Parliamentary Committees

Environmental Protection (Chain of Responsibility) Amendment Bill 2016

Report No. 16, 55th Parliament
Agriculture and Environment Committee
April 2016

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Abbreviations

AMCS	Australian Marine Conservation Society
AMEC	Association of Mining and Exploration Companies
APPEA	Australian Petroleum Production & Exploration Association Ltd
BREC	Brisbane Region Environment Council
CCIQ	Chamber of Commerce and Industry Queensland
DEHP (EHP)	Department of Environment and Heritage Protection
DNRM (NRM)	Department of Natural Resources and Mines
EA	Environmental authority
EDO Q	Environmental Defenders Office Queensland
EDO NQ	Environmental Defenders Office North Queensland
EPO	Environmental protection order
FLP	Fundamental legislative principle
LTGA	Lock the Gate Alliance
NQLC	North Queensland Land Council
PCA	Property Council of Australia
QLS	Queensland Law Society
TEP	Transitional environmental program
WWF	World Wide Fund for Nature Australia

Chair's foreword

This report presents a summary of the Agriculture and Environment Committee's examination of the Environmental Protection (Chain of responsibility) Amendment Bill 2016.

Queenslanders have very clear views about the importance of protecting our unique natural environment. This came across very clearly in the submissions to our inquiry. Queenslanders also have very clear expectations of the role they expect government to play to ensure that businesses and companies that pollute and cause damage to the environment are held accountable for their actions, and that they clean up whatever mess they make before they move on.

Sadly this has not always happened. Our inquiry highlighted a litany of mine sites and other intensive industries where the owners have, or may, default on their environmental responsibilities, leaving a huge mess for the State to fix. In the current resources downturn, this problem has become all too common. The Bill is clearly designed to equip the Department of Environment and Heritage Protection with the authorities and investigative powers to address these problems, and to hold those responsible for environmental damage accountable – something virtually every stakeholder involved in the inquiry has supported. The committee also supports the Bills objectives, though we may differ in our views on some of the provisions.

The submissions and evidence from our public hearings have been invaluable to our work. We sincerely thank everyone who took the time to share their views with us.

The committee has recommended a number of amendments, based on practical concerns raised during the inquiry. We believe the amendments we have recommended will improve the provisions of the Bill, and help to ensure the risks of unintended consequences of the legislation are minimised.

Finally I thank committee members for their work on this Bill.

I commend this report to the House.

Glenn Butcher MP
Chair
April 2016

Recommendations

Points for clarification

Point for clarification **10**

The committee invites the Minister to assure the House that the liabilities and obligations the Bill seeks to impose on executive officers do not duplicate or interfere with the responsibilities of executive officers under the *Corporations Act 2001 (Cwth)* or the COAG principles of executive officer liability.

Point for clarification **32**

The committee invites the Minister to inform the House on the administration of the financial assurance framework by his department, including: information on the numbers of mining, minerals processing, gas and petroleum sites in Queensland; the numbers of sites against which the government holds financial assurance; the amount of financial assurance held; and the proportion of these sites held by companies deemed 'high risk'.

1. Introduction

Role of the committee

The Agriculture and Environment Committee (the committee) is a portfolio committee appointed by resolution of the Legislative Assembly on 27 March 2015. The committee's primary areas of responsibility are:

- Agriculture and Fisheries
- Environment and Heritage Protection
- National Parks and the Great Barrier Reef.[1]

In its work on Bills referred to it by the Legislative Assembly, the committee is responsible for considering the policy to be given effect and the application of the fundamental legislative principles (FLPs).[2]

In its examination of Bills, the committee considers the effectiveness of consultation with stakeholders, and may also examine how departments propose to implement provisions that are enacted.

FLPs are defined in section 4 of the *Legislative Standards Act 1992* as the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament.

Referral of the Bill

On 15 March 2016, Hon Dr Steven Miles MP, Minister for Environment and Heritage Protection and Minister for National Parks and the Great Barrier Reef (the Minister), introduced the Environmental Protection (Chain of Responsibility) Amendment Bill 2016 (the Bill).

The Bill was referred to the committee by the Legislative Assembly for examination. The committee was required to report by 15 April 2016.

Committee process

During its examination of the Bill, the committee:

- notified stakeholders of the committee's examination of the Bill and invited written submissions. A list of submissions is at **Appendix A**
- sought further written information from the Department of Environment and Heritage Protection (DEHP) in relation to issues raised in submissions and about the fundamental legislative principles issues raised by the Bill. A summary of the submissions and advice provides by DEHP is at **Appendix B**, and
- convened a public briefing by DEHP officers on 18 March. Public hearings and a further departmental briefing were held on 5 April 2016. The departmental officers who briefed the committee and the witnesses who appeared at the hearings are listed at **Appendix C**.

1 Schedule 6 of the Standing Rules and Orders of the Legislative Assembly of Queensland.
2 Section 93 of the *Parliament of Queensland Act 2001*.

Policy objectives of the Bill

The Environmental Protection (Chain of Responsibility) Amendment Bill 2016 proposes amendments to the *Environmental Protection Act 1994* (the EP Act. These amendments are designed to:

- facilitate enhanced environmental protection for sites operated by companies in financial difficulty, and
- avoid the State bearing the costs for managing and rehabilitating sites in financial difficulty.[3]

The Explanatory Notes state that, in the past 12 months, the Department of Environment and Heritage Protection (DEHP) has confronted increasing difficulties in ensuring that sites such operated by companies in financial difficulty continue to comply with their environmental obligations. This has included sites such as the Yabulu Nickel Refinery, Texas Silver Mine, Collingwood Tin Mine and Mount Chalmers Gold Mine.[4]

The Explanatory Notes state that the Bill achieves its objectives by:

- allowing environmental protection orders (EPOs) to be issued to a party that has some relevant relationship to the company that is in financial difficulty (which may include, for example, a parent company or executive officer)
- providing that if one of these environmental protection orders is issued, and the recipient fails to comply with it, DEHP may require the recipient to pay the costs of taking action stated in the order or monitoring compliance with the order
- enabling DEHP to amend environmental authorities when they are transferred to impose a condition requiring the provision of financial assurance
- ensuring that authorised officers under the EP Act have powers to access sites no longer subject to an environmental authority and sites still subject to an environmental authority but no longer in operation
- compelling persons 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 committed by that company)
- expanding the ability of DEHP to access information for evidentiary purposes, and
- increasing 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.[5]

Consultation and regulatory impacts

Despite the wide implications of the Bill, few stakeholders were briefed on the Bill prior to its introduction. The department advised the committee that it did not consult stakeholders, or prepare a regulatory impact statement (RIS), because of the urgent nature of the Bill, and to prevent companies from acting to avoid the operation of the Bill as soon as they became aware of its potential introduction.[6]

3 *Environmental Protection (Chain of Responsibility) Amendment Bill 2016, Explanatory Notes* (Explanatory Notes), p.1.
4 Explanatory Notes, p.1.
5 Explanatory Notes, p.2.
6 Department of Environment and Heritage, 2016, *Correspondence*, 8 April.

The committee notes that some regulation may be excluded from the RIS system, including regulation '…for a matter than requires an immediate legislative response to prevent damage to property or injury to persons, and to which the additional time required by the preparation of a RIS would represent an unacceptable increase in the risk of damage or injury.'[7]

Estimated costs for Government

The Explanatory Notes state that no significant costs to government are currently envisaged for the proposed changes to the EP Act, and that any increases associated with the implementation of the new provisions will be met from existing agency budget allocations.[8]

Committee comment

The Bill seeks to amend the *Environmental Protection Act 1994* to ensure environmental obligations for sites will continue to be met and to minimise the potential liabilities for the State, regardless of the financial circumstances of companies operating those sites. The explanatory Notes highlight a number of sites in financial difficulties, including the Yabulu nickel refinery in Townsville.

The Bill proposes to expand the capacity of the Department of Environment and Heritage Protection, as the administering authority, to issue environmental protection orders, to require financial assurance as an additional condition of environmental authorities for sites when transferred, and to investigate and collect information for its compliance and enforcement work. The Bill would also impose new conditions on when courts can stay decisions about financial assurance and the issue of environmental protection orders.

The department conducted no stakeholder or public consultation for the Bill, and did not prepare a regulatory impact statement. The committee's assessment of the regulatory impacts of the Bill are therefore based on the views of submitters and advice from the department during the inquiry.

The committee notes the advice in the Explanatory Notes that the Bill does not impose significant costs for government. The committee acknowledges, however, the concerns expressed by a significant number of submitters that issues remained with the potential cost implications of the Bill.

Should the Bill be passed?

As required by Standing Order 132(1), the committee has considered whether or not to recommend the Bill be passed.

Recommendation 1

The Committee could not agree whether the Environmental Protection (Chain of Responsibility) Amendment Bill 2016 should be passed with the amendments proposed in this report.

[7] Queensland Treasury, 2013, *Regulatory Impact Statement System Guidelines*, p.24.

[8] Explanatory Notes, p.2.

2. Examination of the Environmental Protection (Chain of Responsibility) Amendment Bill 2016

The following sections discuss the key provisions of the Bill and the committee's conclusions based on information provided by DEHP and the issues and views expressed by submitters and witnesses at the public hearings for the inquiry. The summary of submissions at Appendix B provides a summary of the issues raised by submitters and the advice provided by DEHP to the committee in response.

Clause 3: Environmental authorities and financial assurance

Clause 3 amends section 215 of the EP Act to permit the administering authority (DEHP) to amend an environmental authority, where:

- an environmental authority (EA) is transferred to another holder, or
- an environmental protection order (EPO) is amended or withdrawn.

New section 215(3) of the EP Act provides that an amendment to an EA, as a result of the authority being transferred to another holder, is limited to imposing a condition requiring the new holder to give financial assurance to the department.

Clause 4: Amendment of s 332 (Administering authority may require draft program)

Clause 4 amends section 332 of the EP Act to allow the department to require the preparation of a transitional environmental program (TEP) if an EPO has been amended or withdrawn.

Committee comment

The majority of the committee support the proposed amendment of section 215 at clauses 3 and the proposed amendment of section 332 at clause 4.

The committee notes an error in the Explanatory Notes on page 5 - 'chapter 5, part 7, division 2' should be 'chapter 7, part 5, division 2'.

Clauses 5 to 8: Issuing of environmental protection orders to related persons of companies

Clause 5 inserts a new heading 'Division 1' which would cover existing provisions about environmental protection orders (EPOs).

Clause 6 of the Bill amends section 358 of the EP Act to allow the department to issue an EPO in additional circumstances to parties that are 'related persons' of the company responsible for the offending behaviour. These persons and circumstances are defined in new Division 2 of Chapter 7, Part 5 of the EP Act to be inserted by **clause 7** of the Bill.

Committee comment

The committee supports the insertion of the 'Division 1' heading proposed in clauses 5, and the expansion of the circumstances in which the administering authority (DEHP) may issue an EPO, as well as the persons to whom EPOs may be issued.

Clause 7 inserts new Division 2 which contains nine sections, 363AA - 363AI.

New section 363AA, Definition for division

This section inserts a number of definitions for new Division 2:

- associated entity
- financial interest
- high risk company
- holding company
- interest
- related person (refers to section 363AB), and
- relevant activity.

Committee comment

The committee supports the definitions to be inserted in new section 363AA of clause 7. The committee heard from a number of submitters during the inquiry about the absence of a definition for 'executive officer' in new section 363AA. The committee concludes that a more comprehensive list of definitions including definitions for 'executive officer' and related person' would be beneficial for readers of the legislation.

Recommendation 2

The committee recommends that the Minister consider amending clause 7 of the Bill to include other terms used in new Division 2 such as 'executive officer' and 'related person' to assist users of the legislation.

New section 363AB, Who is a *related person* of a company

The concept of extending liability to a 'related person' is new for the EP Act and seeks to extend liability to persons who are either statutorily deemed, or who are identified by the department to be in a position of influence. The Bill is seeking to extend liability to parties who are inferred to have in some way caused a harm, to have failed to prevent it or to have failed to remediate it, when they could have taken other action.. As noted by the Queensland Law Society in its submission:

> *As currently drafted, related persons may be made accountable for a company's obligations, or liable for a company's financial responsibility, as the person carrying the primary obligation and without it being established that the related person contributed to or was aware of conduct which resulted in the company failing to meet those obligations*[9]

New section 363AB(1) provides the critical definition of a 'related person' of a company. According to the section, a person is a 'related person' if:

- the person is a holding company of the company[10]

[9] Queensland Law Society, 2016, *Submission No. 20*, p.2.

[10] A 'holding company' is defined in Section 9 of the *Corporations Act 2001 (Cwth)* as a body corporate of which the first body corporate is a subsidiary.

- the person owns land on which the company carries out, or has carried out, a relevant activity[11], or
- the administering authority (DEHP) decides the person has a relevant connection with the company.

In summary, the definition for a 'related person' of a company has the potential to impose liabilities on:

- a holding company of the company
- native title holders and other owners and lessors of land on which the company's environmentally relevant activities are or were conducted, regardless of whether the owners and lessors have agreed with the activities
- employees, shareholders, service providers and contractors to the company
- financiers to the company
- private royalty holders, and
- for high risk companies, receivers of the company.

A holding company as 'related person'

The first category of 'related person' is the company's holding company of which the company is effectively a subsidiary.

This subsection of the Bill would identify a holding company as a related person to a company for the purposes of issuing an EPO without having established any fault or negligence on the part of the holding company. There is however a plausible 'chain of responsibility' connection between a company and its holding (parent) company.

Committee comment

The committee supports new section 363AB(1)(a) inserted by clause 7 that designates a holding company of a company as a related person of the company.

Owner of land as a 'related person'

The second category of 'related person' at 363AB(1)(b) is a person who owns land on which the company carries out, or has carried out, a relevant activity. As noted by the Queensland Resources Council in evidence at the committee's public hearings:

> *under section 363AB there is no limitation or qualification about a relevant connection or influence or financial interest or anything else like that if the person owns the land. That means that the grazier or agriculturalist—whoever has the underlying land—or perhaps somebody who has purchased it following rehabilitation has liability with no limitation or get-out clause there.*[12]

This category of related person is quite extensive when the wording of the section is considered together with the definition of 'land owner' contained in the dictionary at Schedule 4 of the EP Act, and includes persons who may not be a position to influence or control over the activities conducted by the company.

[11] The term 'relevant activity' is defined at new section 363AA of the EP Act as an environmentally relevant activity that was, or is being, carried out by the company under an environmental authority or that was, or is being, carried out by the company and has caused, or is causing or likely to cause, environmental harm.

[12] Queensland Law Society, 2016, *Hearing and Briefing Transcript*, 5 April, p.15.

According to the definition, 'owner' of land includes: persons with interest in freehold land; leaseholders; trustees; the transferees of Aboriginal land and Torres Strait Islander land; native title holders; mortgagees as 'mortgagees in possession' of land; mortgagees otherwise in control of land or persons appointed by mortgagees to exclusively manage and control land.

Committee comment

The committee does not agree that the 'owner' of land on which a company carries out, or has carried out, a relevant activity should be treated as a 'related person' to the company for the purposes of issuing an environmental protection order. The committee does not support the inclusion of subsection 363AB(1)(b) in clause 7.

Recommendation 3

The committee recommends that subsection 363AB(1)(b) in clause 7 be omitted from the Bill.

Persons with a relevant connection to the company

The third category of 'related person' at subsection 363AB(1)(c) is a person who the administering authority (DEHP) determines to have a 'relevant connection' to the company. Section 363AB(2) provides that the department may determine there is a relevant connection if satisfied that:

- the person is capable of benefiting financially, or has benefited financially, from carrying out a relevant activity by the company, or
- the person is, or has been at any time during the previous two years, in a position to influence the company's conduct (whether alone or jointly and whether by giving a direction or approval, by making funding available or in another way) in relation to the way in which, or extent to which, the company complies with its obligations under the EP Act.

New section 363AB(4) provides a list of factors the administering authority (DEHP) ***may*** consider in deciding whether a person has a relevant connection with a company. These factors include:

- the extent of the person's control of the company – the term 'control' is defined at section 50AA of the *Corporations Act 2001* (Cwlth) and includes both the legal and practical ability to influence decisions of the company carrying out the relevant activity[13]
- whether the person is an executive officer of the company carrying out the relevant activity, a holding company or other company with a financial interest in the company carrying out the relevant activity
- the extent of the person's financial interest in the company carrying out the relevant activity
- the extent to which a legally recognisable structure or arrangement makes, or has made, it possible for the person to receive a 'financial benefit'[14]
- any agreements or other transactions the person enters into with the company carrying out the relevant activity, its holding companies or other companies with a financial interest in the company
- the extent to which dealing with the person and the company carrying out the relevant activity, its holding companies or other companies with a financial interest in the company, are: at arm's length; on an independent, commercial footing; for the purpose of providing professional advice; or for the purpose of providing finance, including the taking of a security, and

13 Explanatory Notes, p.7.

14 Proposed section 363AB(6) states that 'financial benefit' received by a person includes profit, income, revenue, a dividend, a distribution, money's worth, an advantage, priority or preference, whether direct or indirect, that is received, obtained, preferred on or enjoyed by the person.

- the extent of the person's compliance with a notice, issued under section 451 of the EP Act, to provide information relevant to the determination of whether the person has a relevant connection with the company.

According to the Explanatory Notes, the extent to which a person complies with a section 451 notice will be considered in assessing whether they have a relevant connection, and '…a person should not be able to avoid liability under division 2 by failing to comply with a direction given under another provision of the Act.[15]

Many submitters raised concerns about section 363AB(4). For example, the Chamber of Commerce and Industry Queensland in its submission commented that:

> *At its broadest, the Bill could potentially hold any relatable person with substantial financial resources accountable, despite not having any control over the activities that caused the environmental harm, in the event that the environmental authority defaults. While this is not the intent of the legislation, it is open for such an interpretation to be formed.*

And

> *Additionally, the Bill omits the provision of requiring the administering authority to pursue the 'most' related person or the person with the' most' relevant connection. Therefore, any of the related persons may be equally liable.[16]*

Committee comment

The intent of subsection 363AB(2) in clause 7 is clear to the committee, but not how the intent will be achieved. Submitters noted the very broad latitude provided in this section for the administering authority (DEHP) to identify a relevant connection between a party and a company, and have raised many valid concerns about the scope for the proposed subsection and the risk of unintended consequences. The committee also notes the critical importance of this section of the Bill to achieving the policy intent of the Bill.

The committee notes the list of factors provided at subsection 363AB(4) that <u>may</u> be considered by the department in determining a person has a relevant connection to a company. The committee also notes concerns raised by submitters that the second factor, relating to executive officers, may replicate liabilities of executive officers under the Corporations Act, and that its inclusion may conflict with reforms agreed by COAG to directors' liabilities:

'whether the person is an executive officer of the company carrying out the relevant activity, a holding company or other company with a financial interest in the company carrying out the relevant activity'

The committee invites the Minister to assure the House that this provision of the Bill does not duplicate or interfere with the responsibilities of executive officers as specified in the Corporations Act and the COAG principles of executive officer liability.

The committee also believes it would be appropriate for the House to be kept regularly informed by the Minister of the manner in which the provisions of the Bill are used by his department.

The committee believes that many of the concerns raised by submitters about the consideration of the factors listed in section 363AB(4) centre around the use of the word 'may' in the subsection. In the minds of many stakeholders, this creates uncertainty as to whether the factors will actually be considered by the department in determining a relevant connection.

15 Explanatory Notes, p.8.

16 Chamber of Commerce and Industry Queensland, 2016, *Submission No. 59*, pp.2-3.

In the circumstances, it would be appropriate for the Minister to provide explicit guidelines for how his department will determine a person's relevant connection to a company. Some committee members acknowledged that a statutory guideline would be a good start, but do not believe that it will be sufficient to achieve the Bill's stated objectives.

Point for clarification

The committee invites the Minister to assure the House that the liabilities and obligations the Bill seeks to impose on executive officers do not duplicate or interfere with the responsibilities of executive officers under the *Corporations Act 2001 (Cwth)* or the COAG principles of executive officer liability.

Recommendation 4

The committee recommends that the Bill be amended to require the Minister to table in Parliament a statutory guideline that will stipulate the manner in which the Department of Environment and Heritage protection as the administering authority will administer the provisions contained in clause 7 section 363AB, including the department's consideration of the factors listed at subsection 363AB(4) for determining a person's 'relevant connection' to a company.

New section 363AB(5) provides that the department's assessment of whether a person has a relevant connection with a company will be based by the on the factors listed at 363AB(4), both as they exist at the time the assessment is undertaken and as they have existed at any earlier time.[17]

Committee comment

The committee has no comment on the wording of subsection 363AB(5) of clause 7.

What an EPO issued to a 'related person' may cover

New section 363AC provides that the department, when issuing an EPO to a company that is, or was, carrying out the environmentally relevant activity or while an EPO is already in force, may also issue an EPO to a 'related person of the company'. According to section 363AC(2), the order issued may impose any requirement on the related person that is being, or has been, imposed on the company, as if the related person was the company.

According to the Explanatory Notes, this provision will ensure that compliance with an EPO can be achieved by enforcement against a 'related person', even if the original recipient company did not comply for any reason (e.g. if the original company lacked the financial resources to comply).[18]

Where an EPO is issued to more than one related person, new section 363AE provides that those persons may be jointly and severally liable for compliance with the order and the cost of compliance.[19]

EPOs issued to a 'related person' of a high risk company

New section 363AD provides further scope to issue EPOs in relation to companies categorised as 'high risk companies'. Section 363AA defines a 'high risk company' as:

17 Explanatory Notes, p.8.
18 Explanatory Notes, p.8.
19 Explanatory Notes, p.9.

(a) A company that is an externally-administered[20] body corporate within the meaning given by the Corporations Act, section 9; or

(b) A company that is an associated entity[21] of a company mentioned in paragraph (a).

New section 363AD provides that an EPO may be issued to a related person of a high risk company, whether or not an EPO is being issued, or has been issued, to the high risk company. The EPO issued to the related person may impose any requirement '…as if the related person were the high risk company'. In the event that the company has stopped holding an environmental authority, the order issued by the department may include any requirements that could be imposed if the company still held the environmental authority. The EPO may require the related person to:

- take action to prevent or minimise the risk of serious or material environmental harm
- take action to rehabilitate or restore land because of the environmental harm, or
- give the department a bank guarantee or other security for the related person's compliance with the order.[22]

The Explanatory Notes state that these provisions seek to ensure that existing obligations will continue to be complied with even if the high risk company can no longer fund them and even if the environmental authority has been disclaimed or otherwise ceased to be in force.[23]

Committee comment

The committee supports the wording of section 363AC of clause 7 with amendments to specify that the administering authority may only issue an environmental protection order to a related person of the company if an order in the same terms has already been issued to the company, where the company is still in existence. The committee believes this would ensure that orders will not be issued to related persons instead of the company.

Recommendation 5

The committee recommends that section 363AC of clause 7 be amended to require that the administering authority may only issue an environmental protection order to a related person of a company if the authority has also issued an environmental protection order in the same terms to the company, where the company is still in existence.

Provisions for accessing land to comply with an EPO

New section 363AF makes provision for circumstances where the related person is not the owner of the land on which action is required by an EPO. New section 383AF allows the recipient of an EPO and

20 An 'Externally-administered body corporate' within the meaning of the *Corporations Act 2001* (Cwth) section 9 includes a body corporate that is being 'wound up', in receivership, under administration, or which has executed a deed of company arrangement that has not been terminated.

21 'Associated entity' is defined as having the meaning given by the *Corporations Act 2001* (Cwth), section 50AAA. Essentially, in relation to a company, an associated entity includes an entity that: is a related body corporate; controls, or is controlled by, the company; is controlled together with the company by a third entity; or has a qualifying, material investment in, and has significant influence over, the company.

22 New subsection 363AD(4).

23 Explanatory Notes, p.9.

their contractors to enter any land necessary to comply with the order, either with the consent of the owner or on two business days' notice to the owner and occupier.[24]

New section 363AG provides that an authorised person, or a person acting under the direction of an authorised person, may take action, including entering the land in question, in the event that a related person who receives an EPO either:

- fails to comply with the order, or
- secures a stay of the order while the decision to issue an order is the subject of an internal review or an appeal.[25]

The Explanatory Notes state that 363AG will ensure that action considered necessary to prevent or minimise environmental harm can be taken at an appropriate time, without removing internal review or appeal rights.[26]

Committee comment

The committee has no comment on 363AE, 363AF or 363AG of clause 7.

Issue of a cost recovery notice

New section 363AI provides that, if the department issues an EPO to a related person, it may issue a cost recovery notice to that person if:

- the person fails to comply with the order and an authorised person takes action under new section 363AG, or
- the operation of the decision to issue an EPO is stayed due to an appeal, during the period of the stay an authorised person acts under section 363AG, and when the appeal ends, there is either: no decision; the appeal decision confirms the original decision to issue the order; or the effect of the appeal decision is to issue an order for the same purpose as the action taken by the authorised officer under section 363AG.

New section 363AI(3) provides that a cost recovery notice may claim a stated amount for costs or expenses reasonably incurred in taking action stated in an EPO or monitoring compliance with an order.

In the event that an internal review or appeal has resulted in different actions being required under the EPO, the department will only be able to recover the cost of the actions actually required by this amended EPO. In the event an internal review or appeal results in a decision that an EPO should not be issued to the recipient, costs will not be recoverable from the recipient.[27]

New section 363AH provides that obstructing the recipient of an EPO from taking action to comply with the order, without reasonable excuse, is an offence attracting a maximum penalty of 165 penalty units ($19,437.00).

Committee comment

The committee has no comment on 363AH or 363AI of clause 7.

[24] Explanatory Notes, p.10.
[25] Explanatory Notes, p.10.
[26] Explanatory Notes, p.10.
[27] Explanatory Notes, pp.10-11.

Clause 8 Amendment of s 363K (Taking action in place of recipient)

Clause 8 amends the language used in section 363K(1)(a) of the EP Act for consistency with the language used in the new Chapter 7, Part 5, division 2.

Committee comment

The committee has no comment on clause 8.

Clauses 9 to 11: Powers of authorised officers and evidentiary provisions

Entry of place to which an environmental authority applies or has applied

Clause 9(1) amends section 452 of the EP Act to allow entry by an authorised person to a place to which an environmental authority relates if five business days' notice has been given to the owner and occupier. The Explanatory Notes state that the existing provisions:

> *… did not allow for entry when activity to which the environmental authority related was not being carried out or the place was not open for business or entry because, for example, a site had been subject to receivership or administration.*[28]

The Explanatory Notes state that the previous position '…unjustifiably restricted the ability of authorised persons to monitor compliance or the risk of environmental harm on such sites'.[29]

Clause 9(2) amends section 452 to provide that an authorised person may enter a place an environmental authority has applied to, even if the environmental authority has ceased to have effect at the place by the operation of any law except the EP Act. In order to enter a place under this provision an authorised person must give at least two business days' written notice to the owner and occupier.

The Explanatory Notes stated that this will ensure that authorised persons can enter land, including to assess the risk of environmental harm, even if the environmental authority has been disclaimed or has otherwise ceased operating.[30]

Failure to attend or answer questions – self-incrimination

Clause 10 amends section 476 of the EP Act to provide that it is not a reasonable excuse for an individual to fail to answer a question asked by an authorised persons because the answer might tend to incriminate the individual.

Clause 10 clarifies, however, that any incriminating evidence is not admissible in evidence against an individual in a civil or criminal proceeding, other than a proceeding for an offence for which the falsity or misleading nature of the answer is relevant.

Evidentiary provisions

Clause 11 amends section 490 of the EP Act to expand the operation of the evidentiary provision to authorise the department to certify documents as evidence of a matter.

The Explanatory Notes state that the provision would '… allow the administering authority (DEHP) to certify that certain correspondence was received from the holder of an environmental authority'.[31]

28 Explanatory Notes, p.11.
29 Explanatory Notes, p.11.
30 Explanatory Notes, p.11.
31 Explanatory Notes, p.12.

Clauses 12 to 15: Court decisions to stay decisions

Clauses 12 and 14 amend sections 522 and 535 of the EP Act respectively. Clause 13 inserts new sections 522A and 522B. Clause 15 inserts new sections 535B and 535C into the EP Act.

The effect of new sections 522A and 535B are equivalent, that is, they relate to stays of decisions about the amount of financial assurance required under a condition of an environment authority. New sections 522B and 535C provide that the court must refuse an application for a stay of decision to issue an environmental protection order where it is satisfied there would be an unacceptable risk of serious or material environmental harm if the stay were granted. Stakeholder comments about all of these stays of decision appear under 'stay of operation of decisions' below.

Stay of decision about financial assurance

Clause 13 inserts new sections 522A and 522B into the EP Act regarding the stay of operation of particular original decisions. The explanatory notes state that new sections 522A and 522B 'address the circumstances in which certain decisions should, or may be, stayed while the subject of an application for internal review or appeal.'[32] A stay of proceedings is an order of a court preventing an action proceeding further, either before or after, a determination by a court.[33]

New section 522A provides that where an application is made to the court under section 522 of the EP Act for a stay of a decision about the amount of financial assurance required under a condition of an environmental authority, the decision may not be stayed unless DEHP has been given at least 85 percent of the amount of the financial assurance it has decided it requires.

In relation to new section 522A (Stay of decision about financial assurance) the Explanatory Notes state:

> *This new provision is intended to address situations that have arisen in which the amount of financial assurance held for an environmental authority is considered inadequate and a stay has been granted so that the administering authority is unable to enforce a decision about the amount of financial assurance. During the stay period and before the determination of the appeal, the operator can continue its operations and is generally not required to pay additional financial assurance (unless the court orders otherwise as a condition of the grant of the stay). This means that the administering authority holds insufficient financial assurance during this period, increasing the risk to the State in the event that the operator should abandon a project. A decision can effectively be delayed indefinitely by the continuous submission of new plans of operations. The Department of Environment and Heritage Protection expends significant time and resources and is left without a decision, and with inadequate financial assurance, until the court finally determines an appeal.*
>
> *This provision will ensure that the amount of financial assurance held is not significantly lower than the amount that the administering authority has decided is required, to minimise the risk that insufficient funds will be available if the financial assurance needs to be drawn on.*[34]

Section 522B Stay of decision to issue environmental protection order

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32 Explanatory notes, p.12.

33 *Butterworths Concise Australian Legal Dictionary*, second edition, 1998.

34 Explanatory notes, pp.12-13.

New section 522B provides that the land court, or court, must refuse an application for a stay of a decision to issue an environmental protection order if the court is satisfied there would be an 'unacceptable risk of serious or material environmental harm if the stay were granted'.

In relation to new section 522B, stay of decision to issue an environmental protection order, the Explanatory Notes state:

> *…a stay must not be granted under section 522 where there is an unacceptable risk that serious or material environmental harm will occur. This will ensure that, in deciding whether to stay a decision made under the EP Act, a court will have regard to at least the risk that environmental harm may occur, the seriousness of the potential harm and the timeframe within which such harm may occur.*[35]

At the final public briefing, the department told the committee:

> *Clause 13 of the bill ensures that the amount of financial assurance held for an environmental authority is adequate should a stay be granted and if the financial assurance does need to be drawn upon. This is because during the stay period and before an appeal is determined the operator can continue its operations and is generally not required to pay additional financial assurance. A decision can effectively be delayed potentially indefinitely by a continuous submission of new plans of operations which may mean the department is left with inadequate financial assurance until the outcome of the appeal is determined by the court. The new provision is intended to address situations that have arisen in which the amount of financial assurance is insufficient to address any environmental harm and rehabilitation requirements that may be ongoing during the hearing of that appeal.*[36]

Insertion of new sections 535B and 535C

Clause 15 inserts new sections 535B and 535C into the EP Act regarding the stay of operation of decisions.

New section 535B provides that where an application is made to the court for a stay of a decision about the amount of financial assurance required under a condition of an environmental authority, the decision may not be stayed unless DEHP has been given at least 85 percent of the disputes amount of the financial assurance DEHP requires.

New section 535C provides that the court must refuse an application for a stay of a decision to issue an environmental protection order if the court is satisfied there would be an 'unacceptable risk of serious or material environmental harm if the stay were granted'.[37]

Some stakeholders did not support the proposed amendments. The Queensland Environmental Law Association (QELA) raised concerns about the proposed 'limits on the Planning and Environment Court and Land Court's powers to stay an original decision made by DEHP about the amount of financial assurance to be provided under a condition of an EA'.[38] The association further contended that in

35 Explanatory notes, p.13.
36 Robson, G., 2016, *Public Hearing and Briefing transcript*, 5 April 2016, p.39.
37 New section 535C, Environmental Protection (Chain of Responsibility) Amendment Bill 2016.
38 Queensland Environmental Law Association, 2016, *Submission 38*, p.3.

circumstances where the decision to require financial assurance is in dispute, a lower percentage [less than 85 per cent] would be more appropriate.[39]

The Association of Mining and Exploration Companies (AMEC) raised concerns that the rights of companies will be severely curtailed by removing the effectiveness of a court ordered stay of a decision on an amended financial assurance.[40] According to AMEC, under the proposed changes, should a company gain a stay of decision on an amended financial assurance, the company must still provide 85 per cent of the amended financial assurance whilst the matter is heard by the courts.[41] AMEC argued that:

> *…these complex matters may take many months of years, crippling a company's ability to raise funds, explore or provide jobs whilst the liability is uncertain. AMEC views this power as the DEHP being placed in a position where they are beyond the law and not subject to judicial review. This is a position AMEC does not support and should not be given to any government agency.*[42]

The Queensland Resources Council (QRC) held the view that 85 per cent is '…an onerous position to take, particularly in cases where a proponent and [DEHP] are far apart in their calculation and assessment of an appropriate financial assurance amount'. [43] They also argued that requiring that 85 per cent must be paid assumes that calculations of the assurance amount by DEHP will never be incorrect by more than 15 per cent, and that some of its members have experienced incorrect financial assurance figures as a result of incorrect calculations.[44] Furthermore, QRC argued that an applicant may be seeking a stay for a number of reasons, of which financial assurance is only one.[45]

In response to submitters concerns, the department advised the committee:

> *The intent of the Bill is to ensure that the amount of financial assurance held for an environmental authority is adequate should a stay be granted, and if the financial assurance needs to be claimed. This is because during the stay period and before the determination of an appeal, the operator can continue its operations and is otherwise generally not required to pay additional financial assurance.*[46]

In addition, the department advised:

> *A decision on the amount and form of financial assurance and the subsequent submission of financial assurance can effectively be delayed indefinitely by the continuous submission of new plans of operations, which means that the department is left with inadequate financial assurance until the court finally determines an appeal.*
>
> *This new provision is intended to address situations that have arisen in which the amount of financial assurance is insufficient to address any environmental harm and rehabilitation requirements.*[47]

39 Queensland Environmental Law Association, 2016, *Submission 38*, p.3.
40 Association of Mining and Exploration Companies, 2016, *Submission 40*, p.2.
41 Association of Mining and Exploration Companies, 2016, *Submission 40*, p.2.
42 Association of Mining and Exploration Companies, 2016, *Submission 40*, pp.2-3.
43 Queensland Resources Council, 2016, *Submission 42*, p.7.
44 Queensland Resources Council, 2016, *Submission 42*, p.7.
45 Queensland Resources Council, 2016, *Submission 42*, p.7.
46 Department of Environment and Heritage Protection, 2016, *Correspondence,* 8 April.
47 Department of Environment and Heritage Protection, 2016, *Correspondence,* 8 April.

Committee comment

The committee does not support the requirements at sections 522A and 535B of clause 15 that at least 85% of the amount of financial assurance required by the administering authority (DEHP) must be paid as a condition of the granting of stay orders. The committee agrees with the Queensland Resources Council, the Queensland Environmental Law Association, the Association of Mining and Exploration Companies and other stakeholders that requiring 85% of the disputed assurance amount to be paid while the matter is heard by a court is an onerous requirement.

The committee recommends that the department consult with these organisations and other stakeholders to identify a less onerous percentage that is appropriate under the circumstances.

Recommendation 6

The committee recommends that the Minister directs his department to consult with the Queensland Law Society, Queensland Resources Council, the Queensland Environmental Law Association, the Association of Mining and Exploration Companies and other stakeholders, in relation to sections 522A 535B of clause 15, to identify a less onerous percentage that the 85% proposed that is appropriate under the circumstances.

Clause 16 – Transitional provisions - retrospectivity

How amendments apply retrospectively

Clause 16 inserts a new Chapter 13, part 25, consisting of proposed sections 744 to 747. They are transitional provisions for this Bill, which are also discussed in Chapter 4 in relation to fundamental legislative principles, as they apply retrospectively.

Proposed section 744 applies the amendments made by clause 3 of the Bill to section 215 of the Act. It will enable the department, under new subsection 215(3) to impose a condition requiring the holder of an environmental authority to give financial assurance, if another entity becomes the holder of the authority, or an environmental protection order is amended or withdrawn before the commencement of the amendments in the Bill.

The Explanatory Notes state that new section 744:

> *... will allow action to be taken under the new section215(2)(c) even if the holder of the environmental authority changed prior to commencement. This provision will prevent companies from taking action to avoid the operation of the new provision.*[48]

Proposed section 745(1) provides that a 'relevant activity' in proposed section 363AB regarding a 'relevant person' (inserted by clause 7 of the Bill) includes a relevant activity includes an activity carried out before commencement of the provisions in the Bill. The Explanatory Notes state that the proposed section "will ensure that the policy intent of the new power to issue environmental protection orders can be achieved and is not limited by when the relevant environmentally relevant activity was carried out."[49]

48 Explanatory Notes, p.13.

49 Explanatory Notes, p.14.

Proposed section 745(2) provides that the department, when deciding in making a decision under proposed section 363AB whether a person has a relevant connection with a company, may consider include acts, omissions and circumstances occurring before commencement. The Explanatory Notes state that actions which have resulted in the need for an environmental protection order may well have been precipitated by decisions made or profits earned well in advance of the environmental issues emerging.[50]

The power to issue environmental protection orders to a 'related person' is extended by proposed section 746 to 15 March 2016, the day the Bill was introduced into the Legislative Assembly. The proposed section extends the power to issue an order to a person under proposed section 363AC or 363AD who was not a 'related person' when or after the amendments commence but who was during the transitional period a related person of the company. The 'transitional period' is defined to mean the period from the start of 15 March 2016 to the day the amendments commence. This will allow environmental protection orders "to be issued to entities who were related persons for a company upon introduction of the Bill but had ceased to be related persons by commencement."[51]

Proposed section 747 provides that an environmental protection order issued under section 363AC or 363AD may impose requirements relating to a relevant activity or environmental harm that was caused, before the provisions in the Bill commenced.

Stakeholder views

Stakeholders views about the retrospective operation of the capacity of the department to issue an order to a 'related person' are discussed in relation to clause 7 of the Bill, in Part 2 of this report. Some stakeholders were concerned at the broad scope of who may be potentially subject to an order. For example, the Queensland Environmental Law Association was concerned about the implications of retrospective application for landowners and investors:

> *... landowners that have no involvement in the activity and who will not have structured any land-use agreements to accommodate the additional liability the Bill will potentially attribute to them. Retrospective application could also dramatically change the risk profiles of investors and corporate structures in such a way not anticipated at the time of investment or structuring.*[52]

50 Explanatory Notes, p.14.
51 Explanatory Notes, p.14.
52 Queensland Environmental Law Association, 2016, *Submission 38*, p.3.

3. Fundamental legislative principles and explanatory notes

Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that *fundamental legislative principles* are the "principles relating to legislation that underlie a parliamentary democracy based on the rule of law". The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The Committee has examined the application of the fundamental legislative principles (FLPs) to the Bill. The Committee brings the following to the attention of the House.

Rights and liberties of individuals

Clause 7 – related person and environmental protection orders

Clause 7 inserts proposed sections 363AB and 363AD, which are discussed in Part 2 of this report.

Section 363AB provides further grounds for issuing an environmental protection order (EPO) through the definition of 'related person' and the current definition of 'owner of land' pursuant to schedule 4 of the Act. It is likely that these new provisions will impact on a greater number of individuals and groups who may not previously been subject to an EPO. Whether a person is subject to an EPO may ultimately be determined by the administrating authority and the specific circumstances of the matter.

Should an individual be deemed to be a 'related person' of a high risk company they will be required to carry out significant rehabilitation activities as well as any requirements that could be imposed if the 'high risk' company still held an environmental authority.

The wider impact of these provisions potentially breaches the rights and liberties of individuals pursuant to section 4(2)(a) of the *Legislative Standards Act 1992*.

The Explanatory Notes acknowledge the potential FLP and provide the following justification for the expanded definition of relevant person:

> *The powers have been expanded because of the need to ensure that substantial environmental legacies are not left to the State. In circumstances in which a company has limited assets and limited financial capacity to comply with an environmental protection order, the administering authority should have the power to effectively seek to enforce a chain of responsibility for the relevant environmental obligations. In order for the chain of responsibility provisions to be used, there needs to be a 'relevant connection' with the company operating the site. Any person that is made to be liable must have benefitted financially, or been capable of benefitting financially, from the carrying out of a relevant activity or have been in a position to influence the company's conduct in relation to its environmental obligations. It is considered that a person with such a connection bears some responsibility for the actions of the company operating the site.*
>
> *A decision that a person is a 'related person' and a decision to issue an order under the new powers are both reviewable.*[53]

[53] Explanatory Notes, p.3

Section 521(7) of the Act provides that an internal review of decision application must not be dealt with by the person who made the original decision or a person in a less senior office than the person who made the original decision.

The provisions of clause 7 are expected to result in a broad range of individuals and entities being deemed to be a 'related person' to a company and in doing so, impose significant requirements on them.

The committee notes that in determining a relevant person, a 'relevant connection' to the company is required. Although the criteria to determine a relevant connection is not exhaustive, several factors which the department may consider are set out at section 363AB(4). The committee asked the department to advise in what circumstances the matters in subsection 363AB(4) would not be considered when deciding whether a person has a relevant connection.

Request for advice

The committee requested an explanation of the circumstances in which a landowner, director, contractor, service provider, shareholder or an employee could be considered a 'related person'. The committee asked whether any time limits or other limitations apply to the 'related person' decision.

DEHP advice

> *The regime created by the Bill is, in essence, an anti-avoidance regime which will allow the regulator to identify and issue directions to parties who can, and ought to, resolve a risk to a matter of significant public interest.*
>
> *Section 363AB will result in an assessment of the nature and extent of the relationship between a person and the person carrying out the environmentally relevant activity, to determine whether the person is a 'related person' who should have acted proactively to prevent a risk to the environment from arising and who ought to be required to act to address the consequences of that failure.*
>
> *The regulator will take steps under the new powers only where there is a present danger to the environment which entities with a relevant connection have failed to prevent. Those entities may have any of the connections to the company which are identified in s363AB.*
>
> *The 'related person' and 'relevant connection' tests are designed to be applicable to the range of corporate relationships which may exist now or in the future and to limit the potential for the creation of corporate structures designed to facilitate avoidance.*
>
> *While the Bill allows the administering authority to examine the extent of a person's influence over the previous two years, it does not place a specific limit on the period in which other factors may be relevant.*
>
> *The owner of the land upon which the environmentally relevant activity is carried out will be a 'related person' to which an environmental protection order (EPO) may be issued to under the proposed new powers. However, the administering authority has discretion in deciding which, if any, of the 'related persons' an EPO should be issued to. The administering authority could, for example, decide that the circumstances warrant the issue of an EPO to a holding company or person with a 'relevant connection' rather than to the owner of the land. It is acknowledged that stakeholders have raised reasonable 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 (such as the owners of the underlying tenure of mining and petroleum leases and native title parties).

An employee might arguably be said to have benefitted financially from the carrying out of the environmentally relevant activity. However, in deciding whether an employee should be determined to have a 'relevant connection', the administering authority would need to consider the criteria listed in section 363AB(4). That assessment would include the extent of the person's control of the company and the extent of the person's financial interest in the company. For the typical employee, each of these would be likely to be low, indicating that they do not have a 'relevant connection'.

While a shareholder might have the capacity to benefit financially for the purposes of the 'relevant connection' test, before concluding that they were a related person, the administering authority would need to assess factors including the extent of their financial interest and whether they were also an executive officer. If the extent of their financial interest was small and none of the other factors listed in section 363AB(4) demonstrated a connection of financial interest or influence, the shareholder would not be considered a 'related person'.

In the case of service providers or contractors, while they might benefit financially from the carrying out of the relevant activity, if the administering authority found that their contract with the Environmental Authority (EA) holder was negotiated at 'arm's length' for the purposes of section 363AB(4)(f) and that none of the other factors in section 363AB(4) applied, then they would not be found to be a 'related person'. By contrast, if the service provider was part of the corporate group of the EA holder, had common executive officers, a capacity to influence environmental compliance on the site and/or received a share of profits or was used for profit-shifting purposes, then there would be grounds for considering them a 'related person'.

Committee comment

The committee notes the department's detailed response.

Request for advice

The committee requested advice on how the delegation of power to the 'administering authority' to decide whether a person has a 'relevant connection' is justified**.**

DEHP advice

Parliament has equipped the Department of Environment and Heritage Protection, as the administering authority under the Environmental Protection Act 1994, with the powers to undertake its role as a regulator in pursuing the objectives of the Act. The Bill takes an entirely consistent approach by providing the administering authority with the powers necessary to undertake its functions effectively in the current environment.

The decision to use any of the enforcement tools under the Act sits with the administering authority. The approach in the Bill of providing the administering authority with the power to decide to issue an EPO is consistent with the current power to issue EPOs and with all other enforcement powers contained in the Act.

Committee comment

The committee notes the department's advice.

Request for advice

The committee requested advice on whether clause 7 conforms with the Office of Queensland Parliamentary Counsel Guideline on Clear Meaning in relation to the delegation of authority.

DEHP advice

The Bill was prepared and certified by the Office of Queensland Parliamentary Counsel. Its drafting, including in clause 7, accords with the Principles of good legislation: OQPC guide to FLPs (the Guideline).

The Guideline advises that specific care needs to be taken in drafting certain types of provisions, including provisions conferring power and the criteria for the exercise of power.

The Guideline specifies that a provision conferring power should clearly express the nature of the power, when it can be exercised, who it may be exercised by and, where appropriate, provide guidance as to how the entity upon which the power is conferred should exercise it.

The Bill clearly establishes that the power to issue an EPO under section 363AC or 363AD is conferred upon the administering authority and is exercisable in the circumstances listed in section 358 which include for the purposes of securing compliance with the conditions of an EA or with the general environmental duty. The nature of the power (to issue an EPO), who it may be exercised by (the administering authority) and when it may be exercised (in the circumstances listed in section 358) are, therefore, clearly defined in accordance with the advice contained in the Guideline.

Section 363AB will guide the administering authority through the steps necessary to decide whether a person is a 'related person' to which an EPO may be given, including by having regard to a list of specific qualitative criteria to be considered in determining whether a person is a 'related person' on the basis of a 'relevant connection'. Therefore, it is considered that the drafting of criteria for the exercise of the power complies with the Guideline.

Committee comment

The committee notes the department's assurances that clause 7 conforms with the Office of Queensland Parliamentary Counsel Guideline on Clear Meaning.

Request for advice

The committee requested advice in relation to the circumstances in which the matters listed in section 363AB(4) should not be considered by the administering authority in deciding whether a person has a 'relevant connection'.

DEHP advice

> *The Bill provides the administering authority with the power seek out, and issue an EPO to, those entities which could, and ought to have, taken steps to prevent significant environmental harm and requires them to take action to remedy this failure to act.*
>
> *The administering authority may decide that a person has a relevant connection with a company if it is satisfied either that the person is capable of benefitting financially (or has benefitted financially) from the carrying out of the relevant activity or that the person has, in the previous two years, been in a position to influence the extent to which environmental obligations have been complied with.*
>
> *Section 363AB(4) is an inclusive list of the factors to which the administering authority may have regard in deciding whether a person has a 'relevant connection' on either basis. The principles of administrative law dictate that, in making that decision, the administering authority must have regard to any factors which are relevant and must not have regard to factors which are irrelevant. In so far as the factors listed in this subsection are potentially relevant to the nature of the relationship between the company and the potentially 'related person', they will need to be considered. If a factor is not relevant, in light of the nature of the relationship under consideration, then it should not be considered.*

Committee comment

The committee notes the department's advice.

Clause 10 – Protection against self-incrimination

Currently, section 476(1) of the Act provides that if an authorised person requires a person under section 465 to answer a question or attend a stated reasonable place at a stated reasonable time to answer questions, then pursuant to section 476(2), the person must comply with the requirement, unless they have a reasonable excuse for not complying. Section 476(3) provides that it is a reasonable excuse if the answer to the question might tend to incriminate the individual.

Clause 10 amends section 476(3) of the Act to provide that for subsection (2), it is not a reasonable excuse for an individual to fail to answer a question because complying with the requirement might tend to incriminate the individual.

Proposed section 476(3A) provides that incriminating evidence for an individual who answers a question is not admissible in evidence against the individual in a civil or criminal proceeding, other than a proceeding for an offence for which the falsity or misleading nature of the answer is relevant.

Clause 10 will require an individual to answer a question without the protection of self-incrimination as a reasonable excuse. Pursuant to section 476(3A) there is no 'derivative use' of the information, meaning that the information cannot be used against the individual in a civil or criminal proceeding, other than in relation to the falsity of evidence provided. The clause is a potential breach of section

4(3)(f) of the *Legislative Standards Act 1992* which provides that a Bill should provide appropriate protection against self-incrimination.

Request for advice

The committee requested examples of the difficulties that could arise that justify the removal of the protection from self-incrimination.

DEHP advice

> *In investigating whether a corporation has committed an offence under the Environmental Protection Act 1994 and, in particular, in investigating whether the more serious offences of a wilful nature have been committed, one of the important tools available to the department is the ability to require persons to answer questions.*
>
> *Information about the circumstances surrounding an offence often resides with the employees of a company. Where that information relates to whether the offence was committed intentionally, recklessly or with gross negligence (and therefore falls into the more serious category of wilful offences), the relevant information often resides with employees who are executive officers. Executive officers potentially have personal liability for certain offences under the Act and may therefore decline to answer questions on the basis of the privilege against self-incrimination. The potential for personal liability can, in that way, prevent corporations from being properly investigated and held to account for their poor environmental performance.*

Request for advice

The committee asked the department why it considers clause 10 to provide appropriate protection against self-incrimination.

DEHP advice

> *Clause 10 will require a person to answer a question even if the answer might incriminate them. However, that answer, and any evidence directly or indirectly derived from it, 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). In these circumstances, the department considers that the Bill provides appropriate protection against self-incrimination.*

Committee comment

The principle that a person should not be obliged to incriminate themselves is a long established principle of common law. Denial of this protection against self-incrimination is potentially justifiable if the questions posed are peculiarly in the knowledge of the person to whom they are directed and it would be difficult or impossible to establish the evidence in another way. In addition, to be justifiable, the legislation should prohibit use of the information obtained in a prosecution against the person.

The committee notes that the Explanatory Notes did not identify clause 10 as a potential breach of the FLPs. The committee also notes that the provision does not enable derivative use of the information, and considers that the departure from the FLPs is justifiable in this instance.

Clause 16 – Retrospectivity

Clause 16 inserts proposed sections 744, 745 and 747 and allows for the retrospective operation of these provisions before the commencement of the Act.

Section 744 provides that a reference in section 215(2)(c) to an entity becoming the holder of an environmental authority includes an entity becoming the holder before commencement.

Pursuant to section 745(1), a reference in section 363AB (Who is a related person of a company) to a relevant activity carried out by a company includes a relevant activity carried out before commencement. Section 745(2) provides that in making a decision under section 363AB about whether a person has a 'relevant connection' with a company, the matters the administering authority may consider include acts, omissions and circumstances occurring before commencement.

Section 747 provides that an environmental protection order issued under section 363AC (Order may be issued to related person) or 363AD (Order may be issued to related person of high risk company) may impose requirements relating to a relevant activity carried out, or environmental harm caused, before commencement.

In allowing for matters to considered that occurred before commencement of the Act, clauses 744, 745 and 747 potentially breach section 4(3)(g) of the Legislative Standards Act 1992 which provides that legislation should not adversely affect rights and liberties, or impose obligations, retrospectively.

Committee comment

The committee notes the department's advice.

Request for advice

The committee asked for advice on why it is considered necessary for proposed section 744, 745 and 747 to apply retrospectively to a 'related person', who may have had limited or no involvement in matters occurring before the commencement.

DEHP advice

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.

No part of the Bill will extend environmental obligations to entities which have had limited, or no, involvement in the relevant activity. The regime created by the Bill will allow the administering authority to require entities to remedy harm or risks which they ought to have addressed without the need for compulsion.

Sections 745 and 746 will ensure that entities which have had significant involvement in, and responsibility for, environmental harm prior to commencement can be the subject of an EPO under the new provisions.

Section 745(1) allows an EPO under the new provisions to be issued in relation to an environmentally relevant activity which ceased prior to the commencement of the Bill. This would apply where, for example, a company has ceased to trade because it has entered into voluntary administration. Such an EPO could not be directed to a person who has had no or limited involvement in matters prior to commencement. Such an EPO could only be issued to entities which could, and ought to have, taken action to prevent the very risk or harm that the EPO remedying.

Section 745(2) ensures that the date of commencement doesn't create an artificial barrier to an examination of the entities which actually have a 'relevant connection' and which are, in that way, responsible for the harm. It is intended to allow an examination of connections and actions which occurred prior to commencement to ensure that those who are responsible for the harm bear the cost. This provision will not affect entities which have had limited or no involvement prior to commencement.

Section 746 will ensure that an EPO under the new provisions can be issued to a person who had a 'relevant connection' upon introduction of the Bill but who has ceased to have a connection by commencement. This provision is intended to capture entities which had significant involvement prior to commencement. The provision will not affect entities which have had limited or no involvement before commencement.

Committee comment

The committee notes the department's advice.

Request for advice

The committee requested explanation of how proposed sections 744, 745 and 747 have sufficient regard to the rights and liberties of individuals.

DEHP advice

> *The regime created by the Bill applies to businesses which have carried out environmentally relevant activities under environmental authorities in circumstances where there is a risk that the activity may cause harm to the environment. The regime does not attach liability to, or affect, individuals in their private capacity; it is directed to the conduct of businesses carrying out potentially harmful activities.*
>
> *The retrospective application of the legislation is considered justifiable given the public interest in environmental protection. The Bill ensures that the department is able to reach entities that have genuine responsibility for managing and preventing environmental harm.*

Committee comment

The committee notes the department's advice.

Administrative power

Section 363AB(4)(g) provides that in determining a person's relevant connection to a company, their compliance with the information requirements of section 451 of the Act should be taken into account. However, the clause does not allow for an internal right of review or a right of appeal in relation to a decision based on the section. Section 451(3)(f) itself states that the notice to the person must state the review or appeal details.

The lack of an internal review and appeal process is a potential breach of section 4(3)(a) of the *Legislative Standards Act 1992* which provides that an administrative power should be sufficiently defined and subject to appropriate review.

Legislation should make rights and liberties, or obligations, dependent on administrative power only if subject to appropriate review. The OQPC Notebook states:

> *Depending on the seriousness of a decision and its consequences, it is generally inappropriate to provide for administrative decision-making in legislation without providing for a review process. If individual rights and liberties are in jeopardy, a merits-based review is the most appropriate type of review.*[54]

The Explanatory Notes provide the following justification for the lack of a review and/or appeal process:

> *The Bill excludes internal review and appeal rights for a decision to require a person to give information relevant to the making of a decision under new section 363AB (whether a person has a 'relevant connection' with the high risk company). This appears to be contrary to the principle that legislation should make rights and liberties dependent on administrative power only if subject to review.*

54 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p.18

However, it is considered that this 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'.[55]

Request for advice

The committee asked for advice on how the absence of internal review and appeal rights is justified in relation to the decision to require a person to give information relevant to assessing whether a person has a 'relevant connection'.

DEHP advice

The critical elements of the regime created by the Bill are the decision that a person is a related person and the decision to issue that person an EPO, both of which are subject to internal review and appeal rights.

The only decision which is not subject to internal review and appeal is the decision to utilise the investigative powers available under the Act to identify the related person. Extending review and appeal rights to that decision has the potential to fetter the entire purpose of the regime through the potential for delay and avoidance.

The removal of review and appeal rights is considered to be justified by the significance of the objectives of the legislation. The effectiveness of the new EPO powers could be seriously compromised through delay associated with gathering information to support a decision that a person has a 'relevant connection'.

The significant public interest in the protection of the environment, and in ensuring that the taxpayer is not left with the burden of rehabilitation, is considered to outweigh any private interest in the confidentiality of information about a person's connection with a particular company.

The Bill does not remove the right to seek judicial review of the decision to require such information. As a consequence, appropriate recourse to the courts will remain available.

Committee comment

The committee notes the department's advice.

[55] Explanatory Notes, p.3

Request for advice

The committee asked for advice on the likely delay that would be encountered whilst an internal review or appeal is conducted.

DEHP advice

Internal review and appeal of a decision to require documents to inform a decision about whether a 'relevant connection' exists could involve a delay in excess of 12 months.

There have been two recent cases where such notices to require documents have been issued and challenged by the recipient. In both cases the delay was beyond 12 months, and in any event the appeal was never finally resolved, as the matter was overtaken by other events.

Committee comment

The committee notes the department's advice.

Request for advice

The committee asked whether the department considered alternative mechanisms to allow a temporary halt to activities causing environmental damage pending the outcome of an internal review or appeal.

DEHP advice

The measures required by an EPO could involve a direction that certain environmentally harmful activities be ceased. An EPO of that nature is likely to be easily enforceable against the entity actually carrying out the environmentally relevant activity. As a consequence, recourse to the EPO powers contained in the Bill is unlikely to be necessary to achieve such an outcome.

The new powers are much more likely to be exercised in circumstances where it is necessary to either clean up environmental harm that has already been caused or where active steps are required to prevent environmental harm (e.g. management of a tailings dam to prevent overflow to sensitive environments). In such cases, action may need to be taken on an urgent basis. If an EPO has been issued, then the cost of such action could be recovered under the cost recovery provisions of the Bill in the event the department needed to step in to prevent or clean up harm. If the department was not in a position to issue an EPO due to a lack of information about potential 'related persons', then the cost recovery provisions would not be available and the state would bear the cost of any actions taken.

If the right of review and appeal is available in relation to a notice requiring information about a 'relevant connection', a considerable period of time could elapse before the administering authority was in a position to even decide to issue an EPO. Following the issue of an EPO, internal review and appeal rights will arise in regards to the decision to issue the EPO, at which time the recipient of the EPO can argue that they should not have been determined to be a 'related person'.

Committee comment

The committee notes the department's advice.

Request for advice

The Committee has requested examples of situations that have arisen or are anticipated in which the department was/is unable to prevent environmental harm whilst an internal review of a decision was/is conducted or an appeal was/is resolved.

DEHP advice

> *In the short time available, we have not had the opportunity to review records of particular circumstances. However, officers believe that a number of situations have arisen where stays of enforcements tools such as clean-up notices and EPOs have created a situation where environmental harm was a significant risk.*

Explanatory Notes

Part 4 of the *Legislative Standards Act 1992* provides that an Explanatory Note must be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an Explanatory Note should contain. The Committee notes that Explanatory Notes were tabled with the Bill on its introduction in the Legislative Assembly.

Committee comment

The Committee considers that the Explanatory Notes are fairly detailed and contain the majority of information required by Part 4 of the *Legislative Standards Act 1992,* and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

4. Other matters

Abandoned mines and the financial assurance framework

A number of submitters to the inquiry raised concerns about the liabilities associated with abandoned mines in Queensland and the adequacy of the financial assurance framework for ensuring that mines are properly rehabilitated at the end of their useful life and that risks to the State associated with these sites are minimised.

Abandoned mines are resource sites that are no longer operated by environmental authority holders but have ongoing environmental management or public safety issues. A review by the Auditor General in 2013-14 cited a 2007 review that identified an estimated 15,000 abandoned mines sites in Queensland; 3,500 of them on State-owned land.[56]

A key instrument of government for the management of abandoned mines is financial assurance. Financial assurance (FA) is a type of financial security provided to the Queensland Government by the holder of an environmental authority (EA). Financial assurance is designed to provide the government with a financial security to cover any costs or expenses incurred in taking action to prevent or minimise environmental harm or rehabilitate or restore the environment, should the holder fail to meet their environmental obligations.

Financial assurance may be required as a condition of an EA or a transitional environmental program (TEP) under the EP Act, but it is not a mandatory requirement. Financial assurance was never, for example, sought by the Queensland Government in relation to the Yabulu nickel refinery. The committee also heard that the Government holds no financial assurance for the Texas Silver Mine.[57] Concerns about these sites were discussed in the Explanatory Notes to explain the reasons for the Bill's policy objectives.[58]

Financial assurances for mining environmental authorities are held by the Department of Natural Resources and Mines (DNRM), and the DEHP holds the financial assurances for all other environmental authorities (for example, for waste, petroleum and gas). According to DEHP, approximately $7 billion is held in financial assurances in Queensland. Of this amount, around $5.7 million is for mining activities, around $1 billion is for petroleum and gas activities and $31 million is held for prescribed environmentally relevant activities.

The Auditor General also found that financial assurances, where they are required, are often insufficient to cover the cost of rehabilitation, and site-specific rehabilitation is rarely enforced. Because holders of the environmental authority are unable to meet rehabilitation requirements, some sites become non-operational and go into 'care and maintenance'. According to the Auditor General, these sites are not generating royalties because they aren't operating, and are at high risk of being abandoned.[59]

The Auditor General's recommendations in 2014 from the audit included that: DEHP assume responsibility for administering all financial assurances, and ensure that assurances reflect the cost of rehabilitation; and that clear definitions, guidelines and protocols be established between DEHP and DNRM for management and transfer of 'care and maintenance' sites.

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56 Queensland Audit Office, 2014, *Environmental regulation of the resources and waste industries*, Report 15:2013-14, p.1.

57 Hutton, D., 2016, *Hearing and briefing transcript*, 5 April, p.6.

58 Explanatory Notes, p.1.

59 Queensland Audit Office, 2014, *Environmental regulation of the resources and waste industries*, Report 15:2013-14, p.42.

From the submission to the committee's inquiry, it appears that many submitters still harbor concerns about the financial assurance framework. The submission from AMEC, for example raised concerns about the administration of the framework and the continuation of operations where environmental harm was likely or imminent. At the public hearing, AMEC told the committee that in relation two mining projects, financial assurance was not applied or was missed in the transfer. AMEC noted that this failure is not an indication that the law does not work, but rather that it was not applied.

Committee comment

The committee believes it would be timely for the Minister to update the House on the administration of the financial assurance framework, and the adequacy of financial assurance held by his department.

Point for clarification

The committee invites the Minister to inform the House on the administration of the financial assurance framework by his department, including: information on the numbers of mining, minerals processing, gas and petroleum sites in Queensland; the numbers of sites against which the government holds financial assurance; the amount of financial assurance held; and the proportion of these sites held by companies deemed 'high risk'.

Appendix A – List of submissions

Sub #	Submitter
1.	Brisbane City Council
2.	Western Rivers Alliance
3.	Evolution Alliance Pty Ltd
4.	Dianne Turner
5.	Electra Frost
6.	Jeanette Dall
7.	Sharon Yoxall
8.	Matthew Roche
9.	Sean Corrigan
10.	Richard Howard
11.	PPB Advisory
12.	Laurel Wilson
13.	EnviroSure Organisation Pty Ltd
14.	Queensland Cement Concrete & Aggregates
15.	Dr Andrew White
16.	Norma Ohara Murphy
17.	Leigh Evans
18.	Catherine Kelly
19.	North Queensland Conservation Council
20.	Queensland Law Society (QLS)
21.	Lock the Gate Alliance
22.	Richard G. Pearson
23.	J Devine
24.	Mackay Conservation Group
25.	Doug Steley
26.	Kate Eagles
27.	Queensland Murray-Darling Committee (QMDC)
28.	Franklin Bruinstroop
29.	Hope Inc
30.	Property Council of Australia
31.	Jenny Fitzgibbon
32.	Christine Francies
33.	Gail Hamilton
34.	Diane Thomas
35.	Lily Podger
36.	Steve Swayne
37.	Christine Carlisle
38.	Queensland Environmental Law Association
39.	Johnathan Peter
40.	AMEC
41.	Resolve Coal Pty Ltd
42.	Queensland Resources Council
43.	Brian Clark
44.	Gecko
45.	Monica Brindle
46.	MinterEllison
47.	Drew Nichols
48.	Cairns and Far North Environment Centre
49.	Environmental Justice Australia
50.	Fraser Island Defenders Organisation

Sub #	Submitter
51.	Elizabeth Mahood
52.	Mary River Catchment Coordination Association Inc
53.	Whitsunday Residents Against Dumping
54.	Peter Smith
55.	Daley Stritzke
56.	Catherine & Eric Johnson
57.	Thiess Pty Ltd
58.	Australian Institute of Company Directors
59.	Chamber of Commerce & Industry Queensland
60.	Darling Downs Environment Council Inc
61.	WWF Australia
62.	Christine Bennett
63.	George Houen
64.	North Queensland Land Council
65.	Environmental Defenders Office of Northern Queensland
66.	Save the Mary River Coordinating Group Inc
67.	BREC
68.	Baker &McKenzie
69.	Agforce Queensland
70.	Environment Defenders Office (EDO QLD)
70A	Environment Defenders Office (EDO QLD) supplementary submission
71.	APPEAA
72.	Conondale Range Conservation Inc
73.	Pamela Linwood
74.	Judith Sinnamon
75.	Coast and Country
76.	Sister City Partners Ltd
77.	Mackay Regional Council
78.	Makensi Caldwell
79.	Colette Thomas
80.	Kieran Holmes
81.	Victoria McGuin
82.	John Paterson
83.	Brenda Mason
84.	Peter Van der Duys
85.	Gia Holma
86.	Alfred and Kate Wimblett
87.	Citizens Against Mining Ben Lomond
88.	Australian Bankers' Association Inc.
89.	Australian Finance Conference and the Australian Equipment Lessors Association

Appendix B – Summary of submissions and DEHP advice

Issue	Points	Subs	DEHP response
Consultation	• Submitters raised concerns regarding the rushed timeframe and lack of consultation on the Bill	Sub 14, 40, 42, 46, 57, 58, 59, 69, 71	No community consultation was undertaken prior to the introduction of the Bill because of the urgent nature of the Bill. It was also necessary to prevent companies from acting to avoid the operation of the Bill as soon as they became aware of its potential introduction.
RIS	• Concern for lack of Regulatory Impact Statement	Subs 59, 71	No Regulatory Impact Statement was completed because of the urgent nature of the Bill. It was also necessary to prevent companies from acting to avoid the operation of the Bill as soon as they became aware of its potential introduction.
General support for the Bill	• There was support for the Bill so that the costs of environmental damage do not fall on ratepayers and the community at large. • Arguments in support of the Bill included: o Not acceptable for ratepayers to foot the bill for damage (Sub 2,Western Rivers Alliance) o Resources sector should be held to account o Land should be restored so that it supports native vegetation and can be used for other purposes. (Sub 4, Turner) o Essential that tools available so that parent companies and directors are held responsible for rehabilitation (Sub 24, Mackay Conservation Group,) o DEHP should have legal recourse to some entities within a first company's corporate circle which benefit financially from activities of the company. Argue it may be an incentive for investors to seek more solid backing from a parent company to ensure the parent company is first in line for the 'related person' test. (Sub 68, Baker & McKenzie)	Subs 1, 2, 4, 24, 60, 61, 68, 70	Noted. Suggestions regarding the rehabilitation requirements of mining companies are beyond the scope of the Bill.
	o BCC requests equivalent powers to compel rehabilitation or clean up requirements (Sub 1)		Administration and enforcement of some provisions of the *Environmental Protection Act 1994* are devolved to local government in the *Environmental Protection Regulation 2008*. The enforcement tools available to local government need to be proportionate to the

Issue	Points	Subs	DEHP response
			environmental risks associated with the activities regulated by local government. The department intends to have further discussions with local government regarding the appropriateness of delegation following passage of the Bill.
Form submission (most differ in their wording)	• Supports the Bill. Advocates that 'the proposed legislation needs to mandate extending the responsibility for cleaning up environmental impacts to all mineral processing facilities in the State.' Supports the polluter pays principle, where those that profit from exploiting the mineral resources which are owned by the people of Queensland leave their sites in a condition without residual environmental impacts.	Subs 2, 3, 4, 5, 7, 8, 9, 12, 17, 18, 19, 22, 26, 28, 31, 32, 33, 35, 36, 44, 45, 62, 66, 76-85	Noted. The rehabilitation obligations of mineral processing facilities are contained in environmental authorities. The review of those rehabilitation obligations is outside the scope of the Bill.
General opposition to the Bill	• Unprecedented level of concern by Queensland Resources Council members (Sub 42) • The Bill will have unintended consequences for land owners, shareholders, directors • The PCA submits that a land owner on which a tenant company carries out an environmentally relevant activity may not have responsibility for these activities, and should not be potentially responsible for the tenant's behaviour. In the current wording of section 363AB(1)(b), responsibility is attributed to the current landholder for activity that may have taken place prior to their ownership of the land. This outcome is clearly contrary to the government's objective to hold those with relevant relationships to the offending company financially responsible for the required environmental management	Sub 42 Subs 40, 41, 42, 59, 64, 76	Noted. The Bill is only intended to capture those genuinely responsible for environmental harm, whether through their ability to profit from the harmful activity or through their ability to influence environmental compliance. While landowners do qualify as 'related persons', the intent of the Bill is that the administering authority would consider the full range of potential related persons, taking into account that in many cases the landowner will not have the ability to, for example, prevent the grant of a mining lease over their land. In these circumstances, it is very unlikely that the landowner would be liable in the chain of responsibility unless they also have a relevant connection to the company. In some cases, landowners will have relationships with, and capacity to exercise some control over, the entities undertaking environmentally relevant activities (ERAs) on their land. In the case of industrial land leased for the purposes of an ERA, the landowner will have had an opportunity to negotiate lease terms, such as make

Issue	Points	Subs	DEHP response
			good obligations or indemnities, which are commensurate with the risks to the land posed by the relevant activity. The Bill strikes a balance between providing certainty for industry and flexibility for the department in reaching entities that have a genuine responsibility for managing environmental harm. The potential diversity of 'related persons' means that provisions need to be drafted in a way to capture a diverse range of circumstances. The Bill is not intended to target genuine arms-length investors, including 'mum and dad' investors and those with only a small interest in a company. The department is carefully analysing the submissions in respect of the potential implications of the Bill on landowners to ensure the intent of the Bill is achieved in the drafting.

Issue	Points	Subs	DEHP response
Clause 3 financial assurances – on transfer of an environmental authority Amends s.215 re amendment of environmental authorities	<u>Submitters raised concerns about clause 3</u>, which enables changes to financial assurance obligations on transfer of an environmental authority • Queensland Law Society (QLS) argues this could materially increase transaction uncertainty for parties considering the acquisition of an asset or business that is subject to an existing environmental authority. QLS argue that provision should be included in the legislation for parties to seek indicative approval in advance of any formal application for transfer. • QLS submits that companies other than those facing financial difficulty would be captured. • Cement Concrete and Aggregates Australia (CCAA) submits 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	Sub 20 Sub 14	The department confirms that clause 3 is not limited to companies in financial difficulties. 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. Purchasers proposing to acquire a business involving an ERA could inform themselves of the risk of a financial assurance condition by recourse to the financial assurance guideline prescribed under the *Environmental Protection Regulation 2008*. Such purchasers 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 1994* and the calculation methods prescribed in the guideline. The department can also be contacted to provide guidance on likely financial assurance requirements. The Bill does not amend the existing procedure in regards to determining the amount and form of financial assurance. Clause 3 simply allows the department to impose a condition on an environmental authority to require financial assurance to be given. Review of the financial assurance system is outside the scope of the Bill.
	<u>Support for clause 3</u> • Lock the Gate Alliance (LTGA) support financial assurances so that the state is protected when new operators take over a site. Without financial assurances being held by the DEHP, there are very few powers to ensure that environmental obligations under the environmental application are met, including rehabilitation requirements.	Sub 21	Noted. There is a range of tools in the *Environmental Protection Act 1994* which can be used to deal with a breach of the legislation, to deter or prevent a person or persons from committing future breaches of the legislation, or to require someone to remedy or stop committing a breach of the legislation. Financial assurance is generally not the first or only tool used, but is an important tool.

Issue	Points	Subs	DEHP response
	<u>Review of financial assurance system:</u> • LTGA urges the committee to recommend that a full review of the current financial assurance calculator is undertaken as it relates to mining and minerals processing to ensure that the amount of financial assurance for mines and mineral processing facilities reflects the real cost of clean-up and rehabilitation. • QMDC submits that there should be public review of financial assurance agreements to ascertain whether they are fiscally adequate to provide for full restoration and meet future needs of communities. In addition, that a financial assurance should not be commercial in confidence. • B&K submit that DEHP consider progressing an urgent review of the financial assurance system and offering greater incentives for mining companies to conduct progressive rehabilitation earlier in the mine plan. • EJA supports ability of the DEHP to impose conditions requiring financial assurance on transfer of an environmental authority however argues that companies can still sell operations and avoid the imposition of financial assurance. EJA recommend the clause is amended to insert new section 215(2)(bb) 'another entity becomes the ultimate majority owner of the holder of the authority'. • QRC argue that despite assurance from DEHP, the current drafting of the Bill gives the department powers to amend environmental authority conditions, e.g. about noise because of an amended or withdrawn EPO about another matter; where there is no basis for the EPO in the first place; or where a court has amended the EPO because the original was wrong. Argue that clauses 3 and 4 should be amended to reflect the intent specified in the explanatory notes.	Sub 21 Sub 27 Sub 68 Sub 49 Sub 42	The department notes the submissions requesting review of the financial assurance system. This is outside the scope of the Bill. The department's financial assurance calculator and guideline have recently been updated by the department. The department notes the suggestion made by EJA in relation to expanding the scope of the proposed new section 215(2)(ba) to also capture share sales. In response to concerns from QRC regarding the department's power to amend environmental authorities, the relevant provision of the Bill will allow the department to make amendments it considers necessary or desirable because of the amendment or withdrawal of an EPO. As a consequence, the subject matter of any amendment is limited by the subject matter of the EPO. Furthermore, a decision to amend an environmental authority is subject to internal review and appeal rights. The review and appeal rights ensure that the powers are subject to appropriate checks and balances.

Issue	Points	Subs	DEHP response
Clause 4 Amends s. 332	• QRC do not support clause 4, for the same reasons as clause 3.	Sub 42	See response above.
Clause 7 retrospective application of 'related person'	• Some submitters do not support the retrospective application of the provision; some of the reasons given include: • it has significant implications for landowners who have had no involvement in the activity • it could dramatically change the risk profiles of investors and corporate structures in a way not anticipated at the time of investing or structuring.	Subs 38, 40, 42, 46, 58, 59, 71	Noted. While landowners do qualify as 'related persons', the intent of the Bill is that the administering authority would consider the full range of potential related persons, taking into account that in many cases the landowner will not have the ability to, for example, prevent the grant of a mining lease over their land. In these circumstances, it is very unlikely that the landowner would be liable in the chain of responsibility unless they also have a relevant connection to the company. The department is carefully analysing the submissions in respect of the potential implications of the Bill on landowners to ensure the intent of the Bill is achieved in the drafting.

Issue	Points	Subs	DEHP response
Clause 7 – issue of orders to related persons of companies, 'related person' and 'relevant connection'	**Support** for definition of 'related person' and 'relevant connection' • Environmental Defenders Office (EDO) considers there are appropriate limitations on how a person can be considered a 'relevant person' • Coast and Country submit that the limitation of two years which will apply to a 'relevant connection' is inadequate and submits the period be extended to 30 years. • North Queensland Land Council (NQLC) submits that native title holders and registered native title bodies corporate should be expressly excluded from the definition of 'related person' and 'relevant connection'. In addition, agreements between native title parties and proponents to be considered by an administering authority and such agreements must be excluded from the definition. • LTGA supports 'relevant person' provision to be adequate to hold those responsible to account.	Subs 21,24,49,75	The two year limitation applies only in considering whether a person is in a position to influence a company's conduct. The department is considering the position of native title holders and registered native title bodies, along with the other submissions that comment on the Bill's potential impacts on landowners.

	Do not support for the definition of 'related person' and 'relevant connection' as too wide and will indirectly affect those not directly involved with the management of companies. For example: • QLS consider it may have a negative impact on both the cost and supply of credit to mining and resource companies. QLS were also concerned about the provision 'relevant connection' under new section 363AB (1)(c). The QLS argued that the pool of applicable entities is too wide, which includes shareholders, employees, service providers, bankers, investors and private royalty holders. • Resolve suggests that companies will now potentially have excessive insurance costs to ensure its boards and senior management are protected from liability. • Minter Ellison (ME) states that after an EPO is issued to a related person, there is no requirement for the regulator to pursue the defaulting company or any other responsible persons. • QRC recommends the government consult with industry to develop a statutory system of rehabilitation management so that a person who buys land will know the risk involved. In addition, QRC submits that section 363(AB(1) be amended so there is a hierarchy of 'related persons'. • Thiess argues that the definition of 'related person' should be amended to clarify that it does not extend to service providers or contractors to the mining industry. • Chamber of Commerce Industry Queensland (CCIQ) is concerned about the concept of 'related persons' and the unfair treatment of landowners. • Baker &McKenzie argue that the 'related persons' test may be inflexible or limited and may constrain the effectiveness of the proposed changes by potentially enabling companies to modify their corporate relationships to fall outside the test, and by limiting the ability of these changes to cover new or innovative corporate structures.	Subs 14, 15, 20, 21, 30, 38, 40, 41, 42, 46, 57, 58, 59, 68, 69, 71, 64, 76	The Bill has been introduced in light of the limitations encountered by the department in enforcing environmental obligations. In order to correctly assess the capital costs of projects, companies should factor in the project's actual and potential environmental liability. The Bill strikes a balance between providing certainty for industry and flexibility for the department in reaching entities that have a genuine responsibility for managing environmental harm. The potential diversity of 'related persons' means that provisions need to be drafted in a way to capture a diverse range of circumstances. New section 363AB sets out qualitative criteria for the department to consider in making a decision. Subsection (4)(f) includes specific criteria that are exclusionary in effect, meaning that the definition of related person is not intended to capture professional services (such as legal or technical services) or employees. Genuine arms-length investors, including 'mum and dad' investors, merchant bankers and small shareholders, are not intended to be captured. The qualitative criteria contained in proposed new section 363AB(4) are intended to allow an examination of the full extent of the relationship between the company operating the relevant activity and any potential 'related person'. In response to the submission from Minter Ellison, the department would generally pursue the defaulting company first. There are a number of enforcement tools available under the *Environmental Protection Act 1994* which will be suitable for use in different situations. The effectiveness of the new provisions and the department's ability to use them in circumstances of imminent risk, are likely to be compromised by a provision requiring other options to be exhausted before recourse to the new powers becomes available. Recommendations from QRC to develop a statutory system of rehabilitation management are beyond the scope of the Bill.

Issue	Points	Subs	DEHP response
	• Baker & McKenzie submit that the Bill be amended to reflect that contractors and employees are not 'related persons' and arms lengths lenders such as authorised deposit taking institutions that is not a shareholder of the borrower.		The department is carefully analysing the submissions in respect of the potential implications of the Bill on landowners to ensure the intent of the Bill is achieved in the drafting. The department is considering the submission from Baker & McKenzie.
Clause 7 - 'high risk company'	• Support for the definition of 'high risk company' as it is designed to capture where the operator of an environmentally relevant activity is in administration	Sub 21	Noted.
Clause 7 – new section 363AG	• The sections need to be redrafted after proper consultation with the Department of Natural Resources and Mines in relation to health and safety legislation.	Sub 42	The mining health and safety laws apply to everyone who enters a mining site, irrespective of powers to be on the site under a separate piece of legislation. The proposed new sections 363AF-AH are in similar terms to the existing provisions of the *Environmental Protection Act 1994* which allow access to sites the subject of a clean-up notice. Health and safety precautions and procedures which are appropriate to the relevant site will, of course, need to form part of the practical implementation of the relevant powers. The submitter questions the two business day notice requirement in the new section 363AF. The two business day requirement was inserted to ensure that, where appropriate, urgent action can be taken to address the risk of environmental harm. The department would like to clarify that the new section 363AF requires either the consent or notification of both the owner and occupier of the land. This ensures that all potentially affected persons are notified of activities that may be of concern to them.
Clause 9 - Entry (Power to enter premises)	• Support for DEHP to enter a premises (Sub 24) • No support for DEHP to enter a premises	Subs 14, 24, 60, 68	The new powers to enter premises align with the policy intent of the Bill (i.e. ensuring that companies comply with their environmental obligations).
Clause 10 – failure to attend/ answer questions	• No support as does not align with natural justice • Support, however in limited circumstances • DDEC supports coercive powers associated with investigations into alleged environmental offences and improved statutory disclosure.	Sub 24 Sub 42, 60 Sub 60	Clause 10 is designed to ensure that evidence can be effectively gathered to hold corporations to account for offences they have committed without requiring individuals to give evidence against themselves. Any evidence gathered in this way could be used as evidence in the prosecution of a company or another person; but

Issue	Points	Subs	DEHP response
			could not be used as evidence against the person providing it. The department considers that this strikes an appropriate balance between the privilege against self-incrimination and the policy intent of the Bill to ensure companies comply with their environmental obligations.
Clauses 12,13,14,15 – Stay of decision (re financial assurance)	• Bill provides that on transfer a stay of decision is possible only if 85% of financial assurance is paid; submitters (e.g. Qld Environmental Law Association; AMEC, QRC) consider 85% to be too onerous • The QELA raised concerns regarding the Bill proposing a limit on the Planning and Environment Court and Land Court's powers to stay an original decision made by DEHP about the amount of financial assurance to be provided under a condition of an EA. The QELA propose that in circumstances where the decision to require financial assurance is in dispute, a lower percentage (than 85%) would be more appropriate. • AMEC states that companies' rights will be severely curtailed by removing the effectiveness of a court ordered stay of a decision on an amended financial assurance.	Subs 38, 40, 42	The intent of the Bill is to ensure that the amount of financial assurance held for an environmental authority is adequate should a stay be granted, and if the financial assurance needs to be claimed. This is because during the stay period and before the determination of an appeal, the operator can continue its operations and is otherwise generally not required to pay additional financial assurance. A decision on the amount and form of financial assurance and the subsequent submission of financial assurance can effectively be delayed indefinitely by the continuous submission of new plans of operations, which means that the department is left with inadequate financial assurance until the court finally determines an appeal. This new provision is intended to address situations that have arisen in which the amount of financial assurance is insufficient to address any environmental harm and rehabilitation requirements.
Clean up bonds	• Mackay Conservation Group (MCG) states that of six calls on financial assurances made, five were inadequate to cover the rehabilitation cost. • MCG supports the amendment which allows an environmental authority to require the provision of financial assurance where none was previously required, or where an environmental protection order has been amended or withdrawn. • Advocates a 'clean up bond' should be paid by mining and gas companies to be held in trust, before their companies face financial pressure and risk going into administration (Assoc Mining and Exploration Co)	Sub 24 Sub 40 Sub 58	Noted. Proposals to amend the financial assurance calculation and regulatory regime are outside the scope of the Bill. In 2014, the department's financial assurance calculator came into effect to increase consistency in the application and calculation of financial assurance. The calculator has gone a long way towards updating the amount of financial assurance the department holds.

Issue	Points	Subs	DEHP response
	• Queensland Environmental Law Association (QELA) supports proposed amendments to enable the addition of a condition requiring the provision of financial assurance upon the transfer of an environmental authority. • Australian Institute of Company Directors (AICD) argues that there should be an introduction of additional financial assurance requirement or a fidelity fund.		
Adequacy of financial assurance	• Environmental Justice Australia (EJA) submits that DEHP be provided with powers to obtain 'any potentially responding insurance policies of holders of environmental authorities and 'related persons'. This would contribute to allaying concerns about the capacity to receive a financial outcome as a result of issuing an EPO to a troubled entity or 'related person'. • EJA argues the problem that needs to be addressed is not the absence of financial assurances, but the inadequacy of assurances	Sub 49	Noted. Proposals to amend the financial assurance calculation and regulatory regime are outside the scope of the Bill.
WA model	• AMEC strongly advocates that Queensland implement a Mining Rehabilitation Fund model (MRF) similar to the one that has been successfully implemented in the Western Australian mining sector where companies pay an annual levy of 1% of their estimated rehabilitation liability. The MRF protects the taxpayer from being exposed to environmental liability after all other normal compliance and enforcement processes have been pursued.	Sub 40	Noted. This is outside the scope of the Bill. In 2014, the department publically consulted on a pooled fund model similar to the Western Australian model. This was not supported by some stakeholders or progressed by the government at the time.
Public comment on issuing EPOs	• The public should be able to submit proposals for rehabilitation for any site, which would be considered by a panel of experts.	Sub 49	Noted. This is outside the scope of the Bill. However the department is currently reviewing rehabilitation policy.
External administration	• Uncertainty around how an external administrator is appointed under Chapter 5 of the *Corporations Act 2001* • The Bill may deter external administrators from being prepared to accept an appointment in respect to an insolvent entity within the industries covered by the Bill. Argue that an external administrator may be personally	Sub 11, 20	The Bill is not intended to impose liability on administrators carrying out their duties under the *Corporations Act 2001 (Cth)* for harm for which the externally administered company and/or its related entities are responsible. The provisions of the Bill are drafted to capture those genuinely responsible for environmental harm, whether through their ability to profit from the harmful activity or

Issue	Points	Subs	DEHP response
	liable for shortfalls in environmental compliance caused by companies prior to the external administrator's appointment.		through their ability to influence environmental compliance on the relevant site. The 'related person' test is intended to allow the department to identify the true nature of the relationship between the non-complying company and those entities which either significantly benefited from its environmentally harmful activities or which had the ability to influence environmental compliance. The provisions of the *Corporations Act 2001* will, of course, prevail to the extent of any inconsistency with the *Environmental Protection Act 1994*.
Increased director liabilities and potential to effect investor confidence in Queensland	• Support for increased liability (through the 'related person' test) • No support for increased director liability which has the potential to effect investor confidence in Queensland (through the 'related person' test) • Sister City Partners argue the sweeping nature of the amendments has placed in jeopardy international interest in participating in the creditor-community buyback proposal for the Yabulu Nickel Refinery. The proposed buyback has been seriously and adversely affected and with it the prospects of re-employment of hundreds of people in North Queensland. • The AICD argues that directors should have an opportunity to raise an appropriate defence, to recognise the role directors play in influencing the conduct of a company; should be permitted to apply to the courts for relief from liability under the EP Act; the Bill is at odds with recent policy trend focussing on greater protection to directors who act honestly, with due care and skill and proper purposes.	Subs 20, 41, 46, 58, 60, 76	In response to claims that the provisions are at odds with COAG principles, the department notes that the COAG Guidelines acknowledge that serious damage to the environment poses the potential for significant public harm, which is acknowledged as a compelling public policy reason for imposing liability on executive officers. The *Environmental Protection Act 1994* (EP Act) already contains executive officer liability provisions which are consistent with the COAG Guidelines, precisely because the EP Act provisions are designed to discourage significant public harm. The new provisions in the Bill are consistent with the approach to executive officer liability in the existing EP Act. The risk of environmental harm is of significant public concern and considered to be a compelling policy justification for imposing liability on directors who have the ability to influence a company's environmental conduct or who have benefited financially from carrying out an environmentally relevant activity.
Exemption for the petroleum industry	• APPEA submit that the petroleum industry should be exempt from the application of the legislation.	Sub 71	The legislation will only apply in cases where companies do not comply with their environmental obligations. Therefore, provided companies continue to comply with their environmental obligations, the legislation will not apply to them.

Issue	Points	Subs	DEHP response
Review and appeal	• Ag force raises concerns that the Bill excludes internal review and appeal rights for a decision to require a person to give information relevant to the making of a decision under new section 363AB. Notes this is contrary to Fundamental Legislative Principles. • QLS raise concerns that clause 17 of the Bill amends Schedule 2 to exclude internal review and appeal rights for a decision to issue a notice under the EPA. The QLS argue that this exclusion has the potential to give rise to breaches of procedural fairness and natural justice. • QRC raise concerns regarding the removal of the right of an individual not to self-incriminate. • AICD argues that in relation to the right to protect against self-incrimination, amendments in clause 4 bestow power on an administrative authority without appropriate checks and balances, and unjustifiably encroach on rights and liberties.	Subs 20, 69, 42, 58	The department confirms that there will be no right of internal review or appeal from a notice requiring information about a person's connection with the high risk company or environmental authority holder for the purposes of deciding whether they can be issued with an EPO under the new provisions. Securing this type of information quickly will be an important first step in allowing EPOs to be issued to 'related persons', particularly where there is an imminent risk of significant environmental harm. However, an application for judicial review will remain available. The proposed provisions will require people with knowledge of a suspected offence to answer questions but those answers and any information gathered as a result of them cannot be used against the person. The amendment is designed to ensure that evidence can be effectively gathered to hold corporations to account for offences they have committed without requiring individuals to give evidence against themselves. Any evidence gathered in this way could be used as evidence in the prosecution of a company or another person; but could not be used as evidence against the person providing it. The department believes that the proposed provision strikes an appropriate balance between the privilege against self-incrimination and the policy intent of the Bill to ensure companies comply with their environmental obligations.

Appendix C – Briefing officers and hearing witnesses

Public briefings
Mr Geoff Robson, Executive Director, Strategic Environment & Waste Policy, Department of Environment and Heritage Protection
Mr Adam Cradick, Senior Director, Litigation Branch, Department of Environment and Heritage Protection
Ms Deborah Brennan, Manager, Environmental Policy and Legislation, Department of Environment and Heritage Protection
Chris Wake, Compliance Delivery Director, Department of Environment and Heritage Protection

Public hearings
Ms Wendy Tubman, Coordinator, North Queenlsand Conservation Council
Ms Revel Pointon, Solicitor, Environmental Defenders Office Queensland
Ms Tania Heber, Principal Solicitor, Environmental Defenders Office of North Queensland
Mr Rick Humphries, Coordinator, Mine Rehabilitation Reform Campaign, Lock the Gate Alliance
Mr Drew Hutton, Coordinator, Mine Rehabilitation Reform Campaign, Lock the Gate Alliance
Mr Lee Mason, Secretary, Darling Downs Environment Council
Mr Greg Lane, Acting Chief Executive, Queensland Resources Council
Ms Leanne Bowie, Legal Advisor, Queensland Resources Council
Ms Frances Hayter, Director - Environment Policy, Queensland Resources Council
Mr Bernie Hogan, Regional Manager, Association of Mining and Exploration Companies Inc
Mr Keld Knudsen, Policy Director – Access, Australian Petroleum Production & Exploration Association
Mr Matthew Paull, Policy Director – Queensland, Australian Petroleum Production & Exploration Association
Ms Trish Russell, General Counsel, Thiess Pty Ltd
Mr Paul Careless, Special Counsel - Corrs Chambers Westgarth, QLS Mining and Resources Committee
Mr Tim Reid, Partner - Clayton Utz and Chair, QLS Corporations Law Committee
Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors
Ms Lysarne Pelling, Senior Policy Advisor, Advocacy, Australian Institute of Company Directors
Ms Rhonda Jacobsen, Senior Legal Counsel - Manager, Future Acts Mining and Exploration (FAME) Unit, North Queensland Land Council
Ms Shanti Fatchen, Legal Officer, North Queensland Land Council
Mr Warwick Powell, Chairman, Sister City Partners Ltd

Stephen Bennett MP

MEMBER FOR BURNETT

14 April 2016

Statement of Reservation:
Mr Stephen Bennett MP

Mr Glenn Butcher MP
Chair, Agriculture and Environment Committee
Parliament House
George Street, Brisbane QLD 4000.

Dear Mr Butcher,

Re: Report No. 16, Environmental Protection (Chain of Responsibility) Bill 2016.

I wish to notify the committee in accordance with SO214 of our reservations about many aspects of Report No. 16 of the Agriculture and Environment Committee.

It was widely reported by the majority of submitters to the Agriculture and Environment Committee that should this Bill be passed (in its current form) and these amendments made to the EP Act, that many serious unintended impacts would result across all sectors of the Queensland economy, affecting jobs, investment, as well as existing businesses.

It is clear that the proposed Bill requires major amendments to ensure future investment and employment are not jeopardised.

I believe all Queenslanders would be generally supportive of the overarching policy objectives and reasoning of the Environmental Protection (Chain of Responsibility) Bill 2016, as has been provided in the Explanatory Notes, details provided by the Minister and subsequently the Committee inquiry. It is argued that the Explanatory Notes allude to problems at sites across Queensland and then refers to the mining sector when the current issue is occurring at a Nickel Refinery which is a mineral processing activity not a mine. This is one of the many apparent problems with the rushed Bill, something that consultation would have addressed.

The committee heard that environmental bonds or financial assurance are widely used across Queensland to ensure rehabilitation is completed. It is a real failure to have the circumstances of previous policies giving exceptions to certain industries not included in the amendments in the Bill.

The many inconsistencies throughout the proposed Bill further highlight that we should not be rushing through legislation with such a broad scope and discretionary powers, forcing investors to question if they should continue to support Queensland when other States and Territories have more reasonable, sustainable and practical legislation to operate within.

In the limited time available to the committee, there were no examples of comparable legislation in any other Australian States and Territories provided. In the case of the resource

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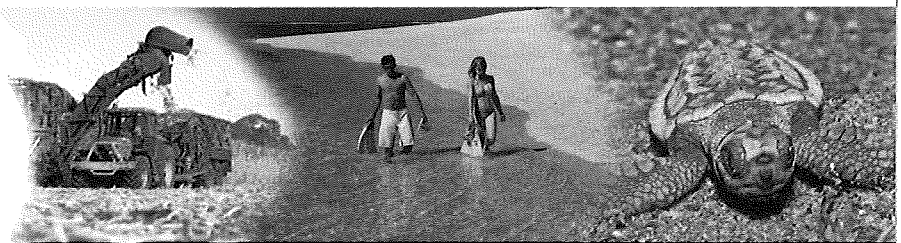

sector, the relevant legislation (e.g., the *Petroleum and Gas (Production and Safety) Act 2004*) requires a company to negotiate a Conduct and Compensation Agreement (CCA) with the landholder prior to undertaking petroleum and gas exploration or production. Under this Bill, the presence of the CCA should be sufficient to make the landholder liable for statutory enforcement of any remediation.

The Committee was not provided with any evidence for the potential for abuse and interpretation during administration. The risks in the provisions of the Bill are so great as to preclude any benefit to the state of Queensland that may arise from the passage of the legislation.

There are two examples of over-reach in the Bill in terms of incrimination:

The most obvious was the removal of the privilege against self-incrimination in Clause 10 – Section 476. 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 Office of Parliamentary Guideline on Self-incrimination, made pursuant to the Legislative Standards Act.

The broader issue is that the Bill creates liability ('criminalises') large numbers of innocent people (graziers, mums-and-dads shareholders, unpaid creditors etc.) under Clause 7 without adequate controls over the subjective administrative discretion which is given to EHP about which of these people to pursue. This is contrary to the Office of Parliamentary Guideline on Clear Meaning made pursuant to the Legislative Standards Act. Pages 12 to 13 of this guideline particularly deal with the need for certainty where administrative powers are conferred, particularly where the power conferred is 'intrusive and potentially highly incriminating'. EHP should not have broad subjective powers to decide who might be liable out of a wide range of options but rather, there should be objective, measurable criteria, and a hierarchy of liability.

The Explanatory Notes state the Bill will have retrospective application. This is 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 quoted 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 committee heard many examples of the financial assurance regime that is already in place, and has also been recently been updated and designed to better protect the State.

The committee heard many concerns with the broad and open-to-interpretation definitions of "related person", "relevant activity" and "relevant connection" having significant potential of unintended consequences.

The application to "related persons" in the Bill of further empowering the Administering Authority to amend an Environmental Authority (the instrument under which an activity is authorised) is limited to requiring an increase in the financial assurance. Section 363AB provides that a "related person" may be anyone that the Administering Authority decides has a "relevant connection" to the company if DEHP determines benefitted financially. It would be expected that the primary responsibility for remediation of environment harm would lie with the company and its management. Instead, the Bill enacts the power to compel a clean-up and rehabilitation on landholders, shareholders and other stakeholders (which could extend to the

beneficiary of a distribution under a superannuation scheme or a native title party who has received a benefit under an agreement with the company). This has significance for all shareholders of a company including financial institutions and could lead to a reduction in the confidence to invest in Queensland.

The committee was surprised to learn that some industries which pose environmental impacts were not previously required to provide financial assurances, something this Bill fails to address. However through the evolution of DEHP's 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 financial assurances should be reviewed and amended by DEHP if their assurance is found to be inadequate. It is also disappointing that the Bill excludes provisions for those who have not been subject to a financial assurance requirements but which pose a high environmental risk to not be subject to a power held by DEHP to amend their environmental authority to require the financial assurance.

The committee heard that the current potential problems for taxpayers may not have arisen to the existing extent if the State Government had required a financial assurance for the problem refinery, as it had jurisdiction to do for a mineral processing activity, from the time that an environmental license was originally issued.

This Bill should address policy deficiencies by targeting the actual source of the potential problem by engaging and consulting with key stakeholders, instead of rushing through a clearly flawed Bill that will have serious unintended consequences.

It is suggested that the passage of the Bill be delayed until a detailed Regulatory Impact Statement (RIS) be prepared to enable all Stakeholders details of costs and ramifications of the Bill and to investigate alternatives.

Yours faithfully,

Stephen Bennett MP
Member for Burnett
Shadow Minister for Environment, Heritage Protection and National Parks

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Rob Katter MP
Member for Mount Isa

Thursday April 14 2016.

RE Statement of Reservation on Report No 16, Environmental Protection (Chain of responsibility) Amendment Bill.

I write to lodge a Statement of Reservation to the Agriculture and Environment Committee on the Report No 16, Environmental Protection (Chain of responsibility) Amendment Bill which was tabled in April 2016.

It is accepted that the intention of this bill is to;

1. facilitate enhanced environmental protection for sites operated by companies in financial difficulty, and
2. To avoid the state bearing the costs for managing and rehabilitating sites in financial difficulties

In so far as it is the intended to apply retrospectivity to the process, as in clause 16, to reach back prior to enactment, it is difficult to find myself in agreement with this element of the bill and the report. Once set in place I believe the implementation of 'retrospectivity' will most certainly have the effect of dramatically reducing business confidence, as it will be clear to all members of the community that it is impossible to pre-empt where the law and obligations which flow may ultimately land at any time.

In the current economic climate the industry which makes up a huge part of the economic activity of regional Queensland does not need any reduction in confidence whatsoever. It may seem timely to say "now" due to the fragile nature of contemporary industry, but the proposition of retrospectivity is not one which fits at all well with myself, my electorate or the business community. The activity of mining is very capital intensive and thus needs a high degree of confidence to cause capital to be available to provide employment and royalties to our state.

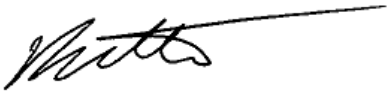
The problem which has precipitated the current legislation at Yabulu is clear to us all, it is however clear it has been always in the best interest of the government to have in place a system where by companies do not find themselves in trouble, and as a result leave the state with the burden of clean up. In this case it seems that the horse has bolted and that the government should now seek communication with the receivers and see whether the monies removed from the business are available to the company, to meet clean up obligations rather than precipitate unintended consequences and bring on a new act to clean up this incident.

There are a number of other areas of concern of note, within the legislation and this report. The fact that it is acknowledged that there has been no effective consultation with the community and many stakeholders because of the short timeframe of this bill. This seems to be a pattern within government which is simply not palatable for the people of our state.

Of particular concern is that the chain of responsibility seems to extend long past the individuals who are responsible and may even extend to property owners who have no control whatever of the processes utilised by operating mining companies, and may have no interest at all in the benefits which derive from the activity of the operation. This unintended outcome, reinforces the probability of hastily drawn legislation to catch an out of control situation.

Given the very many reservations I have to the Bill and to the fact the committee has recommendation the government pass the Bill, I have submitted this statement. It is clear any stance to support the Passing of the bill fails the test of common sense to the business community and the public who I represent.

Yours sincerely



Rob Katter

Member for Mount Isa

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