Review of Queensland's Environmental Chain of Responsibility laws

Queensland Government

Background to review

The *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (CORA) amended the *Environmental Protection Act 1994* (EP Act) to broaden the circumstances in which an environmental protection order (EPO) can be issued by the Department of Environment and Science (DES) (formerly the Department of Environment and Heritage Protection). These amendments commenced on 27 April 2016.

Section 363AJ(1) of the EP Act requires the Minister administering the EP Act to review the operation of Chapter 7, Part 5, Division 2 of the EP Act within two years of its commencement, to determine whether the provisions of the division remain appropriate. Chapter 7, Part 5, Division 2 contains the powers, introduced by CORA, to issue EPOs to ‘related persons’ of companies with obligations under the EP Act.

Under section 363AJ(2) of the EP Act, the Minister is required to table a report about the outcome of the review of Chapter 7, Part 5, Division 2 in the Legislative Assembly as soon as practicable after the conclusion of the review. This report has been prepared for the purposes of complying with this requirement.

Review process

The review was undertaken by DES. A draft review report was released for public consultation in April–May 2018. Seven submissions were received during the 20 business day submission period.

Intent of the Chain of Responsibility amendments

Chapter 7, Part 5, Division 2 of the EP Act was introduced to effectively impose a chain of responsibility to ensure that companies and related entities bear the cost of managing and rehabilitating sites and prevent leaving Queensland taxpayers with environmental clean-up bills.

The Environmental Protection (Chain of Responsibility) Amendment Bill 2016 (the Bill) was introduced in response to an increasing number of companies entering financial difficulties and not rehabilitating or stabilising their sites to prevent environmental harm.

In the first reading speech for the Bill, former Minister for Environment and Heritage Protection and Minister for National Parks and the Great Barrier Reef, the Honourable Dr Steven Miles MP, cited concerns arising at sites in financial difficulty, including specific refinery and mining operations, such as the Texas Silver Mine, Collingwood Tin Mine and Mount Chalmers Gold Mine. The Yabulu Nickel Refinery was also specifically mentioned:

> *Right now Queensland is facing down the unacceptable prospect of the taxpayer being left to clean up after the owner of the Yabulu nickel refinery. … [I]t should be for Queensland Nickel, Queensland Nickel Sales or their associated companies or officers to bear the cost of managing and rehabilitating the refinery. This should not be up to Queensland taxpayers.*[1]

The legislation is intended to capture entities actively avoiding their environmental obligations. The related persons test in Chapter 7, Part 5, Division 2 of the EP Act is drafted to capture entities genuinely responsible for environmental harm, whether through their ability to profit significantly from the relevant activity or through their ability to influence environmental compliance at the relevant site. In the first reading speech, Minister Miles stated:

> *The chain of responsibility will not attach itself to genuine arm’s length investors, be they merchant bankers or mum-and-dad investors. It will not impact contractors or employees. This legislation targets those who stand to make large profits, those who are really standing behind the company and whose decisions have put the environment at risk…*[2]

The legislation's related persons test needs to be broad, as it is designed to 'capture all those artificial corporate structures and profit-shifting exercises which we know already exist, and anticipate those that are yet to be uncovered'.[3] It is not intended to capture entities that have acted in a way that is consistent with their obligations.

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[1] Queensland Parliament, Record of Proceedings, 15 March 2016, pp. 692-3.

[2] Queensland Parliament, Record of Proceedings, 15 March 2016, p. 693.

[3] Queensland Parliament, Record of Proceedings, 21 April 2016, p. 1459.

The legislation does not impose any new obligations beyond those already in existence in the EP Act. The power to issue an EPO under Chapter 7, Part 5, Division 2 of the EP Act provides an additional tool that can be used to ensure that existing obligations about rehabilitating and stabilising a site are properly discharged.

Key Chain of Responsibility provisions

The new Chapter 7, Part 5, Division 2 of the EP Act enables EPOs to be issued to 'related persons' of a company that has itself received an EPO, or to a company considered 'high risk'.[4]

Related persons

Section 363AB of the EP Act specifies four categories of related persons:

1. holding companies
2. owners of land on which the company has carried out a relevant activity other than a resource activity
3. associated entities[5] that own land on which the company has carried out a resource activity
4. entities[6] that DES consider have a 'relevant connection' with a company.

Relevant connection

An entity may be considered to have a relevant connection with a company if:

- the entity is capable of significantly benefiting financially, or has significantly benefited financially, from the carrying out of a relevant activity of the company
- the entity is, or has been at any time during the previous two years, in a position to influence the company's conduct in relation to the way in which, or extent to which, the company complies with its obligations under the EP Act.[7]

Section 363AB(4) of the EP Act lists a number of factors that DES may take into account in deciding whether an entity has a relevant connection with a company, including:

- the extent of the entity's control of the company
- whether the entity is an executive officer of the company, of a holding company, or of another company with a financial interest in the company
- the extent of the entity's financial interest in the company.

Reasonable steps

In deciding whether to issue an EPO to an entity determined to be a related person, section 363AB of the EP Act states that DES may consider whether the related person took all reasonable steps, having regard to the extent to which the related person was in a position to influence the company's conduct, to ensure the company:

- complied with its obligations under the EP Act
- made adequate provision to fund the rehabilitation and restoration of the land because of environmental harm from a relevant activity carried out by the company.

Guideline

Section 548A of the EP Act states that guidelines may be made about how DES decides whether an entity has a relevant connection to a company and whether to issue an EPO to a related person of a company. In making a decision about who is a related person and whether to issue an EPO to a related person, DES must have regard to any guidelines in force.[8]

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[4] *Environmental Protection Act 1994,* ss. 363AC and 363AD.

[5] 'Associated entity' is defined in s. 363AA of the *Environmental Protection Act 1994* to have the meaning given by s. 50AAA of the *Corporations Act 2001* (Cth).

[6] 'Entity' is used in this document to refer to both companies and individuals.

[7] *Environmental Protection Act 1994*, s. 363AB(2).

[8] *Environmental Protection Act 1994*, ss. 363AB and 363ABA.

Statutory guideline

Development

In May 2016, a working group of key stakeholders was set up to inform the development of a guideline for Chapter 7, Part 5, Division 2 of the EP Act. The working group had representation from:

- Queensland Resources Council
- Peabody Energy
- Australian Bankers' Association
- Australian Petroleum Production and Exploration Association
- Queensland Law Society
- Environmental Defenders Office Queensland
- Chamber of Commerce and Industry Queensland
- Association of Mining and Exploration Companies
- Queensland Environmental Law Association
- Australian Institute of Company Directors
- Australian Restructuring Insolvency and Turnaround Association.

Five working group meetings were held, as well as a number of satellite working group meetings with the Australian Bankers' Association, Australian Restructuring Insolvency and Turnaround Association, Environmental Defenders Office, Australian Petroleum Production and Exploration Association, and Queensland Resources Council.

A draft guideline was released for public consultation from 14–25 November 2016. Submissions were received from 14 stakeholders. Most issues raised in the submissions that were within the scope of the draft guideline were addressed through amendments to the guideline. A consultation report was released which provided a summary of the key issues identified in the submissions and the department's responses to each issue.[9]

The consultation process provided an opportunity for many constructive discussions with stakeholders in which DES was able to provide greater clarity about the operation of the legislation. In particular, industry stakeholders were provided further clarification about the provisions in Chapter 7, Part 5, Division 2 of the EP Act that have the effect that a related person is very unlikely to be issued with an EPO if that person has taken all reasonable steps available to them to ensure that obligations under the EP Act were complied with and that rehabilitation would be adequately funded.

Implementation

Following the extensive industry and public consultation undertaken as part of drafting the guideline, the guideline took effect on 27 January 2017. The guideline has given crucial direction to industry and the community about how the powers in Chapter 7, Part 5, Division 2 of the EP Act will be applied, providing greater certainty about the reach of the powers for all stakeholders. In particular, the statement of 11 key principles which are to be used to guide decision-making under Chapter 7, Part 5, Division 2 of the EP Act, has addressed many concerns expressed by stakeholders. These key principles include:

- being a related person does not of itself trigger the issue of an EPO under Chapter 7, Part 5, Division 2 of the EP Act. The related person must also be determined to have culpability
- DES will only consider issuing an EPO to a related person where a company has avoided, or attempted to avoid, its environmental obligations and the related person has participated in this conduct
- any enforcement action taken by DES will be proportionate to the seriousness of the matter.[10]

The guideline also addresses some issues regarding whether DES will consider an entity to have significantly benefitted financially. For instance, the guideline makes clear that the provisions are not intended to capture banks in their role as lenders (provided that the lending is an arm's length commercial transaction).[11]

[9] A copy of the consultation report is available on the DES website.

[10] A full list of the key principles can be found on pp. 5–6 of the guideline.

[11] See the example provided on pp. 9–10 of the guideline.

The final statutory guideline is available on the DES website.

Use of the Chain of Responsibility provisions

There have been four EPOs issued under Chapter 7, Part 5, Division 2 of the EP Act.

Mr Peter Bond

On 25 May 2016, an EPO was issued to Mr Peter Bond as a related person of Linc Energy Ltd. The EPO was issued in respect of the activities of Linc Energy Ltd carried out at an underground coal gasification site at Chinchilla. The EPO was issued under section 363AD of the EP Act on the grounds that Linc Energy Ltd was a high risk company and Mr Bond had a relevant connection to the company.

Linc Energy Ltd was placed in voluntary administration on 15 April 2016 and subsequently wound up by creditors on 23 May 2016.

Mr Bond was considered to have been, in the preceding two years, in a position to influence Linc Energy Ltd's conduct in relation to the way in which, or the extent to which, the company complied with its obligations under the EP Act. Mr Bond was the Chief Executive Officer and Managing Director from 2004 until 1 October 2014. From 1 October 2014 to 11 December 2015, Mr Bond was Executive Chairman of the Board. As at 21 July 2015, Mr Bond held 202,626,940 shares in Linc Energy Ltd. Mr Bond also received significant remuneration from the company.

The EPO requires Mr Bond to take action to rehabilitate dams and other land, and clean specified infrastructure, at the Chinchilla site. The activities of Linc Energy Ltd at the site had caused soil contamination. The site has also been an ongoing source of odour to the surrounding community.

The EPO also required the provision of a $5.5 million bank guarantee to secure Mr Bond's compliance with it, in accordance with section 363AD(4) of the EP Act.

The decision to issue the EPO is currently under appeal in the Planning and Environment Court.

Mr Antonino DiCarlo

On 6 December 2016, two EPOs were issued to Mr Antonino DiCarlo in relation to tyre storage and processing activities carried out at Rocklea and Kingston. The EPOs were issued pursuant to sections 363AC and 363AD of the EP Act, on the basis that Mr DiCarlo was a related person of Tyremil Group Pty Ltd and Grindle Services Pty Ltd, which were deemed to be carrying out the relevant activities.

Grindle Services Pty Ltd was in external administration and deemed to be a high risk company. Tyremil Group Pty Ltd was also deemed to be a high risk company on the basis that a third entity, Mojo Investments (Aus) Pty Ltd, controlled both Tyremil Group Pty Ltd and Grindle Services Pty Ltd.

Mr DiCarlo was determined to have a relevant connection with both Tyremil Group Pty Ltd and Grindle Services Pty Ltd on the basis that he had significantly benefited financially from the activities carried out by the companies and that he had been in a position to influence the conduct of the companies over the previous two years.

In making this decision, DES noted that Mr DiCarlo was the Chief Executive Officer of both companies and had a financial interest in the two companies, including income and revenue.

The EPOs required Mr DiCarlo to take action to prevent or minimise the risk of unlawful environmental harm arising from the storage of a large volume of tyres at the sites at Rocklea and Kingston. At both premises, there appeared to be ongoing non-compliance with orders issued by Queensland Fire and Emergency Services. DES were concerned that the management of tyres at the premises posed an environmental risk in the event of a fire. The storage of large volumes of tyres can pose a significant risk to the environment, causing pollution of the air, soil, groundwater and surface waters in the event of a fire.

Mojo Investments (Aus) Pty Ltd

On 6 December 2016, a further EPO was issued to Mojo Investments (Aus) Pty Ltd in respect of the same tyre storage and processing activity at Rocklea that was mentioned above. DES relied upon section 363AD of the EP Act, which allows an EPO to 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. DES considered Mojo Investments (Aus) Pty Ltd to be a related person of Grindle Services Pty Ltd, which DES determined to be in external administration, and therefore a high risk company.

Mojo Investments (Aus) Pty Ltd was a holding company or other company with a financial interest in Grindle Services Pty Ltd. Mojo Investments (Aus) Pty Ltd was also determined to operate from the Rocklea premises.

The requirements of the EPO were in the same terms of the EPOs issued to Mr DiCarlo, requiring Mojo Investments (Aus) Pty Ltd to take action to prevent or minimise the risk of unlawful environmental harm arising from the large volume of tyres at the site at Rocklea.

Key findings on the use of the Chain of Responsibility provisions

All four EPOs issued under Chapter 7, Part 5, Division 2 of the EP Act were issued in response to serious concerns regarding actual or potential environmental harm. In all cases, there was a present danger to the environment which entities with a relevant relationship had failed to prevent. The powers under Chapter 7, Part 5, Division 2 of the EP Act were exercised in order to, in effect, extend environmental obligations to entities which had significant involvement in the company actually carrying out the relevant activity that caused actual or potential environmental harm. The EPOs were issued for the purposes of securing compliance with conditions of an environmental authority and/or with the general environmental duty.

Three of the EPOs were issued to individuals which had such a connection to the company carrying out the relevant activity that the individuals should have been proactive in preventing that harm and ought to be required to act to address the consequences of that failure. These individuals were current and former Chief Executive Officers that were responsible for the day to day operations of the relevant sites, and therefore had a significant capacity to influence the company's compliance with its environmental obligations.

The other EPO was issued to a company which was in the same corporate group as the company authorised to carry out the relevant activities.

The four EPOs were issued in relation to activities carried out at three different sites. There was no financial assurance held for two of the sites and the financial assurance held for the other site was believed to be inadequate to fund rehabilitation.

All EPOs were issued prior to the statutory guideline coming into force. As such, the guidelines were not considered in deciding whether to issue the EPOs. DES considered all of the other relevant criteria listed in s. 363AB of the EP Act in determining that the entities were related persons, and also considered whether the entities had taken reasonable steps to ensure the company complied with its obligations and whether they made adequate provision for rehabilitation and restoration.

Investment in Queensland

Since the introduction of the Environmental Protection (Chain of Responsibility) Amendment Bill 2016, stakeholders have expressed concerns regarding the implications of the legislation for investment in Queensland. Data gathered during the review demonstrates that Queensland continues to be an attractive investment destination, with a stable economy and solid growth forecast. It has experienced significantly improved economic outcomes in recent years, with economic growth expected to strengthen from 2.75 per cent in 2017–18 to 3 per cent in 2018–19.[12]

Overall business investment stabilised in 2016-17, driven by a return to growth in machinery and equipment investment, following the decline in investment in 2014-15 and 2015-16 as the LNG construction boom unwound. Business investment has rebounded strongly in 2017-18, up 9.9 per cent in trend terms over the year to the March quarter 2018, reflecting growth across all key components. Growth in engineering construction is expected to be supported by investment in renewable energy projects, including wind and solar farms, across 2017-18 and 2018-19.

Non-residential building construction work has risen, strengthened by accommodation and educational facilities amid increased education enrolments and tourism activity. This trend is likely to continue. Overall business investment is forecast to grow steadily over the next two financial years.

There have also been positive trends for Queensland's resources sector. In the 12 months from March 2017 to March 2018, petroleum exploration expenditure totalled $179 million, a rise of almost 50 per cent over the past 12 months. Minerals exploration expenditure also increased - with a 38 percent increase to $267.3 million.[13]

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[12] Queensland Government, 2018–19 Queensland Budget Papers, Budget Paper No. 2.

[13] Australian Bureau of Statistics, Mineral and Petroleum Exploration, Australia, March 2018.

Queensland’s coal industry enjoyed a much better operating environment in both 2016 and 2017, reflecting higher demand and prices. In terms of coal mining exploration expenditure in Queensland, expenditure peaked in 2011 at $653.8 million, before falling over subsequent years to be at around 2005 levels by 2016, before stabilising in 2017.

Higher coal prices have presented Queensland’s coal industry as a commercially attractive sector for investment. A number of coal mines re-entered production over the past year, and several new mines are progressing towards development. This includes the Byerwen Coal Mine which commenced construction in September 2017 and Meteor Downs South which commenced production in early 2018. In May 2018, it was announced that South 32 had agreed to acquire a 50 per cent stake in the Eagle Downs coking coal project. Sojitz Coal Mining, an Australian subsidiary of a Japanese company, also announced that it agreed to buy BHP Billiton's Gregory Crinum mine for $100 million.

Queensland’s minerals sector has also experienced strong opportunities due to higher commodity prices driving investment. Some recent projects include:

- Capricorn Copper commenced a $110 million capital program in 2017 to restart the former Mount Gordon copper mine in Queensland’s northwest
- work continued on Rio Tinto’s $2.6 billion Amrun bauxite mine in the western Cape York throughout 2017
- the reopening of the Mount Gordon copper mine by Capricorn Copper in November 2017
- MMG Limited completed construction of its $1.4 billion Dugald River zinc project with its first batch of zinc concentrate being shipped in December 2017
- the planned partial reopening of the Lady Loretta zinc mine (which temporarily ceased operations in October 2015).

There have been several significant gas developments announced or progressed in Queensland in the past two years, such as:

- the $500 million Project Ruby announced in March 2017, which involves the construction of up to 161 additional wells in the Surat Basin
- commencement of the construction of the $800 million Northern Gas Pipeline in July 2017, which will transport up to 100TJ of gas per day to Mount Isa
- the first domestic gas acreage tender was awarded to Senex Energy in September 2017, providing an expected investment of over $200 million to drill around 100 wells and construct support infrastructure
- the completion of QGC's $1.7 billion Charlie Gas Field in late 2017
- Santos GLNG's announcement of its $400 million investment in the 137-well gas project in the Bowen Basin.

Interaction with rehabilitation scheme

The review identified that there was some lack of clarity regarding how Chapter 7, Part 5, Division 2 of the EP Act interacted with the financial assurance and rehabilitation reforms, particularly the proposed new financial provisioning scheme in the Mineral and Energy Resources (Financial Provisioning) Bill 2018.

The new financial provisioning scheme will not affect the interaction between financial assurance and an EPO under Chapter 7, Part 5, Division 2 of the EP Act. The administering authority will continue to determine the most appropriate tool on a case-by-case basis.

In circumstances where environmental harm has occurred, or may occur, it may be best remedied by the administering authority issuing an EPO to a related person. An EPO can direct immediate action to be undertaken on a site to address or prevent environmental harm. An EPO may be more timely and effective than the administering authority making a claim for funds and then conducting the works itself.

The statutory guideline will be considered by the administering authority prior to making a decision about whether to issue an EPO under Chapter 7, Part 5, Division 2 of the EP Act. However, there is no set criteria as to whether an EPO will be used ahead of, or instead of, a claim on the financial provisioning scheme. The primary objective for the administering authority is to ensure that rehabilitation obligations are complied with. Where there is non-compliance by an operator, the administering authority will assess the facts of each case to determine the most appropriate way to achieve this given all of the circumstances.

Conclusion

Following the review, DES considers that Chapter 7, Part 5, Division 2 of the EP Act has been used responsibly and remains appropriate. The powers provide an important enforcement tool that enables DES to respond to circumstances where there is a risk of environmental harm to which entities with a relevant relationship to the company actually carrying out the activity have failed to respond.

The provisions have been applied cautiously to-date, with only four EPOs issued as at August 2018. In each instance, an entity was alleged to have failed to take reasonable steps despite having the ability to influence or control a company's activities. In all cases, there was significant public interest in protecting the environment, and in ensuring that the taxpayer was not left with the burden of restoration or rehabilitation.

The legislation has not been applied to some sites, such as the Yabulu Nickel Refinery, that were cited as reasons for the introduction of the legislation. The application of other enforcement tools has achieved the necessary environmental outcomes without the further need to use the CORA provisions. These sites continue to be investigated and monitored.

The statutory guideline has provided a level of certainty for entities that may be exposed to an EPO under Chapter 7, Part 5, Division 2 of the EP Act. Although the related persons test is intended to apply to a 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, the guideline makes it clear that the legislation will not be used in relation to arms-length transactions for fair market value.

Feedback received during the review process indicated that stakeholders had obtained comfort from the guideline but were concerned that DES could make amendments to the guideline without any consultation process.
In response, DES has committed to undertaking consultation before any amendments (other than minor or administrative amendments) are made to the guideline.

While it is difficult to quantify the extent to which the legislation has changed behaviour, DES has witnessed signs that entities, including holders of environmental authorities, are taking more positive steps in respect to environmental responsibility. They now have greater incentives to have systems in place to demonstrate the reasonable steps they have taken to ensure compliance with their environmental obligations. There are also indications that entities are improving the way they conduct due diligence and risk assessments in their dealings with companies that have obligations under the EP Act. Furthermore, the legislation has generated greater awareness of the extent of the existing executive officer liability obligations in the EP Act.