

# **Environmental Protection (Chain of Responsibility) Amendment Bill 2016**

## **Explanatory Notes**

### **Short title**

The short title of the Bill is the Environmental Protection (Chain of Responsibility) Amendment Bill 2016

### **Policy Objectives and the reasons for them**

The objectives of the Bill are to amend the *Environmental Protection Act 1994* (EP Act) to:

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

In the past 12 months, the Department of Environment and Heritage Protection has confronted increasing difficulties in ensuring that sites 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.

Urgent amendments are required to ensure that the Department of Environment and Heritage Protection can effectively impose a chain of responsibility so that these companies and their related parties bear the cost of managing and rehabilitating sites. This has emerged as a looming major problem with the downturn in the mining sector. Without additional powers in the EP Act, there is a risk that the State will incur operational and financial responsibility for sites in financial difficulty.

### **Achievement of policy objectives**

The policy of facilitating greater environmental protection for sites in financial difficulty and avoiding costs being incurred by the State for the environmental management and clean-up of such sites is to be achieved by:

- allowing environmental protection orders 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, the Department of Environment and Heritage Protection may require the recipient to pay the costs of taking action stated in the order or monitoring compliance with the order

- enabling the Department of Environment and Heritage Protection 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 the Department of Environment and Heritage Protection to access information for evidentiary purposes
- 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.

## **Alternative ways of achieving policy objectives**

There are no other viable alternatives that would achieve the policy objectives other than the proposed Bill.

## **Estimated cost for government implementation**

No significant costs to government are currently envisaged for the proposed changes to the EP Act. Any increases in administrative costs associated with the implementation of the new provisions will be met from existing agency budget allocations.

## **Consistency with Fundamental Legislative Principles**

The Bill is generally consistent with Fundamental Legislative Principles. Potential breaches of Fundamental Legislative Principles are addressed below.

### **Retrospectivity**

The new environmental protection order provisions have been designed to be prospective but an element of retrospectivity cannot be avoided. The new provisions operate by reference to factors about the involvement of various entities in the activities of companies, some of which may have happened before the commencement of the amendments. For example, a company or individual may be given an environmental protection order requiring them to undertake actions because of acts and omissions happening before the commencement of the amendments. Therefore, these provisions may raise an issue with regards to the principle that legislation should not be retrospective.

The provisions are, however, directed at both an existing and looming problem in ensuring the protection of the environment, for the benefit of the community as a whole. The provisions 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 activities were

carried out or when the relevant harm was caused. This is necessary to prevent a legacy of environmental harm being left by companies.

### **Expanded power to issue environmental protection orders**

The Bill expands the grounds on which the Department of Environment and Heritage Protection may issue an environmental protection order. An order may be issued to a 'related person' of the company operating the site.

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.

### **Administrative power subject to appropriate review**

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.

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'.

## **Consultation**

Due to the urgency of the Bill, consultation has been limited to within government.

## **Results of Consultation**

Changes have been made to the Bill in response to feedback from the Department of Justice and Attorney-General.

Some concerns were raised regarding the extension of provisions to executive officers. However, the review of directors' liability provisions by the Council of Australian Governments (COAG) in 2012 did not lead to any changes to the EP Act. The existing directors' liability provisions in the EP Act were retained and the new provisions proposed by this Bill can be considered to be an extension of these.

## **Consistency with legislation of other jurisdictions**

The Bill is specific to Queensland and is not uniform with related legislation in other State jurisdictions. Queensland appears to be leading in establishing chain of responsibility provisions for environmental obligations.

## Notes on Provisions

### Short title

*Clause 1* states that the Act should be cited as the *Environmental Protection (Chain of Responsibility) Amendment Act 2016*.

### Act amended

*Clause 2* states that this Act amends the EP Act.

### Amendment of s 215 (Other amendments)

*Clause 3* amends section 215 to allow the administering authority to amend an environmental authority where the environmental authority is transferred to another holder or where an environmental protection order is amended or withdrawn.

The transfer of an environmental authority to a new holder may increase the risk that the administering authority will need to take action to prevent or minimise environmental harm or to rehabilitate or restore the environment. As a consequence, the transfer of an environmental authority to a new holder should allow the administering authority to amend the environmental authority to impose a condition requiring financial assurance.

In the event an environmental protection order is amended or withdrawn, it is appropriate for the administering authority to assess whether amendments to the environmental authority could proactively avoid the harm, or risk of harm, that had resulted in the environmental protection order being issued.

### Amendment of s 332 (Administering authority may require draft program)

*Clause 4* amends section 332 of the EP Act to allow the administering authority to require the preparation of a transitional environmental program if an environmental protection order has been amended or withdrawn.

This amendment is necessary to allow the administering authority to require the preparation of a transitional environmental program when it is appropriate to withdraw an environmental protection order issued under the new chapter 5, part 7, division 2. Such action may become appropriate if, for example, a high risk entity trades its way out of financial difficulty or sells the relevant activity as a going concern. In such circumstances, it may be appropriate to remove obligations from related persons and to instead put in place a program for the operator to rectify any outstanding non-compliance with the Act.

## **Insertion of new ch 7, pt 5, div 1 hdg**

*Clause 5* inserts a new heading to apply to the existing provisions about environmental protection orders. This is necessary because the new division 2 will apply to environmental protection orders issued to related persons of the company carrying out the activity to which the order applies to.

## **Amendment of s 358 (When order may be issued)**

*Clause 6* amends section 358 to provide that an environmental protection order can be issued in the circumstances stated in the new chapter 5, part 7, division 2 (inserted by clause 7). This is a consequential amendment inserted because of the new provisions.

## **Insertion of new ch 7, pt 5, div 2**

*Clause 7* inserts a new division 2 in chapter 7, part 5. This new division will allow environmental protection orders to be issued to related persons of the company that is, or was, carrying out the environmentally relevant activity.

### **Division 2 Issue of orders to related persons of companies**

#### **Section 363AA Definitions for division**

This section inserts definitions, which will apply for chapter 7, part 5, division 2.

‘Associated entity’ is defined by reference to the *Corporations Act 2001 (Cth)*.

‘Financial interest’ is defined to include both direct and indirect (including legal and equitable) interests in the shares of a company, in security given by the company or income or revenue of the company.

‘High risk company’ is defined to include externally administered companies under the *Corporations Act 2001 (Cth)*, as well as companies which are related entities to such companies. This definition will encompass circumstances where the operator of an environmentally relevant activity is externally administered itself and at consequent risk of failing to comply with its environmental and rehabilitation obligations. The definition also captures circumstances where external administration of an associated entity within the meaning of section 50AAA of the (*Corporations Act 2001 (Cth)*) is an indication of financial difficulty in the corporate group. The definition is intended to prevent companies from avoiding the operation of these provisions by transferring operation of the relevant activity from an externally administered company to another member of its corporate group or other associated entity.

‘Holding company’ is defined by reference to the *Corporations Act 2001 (Cth)* to mean a company of which the relevant company is a subsidiary under the operation of that Act.

‘Interest’ is a term used in the definition of ‘financial interest’ and is defined to mean a legal or equitable interest. This is intended to clarify that trust structures can not be used to avoid the operation of this division.

‘Related person’ is defined by reference to the new section 363AB.

‘Relevant activity’ is defined to mean an environmentally relevant activity which was, or is, being carried out by the company under an environmental authority.

### **Section 363AB      Who is a *related person* of a company**

Section 363AB identifies the ‘related persons’ which may be issued with an environmental protection order under the new division 2.

‘Related persons’ will include a holding company of the company carrying out the activity, the owner of the land upon which the relevant activity is, or was, carried out and other persons determined by the administering authority under subsections (2) and (3) to have a ‘relevant connection’ to the company carrying out the activity.

A person will have a ‘relevant connection’ to the company carrying out the activity where the person has either benefited financially from the relevant activity or was in a position to influence the company’s compliance with its environmental obligations. A person with a relevant connection bears some responsibility for the environmental harm caused, or likely to be caused, as a result of a company’s activities and should bear responsibility for action to address such harm.

Section 363AB(3) is a non-exhaustive list of factors which will indicate that a person is in a position to influence the conduct of a company, including legal and practical ability to exert influence whether alone or jointly with an associated entity (as that term is defined in the *Corporations Act 2001 (Cth)*).

Section 363AB(4) is a non-exhaustive list of the factors which can be considered by the administering authority in determining under section 363AB(2) whether a person has a relevant connection with the company carrying out the activity (referred to as the ‘first company’). These factors include the extent of the person’s control of the company carrying out the activity, as the term ‘control’ is defined in section 50AA of the *Corporations Act 2001 (Cth)*, which will encompass both legal and practical ability to influence the decisions of the company carrying out the activity. Such control may be evidence of an ability to influence the extent of the company’s environmental compliance.

The relevant factors also include whether the person is an executive officer of the company carrying out the activity, a holding company or other company with a financial interest in the company carrying out the activity. Such a position indicates the potential ability to influence decisions about environmental compliance either directly or indirectly.

The relevant factors also include the extent of the financial interest a person has in the company carrying out the activity. This consideration is intended to avoid environmental protection orders being issued to persons with only very small interests in the company or its profits, having regard to the corporate structure and associated financial interests as a whole. An ability to derive financial benefit from the relevant activity including, but not limited to, through structures such as discretionary trusts is also be relevant factor.

Any agreements or other transactions entered into by the company carrying out the activity, its holding companies or other companies with a financial interest in the company will also be relevant to assessing whether a person is a related person. Such agreements and transactions, particularly if they are with related entities, may provide evidence of a potential to profit from the relevant activity as well as ability to influence environmental performance on the site of the relevant activity.

In considering whether entity person has a relevant connection with the company carrying out the activity, the administering authority may also consider whether their dealings with the company were at arm's length, on a commercial footing, for the purposes of providing professional advice or for the purposes of providing finance or taking a security. These factors will be relevant to the nature of the relationship between the person and the company carrying out the activity. For example, arm's length transactions and dealings for the provision of professional advice may suggest that a person should not be determined to have a relevant connection.

The administering authority may issue notices under section 451 of the EP Act to require information relevant to determining whether a person has a relevant connection with a company. The extent to which a person complies with such a notice will be a factor considered in assessing whether they have a relevant connection. 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.

Section 363AB(5) makes it clear that the assessment under section 363AB(4) will be based on those factors both as they exist at the time the assessment is undertaken and as they have existed at any earlier time.

### **Section 363AC      Order may be issued to a related person**

Section 363AC provides that, where an environmental protection order has been issued to a company under division 1, an environmental protection order may also be issued to a related person for that company. The environmental protection order issued to the related person may impose any requirements that could be imposed on the original recipient.

This provision will ensure that compliance with an environmental protection order 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). If an environmental protection order has been issued



under this section, the administering authority will have the power to step in under section 363AG and recover the costs of doing so under section 363AI.

**Section 363AD      Order may be issued to related person of high risk company**

Section 363AD provides that the administering authority may issue an environmental protection order to a related person or related persons of a high risk company.

Sections 363AD(2) provides that environmental protection orders may be issued to a related person to impose any obligations which could be imposed under division 1. The provisions make it clear that such requirements can continue to be imposed in circumstances where the high risk company no longer holds the relevant environmental authority. 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 has otherwise ceased to be in force.

Section 363AD(4)(a) will ensure that an environmental protection order can be issued requiring the related person to take any action necessary to prevent or minimise the risk of serious or material environmental harm which is occurring, or may occur, as a result of the relevant activity or more broadly as a result of the condition of the land upon which that activity was carried out. This will, for example, allow appropriate measures to be imposed at sites that require active management to avoid serious or material environmental harm.

Section 363AD(4)(b) will ensure that a related person can be required to rehabilitate or restore the site upon which the relevant activity was carried out as well as any harm it has caused on adjacent sites. This will ensure that those who profited from a commercial venture or directed its actions will take responsibility for rehabilitating the resulting environmental harm. The actions required could, for example, include investigating the status of the land, preparing and implementing a rehabilitation plan, as well as any necessary monitoring.

**Section 363AE      Order may provide for joint and several liability**

Section 363AE provides that an environmental protection order issued to more than one related person may provide that they are jointly and severally liable for compliance with the environmental protection order and the cost of compliance with that order. This will ensure that compliance can be enforced against any related person.

**Section 363AF      Procedure if related person is not the owner of land on which action is required**

Section 363AF will allow the recipient of an environmental protection order and their contractors to enter any land necessary to comply with the order, either with the

consent of the owner and occupier or on 2 business days notice to the owner and occupier.

This provision is necessary as a related person will not necessarily have any rights or interests over the relevant land and because it may be necessary to enter other land in the vicinity of the relevant land to comply with the environmental protection order if, for example, off-site harm has occurred.

The 2 business day timeframe may be considered to provide only short notice. This short notice period is necessary to ensure that any urgent action required to prevent environmental harm can be taken in a timely fashion, even if the owner or occupier is not readily available to provide consent.

The provision also requires the recipient and contractor to take all reasonable steps to minimise inconvenience and damage to the land and provides persons (other than the company carrying out the activity to which the environmental protection order relates) with a right to claim compensation for any harm caused.

### **Section 363AG Taking action in place of related person**

This section will allow the Department of Environment and Heritage Protection to step in and take action in the event the recipient of an environmental protection order either fails to comply with the order or secures a stay of the order while the decision to issue the order is the subject of an application for internal review or appeal under chapter 11, part 3 of the EP Act.

This provision will ensure that action considered necessary to prevent or minimise environmental harm can be taken at an appropriate time, without removing internal review and appeal rights.

This provision also authorises entry to land. The same notice requirements that apply to the recipient of the order under section 363AF apply to the authorised person (or contractor) that is entering land under section 363AG.

### **Section 363AH Obstruction of recipient complying with notice**

Section 363AH makes it an offence to obstruct the recipient of an environmental protection order from taking action to comply with the order. This will ensure that any requirements imposed can be complied with in practice.

### **Section 363AI Administering authority may issue cost recovery notice**

In the event the administering authority has decided that it should step in to take action under section 363AG, section 363AI will allow the costs of such action or any costs of monitoring compliance with the order to be recovered from the recipient of the environmental protection order.

In the event an internal review or appeal has resulted in different actions being required under the environmental protection order, then the administering authority will only be able to recover the cost of the actions actually required by this amended environmental protection order. In the event an internal review or appeal results in a decision that an environmental protection order should not be issued to the recipient, then costs will not be recoverable from the recipient.

### **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. This amendment clarifies that a clean up notice has not been complied with if an action required in the notice is not taken within the time specified in the notice.

### **Amendment of s 452 (Entry of place—general)**

*Clause 9* amends section 452 of the EP Act, which allows an authorised person under the Act to enter a place.

This clause inserts a new paragraph in the existing subsection (1) to allow entry by an authorised person to a place to which an environmental authority relates if 5 business days notice has been given to the owner and occupier. The existing subsection (1) did not allow for entry when the 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. This unjustifiably restricted the ability of authorised persons to monitor compliance or the risk of environmental harm on such sites.

The clause also inserts a new subsection, which will allow an authorised person to enter a place an environmental authority has applied to, even if the environmental authority has ceased to have effect by the operation of any law except the EP Act. 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. The clause is intended to address a limitation in the current section 452(1)(c), which allows entry to a place ‘to which an environmental authority relates’.

### **Amendment of s 476 (Failure to attend or answer questions)**

*Clause 10* amends section 476, which contains the offence of failing to comply with a requirement under section 465 to answer questions about a suspected offence.

Under the current section 476, it is an offence to fail to comply with such a requirement unless the person has a reasonable excuse. It is currently a reasonable excuse that the answer to the question might tend to incriminate the person.

This limitation has created unnecessary difficulties in investigating companies suspected of offences under the EP Act. The amended provision 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).

### **Amendment of s 490 (Evidentiary provisions)**

*Clause 11* expands the operation of the evidentiary provisions contained in section 490 of the Act by expanding the administering authority's ability to certify documents as evidence of a matter.

The expanded operation is intended to allow the administering authority to certify copies of documents issued, given, received or kept by the administering authority, beyond those currently specified in section 490(5)(a). The provision would, for example, allow the administering authority to certify that certain correspondence was received from the holder of an environmental authority.

### **Amendment of s 522 (Stay of operation of particular original decisions)**

*Clause 12* amends the current section 522 to make its application subject to the new sections 522A and 522B. This is a consequential amendment inserted to ensure the proper operation of the new sections 522A and 522B.

### **Insertion of new ss 522A and 522B**

*Clause 13* inserts a new section 522A and 522B to address the circumstances in which certain decisions should, or may be, stayed while the subject of an application for internal review or appeal.

#### **Section 522A      Stay of decision about financial assurance**

Section 522A provides that a stay may not be granted under section 522 in relation to a decision about the amount of financial assurance required under a condition of an environmental authority unless the administering authority holds security in the amount of at least 85% of the amount it has decided is required.

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.

**Section 522B      Stay of decision to issue environmental protection order**

Section 522B provides that, in relation to a decision to issue an environmental protection order, 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.

**Amendment of s 535 (Stay of operation of decisions)**

*Clause 14* provides that the operation of section 535, which contains the power for the Planning and Environment Court to stay a decision during an appeal from a review decision, is subject to the operation of section 535A and 535C.

**Insertion of new s 535B and 535C**

*Clause 15* inserts provisions that are equivalent to those contained in clause 13. This clause inserts provisions that deal with the grant of stays for decisions about financial assurance or decisions to issue environmental protection orders under section 535 of the EP Act, whereas clause 13 relates to the grant of stays for decisions about financial assurance or decisions to issue environmental protection orders under section 522.

**Insertion of new ch 13, pt 25**

*Clause 16* inserts transitional provisions for the operation of the *Environmental Protection (Chain of Responsibility) Amendment Act 2016*.

**Section 744      Amendment of environmental authority because of particular pre-commencement matter**

The new section 744 is a transitional provision which will allow action to be taken under the new section 215(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.

**Section 745                    Decision about related persons based on particular pre-commencement matters**

The new section 745(1) makes it clear that the relevant activity carried out by a company includes an activity carried out prior to commencement. This provision 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.

The new section 745(2) allows the administering authority, in determining whether a person has a relevant connection to a company, to consider acts, omissions and circumstances which occurred prior to the commencement of the amending Act. 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.

**Section 746                    Extension of power to issue environmental protection orders to particular persons**

The new section 746 will allow environmental protection orders under the new division 2 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. This provision is necessary to prevent companies from taking action to avoid the operation of the new provisions.

**Section 747                    Requirements under environmental protection orders may relate to past matters**

The new section 747 clarifies that an environmental protection order may be issued under the new division 2 in respect of relevant activities carried out prior to the commencement of the amending Act and harm caused prior to the commencement of the amending Act. This provision is necessary to ensure that the new powers are effective and that a legacy of environmental harm is not left by high risk companies.

**Amendment of sch 2 (Original decisions)**

*Clause 17* amends schedule 2, which lists original decisions in respect of which internal review and appeal is available under chapter 11, part 3. This is a consequential amendment inserted to ensure natural justice in relation to the new provisions inserted in the new chapter 7, part 5, division 2.

The decision to issue an environmental protection order under the new section 363AC or 363AD and related decisions under the new division 2 will be original decisions appealable to the Land Court to the extent that the decision imposes requirements relating to a resource activity and will otherwise be appealable to the Planning and Environment Court.

This clause also amends schedule 2 to exclude internal review and appeal rights for a decision to issue a notice under section 451 of the EP Act requiring information relevant to whether a person is a 'related person'. This amendment is necessary to ensure that the administering authority can act to prevent environmental harm under the new section 363AC at the appropriate time, without being delayed in the initial step of gathering information to identify 'related persons'.

### **Amendment of sch 4 (Dictionary)**

*Clause 18* inserts definitions for the new terms in the new chapter 7, part 5, division 2. It also inserts a definition for 'resource activity EPO'. This is a consequential amendment required because 'resource activity EPO' is a new term inserted by the amendments to schedule 2.