Speech By

Stephen Bennett

MEMBER FOR BURNETT

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ENVIRONMENTAL PROTECTION (CHAIR OF RESPONSIBILITY) AMENDMENT BILL

Mr BENNETT (Burnett—LNP) (1.01 am): From the outset, it is important that we acknowledge the government's stated claims in relation to this legislation and we agree that they are understandable. It was a little unfortunate that the bill was rushed through the committee process and the deliberations about establishing good policy. The amendments to the Environmental Protection Act 1994 certainly drew some attention. The opposition will consider the minister's amendments, which have been tabled tonight. We have been assured that he will address the majority of stakeholder concerns.

The bill proposes to change the EPA to require companies and their related parties to bear the costs of managing rehabilitating sites that have been impacted by environmentally damaging uses. The explanatory notes indicate that the bill was introduced to address the increasing risk due to the downturn in the mining sector and the number of companies that may be unable to perform certain environmental obligations, leaving those potentially costly responsibilities with the state. The bill aims to avoid the need for the state to carry out those obligations and ensure that, if a relevant company cannot perform the duties, a related person will be held accountable.

There were some limitations on the relevant person test. The Environmental Defenders Office, the member for Ipswich and other members of the committee certainly had problems with the relevant person test. We welcome the proposed amendments that will in some way deal with this issue. The committee first heard from the minister and the department and then others about section 363AB(4). We acknowledge that without these amendments it would not be clear that the bill avoids those without a sufficiently relevant extent of control, or obtaining significant financial benefit, from being held liable for remediation or avoidance of environmental harm caused by the relevant activity. After some discussion we finally agreed that the definition of 'relevant person' to include the person who owns the land, provided in subsection 363AB(1)(b), should be amended.

Many submitters were greatly concerned about the proposed provisions for related persons, particularly the extension of associated—retrospective and future—liabilities for landowners. I welcome the minister's comments tonight that that issue will be addressed. It was of particular concern that landowners may be faced with these issues as a result of mining and resource or gas and petroleum activities occurring on their land.

The Queensland Law Society considered that section 363AB may have a negative impact on both the cost and supply of credit to mining resource companies. The Queensland Law Society also had concerns about the provision of 'relevant connection'. The Queensland Law Society argued that the pool of applicable identities is too wide. It includes shareholders, employees, service providers, bankers, investors and private royalty holders.

In its submission to the committee, the Australian Bankers Association stated—

We believe that unless appropriate amendments are made to the Bill, it could materially restrict the ability of certain companies and projects to obtain finance in Queensland. In addition, it could cause banks and other financiers to exit existing relationships where they perceive this legislation may expose them to additional risk.

Significant concerns were raised by submitters that this unfairly exposes landowners to liability for activities that they might not have control over. The bill was drafted in such a way as to cause concerns. Therefore, we welcome the amendments to shorten the 'relevant connection' as defined in the bill. Of course, we do not want to impose any undue harm or liability on landowners.

Legislation relevant to the resource sector, such as the Petroleum and Gas (Production and Safety) Act 2004, requires a company to negotiate a conduct and compensation agreement with the landowner prior to undertaking petroleum and gas exploration. Under this bill, the presence of the CCA is sufficient to make the landowner liable for statutory enforcement of any remediation, but of course we welcome the new amendments being proposed. Proposed section 363AB(2) states—

The administering authority may decide a person has a relevant connection with a company if satisfied—

(a) the person is capable of benefiting financially ...

I notice the amendment now has a significant financial inclusion and we know that that criteria is welcomed. Currently, under the Mineral and Energy Resources (Common Provisions) Act 2014, stakeholders may be paid compensation for negotiating access or enter into a conduct and compensation agreement with mineral and resource companies to offset various negative impacts to farming land use and farming activities. As the bill was written, farmers would be potentially liable for rehabilitation both as landowners and as receiving some form of financial benefit. It is welcome that that is being tightened.

There was additional complexity for farmers under make-good arrangements, such as in the Water Act 2000. Those arrangements include the provision to make good the impairment of bores now and into the future where farmers in areas of intensive coal seam gas development are being impacted by the cumulative impacts from those bores. Make-good arrangements, which apply in various forms, mitigate those impacts. It would be significantly negative should the administering authority see these arrangements as being financially beneficial in any way. Additionally, gas bores are subject to extensive rehabilitation and examples were provided to the committee.

The bill would have imposed unintended consequences on farmers who have no definitive land access rights of veto. It was of concern that farmers and landowners could be responsible for activities when the state government has set conditions on the operator of the activity through an environmental authority. For instance, this might have happened if the site had been effectively abandoned by the operators and DEHP did not have sufficient evidence to track down the relevant persons to the company responsible. In that instance, the government would be required to respond if the landowner is not made to take necessary and urgent action. Landowners should have contractual arrangements with the operators on their site to ensure that the operators themselves remain responsible for avoiding or remediating environmental harm on the site and, therefore, the liability could return to the operator.

Under the original proposed amendments, related persons may have been responsible for meeting certain environmental defaults of companies. Related persons included not only holding companies and landowners but also persons determined to be related by the chief executive officer of the Department of Environment and Heritage Protection.

We seek from the minister clarification as to whether a person who has no actual connection with the defaulting company at the time when the default occurs, or when an environmental protection order is issued, can still be determined by the department to be a related person and then, by default, inherit the liabilities of an environmental protection order. The committee heard that, if this was the intended effect of the bill, there were going to be consequences for ordinary business transactions. For example, an owner of land on which the environmental default occurred could receive an EPO, even if they had no actual control over the defaulting company's actions or even if the defaulting company was a trespasser; a seller of shares in a company can be potentially liable for a breach of environmental obligations that occur after the company is sold, even if there is no connection between the seller and the company at the time when the default occurs; and professional advisers may be potentially liable for company defaults.

Environmental protection orders are issued in a number of situations to protect the environment, including when a person has contravened the environmental authority or has caused or is likely to have caused environmental harm. Failure to comply with an EPO attracts very high penalties. Currently, the EP Act allows an EPO to be issued to either an environmental authority holder or an entity causing or threatening to cause unlawful environmental harm.

Under the proposed changes, if an EPO is issued to a company the Department of Environment and Heritage Protection may also issue an EPO to a related person. Persons related to high-risk companies—for example, companies under external administration or their associated entities—may also be issued EPOs, even if no EPO is issued to the high-risk company and even if the high-risk company no longer holds the relevant environmental authority.

Related persons can be companies or individuals. There are three types of related persons: holding companies, landowners of land on which the defaulting company carries out the relevant activity or other persons whom DEHP determines are related. A relevant connection test will be applied, which considers whether the person benefitted financially or is capable of benefitting financially from the carrying out of the relevant activity.

When assessing the relevant connection, DEHP can take into account a number of factors. Based on this list of factors, persons who might be at risk of being a related person include: executive officers of a company or a holding company; persons who control a company or who have a financial interest in a company; and professional advisers. We see the tightening of the amendments to include other stakeholders.

The decision that a person is a related person and a decision to issue an EPO are both reviewable and can be stayed pending a determination. In the event of noncompliance or if a stay of the relevant order is secured, DEHP has the power to carry out the required works itself. We see that activity happening in Queensland now. Under the bill DEHP has the power to amend an environmental authority when it is transferred in order to place a condition requiring financial assurance on the authority. This power applies retrospectively.

The bill also increases DEHP's investigation powers. The department now has the power to enter a place where an environmental authority has applied, not just in places in which environmentally relevant activities currently occur.

There were some issues raised that I note have not been addressed in the amendments and that I seek some comment from the minister on. The concerns relate to the removal of the privilege against self-incrimination in clause 10. It has been recognised by the High Court as a human right. The removal of this privilege for individuals to protect themselves personally, as opposed to their companies, which is a different issue, is contrary to the parliamentary guideline on self-incrimination. I welcomed the briefing by the minister this afternoon and his explanation. I would ask the minister to share with the House his understanding of how clause 10 will apply in the broader context. I think that would go a long way to appease some of the concerns we still have with clause 10.

With reference to the transitional provisions, the bill introduces a new chapter into the EP Act that deals with transitional provisions. The bill essentially operates retrospectively. For example, action can be taken even if the holder of the relevant environmental authority changed before the commencement of the amendments. A relevant activity includes activities carried out before the commencement of the amendments. The issue around persons who were related persons at the time the bill was introduced but are no longer related persons certainly needed to be amended. We welcome more activity in that space.

The power to amend environmental authorities should extend to being able to amend all relevant environmental authorities which pose environmental risks of a certain level so that they are in line with the updated financial assurance guidelines of the department, without this power being dependent on being able to be exercised only on the transfer of an environmental authority to a new operator.

Some industries that impose environmental impacts were not previously required to provide financial assurances. However, through the evolution of the financial assurance framework and environmental regulation there has been a realisation that financial assurances should be required for a broader range of industries, such as refineries. Environmental authorities which currently require a financial assurance could be reviewed and amended if their assurance is found to be inadequate. I acknowledge that the committee spent a lot of time trying to understand the problems associated with financial assurance.

There was an example given during the committee's deliberations of Cockatoo Coal's coalmine extension. Cockatoo Coal applied for an amendment to their environmental authority in November 2014 to allow them to extend their mining operations. They received a draft environmental authority in December 2014. Objections to the application and the draft environmental authority were referred to the Land Court, including an objection which raised concern as to the financial viability of the proponent and the proponent's consequent ability to meet rehabilitation requirements.

While the Land Court hearing was still being determined, Cockatoo Coal went into voluntary administration. On 15 December 2015 the Land Court subsequently recommended approval of the authority. To our knowledge the final environmental authority has not been granted by the department. However, the department would have the power to grant the authority even if the company is in voluntary administration. There can be little certainty provided to the community that only responsible and worthy proponents will be granted environmental authorities when companies in voluntary administration can obtain environmental authority.

I move now to concerns raised with clause 3 which enables changes to the financial assurance obligations on transfer of an environmental authority. The Queensland Law Society argued that this could materially increase transaction uncertainty for parties considering the acquisition of an asset or a business. The Queensland Law Society submitted that companies other than those facing financial difficulty could be captured. The Cement Concrete and Aggregates Australia submitted that cases when financial assurances are appropriate in the extractive industry need to be based on proper criteria and reflect the true environmental risk to the state.

The department confirmed to the committee that clause 3 is not limited to companies in financial difficulty. This is because of the risk that a holder may come into financial difficulty in the future. The provision of financial assurance ensures that there are funds which can be drawn on to prevent or minimise environmental harm or rehabilitate or restore the environment should the holder fail to meet their environmental obligations.

The department advised that purchasers proposing to acquire a business involving an ERA could inform themselves of the risk of a financial assurance condition by recourse to financial assurance guidelines prescribed in the Environmental Protection Regulation 2008. Such purchases could similarly understand the likely amount of financial assurance through a review of the limitations contained in section 295(4) of the Environmental Protection Act and the calculation measures prescribed in the guidelines.

There were several submitters that raised concerns about workplace health and safety implications as there appears to be no time limit on the powers being sought by the department to enter sites. It was noted that the department's staff work under strict workplace health and safety guidelines. I believe that should be addressed.

While we heard about the urgency of the bill, consultation was originally limited to just within government, again highlighting the lack of transparency afforded by the government to legislation relating to environmental matters. We note the assurance from the minister that there has been subsequent and full consideration of the implications or unintended consequences for all stakeholders in the last week.

We still consider that there could have been a more far-reaching study and inquiry, including extensive consultation with relevant stakeholders, but we acknowledge the urgency of the bill. We acknowledge the government's intent to get this bill passed.

I again highlight that we understand the intent of the bill to introduce stronger legal requirements for mining companies and related industries to meet their obligations to rehabilitate mining sites. I want to talk about some of the amendments that the minister has proposed. I will highlight some of the areas that I hope we can discuss during consideration in detail.

We believe that there is a problem in the drafting of the jurisdiction to impose amendments upon an environmental authority or transitional environmental program, upon amendment or withdrawal of an EPO. Clause 3 is the amendment of section 215, other amendments. Clause 4 is the amendment of section 332, administering authority may require a draft program.

The stated intent set out in the explanatory notes is that an environmental protection order should be able to be withdrawn or amended on the basis that either an environmental authority is compulsorily amended or a transitional environmental program is approved to avoid harm or risk of harm that had resulted in the environmental protection order being issued. Unfortunately, that limitation has not been included in the bill itself.

Unless the intent is carried through to the drafting of the bill the following unintended consequences could arise. EHP would have jurisdiction to amend environmental authority conditions about noise just because they had an EPO about contaminated water, which has been amended or withdraw. EHP would have jurisdiction to end 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 would 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. I ask the minister to give assurances to the House through consideration in detail that EHP will not take advantage of these loopholes. If the revised explanatory notes as tabled tonight are correct, the department appears to have resisted including amendments with qualifying words in the bill. I think there was an issue with some of the words in the bill such as 'may' and 'must'. I think they have been tightened. We welcome some consideration during that debate.

In relation to the jurisdiction to impose financial assurance upon a transfer—again, clause 3—I welcome some conversation about those issues. There are problems with the way the original drafting has addressed the issue. There are numerous provisions in the act that enable amendments to be made to environmental authorities. I believe that the Department of Environment and Heritage Protection has selected the wrong section. I have raised this with the minister and I raised this in the committee. We spoke about section 215 not being the correct section to amend to address this issue. I seek reassurance from the minister and the department tonight that this is where they did want to amend this particular issue. Again, we thought amending other sections would have given us a better outcome—sections 254 or 255 or 292.

I note that the transfer provisions in chapter 5 part 9 only apply to prescribed environmental activities, such as the nickel refinery, not to mines and petroleum and gas activities. There are existing requirements in the act and existing model conditions imposed on all current mines and petroleum and gas activities requiring them all to have financial assurances in place prior to commencing operations. Therefore, there is no need to impose this condition for the first time upon a transfer. Those existing conditions do not specify the amount of financial assurance but rather it is required to be calculated in accordance with the EHP guideline for the financial assurance calculator. For a mine, this is already required to be reviewed every time a new or amended plan of operations is submitted—at intervals of a maximum of five years but normally at least every 12 months.

We would also like to work through the amendments in clause 7 tonight. Clause 7 attempted to deal with this topic by giving EHP power to issue an EPO to carry out rehabilitation work at various types of hazardous operations. I talked about workplace health and safety before. We have to be really careful about how we deal with access to sites. We believe that the department's assurances that their staff will take appropriate action when doing this sort of activity will also put these concerns to rest.

When a polluter company is in liquidation, the liquidators have powers and duties under the Corporations Act. The issues around access of financial assurance and how we deal with people who default who may be caught up as a polluter were raised with the committee. The Corporations Act 2001, a Commonwealth law, can generally go back four years in the case of related parties and as far back as 10 years if there is evidence that the purpose of the transaction was to default creditors. The liquidators then have statutory duties under section 556 of the Corporations Act about the priority order in which they pay out those funds. We believe that the state should not attempt to override this. This is why it is so important in the first place that EHP should obtain an accurate financial assurance for rehabilitation before the operations commence rather than trying to play catch-up later. Where EHP has failed to obtain adequate financial assurance up-front, it was raised that EHP should take its place, together with other unsecured creditors. It is wrong that EHP have overlooked the need to obtain an accurately calculated financial assurance. The committee heard many examples of undercapitalised and underfinancially assured projects across Queensland.

In closing, I want to reiterate that the Agriculture and Environment Committee was overwhelmed with negative comments and feedback from key stakeholder groups including the Queensland Law Society, the Queensland Resources Council, AgForce and the Farmers' Federation. The Queensland Law Society had big issues because the bill imposed obligations on a broad range of 'related persons' rather than keeping the obligations on the person who contributed to or was aware of conduct that resulted in a company failing to meet its obligations.

The draft bill went way beyond the scope of the intended objective. Really it was a shotgun approach with the potential to do great damage. It would have made landowners liable for clean-up costs even though they may not be responsible for environmental damage. There was a raft of

unintended impacts across all sectors of the Queensland economy which would have affected jobs, investment, as well as businesses. It would have increased sovereign risk which would force investors to look at other states and territories with more reasonable, sustainable and practical legislation. It would have removed the privilege against self-incrimination in clause 10, section 476, which was recognised by the High Court as a 'human right'. Removal of this privilege for individuals to protect themselves personally, as opposed to their companies, is contrary to the Legislative Standards Act.

It would have created liability for innocent people—graziers, mum-and-dad shareholders, unpaid creditors et cetera—under clause 7 without adequate controls over the subjective administration discretion which is given to the government. This also is contrary to the Legislative Standards Act. There were issues with retrospective application.

In conclusion, there were heaps of problems. However, the minister has given an absolute assurance that he has listened to the concerns and gone back to the key stakeholder groups and made necessary amendments to redress their concerns. This side of the House has been given an absolute assurance that the changes will ensure the bill will be fair and it will work to ensure taxpayers are not left with mine, resource and refinery site environmental clean-up costs.

The LNP will be holding the minister and the Palaszczuk Labor government to account and the assurance that there will be a full review of the legislation in two years and any changes that are needed will be made. For those reasons, the LNP will not be opposing the amendments. We believe that mining and resource development should be undertaken responsibly and that companies need to be held to account to do the right thing and that taxpayers should not be exposed to environmental clean-up costs.