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Submission No. 71

Research Director
Agriculture and Environment Committee
Parliament House
BRISBANE QLD 4000

31 March 2016

Dear Sir/Madam

Environmental Protection (Chain of Responsibility) Amendment Bill 2016

The Australian Petroleum Production & Exploration Association (APPEA) is the peak national body representing the upstream oil and gas exploration and production industry. APPEA has more than 80 full member companies comprising oil and gas explorers and producers in Australia. APPEA members produce an estimated 98 per cent of the nation's petroleum. APPEA also represents more than 250 associate member companies providing goods and services to the upstream oil and gas industry. Further information about APPEA can be found at www.appea.com.au.

APPEA's comments on the Chain of Responsibility Bill are as follows.

Purpose of the Bill

The Explanatory Note for the Bill makes it clear that the impetus for the Bill are issues related to the "mining downturn" and mining projects such as the Yabulu Nickel refinery, Texas Silver Mine, Collingwood Tin Mine, and Mount Chalmers Gold Mine.

APPEA would like to assure the Committee that we consider it a fundamental principle that resource proponents must meet their rehabilitation obligations under the law. Proponents that seek to avoid this responsibility by legal manoeuvring or other means undermine the broader industry's reputation.

Our feedback on the Bill focuses on the ramifications for the practical interpretation and implementation of its definitions and the scope of possible unintended impacts.

Exemption for petroleum activities

Existing financial assurance system

Unlike most industries, there is already in place a financial assurance regime for the petroleum industry, and the resources industry more broadly, that is designed to manage the risk of projects failing to meet their environmental obligations. The financial assurance regime gives government the power to require that sufficient funds for full rehabilitation are in place and accessible by government. Queensland's financial assurance guidelines have in fact recently been updated to

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ensure that the financial assurance regime adequately protects the State and the public interest.

At present the Queensland Government holds financial assurance for the petroleum industry in excess of $800m. The Queensland Government therefore has a very high level of assurance that the petroleum industry will continue to meet its obligation to rehabilitate.

We are not aware of any instances of a petroleum project failing to comply with environmental obligations resulting in the Queensland Government needing recourse to this financial assurance to cover the costs of managing and rehabilitating sites in financial difficulty.

Petroleum industry relationship with landholders

The onshore petroleum industry in Queensland differs from other resource activities in that in the majority of cases petroleum activities are carried out on land owned by third parties. The industry has been successful in coexisting with a broad range of land uses and positive relationships with landholders are essential to the long term success of the industry.

Naturally, a key concern for many landholders is that rehabilitation of petroleum activities be carried out by petroleum operators effectively. As discussed below, the Bill would retrospectively extend potential liability for rehabilitation to landholders which would have the effect of elevating this concern and placing in jeopardy the petroleum industry's existing and future relationships with landholders.

Given the above factors APPEA submits there is a strong justification to exempt the petroleum industry from the Chain of Responsibility Bill. The industry is not the cause of the issue the Bill is designed to address, has an excellent track record for rehabilitation, and has significantly different operational practices and relationships that would be undermined by the Bill for no positive benefit.

Retrospectivity

The Explanatory Notes state the Bill will have retrospective application in breach of the important principle contained in section 4(3)(g) of the *Legislative Standards Act 1992* (Qld) that legislation should not be retrospective. The justification given is that there is a "looming major problem with the downturn of the mining sector" and a need for the State to avoid the cost of managing and rehabilitating sites in financial difficulty.

The Office of the Queensland Parliamentary Council's *Fundamental Legislative Principles* handbook provides guidance in this area and states there must be a strong argument to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.

In the context of penalty liabilities OQPC states that:

> "The retrospective imposition of a liability to pay a penalty, in particular a criminal penalty, is one of the most objectionable things that can be provided for in legislation. One of the most commonly understood aspects of the rule of law in a democratic society is that laws only impose liability prospectively, because to do otherwise would be arbitrary."

The Chain of Responsibility Bill is arbitrary in these terms and insufficient justification has been given for this retrospective legislation which has been developed in a very short timeframe with no consultation outside of government.

Upturns and downturns in any industry are reasonably foreseeable and do not justify the retrospective imposition of a liability to pay a penalty.

Further, as noted above, the financial assurance regime is already in place, has recently been updated to better protect the State, and is designed to manage the issue that is the subject of this Bill.

Definition of “related person”, "relevant activity" and “relevant connection”

The definitions of “related person”, "relevant activity" and “relevant connection” are very broad and have significant potential to produce significant unintended consequences.

For example, s363AB provides that a “related person” may be anyone that the administering authority decides has a “relevant connection” to the company if the person is capable of benefiting financially, or has benefited financially, from the carrying out of a relevant activity by the company.

The administering authority has broad discretion to make this determination and need not even take into account the "relevant connection" factors listed in section 363AB(4).

A "relevant activity", in the context of a resources project, means the undertaking of the resources activity – it is not restricted to the particular act or omission which has caused environmental harm or has led to the need for an environmental protection order to be issued. The term has potentially broader application in the context of resources projects than it does in the context of other industrial uses, where the "relevant activity" (the environmentally relevant activity or the activity actually causing harm) is usually not the whole of the commercial undertaking.

A “relevant connection” is determined by reference to a number of factors but the administering authority arguably need not consider any of these in making its decision.

In this manner the Bill would create a situation whereby the administering authority is able to determine that any person capable of benefiting financially, or who has benefited financially, from the activities of a resources company is a “related person” with a “relevant connection” and therefore liable to be served with an environmental protection order.

The Bill thus has potential retrospective impact on a very large group that includes employees, shareholders, landlords, financiers and other companies or individuals that do business with a resources company.

Under the Bill, resources companies may never be free from the threat of potential liability, even if their own environmental record is pristine and they have legitimately sold the company. For example, a former holding company of a resources company which has legitimately sold the shares in the resources company could retain its "relevant connection" (as a one-time recipient of profits from the resources activity) and hence its potential liability for the past or future defaults of the resources company indefinitely under section 363AB(4) and (5).

Given that the financial assurance regime is already in place to ensure that the State does not bear the cost of rehabilitation, APPEA submits there is no justification for the rushed introduction of a Bill with such a broad scope and potential impact.

In the context of the Queensland petroleum industry over 22,000 employees are potentially affected as are many hundreds of businesses and individuals that supply the industry with goods and services.

Given that the Bill would create new obligations for investors and shareholders unique to Queensland there may also be an increased reluctance to finance and operate resource activities in this State and a movement of mobile investment to competing jurisdictions.

APPEA strongly urges the Committee recommend sufficient time be taken to properly consult on these issues with potentially affected parties to ensure that the Bill achieves its intended purpose without inappropriately penalizing individuals or negatively impacting on investor sentiment.

Bill is not consistent with treatment of environmental responsibilities in other jurisdictions

In the limited time available for comment, APPEA has not been able to locate any comparable legislation in other Australian jurisdictions. APPEA is concerned that the introduction of the Bill could take Queensland out of step with other jurisdictions, adding to the likelihood that investment in Queensland might be adversely affected.

While some other Australian jurisdictions do permit the environmental regulator to "look through" company relationships to ensure that genuine evasions of responsibility are punished, these are generally much more constrained than the Bill's regime, and liability is generally clearly linked to culpability.

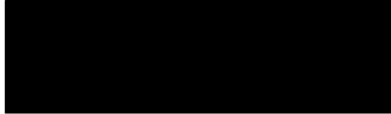
For example, in New South Wales under sections 63 – 65 of the Contaminated Land Management Act 1997 (NSW), associated persons and sometimes holding companies can be made responsible for a company's default if the Court determines that there has been a scheme to avoid compliance with a management order in the case of insolvency, or when there has been a transfer of land. In Western Australia similar provisions apply in the case of contamination responsibility, where the Contaminated Sites Committee can make an order against related persons under the Contaminated Sites Act 2003 (WA) about contamination responsibility where the Committee is satisfied, among other things, that a company became insolvent to avoid responsibility (section 28).

Need for a Regulatory Impact Statement

At a minimum, a detailed Regulatory Impact Statement (RIS) should be prepared to enable the cost of the Bill to be properly assessed and alternatives considered to address the identified concerns. The exemption of the petroleum industry from the Bill should be included in such an assessment.

APPEA would welcome the opportunity to discuss our comments with the Committee. We also intend to make a supplementary submission to the Committee that would cover in more detail comparable or alternative legislative treatments in other jurisdictions and possible alternative approaches to that proposed by the Bill.

Regards,



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