JONES DAY

APRIL 2016

COMMENTARY

Queensland Parliament Passes Environmental Chain of Responsibility Legislation: Investors Off the Hook but Directors Remain Accountable

Further to the *Alert* issued by Jones Day in March, the Queensland Parliament passed the *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld) (Amendment Act) on 22 April 2016.

Before the Amendment Act was passed, the Queensland Government referred the original version of the legislation to the Parliament's Agriculture and Environment Committee ("Committee") for examination. In its final report tabled in Parliament, the Committee noted that the Government introduced the original legislation without stakeholder consultation, purportedly because of the "urgent nature of the Bill and to prevent companies from acting to avoid the operation of the Bill as soon as they became aware of its potential introduction". In the Committee's view, the lack of consultation created "significant unintended consequences" from the operation of the legislation.

As foreshadowed in our previous *Alert*, of greatest concern to the Committee was the width of the definition of "related persons" who could be held liable for a company's cleanup responsibilities under an environmental protection order if deemed by the Environmental Protection Agency ("EPA") to have a "relevant connection" with the company. Referring to submissions received from industry stakeholders such as the Queensland Law Society and the Queensland Chamber of Commerce and Industry, the Committee noted the potential for the legislation, as originally drafted, to apply to persons capable of deriving financial benefits from a company's activities (such as shareholders, financiers and suppliers) even if those persons were not in a position to directly influence the conduct of the company that created the relevant environmental harm.

As noted in our *Alert*, while the original version of the legislation proposed to allow the EPA to take into account a range of prescribed factors (to be set out in section 363AB(4) of the *Environmental Protection Act 1994* (Qld) ("EP Act")) in deciding whether a person has a relevant connection with a company, including whether dealings were conducted with a company on an ordinary commercial and arm's-length basis, it was not mandatory for the EPA to do so, and there was a lack of definitive guidance as to the potential liability of a wide range of corporate stakeholders.

If passed in its original form, the legislation may have had a significant adverse impact on investment in Queensland's already struggling mining and resources sector.

In its report, the Committee also viewed as inequitable provisions of the original legislation that automatically deemed land owners to be "related persons" who could be made liable for a company's environmental cleanup bill even if they had no influence or control over the activities conducted by the company on the land.

Under the Amendment Act as passed, land owners are no longer automatically considered to be related persons. This is a welcome development and means that farmers, graziers, native title parties and others with an ownership interest in freehold land will not be personally responsible for rectifying environmental damage caused by a company undertaking activities on the land absent any influence or control over those activities.

Additionally, a person can now be found to have a relevant connection with a company that has caused environmental harm only if the person is (or was at any time in the previous two years) in a position to influence the company's compliance with the EP Act or is otherwise capable of *significantly benefiting financially* from the company's activities (the legislation as originally drafted excluded the word "significantly"). While it is still not mandatory for the EPA to consider the prescribed factors in section 363AB(4) of the EP Act in assessing whether a relevant connection exists, the EPA is now required to develop and take into account express statutory guidelines designed to control the exercise of the EPA's discretion.

This amendment has the potential to provide certainty to corporate stakeholders with respect to their environmental cleanup obligations. While the precise terms of the statutory guidelines have not yet been finalised, the Government has indicated that, in contrast to the hasty introduction of the original legislation, it will consult widely with stakeholders to ensure the intended objectives of the Amendment Act are achieved. The Government intends to make it clear that third parties will not face personal liability for a company's environmental cleanup obligations if they were not in a position to influence or control the company's activities and they derived financial benefits only from ordinary arm's-length transactions with the company, such as financing arrangements and share transactions.

While the Amendment Act as passed therefore addresses concerns about adverse repercussions on investment in the energy and resources sector in Queensland, it remains the case that directors will almost certainly face the prospect of personal liability under the Amendment Act (in the form of remediation costs and/or criminal liability) for the environmental cleanup obligations of a company, regardless of whether they have acted responsibly, in good faith and in accordance with evidence-based decisions with respect to environmental management issues. Despite strong objections raised by stakeholders, including the Australian Institute of Company Directors, the Government chose not to limit the prospective liability of directors under the Amendment Act. The Government also chose not to introduce a statutory defence excusing directors from liability if they were in a position to influence the conduct of the company that gave rise to the relevant environmental obligation or liability but nevertheless took all reasonable steps to ensure the company's compliance with the EP Act.

The liability faced by directors under the Amendment Act appears to be inconsistent with the Council of Australian Governments' *Personal Liability for Corporate Fault Guidelines*, under which all Commonwealth, State and Territory Governments agreed to minimise the regulatory burden on directors and to ensure that any liability provisions are drafted "to achieve a result that is equitable and does not impose any unfair burden" on directors.

The potential for directors to incur civil and criminal liability as a result of the imposition of an environmental protection order under the Amendment Act, even if they have not acted dishonestly or improperly, does not strike a fair and equitable balance between the protection of the environment in the public interest and the reasonable expectations of honest, diligent directors.

While it is possible the statutory guidelines, when drafted, may reduce directors' environmental responsibilities, that appears unlikely in light of the EPA's view, noted in the Committee's report, that the risk of environmental harm is "of significant public concern and considered to be a compelling policy justification for imposing liability on directors who have the ability to influence a company's environmental conduct or who have benefited financially from carrying out an environmentally relevant activity".

As a result, the Amendment Act may create significant disincentives to the uptake of directorships and management positions in the energy and resources sector in Queensland. As noted by the Queensland Law Society in its submission to the Committee, "[t]his will be to the significant detriment of not only business development but decision making in these industries around governance and risk management, including the monitoring of compliance".

If the Amendment Act is enforced strictly as written, it will be important for directors, managers and all related parties of an entity that is liable for environmental rehabilitation to do what they can to ensure the entity has sufficient funds to pay full rehabilitation costs in all scenarios. This will include carrying provisions for rehabilitation liability that are:

- Based on worst-case technical evaluation and assumptions as to the necessary rehabilitation;
- Based on worst-case economic assumptions as to life of the facility; and
- Not discounted based on expected timing of costs.

Even then, these steps may not provide full protection from personal liability for related parties.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

Brett Heading
Brisbane
+61.2.8272.0521
bheading@jonesday.com

Tony Wassaf
Sydney
+61.2.8272.0527
twassaf@jonesday.com

James Parker
Sydney
+61.2.8272.0777
jimparker@jonesday.com

Kai Luck
Brisbane
+61.2.8272.0502
kluck@jonesday.com