



AGRICULTURE AND ENVIRONMENT COMMITTEE

Members present:

Mr GJ Butcher MP (Chair)
Mr SA Bennett MP
Mrs J Gilbert MP
Mr J Pearce MP

Staff present:

Mr R Hansen (Research Director)
Mr P Douglas (Principal Research Officer)

PUBLIC BRIEFING—EXAMINATION OF THE ENVIRONMENTAL PROTECTION (CHAIN OF RESPONSIBILITY) AMENDMENT BILL 2016

TRANSCRIPT OF PROCEEDINGS

FRIDAY, 18 MARCH 2016

Brisbane

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Committee met at 8.34 am

BRENNAN, Ms Deborah, Manager, Environmental Policy and Legislation, Department of Environment and Heritage Protection

CRADICK, Mr Adam, Senior Director, Litigation Branch, Department of Environment and Heritage Protection

ROBSON, Mr Geoff, Executive Director, Strategic Environment and Waste Policy, Department of Environment and Heritage Protection

WAKE, Mr Chris, Compliance Delivery Manager, Department of Environment and Heritage Protection

CHAIR: I declare this meeting of the Agriculture and Environment Committee open. I acknowledge the traditional owners on the land on which this meeting is taking place today. My name is Glenn Butcher. I am the state member for Gladstone and chair of the Agriculture and Environment Committee. Other members with me today are Steven Bennett, the member for Burnett, who is the deputy chair; Julieanne Gilbert, the member for Mackay; and Jim Pearce, who is the member for Mirani. These proceedings are being transcribed by our parliamentary reporters and broadcast live on the parliament of Queensland website. Welcome everyone who is watching on TV.

The purpose of this meeting is to assist the committee in its examination of the Environmental Protection (Chain of Responsibility) Amendment Bill 2016. The bill was introduced into the parliament on Tuesday by the Hon. Dr Steven Miles MP, Minister for Environment and Heritage Protection and Minister for National Parks and the Great Barrier Reef and subsequently referred to this committee. We are hoping that today's briefing will give a general overview of the bill and what it seeks to achieve. The committee is due to report to parliament on the bill on 15 April. The committee's report will help the parliament when it considers whether the bill should be passed. I remind everyone that the bill is not law until it has been passed by our parliament.

Today the committee will be briefed by officers from the Department of Environment and Heritage Protection. Welcome, officers. We are hoping your briefing today can cover the policy background to the bill, the need for amendments to be considered urgently, why there has been no consultation outside of the government on the bill and what each of the 18 clauses of the bill is intended to achieve. The explanatory notes also refer to three potential breaches of fundamental legislative principles so please can you cover these breaches as well. When you are ready, if I can get you to make a brief statement.

Mr Robson: Today I will outline for the committee the Environmental Protection (Chain of Responsibility) Amendment Bill for your information. With regard to the objectives of the bill, the bill proposes changes to the Environmental Protection Act 1994, which I will normally refer to as the EP Act. The legislative changes have been proposed in response to increasing difficulties that the Department of Environment and Heritage Protection has confronted in ensuring that sites operated by companies in financial difficulty continue to comply with their environmental obligations. These circumstances mean that there is increased risk that the state has to step in and bear the cost of addressing environmental contamination. The amendments proposed in the bill will enable the department to effectively impose a chain of responsibility so that companies not fulfilling their environmental responsibilities and their related parties bear the cost of managing and rehabilitating sites.

I will turn to the key features of the bill, firstly around environmental protection orders. The first key feature of the bill is that it introduces the ability to allow environmental protection orders, or EPOs, to be issued to a party that has a relevant relationship to a company undertaking environmentally relevant activities. The EP Act as it currently stands allows the Department of Environment and Heritage Protection to issue EPOs. An EPO is a written statutory tool issued to a person or company to undertake specific actions within specific time frames to remedy a risk or prevent further harm. An

EPO can only be issued in particular circumstances. For example, an EPO can be used or can be issued to secure compliance with a condition of an environmental authority, or EA. The things that, for example, an EPO may require a person to do include to stop a stated activity indefinitely or for a particular period of time or until further notice from the department. An EPO may also require a person to carry out a stated activity only during stated times or subject to certain conditions. Also an EPO may require that stated action be taken by a stated date. Failure to comply with an EPO is an offence under the EP Act and penalties apply.

The bill proposes to broaden the range of persons and companies that an EPO may be issued to. It achieves this by introducing two new ways that EPOs can be used. These are the ability to issue an EPO to related persons of the company undertaking the environmentally relevant activity and the ability to issue an EPO to related persons of high-risk companies. I will explain in more detail the two new ways in the bill in which EPOs will be able to be used.

The first provides for a situation in which an EPO may be issued to a related person of a company—they are the bill's terms: 'a related person of a company'—carrying out the activity. A related person is a holding company of the company carrying out the activity, a person or company that owns land on which the company is carrying out the activity, or 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 or have been at any time during the previous two years in a position to influence the company's conduct with respect to environmental performance.

The bill sets out a number of different matters that must be considered in establishing that there is 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. This type of EPO can only be issued if the company carrying out the activity has already been issued with an EPO. The bill provides for a chain of responsibility by allowing the department to issue an EPO imposing the same requirements to a related person.

In relation to high-risk companies, a new power is also proposed to enable an EPO to be issued to a related person of a high-risk company. A high-risk company is one that is externally administered as defined under the Corporations Act. That includes a company in administration, liquidation or receivership or a company that is being wound up. It also includes a related body corporate of such a company. The EPO can be issued even if the high-risk company has not first been issued with an EPO or even if the high-risk company no longer holds an environmental authority. This provision is intended to address circumstances where the high-risk company can no longer pay for its existing environmental obligations.

In addition, the Department of Environment and Heritage Protection can require the related person issued with an order to provide a bank guarantee or other security to secure the related person's compliance with the order. This EPO can also require the person to whom it is issued to undertake rehabilitation or restoration of the land. As with the current EPO provision, failure to comply with one of these two new EPOs is an offence.

The bill also enables the department, if the EPO is not complied with, to step in, undertake the relevant actions and recover its costs from the person issued with the order. These provisions will apply from the introduction of the bill. This means that if any action is taken by a company to break the chain of responsibility, the retrospective provision ensures that the person who was a related person at the time of introduction will remain a related person.

A second key feature of the bill is that it enables the department to impose conditions requiring financial assurance on transfer of an environmental authority. There are many environmental authorities that do not contain a condition that enables the department to require financial assurance from the holder. In circumstances where environmental risk is significant, this is a concern because without financial assurance there is nothing to secure compliance with environmental obligations in the environmental authority, including the rehab obligations.

The bill provides that if an environmental authority is transferred, a condition may be added to the environmental authority requiring that the new holder give the department financial assurance. This can only be done where the department considers the condition is necessary or desirable. The decision to impose the condition is also subject to review and appeal rights.

There are a number of other features of the bill which I will turn to now. In terms of access provisions, the bill will expand on the existing access powers of authorised officers of the EP Act. This will ensure that authorised officers have powers to access the following sites: sites that are no longer subject to an environmental authority and sites still subject to an environmental authority but no longer in operation. A site may no longer be in operation because it has entered receivership but the environmental authority may still be in force. The current EP Act does not provide for access in these circumstances. The bill proposes to amend this limitation to ensure the necessary monitoring and assessment of potential environmental risks can be undertaken.

The bill also expands the evidentiary powers of the department. Persons can be compelled to answer questions in relation to alleged offences committed. This would include, for example, compelling employees of a company in financial difficulty to answer questions about alleged offences by that company. The ability of the Department of Environment and Heritage Protection to access information for evidentiary purposes is also expanded.

The last aspect of the bill which I will cover today in my introductory remarks is the amendments proposed in relation to the ability of a court to stay decisions of the department. A stay effectively prevents the decision from being implemented. When the department makes a decision about the amount of financial assurance that an environmental authority holder should be required to provide, or a decision about whether to issue an EPO, there is the ability to apply for internal review or appeal of that decision. The decision may be stayed by a court while it is the subject of such a review or appeal. The bill will increase 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. Thanks for allowing me to make that introductory statement. I hope that has been helpful. We are happy to take questions.

CHAIR: Thank you very much. Do we see much of this going on? I guess this is why this bill is being introduced. Is this prevalent in big business now or small business?

Mr Robson: What I would say with respect to that question is that particularly over the last 12 months there have been some incidents which have raised these concerns. Your question uses the word 'prevalent'. It is difficult to give it a quantitative aspect. I would be hesitant to say 'prevalent' myself. The issue is that, even if it is a handful of sites, the potential costs may be large and the potential environmental damage may be serious. It is for that reason that the government has seen fit to introduce this act.

The past 12 months in particular is the period of time with which I am familiar—there may have been other occurrences in the past—and the department has been in the situation on a number of sites where companies are in financial difficulty and we have been concerned about their ability to manage the environmental risks of the site and, in looking at our ability as a department under the existing legislation, we have seen constraints with respect to our ability to, for example, issue an EPO to a related party that may have the capability to see that the environmental obligations are carried out. We do not have that necessary power if it is the case that an EPO on a related person may deal with the risk. That is essentially why the government has seen fit to introduce this legislation.

CHAIR: You mentioned that this bill gives you access to sites if you have concerns in relation to potential breaches. What would be the trigger for that? What would trigger the department to have a look and ask questions of workers or do whatever it is you need to to find out if there is a potential risk?

Mr Robson: Broadly speaking, of course, it is where there is a concern that environmental harm may occur if obligations are not getting met. As I indicated in my introductory remarks, there are certain circumstances where access to land is constrained for our officers. I may ask my colleague, Mr Cradick, who is more familiar with the provisions in that respect. I am just unsure.

CHAIR: Does it just take a phone call from a worker in the company or does there have to be a case built?

Mr BENNETT: You would be monitoring these high-risk activities anyway under a licensing ERA, wouldn't you? I would assume you would already have knowledge of these risk activities anyway.

Mr Robson: That is right. We are generally talking about activities that have an EA with respect to the fact that there is risk pertaining to the site that is being managed. Generally speaking there are compliance and monitoring arrangements. Obviously some sites are different to others. Obviously some sites are more high risk and receive greater attention. The other piece of information we receive, of course, is in respect to the financial position of companies if, for example, we are aware that they

have moved into voluntary administration. That is probably the most helpful piece of information I can give you. If a site has moved into voluntary administration then of course we need to take a greater interest to ensure the site is being managed appropriately. Obviously as well, the ongoing monitoring and compliance arrangements from time to time may indicate concerns that environmental obligations are not being met even if a site is not in voluntary administration.

CHAIR: You did not mention FLP breaches in your opening speech.

Mr Robson: I am more than happy to have a bit of a discussion around that. I will turn to the explanatory notes to make sure I am consistent with that. The explanatory notes indicate that the bill is generally consistent with the fundamental legislative principles but we do address potential breaches in the explanatory notes, as no doubt the committee is aware. The main issue to be addressed there is the element of retrospectivity that attached to some provisions. With respect to that, I might actually turn to information contained in the minister's introductory speech which might help to explain the policy intent and therefore see why there is that nature of retrospective amendments. In his introductory speech the minister said—

The bill is designed to prevent any last-minute manoeuvring to avoid the effects of its provisions. I am proposing that certain provisions of this bill, if passed by this parliament, will take effect from today, the date of its introduction.

The main effect there was that, in terms of a related person, provisions with respect to whether or not a person is related to the company—that is, the company in question—would have effect from the date of introduction so that, in effect, if someone is a related person at this point this time but undertakes activity to avoid the effect of those provisions they would still be considered as a related person.

Another aspect of the retrospectivity is in relation to financial assurance. With respect to financial assurance, if there is an environmental authority that is being transferred that does not have a condition that allows us to require a financial assurance, the bill would enable the department to require it, as I mentioned in my introductory remarks, and that provision also has a retrospective effect. If it is the case that someone wishes to transfer an EA at this point in time they would still be captured by those provisions.

In terms of fundamental legislative principles, the retrospectivity element will no doubt be of interest to the committee. Also it probably would be helpful for me to make some remarks about the nature of the provisions anyway in terms of their practical effect in the sense that there is no way that a retrospective impact can be avoided because if we are issuing an environmental protection order it can obviously be issued with respect to harm or an environmental risk that relates to activities that took place before the bill. That is not a retrospective provision as such, but I just wanted to draw members' attention to that effect of the bill for your information because obviously in issuing an EPO you are issuing it with respect to activities that have been taking place over a period of time.

As well as that, clearly there is an extended power to issue environmental protection orders. The explanatory notes do give some additional information on that. In effect, the bill is expanding the ground on which EHP can issue an environmental protection order. As I mentioned in my introductory remarks, that includes issuing environmental protection orders to related person. Further detail on that is included in the explanatory notes. The other thing that is relevant in this context is that the bill does exclude internal review and appeal rights for a decision to require a person to give information that is relevant to the making of a decision on whether a person has a relevant connection with a high-risk company. Just to be clear, that is about excluding review and appeal rights for a decision to require someone to give information with respect to determining whether someone has a relevant connection to a high-risk company. It has been considered that that exclusion is necessary to ensure that the administering authority can act to prevent harm at an appropriate time so that we are not actually delayed in gathering information about who is a person with a relevant connection. It is just about ensuring that initial step of determining relevant persons is not delayed. It is limited in that scope.

CHAIR: You want to know who you are targeting nice and early?

Mr Robson: We want to ensure we have information to determine who may be a related party without delay. If in the course of gathering that information it was subjected to a review or appeal process, obviously there could be a delay and that is just the initial step. The decision itself around a related person is, in fact, subject to review and appeal.

Mr BENNETT: Does the department currently have the framework for identifying what is a high-risk company? The devil's advocate in me is saying: is there an unintended consequence of other related activities being captured under this? We very much understand the legislation's intent.

Mr Robson: I understand the question and it is a very important question. I will refer to a few of my notes, but, again, if I may, I will start with remarks from the minister's introductory speech because I think they are pertinent to this very important question that is being raised. The minister in his introductory remarks did make it clear about the limit and the concern around ensuring there are no unintended consequences, and certainly in the drafting of this legislation that was a consideration. We took specialist advice on that consideration, obviously with the resources available to government with Crown Law and so forth. I want to turn to the particular remarks where the minister said in his introductory comments—

The chain of responsibility will not attach itself to genuine arm's length investors, be they merchant bankers or mum-and-dad investors. It will not impact contractors or employees. This legislation targets those who stand to make large profits, those who are really standing behind the company and whose decisions have put the environment at risk

It is about placing the responsibility for the environmental obligations where it belongs, in effect; it is not about those unintended consequences of capturing people who might be, say, a small shareholder or otherwise at arm's length. It is certainly about who has the ability to influence the conduct of a company with respect to their environmental performance or who significantly stands to benefit from the activities that have caused the environmental harm or risk.

CHAIR: Would that drill down to a board? If I was a director on a board, would I be one of the people that we could target?

Mr Robson: There are provisions around related persons being executive officers.

Mr BENNETT: That has clarified one of the questions I had. In relation to the establishment of what is a high-risk company, I suppose I am alluding to if somebody out there does an activity, unintended or intended, and we now empower the new EPO under this legislation on a related person to that company—and I am thinking of a broadscale land-clearing breach or something like that under the Vegetation Management Act—what is a high-risk company identified as? There are mining examples I am sure I could think of. There are other areas around marine parks that could be seen as a high-risk company. But in the legislation, what companies are we going to try to instil this legislation to capture? Do you understand what I mean?

Mr Robson: I do understand the point.

Mr BENNETT: I do not want the car operator down the road to suddenly become a high-risk company. We have legislation to cover that now if they breach their environmental regulated activity conditions.

Mr Robson: If they hold an environmental authority and breach the conditions, yes, there are tools available to deal with that.

Mr BENNETT: There are obviously companies that you are trying to capture here.

Mr Robson: Yes. Perhaps if I indicate that 'high-risk company' is more of an indication of the financial difficulty of the company.

CHAIR: It is not the difference between a farm and a chemical plant?

Mr Robson: No.

Mr BENNETT: High-risk as in financial risk.

Mr Robson: Yes, that is right.

CHAIR: Are they capable of falling over and then not committing to their obligations?

Mr BENNETT: Very well explained, Chair.

Mr Robson: The bill contains provisions around how a high-risk company is defined and it makes reference to the Corporations Act in doing so as well.

CHAIR: Say someone has one company and it is a refinery, does it set a trigger to have a look at their other business as well if there are links to that one part of the business that becomes high risk? Does that then go to everything they do? Will that be a trigger to have a look into the rest of their businesses?

Mr Robson: That is correct, yes.

Mr BENNETT: Once we get to a position where we want to do an EPO on a troubled entity, the expectation of the capacity to receive any financial support from the state—I assume we are trying to protect taxpayers' liability—what are our thoughts about the actual capacity to achieve a financial outcome? Are we tying up that related entity/person with a financial liability? It is all well and good to put these orders on, but if they have gone broke or are in administration what is the chance of actually achieving the financial implications being dealt with? I am around the shop a little bit, but you know what I mean.

Mr Robson: If I am understanding your question, if you are talking about a company that is in voluntary administration and we are worried about the cost of managing environmental risk or clean-up, then I guess, to put it in very plain terms, what is the point if there is no capability?

Mr BENNETT: Put an EPO on a related person but they have a dollar left.

Mr Robson: That is right, yes. The bill provides that tool to issue an EPO on a related person if there is a related person that has capability or ability to otherwise influence the performance of the company. In that respect it is something that we have noticed is a constraint on our current ability to act. I will try to illustrate it for you. In an example where we are concerned about a site because it requires ongoing maintenance to avoid environmental harm and then that site goes into voluntary administration, there are always, of course, the broad concerns around the social and economic impacts of that. I duly acknowledge that, but as an environmental regulator the department's concerns would be with respect to the capability of the operation of that site to be maintained to avoid environmental harm. At the moment we are only allowed to issue an EPO very directly on the operator that holds the EA. This gives us the ability to see if there is a related party with the ability to influence that company and with capability to avoid the harm. Perhaps the best illustration might be if the company going into voluntary administration is a subsidiary and there is the ability of the parent company to be responsible and deal with those obligations. Then if we were concerned that the operator was not managing its environmental obligations we would then have the ability to issue the EPO on the parent company.

Mr BENNETT: There are a lot of old mine sites across Queensland that are under maintenance provisions now that we know are somewhat problematic. Is there some retrospectivity in capturing some of those sites that may have a potential environmental impact that are now sitting basically uncared for and unloved? We have them under care and maintenance. Is that what it is called?

Mr Robson: There is care and maintenance but, generally speaking, that is the operation of the company itself. I will need to be a bit cautious here because I am straying into areas that are handled often by the Department of Natural Resources and Mines as well because they manage what is called the Abandoned Mines Program. I need to distinguish from that. With respect to care and maintenance, if a site is in care and maintenance and is being taken care of and is being maintained then really this bill is where environmental obligations are not being maintained or are not being cared for. Potentially, if there were a site like that, whether it be an operating mine or a mine in care and maintenance, if it is the case that environmental obligations are not being adhered to then obviously we have powers at the moment to require compliance with an environmental authority and, as I have indicated, this bill gives us some additional tools in that regard.

Mr BENNETT: To capture those?

Mr Robson: Potentially, yes.

Mr BENNETT: You talked about bank guarantees being part of the legislation at the front end of this. In future would we see more financial impetus put on the starting up of a high-risk activity under bank guarantees?

Mr Robson: Under the existing legislation we would have the ability to put a condition on an EA to require financial assurance. One of the issues we have here is that, if there is an existing environmental authority that does not have that condition, we cannot require it on the transfer of the EA, so the bill addresses that concern.

CHAIR: There being no other questions from the committee that brings the committee hearing to a close. I thank departmental officers for their communication today. I remind everyone with an interest in this bill that the closing date for lodging written submissions is Tuesday, 31 March. I now declare this meeting closed.

Committee adjourned at 9.10 am