Speech By

Hon. Dr Steven Miles

MEMBER FOR MOUNT COOT-THA

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ENVIRONMENTAL PROTECTION (CHAIR OF RESPONSIBILITY) AMENDMENT BILL

Second Reading

Hon. SJ MILES (Mount Coot-tha—ALP) (Minister for Environment and Heritage Protection and Minister for National Parks and the Great Barrier Reef) (12.38 am): I move—

That the bill be now read a second time.

This bill amends the Environmental Protection Act 1994 to ensure that those people who could and should take action to prevent an environmental harm do so and that the people who could and should make a contribution to clean up and rehabilitate harm that has already occurred also do so. This bill gives effect to community expectations that their government and their parliament will no longer tolerate companies simply closing their doors and leaving taxpayers to clean up after them.

One of the powers of this bill is that it will allow EHP officers to walk onto the land of an abandoned environmental authority holder and go to the problem, which could be contaminated water leeching into waterways. Previously, officers would turn up on the doorstep of an abandoned property but could not go in because, legally, they can only inspect the premises of a licensed operator. People expect the environmental regulator to be able to take effective action to deal with pollution and this is one example where the laws mean that the regulator cannot do its job. It is a serious problem and one that this government is determined to fix.

After more than a century of mining in Queensland, there are thousands of abandoned mines, mine shafts, tunnels and other mine features. Obviously, we cannot go back in time and address all of those but we can put in place a system to make sure that that number does not increase. This has been a perennial problem in Queensland and people expect a government in the 21st century to be smart enough to come up with legal solutions that will work.

Importantly, all the serious players in the industry will tell us that they want a level playing field. If the government allows one player to behave irresponsibly, then the fear is that commercial competition puts everyone else under pressure to engage in the same behaviour. Mining is an important part of Queensland and always has been, but we have long had this issue and it accumulates. It takes only one or two businesses every year to indulge in this irresponsible behaviour and the legacy for Queensland taxpayers becomes substantial. In my time in this role, I have seen this problem firsthand. It is time for a solution. Stronger laws are needed to deal with this problem.

This bill establishes a chain of responsibility that extends the range of persons and companies that the department can issue an environmental protection order to. This bill also enables the department to impose conditions requiring financial assurance on transfer of an environmental authority. To support the changes, the bill not only expands the powers of authorised officers to access

properties to gather evidence but also expands the evidentiary powers of the department. It increases the grounds that need to be considered or satisfied before a court can stay a decision about an amount of financial assurance or a decision to issue an environmental protection order.

I thank the Agriculture and Environment Committee for its constructive comments and recommendations on the bill. The committee tabled its report on 15 April 2016, putting forward six recommendations and two requests for clarification. I table the government's response to the committee's report which addresses each of the recommendations and requests for clarification.

Tabled paper: Agriculture and Environment Committee: Report No. 16—Environmental Protection (Chain of Responsibility) Amendment Bill 2016, government response [577].

As a result of the committee's report, I will move several amendments during consideration in detail of the bill to give effect to the committee's recommended actions. My department has also identified additional amendments that will further clarify the bill's intent to ensure that companies and their related parties comply with their environmental responsibilities. The amendments to be made are to the Environmental Protection Act 1994. A total of 18 amendments will be moved, which are mostly minor structural amendments to the bill, with five more substantial amendments that I would like to bring to the attention of the House.

The related person test is the key mechanism that establishes the chain of responsibility. It allows the department to identify the true nature of the relationship between the non-complying company and those entities that either significantly benefited from its environmentally harmful activities or had the ability to influence environmental outcomes. Operators should not be concerned about the bill if they are doing the right thing, which I know the vast majority are.

Submissions made to the committee and my ongoing consultation with industry and stakeholder groups identified opportunities to improve the definition of 'related person'. In particular, improvements will fulfil commitments made when the bill was introduced that arms-length investors, ordinary landholders and shareholders would not be captured.

In relation to proposed subsection 363AB(1)(b), which is inserted by clause 7 of the bill, the committee drew attention to the importance of excluding a family farm if it has no voluntary connection to a resource activity. The committee recommended that, to achieve this goal, landholders should not be included as a related person for the purposes of issuing an environmental protection order.

Stakeholders raised concerns about the potential application of these powers to owners who have limited or no ability to decline to allow the relevant activity to be undertaken on their land. These owners have no real capacity to influence the way in which or the standard to which activities are carried out on their land—for example, farmers hosting mining and coal seam gas activities on their land. I am proposing that section 363AB(1)(b) of the bill be amended during consideration in detail to exclude owners of the underlying tenure of mining and petroleum leases and native title parties. The bill was never intended to be used to hold farmers or native title parties responsible for practices on their land. This amendment provides farmers with certainty that that will not be the case.

I am pleased to reassure members that our amendments will remove any doubt about the status of farming landholders. The amendments remove a wide range of agreements made under a variety of acts from being a trigger to the chain of responsibility. This applies to conduct and compensation agreements and other compensation under resource legislation. It applies to make-good agreements under the Water Act. It applies to agreements in relation to native title and cultural heritage. I am grateful for the feedback provided on this matter. The government has listened and acted.

However, although the committee recommended removing entirely a reference to landowners, I believe that there are some elements of this category that should remain subject to the bill. We need to take care not to legislate for an absolute exemption for any person whose business means in part that they are a landholder. If we were to do that, a party seeking to escape the reach of these new laws could do so by contriving to have part of their business falling into the definition of 'landowner'. The amendments to this bill will ensure that only landowners who have the ability to substantially influence activities are potentially captured by the legislation.

A further concern raised with respect to the related person test is that receiving a financial benefit could be interpreted to mean any person, such as a mum-and-dad investor and small-scale shareholder, even though they have no effective control over the activities of the company. This is clearly not the intention of the bill. Although I note that there are qualifications on this assessment in new subsection 363AB(4), I will also move an amendment to clause 7 to make it clear that, if an entity is to be considered to have a relevant connection to an environmental authority holder, the financial benefit received by a company must be a significant financial benefit. This amendment clarifies the government's position.

New section 363AB will improve the bill in a number of ways. The administering authority must consider whether the related person took all reasonable steps to ensure that obligations under the Environmental Protection Act were complied with and that rehabilitation would be adequately funded. This amendment will provide reasonable operators with the reassurance that they will not be mistakenly captured by the new legislation.

Furthermore, clearly setting out the reasonable steps will act as a trigger for industry to engage in long-term thinking about environmental obligations and rehabilitation if they have not already incorporated these factors into forward business planning and investment decisions.

The department has committed to working closely with industry and other stakeholders to provide better certainty on who should be held accountable and what reasonable steps operators should take to ensure that they do not come to be in breach of their obligations. Reports of joint venture agreements being set up to allow assets to be transferred while debt remains behind demonstrates why the related person test needs to have considerable breadth.

Whilst some submissions suggested that the related person test was too broad, there were just as many submissions that expressed strong support for a broad related persons test. It was pointed out that a broad test would be more likely to cover new or innovative corporate structures that may arise in the future and that an inflexible test could constrain the effectiveness of the provisions. We have future proofed this legislation and we will be ready if future market downturns result in corporate failure to meet environmental obligations.

To make it very clear that the provisions of the bill are intended to capture only those entities that are genuinely responsible for addressing environmental harm, I propose to move an amendment during consideration in detail to outline the requirements that the administering authority must have regard to in deciding whether to issue an EPO.

Recommendation No. 4 of the committee suggested that the department develop a statutory guideline to provide operators with greater clarity regarding the manner in which the department will administer the provisions contained in clause 7, including in determining whether a person has a relevant connection to a company. This is a practical and reasonable suggestion and I am pleased to advise that the government supports this recommendation. I will table the necessary amendments.

The guideline will further clarify terms used in the new division 2, such as ‘executive officer’ and ‘related person’ to address recommendation 2 of the committee. The guideline is disallowable in the parliament, binding on the department and can be refined and updated on a continuous improvement basis. I have indicated my willingness to work with a number of organisations in the legal profession and in business that are eager to participate in developing these guidelines.

I think it is worth taking the time to go through section 363AB—that is, who is a related person of a company—in more detail to demonstrate the intent of this provision, as this section is one of the key features of the bill. The existing section 363AB of the bill states that a related person is: (1) a holding company of the company carrying out the activity; (2) a person or company that owns land on which the company is carrying out the activity—note that I intend to move an amendment during consideration in detail in relation to this subsection; or (3) a person or company with a relevant connection to the company carrying out the activity. To have a relevant connection the person must have received some financial benefit from the company or must be in a position or have been in a position in the last two years to influence the company’s conduct with respect to environmental performance.

The related person and relevant connection test in the bill will capture related parties that have profited from activities carried out under the environmental authority. It will also capture parties that have the ability to influence environmental performance on the site, whether financially and/or through the ability to give directions or otherwise. Examples of a related party under this test include parent companies or company directors—or ‘shadow directors’.

Let me be clear: there is no new obligation being imposed by the bill that does not already exist. Rather, the related persons test is a new tool now made available that ensures that the current legal obligations with regard to returning a site to a safe and stable standard are properly discharged. The related person test in the bill needs to be broad to capture all those artificial corporate structures and profit-shifting exercises, which we know already exist, and anticipate those that are yet to be uncovered. However, it is not the intent of the bill to capture those who are doing the right thing.

Section 363AB(4) is a list of factors which may be considered by the administering authority in deciding whether a person has a relevant connection. This includes the extent of the person’s control of or financial interest in the company carrying out the activity, whether the person is an executive officer of the company carrying out the activity or a holding company—for example, a director or other person that takes part in the company’s management—and the extent to which a legally recognisable structure

or arrangement makes it possible for the person to receive a financial benefit from the company undertaking the activity. A financial benefit includes receiving either directly or indirectly a profit, revenue, income, dividend, or distribution or an advantage or preference. There are four other factors listed in section 363AB(4).

I understand that some stakeholders are concerned that the administering authority may cherrypick only certain factors that may make operators liable as a related person and would prefer certainty that all of the factors be considered. I would like to point out that not all of the factors listed in section 363AB(4) will be relevant to any particular relationship of financial benefit or influence. If a factor listed in the subsection is not relevant to a particular relationship then the administering authority should not be required to expend resources to investigate it. The suggestion by some stakeholders that the section should be amended to require consideration of each factor is not accepted as this would require the department to unnecessarily expend resources fully investigating each identified factor. If a factor listed is relevant to a person's relationship with the EA holder and the administering authority failed to consider it, it is very likely that the administering authority's decision would be overturned in judicial review proceedings. The ordinary principles of administrative law will require the administering authority to have regard to any relevant consideration in deciding that a relevant connection exists.

The decision that a person is a related person on the basis of a relevant connection will also be subject to both internal review and appeal rights. If the initial decision that a relevant connection exists did not involve consideration of a relevant factor listed in section 363AB(4), including factors which should have excluded the person, then that person could seek internal review or appeal on that basis. If there is a factor not listed in section 363AB(4) which would tend to suggest that a person should not be regarded as a related person, they would be equally entitled to raise that factor in an internal review or appeal.

I support the committee's recommendation to identify a less onerous percentage for proposed sections 522A and 535B. The bill provided that 85 per cent of the financial assurance is required to be held by the administrative authority if a stay is to be granted. Some submissions to the committee described this amount as too onerous and have called for the amount to be at the discretion of the court. However, holding insufficient financial assurance during the period of a stay will increase the risk to the state in the event that the operator should abandon the project. In response to concerns raised by the committee, I am proposing that the provision should be amended to require a lower percentage. As such, I intend to move an amendment to propose 75 per cent of the FA be required if a stay is to be granted.

On the topic of financial assurance, clause 3, which inserts new section 215(2)(c), will have the effect that the transfer of an EA to a new holder will trigger an ability to impose a condition requiring financial assurance. It has been raised that the same powers should apply in the event there is a share sale that results in the ownership of the EA holder changing which would not be considered a transfer or a change in the holder under the current EPA.

To address this situation we have expanded this provision so that we can reassess the risk associated with a new holder of an EA and require financial assurance if the level of risk warrants it in the event the shares in the EA holder are sold to a new holding company. I will move amendments during consideration in detail to ensure that section 215(2)(c) is applicable to this type of transfer.

I would like to expressly acknowledge that the ability to impose a condition requiring financial assurance upon transfer of an environmental authority will not allow the department to increase the amount of financial assurance. The financial assurance amount will still need to be determined in the usual way through an application under section 294 of the Environmental Protection Act 1994 or the submission of a plan of operations. The department has the power under the EP Act to require a change to financial assurance or to replenish it. However, section 295(4) of the EP Act clearly states that the administering authority cannot require financial assurance of an amount more than the amount that, in the authority's opinion, represents the total likely costs and expenses that may be incurred taking action to rehabilitate or restore and protect the environment because of the environmental harm that may be caused by the activity. Importantly, both the decision to impose the new condition and the decision on the amount are subject to internal review and appeal rights.

Other issues raised by the committee did not require legislative amendment but are important points to clarify. The first point relates to the executive officers and the assertion that the liabilities and obligations imposed on executive officers by the bill will duplicate or interfere with the responsibilities of executive officers under the Corporations Act 2001 or the COAG Principles of Executive Officer Liability. I would like to reassure the House that there is no conflict with Commonwealth law. Any actions taken under the new provisions must be consistent with the Corporations Act 2001. If the administering authority fails to do this, Commonwealth law will prevail and its actions will be ineffective.

With regard to the retrospectivity of the proposed sections 744, 745 and 747, during the committee's deliberations the committee had asked for advice as to why these provisions were necessary. Section 744 will allow conditions requiring financial assurance to be imposed on EAs which are transferred prior to the provisions of the bill coming into effect. This provision is intended to ensure that the financial assurance system contained in the Environmental Protection Act 1994 can be used effectively and to ensure that actions to avoid the operation of the new provision are not effective. This provision is not connected to the EPO powers in the bill or the related person test.

To ensure that the legislation appropriately reflects the policy intent, I will move amendments during consideration in detail to make it clear that the new section 215(2)(c) applies retrospectively only to the extent that an entity becomes a new holder after the introduction of the bill. I have proposed an amendment to the bill to require a review of the new provisions two years after commencement. The amendment requires me as minister to carry out a review of the operation of the provisions to decide whether the provisions remain appropriate. As soon as reasonably practicable after finishing the review, the minister will be required to table a report about the outcome of the review in the Legislative Assembly. In addition to requiring a review of the new provisions, the Department of Environment and Heritage Protection is already required, under the Environmental Protection Act 1994, to report annually on the operation of the act, including the new provisions, and that is also to be tabled in parliament. I will be writing to the director-general outlining my expectations regarding public reporting on these new provisions.

The second point of clarification sought by the committee was on the administration of the financial assurance framework and the adequacy of financial assurance held by the department. This information has been included in the tabled report.

The bill is an important step forward for the environmental laws in Queensland, protecting the environment, the community and taxpayers while supporting a robust and healthy business environment. These amendments make the bill better and stronger than before. The proposed amendments respond to the committee's report and other issues raised by stakeholders in submissions made during the committee process. The amendments will preserve the effectiveness of the new powers while giving the private sector greater certainty about their application. Again I thank the committee members, submitters and the many stakeholders I have met and worked with in developing these laws and I look forward to the debate.