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Draft Environment Protection Legislation Amendment (Chain of Responsibility) Bill 2022

1. Introduction

The Arid Lands Environment Centre (ALEC) is Central Australia's peak environmental Organisation that has been advocating for the protection of nature and growing sustainable communities in the arid lands since 1980. ALEC has worked closely with the Department over the years around petroleum and mining regulatory reform. ALEC actively contributes through policy submissions, as well as through community education and advocacy.

ALEC welcomes the opportunity to comment on the draft 'Environment Protection Legislation Amendment (Chain of Responsibility) Bill 2020 (CoR Bill). The CoR Bill should be a moment of celebration for environmental advocates, however, while some positives remain (the implementation of Recommendation 14.30 of the Pepper Inquiry), they are completely overshadowed by the watered down nature of the CoR Bill, compared to what was originally proposed.

First, we provide a background on CoR. Then, our submission focuses on six key areas: (1) the decision to exempt mining from this legislation, (2) related person; (3) relevant connection; (4) the development of a statutory guideline; (5) review and evaluation; and, (6) the decision-maker.

2. Background

In theory, CoR could be a vital instrument which provides financial protection to the Northern Territory Government when non-compliance occurs around environmental obligations and responsibilities as required under the *Environment Protection Act* 2019 (*EP Act*). It is unique in its jurisdiction as a compliance tool and covers an existing gap where the Northern Territory Government is currently liable.

Importantly, CoR does not add any additional regulatory burdens to corporations that comply with the regulatory environment. What it does do is provide regulators with teeth ensuring that a 'related person' to companies that do not comply with their environmental obligations bear the financial costs. In periods where a company is facing financial hardship and is no longer able to meet its environmental obligations, a statutory compliance notice as part of CoR legislations, ensures that those responsibilities are the responsibility of a connected party. CoR gives added flexibility and strength to the regulatory regime, increasing the likelihood that environmental obligations are satisfied.

This type of legislation aims to protect governments, in this case, the Northern Territory Government from inheriting environmental liabilities and the financial cost if the responsible party does not do so as required. It provides a safety net for the Northern Territory, ensuring they have the means necessary to ensure that industry cleans up, remediates and rehabilitates the environment as they are fully obliged.

As the Department's Context and Consultation Outcomes fact sheets outlines, it does this as 'the laws operate by enabling responsibilities for environmental harm to be extended to accountable 'related persons' who are not the original statutory approval holder, in the circumstances deemed permissible by the legislative provisions (e.g. ability to influence compliance behaviours).'[1] This may be necessary if the statutory approval holder for example, goes into administration. CoR provides a mechanism, whereby costs and environmental liabilities are redirected to a 'related person' of a company who was responsible.

This legislation is so important, as the Territory has a long history of bearing the cost of environmental degradation as a result of non-compliance with legacy mines littered across the Territory. The environmental impacts can be sources of ongoing contamination such as at legacy mine sites at Redbank and Rum Jungle.

3. Section 192C(1)(c) - Exemption of mining and other holders of statutory obligations

The Information Paper distributed in July 2021 had proposed that 'The CoR laws will apply to any statutory obligation imposed on a person or corporation by the EP Act (e.g. conditions on an environmental approval). To ensure all petroleum activities can also be subject to the CoR laws, it is proposed to extend the CoR legislative framework to Acts that are prescribed in the EP Regulations (i.e. the Petroleum Act 1984 will be a prescribed Act)'[2]. The Information Paper was focused on ensuring that statutory environmental obligations were upheld. In short, it was focused on the outcome. Those that gain environmental approval under the EP Act should know that they will have to meet those obligations.

In totally underwhelming circumstances the 'Context and Consultation Outcomes' fact sheet explains that 'mining and extractive industry stakeholders expressed concern about the possibility of the laws being applied broadly, claiming that such laws have the potential to act as a disincentive to investment and increase the cost of doing business in the Territory'[3]. With no further comment or justification, the application of this policy was massively reduced and will only apply to petroleum activities. This is an extremely short-sighted and costly decision.

The Northern Territory has a long history of mining mismanagement, across the Territory legacy mines are scattered. Dealing with legacy mines comes at a massive cost. Ensuring current and future mines are adequately rehabilitated will also bear an incredible cost. Rehabilitation of the Ranger

[1] p.2
[2] Environmental Chain of Responsibility Laws Environmental regulatory reform information paper, p.8.
[3] p.3.

Uranium mine may now cost up to $2.2 billion[4]. That is just for that one mine. $2,200,000,000 for one mine. Rehabilitation of other sites exceeds $1 billion[5], which is likely a conservative estimate. It is vital that the Northern Territory Government have tools to ensure that mines which are often dealing with highly toxic substances are properly rehabilitated, as required.

If a company isn't going to 'invest' in the Northern Territory because they are concerned they might actually have to rehabilitate the land they operate, at their cost, why does the Northern Territory Government want those companies to operate here?

Queensland is one of Australia's largest mining jurisdictions and they have advanced CoR legislation. Their two-year review reiterated that it is working:

> 'Following the review, DES considers that Chapter 7, Part 5, Division 2 of the EP Act has been used responsibly and remains appropriate. The powers provide an important enforcement tool that enables DES to respond to circumstances where there is a risk of environmental harm to which entities with a relevant relationship to the company actually carrying out the activity have failed to respond… While it is difficult to quantify the extent to which the legislation has changed behaviour, DES has witnessed signs that entities, including holders of environmental authorities, are taking more positive steps in respect to environmental responsibility. They now have greater incentives to have systems in place to demonstrate the reasonable steps they have taken to ensure compliance with their environmental obligations. There are also indications that entities are improving the way they conduct due diligence and risk assessments in their dealings with companies that have obligations under the EP Act. Furthermore, the legislation has generated greater awareness of the extent of the existing executive officer liability obligations in the EP Act.'[6]

Under Section 18 and Section 19 of the EP Act 1994, CoR applied across the board to activities like petroleum and mining, but also to other sectors including agriculture and waste.

It is unclear why this legislation is prejudicing one activity above others. We consider the Information Paper to be entirely accurate in its scope. This backflip massively reduces the safety net that this CoR legislation can provide. It erodes the potential for the Northern Territory to take a new path, one in which legacy mines are a product of the past. It is a missed opportunity.

Recommendation 1: CoR Bill apply to all holders of statutory obligations under the *Environment Protection Act* 2019, not just to petroleum activities.

4. Other matters related to Section 192C: exclusion of liquidators, receivers and administrators and 3-year cap

Section 192C(2) makes clear that in 'the capacity of liquidator, receiver, receiver and manager or administrator of the high-risk entity' they are not considered a related person. Environmental obligations must be upheld regardless of the responsible parties authority.

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[4] Fitzgerald, 2022. Ranger uranium mine rehabilitation costs could blow out to $2.2 billion, Energy Resources tells ASX'.
[5] Everingham, S, 2016. 'NT begins clean up of billion dollar legacy mine liability'. ABC
[6] Review of Queensland's Environmental Chain of Responsibility laws, p.7-8.

Recommendation 2: Section 192C(2) is removed from the CoR Bill.

Further, it is unclear why a 3-year cap is tied to the definition of a 'related person'. It may take a long-time for non-compliance activities to be made aware of.

Recommendation 3: Scrap the 3-year cap that is used as part of defining a 'related person' under Section 192C.

5. Section 192D(2) - Relevant connection

ALEC is disappointed that the definition for a relevant connection was kept narrow and focuses primarily on 'influence' under Section 192D(2). Unlike Queensland CoR legislation which focuses on those that may also benefit financially. As their review of the legislation makes clear:

> 'The legislation is intended to capture entities actively avoiding their environmental obligations. The related persons test in Chapter 7, Part 5, Division 2 of the EP Act is drafted to capture entities genuinely responsible for environmental harm, whether through their ability to profit significantly from the relevant activity or through their ability to influence environmental compliance at the relevant site. In the first reading speech, Minister Miles stated:
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> > 'The chain of responsibility will not attach itself to genuine arm's length investors, be they merchant bankers or mum-and-dad investors. It will not impact contractors or employees. This legislation targets those who stand to make large profits, those who are really standing behind the company and whose decisions have put the environment at risk…'
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> The legislation's related persons test needs to be broad, as it is designed to 'capture all those artificial corporate structures and profit-shifting exercises which we know already exist, and anticipate those that are yet to be uncovered'. It is not intended to capture entities that have acted in a way that is consistent with their obligations'[7].

Recommendation 4: Broaden the definition of relevant connection and insert ' the person is capable of significantly benefiting financially, or has significantly benefited financially, from the carrying out of a relevant activity by the company'.

6. Statutory guideline

S 363AB(7) of *Environment Protection Act* 1994 (QLD) ensures that Guidelines relating to CoR are statutory documents. This means that 'the administering authority must have regard to any relevant guidelines in force under S 548A. The CoR Bill has no mention of a statutory guideline.

ALEC considers it prudent due to the significance of the legislation and the highly discretionary nature that the CoR Bill affords responsibility to the Chief Executive Officer. A statutory guideline would provide greater certainty and clarity on function of the decision-maker for all parties involved.

[7] Review of Queensland's Environmental Chain of Responsibility laws, p.2.

Recommendation 5: Insert a statement into the CoR Bill that a CoR Guideline must be developed under the EP Act.

7. Review and evaluation

There is an opportunity to embed review and evaluation into this process. Queensland CoR legislation enshrined a review after 2-years of the commencement of the amendment. This ensured there was an evaluation on the function of the legislation and whether it was being applied as intended.

Recommendation 6: Require review after 2-years of CoR legislation once it has commenced. Ensure the review report must also be tabled before parliament.

8. Decision-maker

As mentioned in other similar matters, ALEC considers these determinations to be the matter for the Minister and not the CEO. This is in alignment with conclusions made during the Pepper Inquiry

Recommendation 7: Decision-maker is the Minister and not the CEO.

Kind regards,

Alex Vaughan
Policy Officer