

Environmental Protection (Financial Provisioning) (Transitional) Regulation 2019

Explanatory notes for SL 2019 No. 187

made under the

Environmental Protection Act 1994

General Outline

Short title

Environmental Protection (Financial Provisioning) (Transitional) Regulation 2019

Authorising law

Sections 580 and 766 of the *Environmental Protection Act 1994*

Policy objectives and the reasons for them

The *Mineral and Energy Resources (Financial Provisioning) Act 2018* (MERFP Act), which commenced on 1 April 2019, amended the *Environmental Protection Act 1994* (EP Act) to:

- implement the Financial Provisioning Scheme; and
- introduce the requirement for a Progressive Rehabilitation and Closure Plan (PRCP) for environmental authorities issued for a site-specific application relating to a mining lease.

The MERFP Act inserted transitional provisions in the EP Act to facilitate a smooth transition to the new Financial Provisioning Scheme and mine rehabilitation framework under the MERFP Act. Specifically, the transitional provisions in the EP Act were intended to ensure that:

- all existing environmental authorities issued for a site-specific application relating to a mining lease require a PRCP schedule to operate but would not be subject to the offence of operating without an approved PRCP schedule (section 431A of the EP Act) for a period of time to enable them to transition to the PRCP framework; and
- all financial assurance decisions made under the old framework would be converted to estimated rehabilitation cost (ERC) decisions.

Due to technical issues in the transitional provisions inserted by the MERFP Act, a small number of environmental authority (EA) holders may not be subject to the requirement to prepare a PRCP, and some other holders may unintentionally be in non-compliance with section 431A of the EP Act. This may be due to a transfer of the EA after 1 April 2019 but

prior to the approval of a PRCP, or if there was no current plan of operations on 1 April 2019. Another technical issue means that two types of financial assurance decisions made under the pre-amended EP Act will not automatically be converted to ERC decisions under the current transitional arrangements.

The objective of the *Environmental Protection (Financial Provisioning) (Transitional) Regulation 2019* (the Transitional Regulation) is to address these technical issues and ensure that the intent of the transitional provisions in the MERFP Act can be achieved. The Transitional Regulation will assist in ensuring consistent transitional arrangements apply to all holders of environmental authorities and small scale mining tenures to which the new framework applies.

In accordance with section 766 of the EP Act, the Transitional Regulation makes provisions of a transitional nature which the MERFP Act did not sufficiently provide. These provisions are necessary to facilitate a smooth transition to the new Financial Provisioning Scheme and mine rehabilitation framework.

Achievement of policy objectives

To provide sufficient transitional arrangements for the MERFP Act, the Transitional Regulation ensures:

- that the term ‘mining EA holder’ in the transitional provisions for the MERFP Act includes new holders of environmental authorities issued for a site-specific application for a mining lease that, on or after 1 April 2019, have been transferred (so that the relevant transitional provisions also apply to these holders);
- that there is a transitional provision the same as section 753(3)-(5) of the EP Act that applies to:
 - ‘mining EA holders’ that had a plan of operations which expired, and was not replaced, before 1 April 2019;
 - ‘mining EA holders’ that were required to have a plan of operations but had not submitted it before 1 April 2019;
 - ‘mining EA applicants’ issued an EA on or after 1 April 2019.
- all financial assurance decisions made under sections 305 and 306 of the pre-amended EP Act (i.e. the EP Act as in force prior to 1 April 2019) on or after 1 April 2019 are deemed to be ERC decisions and efficiently transitioned into the Financial Provisioning Scheme.

Application of transitional provisions

Section 4 of the Transitional Regulation ensures that relevant transitional provisions under chapter 13, part 27 of the EP Act apply if, on or after 1 April 2019, the holder of an EA issued for a site-specific application relating to a mining lease changes and another entity (the ‘transferee’) becomes the holder of the EA.

This provision is necessary because many of the transitional provisions apply only to the ‘mining EA holder’ which is defined in section 750 of the EP Act to mean a person who:

- on commencement, is the holder of a relevant EA (for a mining activity relating to a mining lease, if a relevant activity is an ineligible environmentally relevant activity);
or

- becomes the holder of a relevant EA, if the holder was the applicant for the authority on or before the ‘PRCP start date’ (1 November 2019).

The holder of an EA may change after 1 April 2019 because of the transfer of the mining lease. In this case, if a notice had not been given under section 754 of the EP Act prior to the change in holder, the requirement to give a proposed PRCP to the administering authority may not apply. Alternatively, the new EA holder may inadvertently be in non-compliance with section 431A of the EP Act by operating without an approved PRCP schedule.

Section 4 is intended to ensure all existing EAs issued for a site-specific application relating to a mining lease are required to prepare a proposed PRCP and are (for some period of time) not subject to the offence under section 431A of the EP Act, regardless of whether the holder of the EA changes after 1 April 2019. To ensure holders had time to transition to the new PRCP framework, the intent of the MERFP Act was that all existing EAs subject to the framework would not be in contravention of section 431A until either a PRCP schedule was approved or the holder failed to comply with a notice given requiring a PRCP, whichever is earlier.

For circumstances where the holder of EA changes on or after 1 April 2019, section 4 ensures that:

- if there is a current plan of operations at the time of the transfer - section 753 of the EP Act applies to the transferee;
- if the plan of operations had ended or otherwise not been given to the administering authority at the time of the transfer - section 5 of the Transitional Regulation applies; and
- the administering authority must send a notice to the transferee under section 754 of the EP Act requiring a PRCP (if a notice has not been issued to the previous ‘mining EA holder’ prior to the transfer).

Section 4 also validates actions of the previous ‘mining EA holder’ in response to a notice given under section 754 of the EP Act prior to a transfer. These notices are deemed to have been given to the transferee and anything done by the previous holder to comply with the notice is deemed to have been done by the transferee.

Section 5 of the Transitional Regulation ensures that particular ‘mining EA holders’ are allowed sufficient time to transition into the PRCP framework by stating that section 431A of the EP Act does not apply for a period of time. This provision is necessary because section 753 of the EP Act is limited to ‘mining EA holders’ who had a current plan of operations on 1 April 2019. This means that on or after 1 April 2019 the following may inadvertently be committing an offence under section 431A of the EP Act:

- ‘mining EA holders’ with a plan of operations that had expired, and not been replaced, before 1 April 2019;
- ‘mining EA holders’ that had not submitted a plan of operations (because, for example, they had not started operations);
- ‘mining EA applicants’ (as defined in section 750 of the EP Act) issued an EA on or after 1 April 2019.

Section 5(2)-(4) are consistent with section 753(3)-(5) of the EP Act and ensure the equivalent transitional requirements apply to the above EA holders.

Section 6 of the Transitional Regulation ensures that particular decisions of the administering authority relating to financial assurance are taken to be ERC decisions.

Under section 302 of the pre-amended EP Act, an EA holder could apply to amend the amount or form of their financial assurance. The administering authority would make a decision to approve or refuse the application under section 305 of the pre-amended EP Act.

Under section 306 of the pre-amended EP Act, the administering authority could require a change to an EA holder's financial assurance amount.

While the *Acts Interpretation Act 1954* and transitional provisions in the MERFP Act continued these processes under the pre-amended EP Act, section 761 of the EP Act does not deem the decisions from sections 305 and 306 as ERC decisions.

Section 6 is necessary to ensure that financial assurance decisions made under section 305 and 306 of the pre-amended EP Act are taken to be ERC decisions.

Consistency with policy objectives of authorising law

The Transitional Regulation is consistent with the object of the EP Act.

Inconsistency with policy objectives of other legislation

The Transitional Regulation is not inconsistent with the policy objectives of any other legislation.

Benefits and costs of implementation

The Transitional Regulation will facilitate a smooth transition to the new Financial Provisioning Scheme and mine rehabilitation framework under the MERFP Act. It is intended to ensure the consistent treatment of all holders of environmental authorities and small scale mining tenures to which the new framework applies.

There are no costs associated with the implementation of the Transitional Regulation.

Consistency with fundamental legislative principles

The Transitional Regulation is considered to be generally consistent with fundamental legislative principles as defined in section 4 of the *Legislative Standards Act 1992*. The Transitional Regulation raises potential departures from section 2(a) of the *Legislative Standards Act 1992* which provides that legislation should have sufficient regard to the rights and liberties of individuals.

Retrospectivity

Section 2 of the Transitional Regulation provides that the Transitional Regulation is taken to have commenced on 1 April 2019 (i.e. the same day the MERFP Act commenced). This may be seen to breach the fundamental legislative principle that legislation should not adversely

affect rights and liberties, or impose obligations, retrospectively (*Legislative Standards Act 1992*, section 4(3)(g)).

Section 766(2) of the EP Act states a transitional regulation may have retrospective operation to a day that is not earlier than the commencement of the MERFP Act.

In this case, retrospectivity post-commencement of the MERFP Act is justified to ensure that there are consistent transitional provisions for all holders of EAs and small scale mining tenures subject to the new regulatory framework introduced by the MERFP Act. The Transitional Regulation ensures that the intent of the MERFP Act, which was subject to extensive consultation, can be achieved.

Sections 4 and 5 of the Transitional Regulation avoid particular EA holders potentially breaching section 431A of the EP Act (obligation to have an approved PRCP schedule). While the EA holder will be subject to the obligation to prepare a PRCP, they will also be exempt from the offence in section 431A of the EP Act for a period of time.

Section 6 of the Transitional Regulation ensures that particular decisions of the administering authority to amend the amount or form of financial assurance on or after 1 April 2019 are taken to be ERC decisions. While this provision may operate retrospectively, this provision is intended to ensure the consistent treatment of financial assurance decisions made under the existing framework. When this provision applies, it will ensure that there is no requirement for the EA holder to make an application to the administering authority for an ERC decision.

The Transitional Regulation makes provisions of a transitional nature to provide a temporary measure to facilitate a smooth transition to the new framework under the MERFP Act. The regulation will expire two years after commencement of the MERFP Act.

Sufficient regard to the rights and liberties of individuals

Section 4 of the Transitional Regulation provides that, for chapter 13, part 27 of the EP Act, a transferee is taken to be a ‘mining EA holder’. In some circumstances, section 4 may be considered to be inconsistent with the fundamental legislative principle that legislation must have sufficient regard to the rights and liberties of individuals. This is because the transitional provisions in chapter 13, part 27 of the EP Act apply to the transferee as though the transferee was the previous ‘mining EA holder’.

The transferee may be committing an offence under section 431A of the EP Act because of an omission of another person (i.e. the previous ‘mining EA holder’). The administering authority may have issued a notice under section 754 of the EP Act to the ‘mining EA holder’ prior to transfer of the EA to the transferee. If, on the date of transfer, the ‘mining EA holder’ had not complied with the notice, the transferee will need to ensure that this is addressed so that there will be no offence committed under section 431A of the EP Act.

Section 4 is considered to be justified because it ensures that all EAs issued for a site-specific application relating to a mining lease are subject to the same transitional requirements. It would be unreasonable for some of these EAs to be required to have a PRCP to operate, and for others to not require a PRCP simply because there was a transfer on or after 1 April 2019. This provision ensures that the intent of the MERFP Act can be achieved.

Consultation

External consultation was not undertaken on the Transitional Regulation as its purpose is to address technical issues and facilitate the achievement of the original intent of the transitional provisions in the MERFP Act. Extensive consultation was undertaken on this intent prior to the passage of the MERFP Act.

In accordance with *The Queensland Government Guide to Better Regulation* (the Guide), the Department of Environment and Science consulted the Office of Best Practice Regulation (OBPR) within the Queensland Productivity Commission. OBPR confirmed that the amendments were excluded from further assessment under the Guide.

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