[1] Queensland Audit Office, *Environmental regulation of the resources and waste industries*, Report 15: 2013-2014, p3: "As the financial assurance is often insufficient to cover the estimated cost of rehabilitation, the state is left with an increasing legacy of sites that are not rehabilitated". Available at: www.qao.qld.gov.au/files/file/Reports%20and%20publications/Reports%20to%20Parliament%202013-14/RtP15Environmentalregulationoftheresourcesandwasteindustries.pdf

[2] *Linc Energy Ltd v Chief Executive Administering the Environmental Protection Act 1994 & Anor* [2014] QSC 172 at [7]

We support the definition of 'related persons' in the Bill. In our view, the consideration of related persons' dealings in proposed s 363AB(4)(d), (e) and (f) will allay any fears regarding the unwarranted capture of 'shareholders, banks who lend money to resource projects, corporate advisors and lawyers – or anyone else the government deems has "relevant interest" in projects', as feared by Mr Palmer in 'Palaszcuk environmental laws targeting Palmer will hurt others say miners', *Australian Financial Review,* 17 March 2016.[3]

We commend the Bill in its current form as the definition of 'related person' is necessary to capture permutations of corporate relationships that may, and the safeguards in s 363AB(4) are measured, appropriate and proportional.

Amendments for the Committee's consideration

We offer the following suggestions for possible amendments that we believe would further advance the Bill's policy objectives to assist the Committee in its deliberations.

1. **Transfer of ownership of environmental authority holder**

We commend clause 3 of the Bill and the goal to enable the department to impose conditions requiring financial assurance on transfer of an environmental authority. However companies can sell operations and avoid the imposition of financial assurance.

A recent example is the sale by Anglo Coal Plc of the Callide coal mine whereby the mine was sold to a new company with little financial backing.[4] The transaction was structured as a 'share sale agreement' such that the corporate identity of the environmental holder did not change, but the ultimate owner did.[5] This style of transaction avoids scrutiny of the financial and technical capabilities of the ultimate owner[6] (a DNRM responsibility) and the assessment of suitable operator, a DEHP responsibility.[7] It will also avoid the Bill's trigger to add a financial assurance condition to an existing environmental authority.

We recommend clause 3 of the Bill is amended to insert new *section 215(2)(bb) another entity becomes the ultimate majority owner of the holder of the authority;*.

2. **Public comment on issuing EPOs**

EJA notes the discretion of DEHP to issue and enforce environmental protection orders. Safeguards should exist for the public to submit proposals for rehabilitation for any site, which would be considered by a panel of experts.

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[3] Available at http://www.afr.com/news/politics/palaszczuk-environmental-laws-targeting-palmer-will-hurt-others-say-miners-20160317-gnlavv#ixzz43lcLJ3uY.
[4] http://www.theguardian.com/environment/2016/feb/12/startups-purchase-of-queensland-coalmine-avoids-environmental-scrutiny
[5] http://www.angloamerican.com/media/press-releases/2016/20-01-2016
[6] *Mineral Resources Act 1989* (Qld) ss 318AAR, 18AAX
[7] *Environment Protection Act 1994* (Qld) s 318F

In addition to instances where financial assurance is insufficient for large coal mines, we are concerned about landholders subject to unconventional gas extraction on their lands. Despite some landholders being parties to Conduct and Compensation Agreements, the standard agreement does not cover 'related persons' as does the Bill. Again, the volatility of resource prices and the financial health of companies may mean that landholders who suffer damage are have limited recourse for the remediation of any damage. These individuals (and the public at large with respect to damage caused to other places) should have a statutory right to request DEHP to issue EPOs to related persons.

We recommend that the Committee consider amendments to the Bill to improve accountability for the exercise of the enhanced powers available to DEHP, or at least that administrative procedures are in place to achieve the same ends.

3. Access to insurance policies

We recommend the Bill provide DEHP with compulsive powers to obtain any potentially responding insurance policies of holders of environmental authorities and 'related persons'. This would contribute to allaying concerns expressed by Mr Bennett at the public briefing[8] about the capacity to receive a financial outcome as a result of issuing an EPO to a troubled entity, or a 'related person'.

Conclusion

We support the Bill and urge the Committee to recommend its passage.

Finally, implementation of these important reforms will require the appropriate allocation of resources. The state government should ensure DEHP has sufficient funding to investigate the 'related persons' and pursue EPOs.

[8] Public Briefing – Examination of the Environmental Protection (Chain of Responsibility) Amendment Bill 2016, 18 March 2016, transcript p5