

31 March 2016

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

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

Dear Mr Hansen

Environmental Protection (Chain of Responsibility) Amendment Bill 2016 (Qld)

The Australian Institute of Company Directors (**AICD**) welcomes the opportunity to make a submission on the *Environmental Protection (Chain of Responsibility) Amendment Bill 2016 (Qld)* (**Bill**).

The AICD is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 37,500 includes directors and senior leaders from business, government and the not-for-profit sectors.

This submission focusses on the potential implications of the Bill for directors.

1. Summary

In summary, the AICD submits that:

- (a) companies should bear the primary responsibility for fulfilling their statutory obligations;
- (b) legislation should only infringe the corporate structure to expose directors to liability in exceptional circumstances and only ever in the presence of direct directorial culpability;
- (c) in the rare instances in which it is justifiable to pierce the corporate veil, directors acting in good faith and with due care should be able to invoke an appropriate defence against liability;
- (d) the Bill's encroachment on rights and liberties has not been adequately justified; and
- (e) the Bill may have significant unintended consequences.

2. Absence of public consultation

As a preliminary matter, the AICD notes that there was no public consultation on the Bill prior to it being introduced into the House. The Explanatory Notes for the Bill state:

'Due to the urgency of the Bill, consultation has been limited to within government.'

While the AICD acknowledges the circumstances regarding the Yabulu nickel refinery outlined by the Honourable Dr Stephen Miles in his explanatory speech on the first reading of the Bill, we are strongly of the view that consultation on proposed legislation at an early stage is integral to the making of good law. This is particularly so where the legislation potentially has wide application (going beyond addressing the government's immediate concerns) and possible unintended consequences. The Bill, as drafted, could create significant uncertainty for directors of Queensland-situated companies regarding their exposure to personal criminal and direct liability as a result of their companies' environmental obligations, irrespective of whether they have taken responsible, appropriate and evidence-based decisions on environmental management and remediation issues. Robust debate with relevant stakeholders is critical where a bill lifts the corporate veil, imposes criminal liability and intrudes upon rights and liberties.

3. Liability issues

3.1 Corporate responsibility

The Bill seeks to amend the *Environmental Protection Act 1994* (Qld) (**EP Act**) by conferring additional powers on the Department of Environment and Heritage Protection (**DEHP**) to compel 'related persons' to satisfy the environmental obligations of companies operating in Queensland. The new powers will permit the DEHP to issue environmental protection orders (**EPOs**) to a significantly broader range of entities and persons (including directors, managers and shareholders), who will then become directly liable to satisfy the environmental responsibilities of their companies. Failure to comply with an EPO is an offence punishable by the imposition of a fine. If the failure is willful, a sentence of imprisonment may also be imposed. Additionally, breach of an EPO will enable the DEHP to recover the costs of remediating the environmental concern from the person issued with the EPO.

As a matter of principle, the AICD is of the view that:

- (a) a corporation should have the primary responsibility of fulfilling obligations imposed on it by legislation; and
- (b) where a corporation contravenes a statutory obligation, the corporation should be held liable (**Corporate Responsibility Principle**).¹

¹ On the issue of corporate responsibility, it is noteworthy that the Commonwealth Criminal Code sets out clear principles for imposing criminal liability on companies. Although this Code only applies to offences against Commonwealth legislation, the intention at the time the Code was enacted was that the States and Territories would legislatively adopt the same regime of principles.

This principle is of fundamental importance to the limited liability nature of companies. The protection afforded by limited liability to shareholders and company officers has been influential in the economic prosperity of Australia and other western countries. The corporate veil should only be lifted in limited circumstances where there are compelling public policy justifications for doing so.

Further, the Corporate Responsibility Principle is consistent with the 2009 principles (**COAG Principles**) endorsed by the Commonwealth, States and Territories as part of the COAG-driven reforms of director liability for corporate fault. Relevantly, the Explanatory Notes for the Bill state that during consultation within government:

'Some concerns were raised regarding the extension of provisions to executive officers. However, the review of directors' liability provisions by the Council of Australian Governments (COAG) in 2012 did not lead to any changes to the EP Act. The existing directors' liability provisions in the EP Act were retained and the new provisions proposed by this Bill can be considered to be an extension of these.'

This justification appears to overlook the fact that the EP Act was excluded from the scope of the COAG review.

Rather than deviating from the established Corporate Responsibility Principle, other possible means of achieving the Bill's stated policy objectives of enhanced environmental protection for sites operated by financially distressed companies and avoiding the State bearing the rehabilitation costs for such sites should be carefully considered, including the introduction of additional financial assurance requirements² or a fidelity fund³.

In the circumstances, the AICD contends that there has been insufficient consideration of possible alternatives so as to clearly demonstrate why it is necessary to breach the corporate structure to achieve the stated policy objectives. This is especially so given the EP Act's existing liability regime in section 493, which deems executive officers liable for offences committed by their company against a provision of the EP Act. (It should be noted that the AICD has previously advocated for the reform of section 493 in line with the COAG Principles.)

3.2 *Director liability*

If, contrary to the points raised above, the legislature considers there are sufficient public policy grounds for exposing directors to criminal liability in the manner contemplated by the Bill, then the AICD strongly recommends that directors only be liable for a company's environmental obligations in circumstances where they *knowingly authorised or recklessly permitted* the company's breach of those obligations (**Culpability Principle**).

It is of significant concern to the AICD that the Bill could impose criminal liability on directors in the absence of their direct culpability as well as exposing them to the burden of remediation costs.

² Sparke Helmore Lawyers, 'Environmental chains of responsibility – ties that bind and bite, *Insights*, 17 March 2016.

³ Association of Mining and Exploration Companies (AMEC), Media Release – *Queensland rushing environmental changes without consultation*, 15 March 2016.

Under the Bill, the DEHP may issue an EPO to a ‘related person’ of:

- (a) a ‘high risk company’ irrespective of whether or not an EPO has also been issued to the high risk company itself. A ‘high risk company’ is a company that is an externally administered body corporate or is an associated entity of a company that is an externally administered body corporate (as those terms are defined in the *Corporations Act 2001* (Cth)); and
- (b) any other company if that company is the recipient of an EPO in its own right.

The definition of ‘related person’ includes a person who the DEHP decides has a ‘relevant connection’ to the company. A person will have a relevant connection with a company if the DEHP is satisfied that:

- (a) the person is capable of benefiting financially, or has benefited financially, from the carrying out of an environmentally relevant activity by the company; 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 the extent to which, the company complies with its obligations under the EP Act.

In deciding whether or not a person has a relevant connection with a company, the DEHP may consider a non-exhaustive list of factors set out in the Bill. These factors include: whether the person is an executive officer of the company; the extent of the person’s financial interest in the company; and the extent of the person’s compliance with a requirement under the EP Act to provide information relevant to the making of a decision on whether a relevant connection exists.

The ‘relevant connection’ test has the potential to be applied very broadly, especially as it requires the exercise of administrative discretion and includes a non-exhaustive list of considerations.

Significantly, it is open to the DEHP to conclude that because of their role on a company’s board, directors are, or were during the relevant period, in a position to influence the company’s compliance with the EP Act and should therefore be regarded as ‘related persons’. Similarly, it is arguable that the definition of ‘related person’ would include directors because they may have benefited financially from the company’s environmental activities (for example, through dividends on any shares they hold in the company, or the receipt of remuneration in the case of executive directors or director fees if they are non-executive board members).

The AICD is concerned that the unbounded nature of the ‘relevant connection’ test confers an inappropriately wide decision-making power on the administering authority. Additionally, consideration of a person’s compliance with a requirement under the EP Act to provide information relevant to the making of a decision on whether a relevant connection exists is, we submit, particularly questionable in the context of determining whether that person has a relevant connection with a company.

Furthermore, such an open-ended test creates an unacceptable degree of uncertainty for persons potentially caught by the definition.

According to the Explanatory Notes, the 'relevant connection' test is considered an appropriate nexus for the imposing obligations on a person because 'a person with such a connection bears some responsibility for the actions of the company operating the site'. The AICD submits that this reasoning is flawed.

The Bill fails to recognise the role of directors and that, in publicly listed companies, boards are typically constituted by a majority of non-executives. The role of directors is to collectively monitor, oversee and set the strategic direction for the company. The executive and managers on the other hand are responsible for the day to day operations of the company and for the implementation of the strategy set by the board. Holding a board position, or receiving financial benefits from a company, does not mean that a director is able to control or influence specific environmental activities of a company. And, as another practical matter, it may not be within a director's means or power to satisfy the requirements and conditions stipulated in an EPO issued to the director.

A person should not be liable for a company's failings simply because they hold a board position or receive financial benefits from the company, without regard to their involvement in the wrongdoing. We strongly object to such a broad power and the exposure of directors to criminal offences and direct liability in the absence of direct culpability.

Also of concern to the AICD is the Bill's omission of a regime for apportioning 'responsibility' for a company's failings among related persons. The Bill does not prescribe how the DEHP is to decide which related person or persons to pursue. For example, would the DEHP issue an EPO to the related person who is a holding company, site owner or person with the strongest connection to the company or with the deepest pockets. In addition, there is no mechanism for the DEHP to apportion the responsibilities or costs between multiple recipients of EPOs. Finally, the Bill does not facilitate the recovery by one related person of costs incurred in satisfying an EPO from other related persons who have not been issued with an EPO, or indeed, from the company which caused the environmental harm. These matters give rise to issues of fairness.

3.3 *Defences*

If the legislature forms the view that the Bill's objectives cannot be adequately met through adherence to the Corporate Responsibility Principle or Culpability Principle – an outcome that the AICD considers untenable – then directors should be able to avail themselves of a defence against liability under the Bill. While we agree that dishonest, careless and reckless conduct by directors should be appropriately sanctioned, it is unjustifiable to expose honest and diligent directors to liability for environmental issues over which they have no influence, without the opportunity of raising a defence. At the very least, the existing defences in section 493(4) of the EP Act should be afforded to directors to whom it is proposed to issue an EPO. In the view of the AICD, as we have previously said, the 'all reasonable steps' defence sets the bar too high. A more appropriate defence would be one which provides as follows:

- (a) if the director was in a position to influence the conduct of the company which gave rise to the environmental obligation or liability, the director took all steps that the director rationally believed to be reasonable in the circumstances to ensure the company's compliance with the EP Act; or
- (b) the director was not in a position to influence the conduct of the company which gave rise to the environmental obligation or liability.

Such defences would recognise the role of directors.

3.4 *Relief*

The AICD also recommends that the Bill permit a director to apply to the courts for relief from liability under the EP Act, and for the Court to be empowered to grant relief, where the director has acted honestly and, having regard to all the circumstances, ought fairly to be excused for the breach giving rise to the liability. Relief from liability is different from a defence as it can only be given after a defendant director has been found to have breached a legal obligation. The purpose of such a provision would be to excuse directors from liability in a situation where it would be unjust and oppressive not to do so, thereby recognising that the role of directors is to govern the company in an environment involving calculated commercial risk-taking.

Due to the limited circumstances in which relief could be granted, the AICD advocates that a relief provision be additional to, and not in substitution for, the application of the Culpability Principle or a defence.

3.5 *Liability in times of corporate financial distress*

Recent policy trends are clearly focussed on providing greater protection to directors who act honestly, with due care and skill and for proper purposes in circumstances where their financially distressed companies are exploring restructuring options (see, for example, the Federal Government's commitment in its National Innovation and Science Agenda to the introduction of a 'safe harbour' defence for directors to examine, within limits, restructuring opportunities without liability for insolvent trading). The Bill appears to be at odds with this policy direction.

4. Encroachments on rights and liberties

4.1 *Retrospectivity*

The Explanatory Notes to the Bill accept that the proposed provisions would, in some respects, operate retrospectively.

As recognised by section 4 of the *Legislative Standards Act 1992* (Qld) (**LS Act**), it is a fundamental legislative principle that legislation have sufficient regard to the rights and liberties of individuals, including by not adversely affecting rights and liberties, or imposing obligations, retrospectively. The AICD acknowledges that legislation may infringe the fundamental legislative principles where there is a strong justification⁴ for doing so.

⁴ Department of Premier and Cabinet, *The Queensland Legislation Handbook*, paragraph 7.2.7.

However, the AICD is concerned that the rationale for the Bill's retrospectivity is insufficient to warrant undermining the rule of law, particularly in circumstances where direct liability and criminal sanctions may follow for persons 'connected' to a company carrying on environmentally relevant activities in Queensland.

As drafted, it would be permissible under the Bill to issue a director or former director with an EPO on the basis that the DEHP decides the individual has a 'relevant connection' with a company because that individual previously benefitted financially from the company's environmentally relevant activities or was, during the previous two years, in a position to influence the company's compliance with its obligations under the EP Act. And yet, at the time of benefitting financially or holding a position of influence, the director may not have known of the possibility that such circumstances could give rise to direct and criminal liability for the company's environmental obligations, irrespective of the director's ability to secure the company's compliance with its obligations at all or at the time of the alleged breach by the company. It is difficult to accept the position put forward in the Explanatory Notes that such retrospective effects are justifiable.

4.2 *Non-reviewable administrative power*

Section 4 of the LS Act enshrines another fundamental legislative precept, namely, that legislation should only make rights, and impose obligations, dependent on administrative power if they are subject to review. Contrary to this, the Bill excludes internal review and appeal rights for a DEHP decision to require a person to give information relevant to the making of a decision on whether or not a 'relevant connection' exists.

The Bill's Explanatory Notes state:

'[T]his exclusion is necessary to ensure that the administering authority can act to prevent environmental harm under the new chapter 5, part 7, division 2 at the appropriate time, without being delayed in the initial step of gathering information to identify a person with a 'relevant connection'.'

As a matter of principle, the AICD is opposed to attempts to unfetter administrative power. Access to judicial review of the legality of administrative decisions is an important common law right and should not be impeded.

4.3 *Right to protection against self-incrimination*

The Bill proposes amending a person's right to protection from self-incrimination under EP Act. At present, a failure to answer questions about a suspected offence against the EP Act is itself an offence unless the person being questioned has a reasonable excuse, for example that answering the question might tend to incriminate the person (sections 465 and 476). The Bill seeks to remove the reasonable excuse of self-incrimination and introduce use and derivative use immunities; that is, questions must be answered but any evidence directly or indirectly derived from the answers cannot be used as evidence in civil or criminal proceedings against the individual (unless those proceedings relate to the provision of false or misleading information).

While the immunities afford some protection to persons being questioned in relation to alleged EP Act offences, the AICD is concerned about the Bill's encroachment on such a basic and substantive common law right of individuals.

The AICD is concerned that the reforms outlined in section 4 of this submission bestow power on an administrative authority without appropriate checks and balances, and unjustifiably encroach on rights and liberties. This concern is heightened by the cumulative effect of reforms.

5. Unintended consequences

Due to concerns that personal criminal and direct liability may arise in circumstances where they have acted honestly, in good faith and with care and diligence, the Bill may have the unintended consequence of deterring capable directors from accepting or retaining board positions with companies operating in Queensland. This conclusion is supported by a report of the Corporations and Markets Advisory Committee⁵, AICD director surveys (including one conducted in conjunction with the Federal Treasury)⁶, and the outcomes of AICD's bi-annual *Director Sentiment Index*. These sources also reveal that personal liability concerns lead to overly cautious decision-making. The resultant negative impact on entrepreneurialism and economic growth has implications for all Australians. The Bill would, we believe, erode the progress on this issue achieved by Queensland as part of the COAG reform of directors' personal liability for corporate fault.

Similarly, the Bill may disincentivise investment in Queensland. As a person's share ownership is directly relevant to the DEHP's determination of whether to issue the person with an EPO, investors may conclude that liability risks posed by the Bill outweigh the potential rewards of investing in companies regulated by the EP Act. This position is likely to be exacerbated by the uncertainty regarding what proportion of share ownership, alone or together with other factors, the DEHP will consider sufficient to conclude the shareholder is a 'related person' for the purposes of the Bill. Additionally, as discussed above, the Bill's retrospective elements encroach on the rule of law, a situation averse to attracting investment. The importance of the rule of law in the context of multinationals making foreign direct investment decisions is evident from the survey conducted by The Economist Intelligence Unit on behalf of Hogan Lovells and the Bingham Centre for the Rule of Law and the Investment Treaty Forum.⁷ As recognised by that survey, foreign investment is an important source of capital and job creation.

In the context of these issues, it is noted that the reach of the Bill extends beyond resources companies.

Another potentially significant unintended consequence is that the Bill may deter directors of Queensland-based companies from having 'skin in the game'. Such an outcome would

⁵ Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006.

⁶ AICD and Federal Treasury, *Survey of Company Directors*, 2008, and AICD, *The Impact of Legislation on Directors*, 2010.

⁷ Hogan Lovells, Bingham Centre and Investment Treaty Forum, in conjunction with The Economist Intelligence Unit, *Risk and Return – Foreign Direct Investment and the Rule of Law*, 2015.

be contrary to good governance as director share ownership aligns the interests of directors and shareholders.⁸

We hope that our comments will be of assistance to you. If you would like to discuss our views, please do not hesitate to contact Lysarne Pelling, Senior Policy Advisor, [REDACTED]

Yours sincerely



JOHN BROGDEN
Managing Director & Chief Executive Officer

⁸ The AICD acknowledges that there is a divergence of opinion among governance stakeholders and commentators as to the appropriate proportion of share ownership by non-executive directors.