

Environmental Protection (Chain of Responsibility) Amendment Bill 2016

Explanatory Notes

For

Amendments to be Moved During Consideration in Detail by the Honourable Steven Miles MP

Title of the Bill

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

Objectives of the Amendments

The objectives of the amendments are to improve administrative processes, address errors, and clarify the policy intent of the amendments in the Bill. The amendments address issues which were identified during the inquiry into the Bill by the Agriculture and Environment Committee.

Achievement of the Objectives

The objectives will be achieved by amendments to the Bill that:

- ensure that the ability to impose a condition requiring financial assurance is extended to include circumstances in which the holder of an environmental authority effectively changes because of a change in the ownership of the company that is the holder of the authority
- clarify the intent of the Bill in terms of the types of persons who should not be considered to be a 'related person'
- provide for a review of new chapter 7, part 5, division 2 of the *Environmental Protection Act 1994*
- clarify that the Bill allows environmental protection orders to be issued in respect of environmental harm that is unlawful in order to exclude environmental harm that is authorised under an environmental authority
- clarify that the new section 215(2)(c) of the *Environmental Protection Act 1994* (inserted by the Bill) applies retrospectively only to the extent that an environmental authority was transferred after the introduction of the Bill

- clarify that an environmental protection order can be issued to a person who is a 'related person' during the transitional period but who has ceased to be a 'related person' by the time an environmental protection order is issued
- reduce the percentage of financial assurance that is required before a stay of a decision about financial assurance can be granted.

Alternative ways of Achieving Policy Objectives

These amendments make changes to the existing amendments to address errors, improve administrative processes and clarify policy intent and therefore there are no other ways of achieving the policy objectives.

Estimated cost for government implementation

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

Consistency with fundamental legislative principles

The amendments are consistent with fundamental legislative principles.

Consultation

The amendments to the Bill largely respond to the report of the Agriculture and Environment Committee (Report No. 16, 55th Parliament), as well as to submissions made to the Committee. The amendments address errors, improve administrative processes and clarify the policy intent of the Bill.

Further consultation with the Queensland Law Society, Queensland Resources Council, Queensland Environmental Law Association and the Association of Mining and Exploration Companies was undertaken in relation to *Amendments 10 and 11*, in accordance with recommendation 6 of the report of the Agriculture and Environment Committee.

Notes on provisions

Amendment 1

Amendment 1 amends clause 3 of the Bill to the extent that it inserts a new section 215(2)(ba) (which will be renumbered as section 215(2)(c)). The amendment inserts a new paragraph into the existing section 215(2) of the *Environmental Protection Act 1994* to allow a decision to be made to impose a financial assurance condition on an environmental authority in the event of a sale of the shares by the environmental authority holder.

The amendment responds to a submission made to the Committee that most transfers of resource operations and major industrial operations proceed as share sales, and that this does not result in a different entity becoming the holder of the environmental authority. Just as the transfer of an environmental authority to a new holder may increase the risk that the administering authority will need to take action to require rehabilitation or restoration of the environment, so too does a share sale. Therefore, this event should allow the administering authority to amend the environmental authority to impose a financial assurance condition.

Amendment 2

Amendment 2 amends clause 3 of the Bill to update the renumbering of section 215(2) as a result of *Amendment 1*.

Amendment 3

Amendment 3 omits the definition of ‘holding company’ from clause 7 of the Bill. This is a consequential amendment required because *Amendment 18* inserts that definition in schedule 4 of the *Environmental Protection Act 1994*. This is because the term ‘holding company’ is now also to be used in section 215 and not only for the new Chapter 7, Part 5, Division 2.

Amendment 4

Amendment 4 amends section 363AB(1) to respond to recommendation 3 of the report of the Agriculture and Environment Committee. The Committee noted that the category of ‘related person’ in section 363AB(1)(b) inserted by the Bill was quite extensive and included persons who may not be in a position to influence or control the activities conducted by the company.

The effect of the amendment is that, unless a person is an associated entity of a company carrying out a resource activity, ownership of the land upon which a resource activity is being carried out will not result in the person becoming a ‘related person’.

Subsection (1)(b) is amended so that it applies only to owners of land upon which a non-resource activity is, or has been, carried out. The amended subsection (1)(c) applies to owners of land upon which a resource activity is, or has been, carried out.

The amendment is intended to make it clear that owners of land underlying a resource tenure, who may have little or no ability to influence the activities carried out on their land and who do not have the option of declining to allow those activities, will not be held responsible for any harm caused by the resource activities.

Subsection (1)(d) is in the same words as provided for in subsection (1)(c) inserted by the Bill, but is renumbered as a consequence of the above amendments.

Amendment 5

Amendment 5 amends clause 7 of the Bill to the extent that it inserts a new section 363AB(2)(a). The amendment provides that, under subsection (2)(a), only entities which are capable of receiving, or have received, a *significant* financial benefit will be taken to have a ‘relevant connection’ to the entity carrying out the environmentally relevant activity. This clarifies that the intent of the Bill is not to capture those entitled to only a small financial benefit.

Amendment 6

Amendment 6 is intended to clarify that financial benefits of a compensatory nature, and any associated influence on the conduct of a company, will not be grounds for finding that a ‘relevant connection’ exists for the purposes of section 363AB, which is inserted by clause 7 of the Bill.

The amendment provides that a person will not have a ‘relevant connection’ on the basis of financial benefit or influence received under an agreement or obligation in relation to native title, Aboriginal cultural heritage or Torres Strait Islander cultural heritage, a ‘make good’ agreement under the *Water Act 2000*, or a conduct and compensation agreement or other right to compensation under resource legislation (unless the person is also an associated entity).

Amendment 6 also inserts a new subsection (7) which requires the administering authority, in making a decision about whether a person is a ‘related person’, to have regard to any guideline made under section 548A (inserted by *Amendment 13*).

Amendment 7

Amendment 7 defines ‘owner’ for the purposes of the ‘related person’ test in section 363AB (inserted by the Bill), by excluding native title holders and persons to whom land has been granted under the *Aboriginal Land Act 1991* and *Torres Strait Islander Land Act 1991*. This amendment clarifies the intent of the Bill by specifically excluding these types of persons from the operation of the new powers for the purposes of section 363AB(1)(b) and (c) (as renumbered by amendment 4). This amendment also responds to recommendation 3 of the report of the Agriculture and Environment Committee.

Amendment 8

Amendment 8 amends clause 7 of the Bill to insert a new section 363ABA. The new section will require the administering authority, in deciding whether to issue an environmental protection order under section 363AC or 363AD (inserted by the Bill), to have regard to any guideline prepared under the new section 548A (inserted by *Amendment 13*).

Amendment 8 also provides that, in deciding whether to issue an environmental protection order to a ‘related person’, the administering authority may have regard to whether the person took all reasonable steps to ensure that environmental obligations were complied with and that adequate provision was made to finance the rehabilitation of the relevant site. These issues are considered to influence the accountability of a ‘related person’.

The amendments are intended to provide greater certainty about the entities which may potentially be required to take action under the new environmental protection order powers inserted by the Bill.

Amendment 9

Amendment 9 clarifies that the power to issue an environmental protection order in relation to environmental harm under section 363AD(4)(a) is limited to unlawful environmental harm. This has the effect of excluding environmental harm which is not unlawful within the meaning of s493A of the Act.

Amendment 10

Amendment 10 inserts a new section 363AJ which will require the Minister to review the operation of the new chapter 7, part 5, division 2 of the *Environmental Protection Act 1994* (inserted by clause 7 of the Bill) within two years of commencement. A report on the outcomes of the review must be tabled in the Legislative Assembly as soon as practicable after the review is completed.

Amendment 11

Amendment 11 amends the new section 522A(2) inserted by clause 13 of the Bill. The amendment changes the amount of financial assurance which must be held for a stay to be granted from 85% to 75%.

Amendment 11 responds to recommendation 6 of the report of the Agriculture and Environment Committee.

Amendment 12

Amendment 12 amends the new section 535B(2) inserted by clause 15 of the Bill. The amendment changes the amount of financial assurance which must be held for a stay to be granted from 85% to 75%.

Amendment 12 responds to recommendation 6 of the report of the Agriculture and Environment Committee.

Amendment 13

Amendment 13 inserts a new section 548A which will allow the chief executive to make a guideline about how the administering authority decides that a person has a 'relevant connection' with a company and about the decision to issue an environmental protection order under sections 363AC and 363AD (inserted by clause 7 of the Bill). This amendment is related to *Amendment 8* which requires the administering authority to have regard to any guideline made under section 548A.

This amendment responds to recommendation 4 of the report of the Agriculture and Environment Committee.

Amendment 14

Amendment 14 relocates definitions for the purposes of the transitional provisions of section 746 of the Bill. This is a consequential amendment required because of *Amendment 15*.

Amendment 15

Amendment 15 amends clause 16 of the Bill to the extent that it inserts a new section 744. The amendment will clarify that the new section 215(2)(c) and (d) (as renumbered) apply

retrospectively to changes in the holder of an environmental authority only to the extent that the change occurred following introduction of the Bill.

Amendment 16

Amendment 16 amends clause 16 of the Bill to the extent that it inserts a new section 746. The amendment clarifies that an environmental protection order can be issued to a person who is a ‘related person’ during the transitional period but who has ceased to be a ‘related person’ by the time an environmental protection order is issued. This amendment is intended to prevent avoidance behaviour.

Amendment 17

Amendment 17 deletes definitions which have been relocated by *Amendment 14*.

Amendment 18

Amendment 18 moves the definition of ‘holding company’ into schedule 4 of the *Environmental Protection Act 1994* (see also *Amendment 3*).