

# **Draft review of Queensland's Environmental Chain of Responsibility laws**

## 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 Act to review the operation of Chapter 7, Part 5, Division 2 of the 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 s 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 finishing the review. This report has been prepared for the purposes of complying with this requirement.

## Key provisions of Chapter 7, Part 5, Division 2

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'.<sup>1</sup>

### Related person

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<sup>2</sup> that own land on which the company has carried out a resource activity
4. entities<sup>3</sup> 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.<sup>4</sup>

Section 363AB(4) 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.

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<sup>1</sup> *Environmental Protection Act 1994*, ss 363AC and 363AD.

<sup>2</sup> '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).

<sup>3</sup> 'Entity' is used in this document to refer to both companies and individuals.

<sup>4</sup> *Environmental Protection Act 1994*, s 363AB(2).

## Reasonable steps

In deciding whether to issue an EPO to an entity determined to be a related person, s 363AB 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.<sup>5</sup>

## Intent of Chapter 7, Part 5, Division 2

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 introduction of the Environmental Protection (Chain of Responsibility) Amendment Bill 2016 was 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, cited concerns arising at sites in financial difficulty, including specific refinery and mining operations.

The legislation is intended to capture entities actively avoiding their environmental obligations. The related persons test in Chapter 7, Part 5, Division 2 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...<sup>6</sup>*

In the third reading for the Bill, Minister Miles noted that the related persons test 'needs to be broad to capture all those artificial corporate structures and profit-shifting exercises which we know already exist, and anticipate those that are yet to be uncovered'.<sup>7</sup> However, the related persons test is not intended to capture entities that have acted in a way that is consistent with their obligations.

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 provides an additional tool that can be used to ensure that existing obligations about rehabilitating and stabilising a site are properly discharged.

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<sup>5</sup> *Environmental Protection Act 1994*, ss 363AB and 363ABA.

<sup>6</sup> Queensland Parliament, Record of Proceedings, 15 March 2016, p 693.

<sup>7</sup> Queensland Parliament, Record of Proceedings, 21 April 2016, p 1459.

# Statutory guideline

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 comment between 14 and 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.<sup>8</sup>

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 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.

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 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, 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. 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.<sup>9</sup>

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).<sup>10</sup>

The final statutory guideline is available on the DES website.

## Use of Chapter 7, Part 5, Division 2

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

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<sup>8</sup> A copy of the consultation report is available on the DES website.

<sup>9</sup> A full list of the key principles can be found on pp 5-6 of the guideline.

<sup>10</sup> See the example provided on pp 9-10 of the guideline.

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 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. The department considered all of the other relevant criteria listed in s 363AB 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.

### **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 s 363AD 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 s 363AD(4).

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 ss 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 s 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.

## **Investment in Queensland**

Since the introduction of the Environmental Protection (Chain of Responsibility) Amendment Bill 2016, the resources industry has expressed concerns regarding the implications of the legislation for resources investment in Queensland. There have been concerns that the power to issue EPOs under Chapter 7, Part 5, Division 2 is subject to discretion, which has created uncertainty regarding potential liability under the provisions, threatening investment.

Despite these concerns, there have been positive trends for Queensland's resources sector in both 2016 and 2017. There have been a number of significant investment projects announced or progressed since the commencement of CORA.

Over the 12 months to January 2018, resource sector exports totalled approximately \$55 billion, a 24 per cent improvement year on year. This high growth rate was driven by a considerable increase in the value of exports of premium metallurgical coal (+23 per cent), thermal coal (+34 per cent) and LNG (+36 per cent). Mineral exports also experienced solid gains (+12 per cent).

Further information about recent conditions and investment in Queensland's resource sector is provided in Attachment 1.

## **Conclusion**

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 in which 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 cautiously applied to-date, with only four EPOs issued. In each of these four instances, 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 a significant public interest in the protection of the environment, and in ensuring that the taxpayer was not left with the burden of restoration or rehabilitation.

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

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. Entities now have greater incentives to have systems in place that demonstrate the reasonable steps they have taken to ensure compliance with environmental obligations. There are also indications

that entities are improving the way that 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 existing executive officer liability obligations in the EP Act, including the breadth of these obligations.

# Attachment 1: Recent conditions and investment in the Queensland resources sector

## Summary

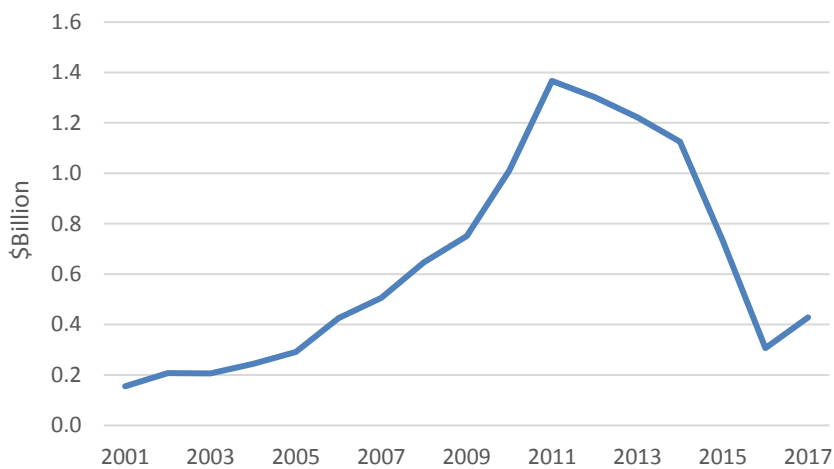
Queensland’s coal industry enjoyed a much better operating environment in both 2016 and 2017, reflecting higher demand and prices. In terms of coal mining exploration expenditure in Queensland, expenditure peaked in 2011 at \$653.8 million, before falling over subsequent years to be at around 2005 levels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

In terms of gas investment in Queensland, several significant CSG developments in Queensland have been announced or progressed in 2017.

The more positive outlook has also been the case for base metals projects, with a continued rally in metal prices, particularly zinc, improving near-term prospects for Queensland metal miners.

Reflecting these trends, the latest Australian Bureau of Statistics (ABS, cat. No. 8412.0) data shows total mineral and petroleum exploration expenditure was \$428.2 million in 2017, up 39.5% on 2016 (see chart below).

**Total mineral and petroleum exploration expenditure, Queensland**  
(Annual total, \$billion)



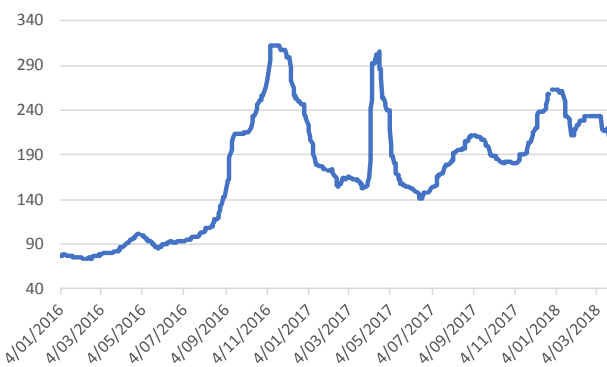
Source: ABS 8412.0.

## Detail

### Coal

The international coal market has staged a substantial recovery since mid-2016. Premium hard coking prices in the spot market surged from below US\$100/t to above US\$300/t by early November 2016. Similarly, the spot thermal coal price also rose from around US\$50/t to above US\$100/t over the period.

**Premium Hard Coking Coal Price (US\$/t)**



**Thermal Coal Price (US\$/t)**



The main driver of this recovery is the reforms of China’s coal and steel industry which began in early 2016. This led to a significant increase in coal imports into China in 2016, from 204.1 million tonnes in 2015 to 255.5 million tonnes in 2016.



Although coal prices partially retraced from their recent highs in the first half of 2017, except for a brief disruption of coal exports from Queensland due to cyclone Debbie, coal prices have returned to their upward trend since mid-2017.

The drivers of the strength in coal prices in 2017 are somewhat different from those in 2016. While China continued to import more coal in the year (270.9 million tonnes in 2017), the more positive outlook for the global economy also led to a more widespread recovery in mineral and energy prices. Meanwhile, the commencement of operation of new coal fired power plants also drove a strong growth in thermal coal imports by Korea in 2017.

In Queensland, the volume of coal exports in 2016 was 219.45 million tonnes, similar to that in 2015 (219.29 million tonnes). Nevertheless, higher coal prices mean that coal export value rose from \$22.88 billion in 2015 to US\$27.42 billion in 2016. While STC Debbie (around 11 million tonnes in 2017) and a reduction in coal production by Peabody adversely affected coal export tonnages in 2017, a further rise in coal prices saw the value of coal exports surge to \$37.46 billion in 2017.

#### Queensland Coal Exports

	Hard Coking		Semi-soft Coking/PCI		Thermal	
	Volume (million tonnes)	Unit Export Value (A\$/t)	Volume (million tonnes)	Unit Export Value (A\$/t)	Volume (million tonnes)	Unit Export Value (A\$/t)
2015	113.20	119.51	48.87	103.18	57.22	75.28
2016	114.24	155.06	47.73	112.77	57.49	75.17
2017	106.92	229.13	43.25	165.53	58.27	99.53

In summary, Queensland's coal industry enjoyed a much better operating environment in both 2016 and 2017, reflecting the higher demand and prices.

In terms of coal mining exploration expenditure in Queensland, expenditure peaked in 2011 at \$653.8 million before falling in subsequent years to be at around 2005 levels by 2016, before stabilising in 2017.

#### Gas

The scheduled completion of the three CSG to LNG projects in Queensland saw LNG exports increase from 5.82 million tonnes in 2015 to 17.47 million tonnes in 2016 and rise further to 20.24 million tonnes in 2017. Meanwhile, a rebound in international crude oil prices since late August 2017 has driven LNG export prices higher.

Currently, there are several significant CSG developments in Queensland:

- QGC's \$1.7 billion Charlie Project, located close to Wandoan, was completed in late 2017. It will supply up to 90PJ of natural gas (1.6 million tonnes of LNG equivalent) per annum.
- QGC also announced in late March 2017 the \$500 million Project Ruby, where up to 161 wells will be drilled in the Surat Basin.
- On 1 December 2017, Arrow and QCLNG signed a deal to commercialise the majority of Arrow's gas reserves in the Surat Basin. This will add up to 240PJ (4.3 million tonnes of LNG equivalent) of gas supply per annum from early next decade.
- The \$800 million Northern Gas Pipeline began construction in July 2017. When completed in late 2018, the pipeline will transport up to 100TJ of gas per day to Mount Isa.
- Senex Energy was awarded the first domestic gas acreage near Miles and Wandoan in September 2017. Around 100 wells will be drilled for this project which is named Project Atlas.
- In June 2017, APA entered into a non-binding Memorandum of Understanding (MOU) with Blue Energy Limited to facilitate options for the delivery of gas from Blue Energy's gas resources in the Bowen Basin to the East Coast gas market.
- APA also entered into an MOU with Comet Ridge in May 2016 to develop a pipeline connecting the Galilee Basin to APA's East Coast Grid.

#### Base metals

There has also been a continued rally in metal prices, particularly zinc, improving near-term prospects for Queensland base metal miners. In particular:

- On 12 December 2017, Glencore announced the anticipated restart of their Lady Loretta zinc mine near Mount Isa in the first half of 2018 (operations have been suspended since October 2015). Glencore is also reportedly looking to fill hundreds of positions across its metals operations.

- Glencore also announced plans in January 2018 that it would undertake a \$30 million rebrick of the Mount Isa Copper Smelter in March, extending the life of Mount Isa smelting operations (and potentially downstream refining at Townsville).
- Despite ongoing uncertainty, processing of tailings at the former Century Zinc Mine appear to be becoming more likely. In an investor update on 31 January 2018, New Century outlined first production is expected in July 2018 and full production by October 2019, although it remains subject to completion of a debt financing package. In February 2018, New Century announced a \$100 million gas supply contract with Santos. There are also plans for a feasibility study to examine the potential of further extending the mine life beyond tailings processing.