Tenure Matters

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Welcome back. This month we are going to talk about the *Environmental Protection (Chain of Responsibility) Amendment Bill 2016.* The Bill appears to have been written and pushed through the parliamentary process with undue haste; being introduced to Parliament on 15 March 2016, referred to the Agriculture and Environment Committee and the closure of public submissions on 31 March 2016. Haste such as this rarely, if ever, delivers a good regulatory result. The potential for (what it is hoped are) unintended consequences is high when there has been insufficient time to consider properly the scope of the Bill, how the legislation will operate, and its interaction with existing processes. It is important to note that this amending Bill applies to all activities under the *Environmental Protection Act 1994,* including Environmentally Relevant Activities and Resource Activities. Therefore it has wide-ranging potential impact across many critical sectors, including resources, agriculture, manufacturing etc.

The stated aims of the Bill, in the Explanatory Notes, are to facilitate enhanced environmental protection for sites operated by companies in financial difficulty; and to avoid the State bearing the costs for managing and rehabilitating sites in financial difficulty. These are, of course, quite laudable aims; but it is the sledgehammer approach that has raised serious concerns across a number of sectors. The Explanatory Notes state that DEHP has had increasing difficulty ensuring that sites operated by companies in financial difficulty continue to comply with their environmental obligations; and specifically mention Yabulu Nickel Refinery, Texas Silver Mine, Collingwood Tin Mine and Mount Chalmers Gold Mine. This begs the question of why there was not adequate Financial Assurance already held for these operations, given the enormous sums of Financial Assurance that are held against the activities of the petroleum and gas sector, including production and exploration activities. Currently the petroleum sector has collectively lodged more than $1 billion in Financial Assurance; and no-one has been able to find an instance where any of this has had to be used by the Government to rehabilitate land in the wake of petroleum activities. The Explanatory Notes also make mention of the “looming major problem with the downturn in the mining sector” as justification for these amendments – but if adequate Financial Assurance had been held, reviewed

periodically as is required, and reassessed with expanding operations, there should be no "looming major problem".

The amendments introduce the concept that "related persons" may be held responsible for the environmental defaults of companies. The scope of the definition of "related persons" is enormous. In what will be section 363AB of the *Environmental Protection Act 1994* should this Bill be passed, a person is a "related person" of a company if:

- they are the holding company of the company, or
- own land on which the company carriers out, or has carried out, the relevant activity, or
- the administering authority decides they have a relevant connection with the company.

When deciding if a person has a relevant connection with the company, the administering authority may consider, among others:

- the extent of the person's control of that company,
- whether the person is an Executive Officer of the company, or a holding company, or another company with a financial interest in the first company,
- the extent of the person's financial interest in the company,
- if it is possible for the person to receive a financial benefit,
- any agreements or transactions a person has entered into with the company.

Additionally these may be considered either at the time the administering authority is making the decision on the person's relevant connection, or at an earlier time relevant to the decision. In other words, a person's relevant connection can be retrospectively determined, even if they no longer hold the position in question or have the relationship in question upon which their relationship is being assessed.

Having a financial interest in a company is defined (new Section 363AA) as having a direct or indirect interest in:

- shares in the company, or
- a mortgage, charge or other security given by the company, or
- income or revenue of the company.

The Bill also introduces the concept of a "high risk company", which is also defined in what will be section 363AA if passed, as a company that is an externally administered body corporate within the meaning given by the Corporations Act, section 9 or a company that is associated with such a company. Note that the definition of "high risk company" is not in any way related to the **environmental performance** of the company.

Currently the *Environmental Protection Act 1994* allows an Environmental Protection Order (EPO) to be issued to an Environmental Authority holder or the entity causing or threatening to cause unlawful environmental harm. These changes propose the administering authority could issue the EPO to a related person. A person who is related to a "high risk company" could also be issued with an EPO. This could apply irrespective of whether the "high risk company" currently holds the relevant Environmental Authority or has been issued with an EPO.

At the time of writing, eighty-four submissions have been received by the Agriculture and Environment Committee. A public hearing was held on 5 April 2016, and the deadline for the committee to report to the House is 15 April 2016. Speakers at the public hearing included representatives of the North Queensland Conservation Council, Environmental Defenders Office Queensland, Lock the Gate Alliance (Mine Rehabilitation Reform Campaign), Darling Downs Environmental Council, Queensland Resources Council, Association of Mining and Exploration Companies, Australian Petroleum Production and Exploration Association, Thiess Pty Ltd, Mining and Resources Committee Queensland Law Society, Australian Institute of Company Directors, North Queensland Land Council, Sister City Partners Ltd, Department of Environment and Heritage Protection. Many of these were strongly supportive of the Bill – although one suspects more with the stated intent of the Bill rather than the drafting and possible wide-ranging consequences of the Bill.

Quite apart from any consideration of Bill itself, its intent and its consequences: it is interesting to note how quickly the process of producing a Bill, going to Parliament and closing consultation can occur when the Government is highly motivated to change something. Otherwise legislative amendments seem to get bogged down in an interminable consultation process that resolves nothing, or the lack of an appropriate "legislative vehicle". The normal administrative hoops and hurdles seem to have mysteriously evaporated in order to produce this Bill and introduce it to Parliament in the time frame achieved.

I am happy to hear suggestions about topics you would like covered. Feel free to email me at sue.slater@rlms.com.au with the subject heading Tenure Matters.

In the meantime, remember "Tenures make the Project; the Project doesn't make the Tenures".

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