

Article Information

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Extending the reach of environmental protection in QLD - What the 'Chain of Responsibility' means for your project

The recent introduction of the Environmental Protection (Chain of Responsibility) Amendment Act 2016 (Qld) (the Chain of Responsibility Act) in Queensland has widened the potential liability for environmental harm and substantially increased the powers of the Department of Environment and Heritage Protection (DEHP) to issue environmental protection orders (EPO) and require and/ or reassess financial assurance provided pursuant to the Environmental Protection Act 1994 (Qld) (Environmental Protection Act).

Given the broad range of people that DEHP can now issue an EPO to, the Chain of Responsibility Act has the potential to significantly affect a variety of people operating in the energy and resources sectors in Queensland.

In summary, the key changes:

(a) Extended liability under the Environmental Protection Act by expanding the classes of people to whom an EPO can be issued to so that it now includes 'related persons' of companies that are, or were, responsible for compliance with the Environmental Protection Act and high risk companies (externally administered companies and/or their related entities).

A 'related person' includes (but is not limited to):

1. holding companies of the company;
2. landowners of the land on which company carries out, or has carried out, a relevant activity other than a resource activity; and
3. other persons whom the DEHP determines have a "relevant connection" with the company.

For the purposes of determining whether a "relevant connection" may exist, the Chain of Responsibility Act provides for a number of (non-exclusive) factors that the DEHP may consider, including:

1. whether the person is capable of benefitting financially, or has benefited financially, from the performance of the relevant activity by the company; or
2. whether the person is, or has been at any time during the previous two years, in a position to influence the company's conduct in relation its compliance with its environmental obligations;
3. the extent of control that the person has over the company;
4. whether the person is an executive officer of the company or holding company; and
5. the extent to which the dealings between the person and the company were at arm's length.

In deciding whether to issue an EPO to a related person, the DEHP may also consider whether the related person took all reasonable steps to ensure that the company complied with its environmental obligations and made adequate provision to fund the restoration and rehabilitation of the land.

(b) **Extend DEHP's ability to amend or impose additional conditions on an Environmental Authority (EA) where:**

1. the EA is transferred;
2. where another entity becomes the holding company of a holder of an EA; or
3. where an environmental protection order is withdrawn or amended.

In these circumstances, the DEHP may amend or impose a condition requiring the holder to provide financial assurance even where financial assurance was not previously a condition to the environmental authority.

(c) **Extend DEHP's powers** for cost recovery, investigation and enforcement. For example, DEHP can now:

1. issue a cost recovery notice to a related person;
2. enter a place to which an EA relates or land which the EA has applied to, even if the EA is no longer in effect; and
3. compel persons to answer questions in relation to alleged offences committed.

Given the significance and breadth of DEHP's extended powers, it remains to be seen how these new changes will be applied. The State has, however, now appointed a working group to develop statutory guidelines to complement the changes and, hopefully, provide some certainty around how these changes will work in practice.

In the interim, some practical implications of these changes for persons who have an interest in energy or resources projects in Queensland include:

(a) reviewing internal policies and procedures relating to environmental protection to ensure that you have taken all reasonable steps to ensure that any associated company has complied with its environmental obligations and made adequate provision to fund necessary rehabilitation obligations;

(b) reviewing existing agreements with joint venture partners, operators and others to ensure that:

1. liability is appropriately apportioned and that you are appropriately indemnified against any additional liability arising from the Act; and
2. you have a contractual right of access to any information necessary to ensure that you can appropriately defend any action taken by DEHP; and

(c) reviewing relevant insurance policies, including directors and officers policies, to ensure these arrangements are adequate.