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Queensland Government Clarifies Liability of "Related Persons" for a Company's Environmental Cleanup Bill

In the *Alerts* issued by Jones Day in March and April 2016, we referred to the passage of the *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld) ("Act"), which amends the *Environmental Protection Act 1994* (Qld) ("EPA"), by the Queensland Parliament on 22 April 2016.

As a result of the Act, it is now possible for a "related person" of a company to be issued with an environmental protection order ("Order") by the Department of Environment and Heritage Protection ("Department"), rendering the person liable for the company's environmental cleanup responsibilities under the EPA where:

- an Order is being, or has been, issued to the company by the Department (section 363AC of the EPA); or
- the company is a "high risk" company (section 363AD of the EPA), meaning a company that is in external administration or that is an associated entity of such a company.

Under section 363AB of the EPA, a "related person" includes a parent company and, where a company is undertaking resources activities on land that it does not own, the landowner if it is an associated entity of the company. More broadly, however, a related person also includes any person the Department decides has a "relevant connection" with a company.

Section 363AB(2) of the EPA states that the Department may decide a relevant connection exists if:

- a person is capable of significantly benefiting financially, or has significantly benefited financially, from the activities of a company issued with an Order or a high-risk company; or
- a person is, or has been at any time during the previous two years, in a position to influence the conduct of such a company in relation to the way in which or the extent to which the company complies with its obligations under the EPA.

Guideline

In response to a flood of concerns from stakeholders that financiers, shareholders, insolvency practitioners and directors would face undue liability risks arising from the breadth of the relevant connection test, the Queensland government issued a Guideline on 27 January 2017, which the Department is obliged under section 363AB(7) of the Act to take into account in determining whether a relevant connection exists in a particular case.

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The Guideline sets out a range of prescribed factors and factual scenarios that provide great clarity in assessing the persons who are likely to be found by the Department to be related persons under either limb of the relevant connection test.

Significant Financial Benefit

According the Guideline, a financial benefit (including profit, income, revenue or dividends) will be considered to be "significant" if it is "important, notable or of consequence" in relation to:

- the proportion of the benefit relative to the total assets or benefits available from the activities carried out by the company on the land;
- the proportion of the benefit, relative to the costs of restoring or rehabilitating the environment or protecting the environment from harm; or
- the abnormality of the benefit received.

Importantly, the Guideline clarifies that, while a person who benefits from an uncommercial transaction entered into (whether by way of gift or contract or otherwise) well above market value is likely to be considered to have received a significant financial benefit, transactions (including financing arrangements) that are concluded on arm's-length terms and that reflect commercial market rates will not give rise to a significant financial benefit. That is so even in the case of a financier that enforces a security agreed to by the company as part of the arm's-length terms of a financing arrangement.

Further, if a shareholder receives dividends in relation to shares held in a company, that shareholder will be considered to receive a significant financial benefit under the Guideline only if the dividends represent a sizeable part of the company's net profit, irrespective of the size of the dividends relative to the shareholder's own annual income.

Position to Influence Company's Conduct

The practical examples in the Guideline indicate that the Department will consider executive directors to be in a position to influence a company's conduct in meeting its EPA obligations in virtually all cases.

In contrast, independent non-executive directors are unlikely to be considered to be in a position to influence the company's conduct. In that regard, the Guideline sets out the practical example of Bob Black, an independent non-executive director of Cattle Corp, an abattoir issued with an Order by the Department. The Guideline states that the Department would not issue Bob Black with an Order on the basis that he could not be considered to have a relevant connection with Cattle Corp:

> Bob Black was not in a position to practically influence [Cattle Corp's] conduct in relation to the way in which, or the extent to which, the company stored and disposed of its chemical waste. While Bob Black was involved in shaping the company's strategic direction, CEO appointment decisions and overseeing the company's risk management framework, he did not exercise the financial or operational control over the company.

However, if a non-executive director's salary or any bonus payments could be considered excessive, a relevant connection could still exist on the basis of a significant financial benefit.

Importantly for financiers, the Guideline is clear that a financier will not be considered to be in a position to influence a company's conduct in meeting its EPA obligations simply by entering into debt restructuring negotiations with a company that the company then implements.

However, consistent with ordinary principles of corporate governance and director liability in Australia, the Guideline contemplates that a financier (or a shareholder or other party) may be regarded as being in a position of influence if it is a shadow director such that the company is accustomed to acting in accordance with the wishes of the financier (or other party) in the ordinary course of trade.

Reasonable Steps

Even if a person is considered by the Department to be a related person, it is indicated in the Guideline that "it will not always be appropriate to pursue all related persons". Rather, the Department is required to consider the "relative culpability"

of all related persons to determine which person is "more culpable" for a company's environmental cleanup obligations.

According to the Guideline, a matter of primary importance for the Department in making that assessment is whether a person has taken all reasonable steps to ensure the company has complied with the EPA and that there has been adequate provision to fund environmental rehabilitation. In that regard, the Department is required to consider:

- the legal and practical ability of the person to influence the company's conduct;
- the extent of the person's actual and expected knowledge in relation to the environmental obligations of the company, including the steps taken to keep informed about those obligations, the nature of the company's operations and the environmental risks involved;
- whether the person exerted any position to influence the company in a positive or negative way (an example of a positive influence would be the development and/or active monitoring of an environmental risk management framework for the company); and
- whether the person reasonably relied on advice from another person.

Resolving consternation that previously existed in the insolvency industry, in relation to the legal and practical ability of a person to influence the company's conduct, the Guideline states that an insolvency practitioner appointed to a company with obligations under the EPA will not be considered culpable for environmental harm resulting from *pre-existing* conditions of the land owned or used by the company and will therefore not be issued with an Order in relation to pre-existing harm.

Conclusion

The Guideline is a welcome addition to Queensland's environmental chain of responsibility legislation, quelling industry fears that the amendments introduced by the Act may expose a range of corporate stakeholders to wide-ranging liability for a company's environmental cleanup obligations to the extent that investment in, and the provision of finance to, mining companies may be compromised, to the detriment of Queensland's future economic growth.

However, while financiers providing funds to a company on commercial and arm's-length terms, insolvency practitioners, "mum and dad" investors and non-executive directors receiving reasonable remuneration and bonuses are unlikely to be held responsible for a company's environmental cleanup obligations, there is a significant risk that major shareholders, executive directors and shadow directors will be held responsible absent proof that they took all reasonable steps to ensure compliance by the company with its EPA obligations.

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