policy brief

New opportunities for improving mine rehabilitation: Queensland's Environmental Protection (Chain of Responsibility) Amendment Act 2016

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This article explains how and why the statutory requirements for mining rehabilitation have failed to serve Queensland in the past and how the *Environmental Protection (Chain of Responsibility) Amendment Act 2016, Qld*, attempts to address the problems. By placing responsibility for mine rehabilitation on mining companies as well as 'related persons', the 2016 Qld Act opens up new enforcement opportunities. The approach Queensland has taken contrasts with measures recently adopted in Western Australia. The strengths and weaknesses of the two different approaches are compared.

Introduction

In 2013, the Queensland Audit Office (QAO) reported that, with respect to the rehabilitation of Queensland's mines, "successful rehabilitation is not occurring and the state remains exposed to unnecessary and unacceptable financial risks."[1] This article explains how and why the statutory requirements for mining rehabilitation have failed to serve Queensland in the past and how the *Environmental Protection (Chain of Responsibility) Amendment Act 2016,* Qld, attempts to address this problem.

The statutory framework

In Queensland, environmentally relevant activities (including mining activities) must be authorised in accordance with the

[1] Queensland Audit Office (QAO), *Environmental regulation of the resource and waste industries* Report 15, Queensland Government, Queensland, 2013, p. 41.

Environmental Protection Act, 1994, Qld. Consistent with the polluter pays principle, the Act contemplates the progressive and final rehabilitation of mine sites by environmental authority holders. It requires applicants applying to mine a site to prepare an Environmental Impact Statement including a rehabilitation strategy for when the mine comes to an end.[2] This enables the Department of Environmental Heritage Protection (DEHP) to include relevant conditions for progressive and final rehabilitation in the environmental authority (i.e. the holder's licence to operate). The DEHP may also require the applicant to pay a financial assurance prior to commencing operations. This provides the government with a degree of financial security so that, if the environmental authority holder fails to undertake the required measures, the Department may take the action and debit those expenses from the financial assurance.

In general a company's financial assurance will take the form of an unconditional, irrevocable and on demand guarantee by a financial institution supporting the applicant.[3] In effect, the issuer of this guarantee becomes the 'surety' to ensure money is going towards rehabilitation after the completion of the mine. The surety agrees to hold itself liable for the acts or failures of the

[2] Environmental Protection Act, 1994, Qld, s 125.

[3] DEPH, *Financial assurance under the Environmental Protection Act 1994,* Guideline, Version 3, Queensland Government, Queensland, 3/03/2016, p. 10.

environmental holder if it fails to meet the conditions of its environmental authority.[4]

Despite the apparent efficacy of this framework, in 2013, the QAO concluded:

> Although recent initiatives by the Department of Environment and Heritage Protection (DEHP) have increased the amount of financial assurance held by the state, the financial assurance held is often insufficient to cover the estimated cost [of] rehabilitation and is rarely enforced.[5]

With the recent down turn in mining activity, recent events (discussed below) have further highlighted how the statutory framework has not worked well in practice.

The problem – why haven't financial assurances been working?

The current statutory provisions requiring the payment of financial assurances are a relatively modern phenomenon. Therefore, one source of today's problem is historically abandoned mines for which a financial assurance was never given. In 2013, the QAO estimated Queensland's 15,000 abandoned mines amount to an A$1 billion liability on the State[6] -

[4] J Boyd 'Financial responsibility for environmental obligations: Are bonding and assurance rules fulfilling their promise?', *Research in Law and Economics* vol 19, no.1, 2002, pp. 417-485 at p.418.

[5] QAO, p.41.

[6] QAO, p.1.

but that sum represents only a small proportion of the overall problem. Approximately 12,000 out of the 15,000 abandoned mines in Queensland are located on private land and as such are not considered the responsibility of government.[7]

In addition to historic, closed and abandoned mines, there are other mines which fall into a "care and maintenance" category. This term relates to mines which are not currently in operation but the environmental authority holder is maintaining the site, infrastructure and equipment. In 2013 there were 96 sites in care and maintenance. Eleven of those sites were investigated by the QAO. Of that sample, ten sites had one or more enforcement actions taken against them; six of the sites had NRM incidents reported against them and seven sites did not have sufficient financial assurance to cover the estimated cost of rehabilitation.[8]

The QAO found that, even when a financial assurance has been given, the amount required has historically been insufficient to cover the estimated rehabilitation costs. Although the amount required has increased in recent years, there is still a significant shortfall.[9] The DEHP may - but is not required - to insist on a financial assurance that covers the full costs of rehabilitation (as

[7] C Unger, 'What should we do with Australia's 50,000 abandoned mines?' *The Conversation* 23/07/2014, available at: http://theconversation.com/what-should-we-do-with-australias-50-000-abandoned-mines-18197.

[8] QAO, p. 46.

[9] QAO, p. 41.

estimated by the applicant).[10] This means the level of financial assurance is vulnerable to a negotiated outcome from the outset.

In 2013, the QAO also reported the DEHP has seldom taken action against companies that fail to meet their rehabilitation requirements. Only two cases have been pursued - one where the financial assurance amounted to only 1.5 per cent of the estimated rehabilitation cost and another where the financial assurance amounted to 10 per cent of the estimated rehabilitation cost.[11] The QAO concluded, "EHP is not fully effective in its supervision of, monitoring and enforcement of environmental conditions and is exposing the state to liability and the environment to harm unnecessarily".[12]

Regardless of the flaws in the DEHP's enforcement strategy, mining companies have found their own ways of undermining the intention of the law. For example, early in 2016, a subsidiary of Anglo American sold its Callide Mine to Batchfire Resources, a company first registered in 2015. [13] Anglo American had previously secured a financial surety of more than $120 million for rehabilitation purposes but Batchfire Resources' issued shares totaled less than $750,000 at the time it purchased the Callide Mine. In these circumstances, it is unlikely Batchfire Resources will ever be able to secure a $120 million surety but recovery

[10] DEHP, p.5.

[11] QAO, p. 45.

[12] QAO, p.1.

[13] A McCosker, 'Callide Mine sale may show growing confidence in coal, expert says' (2016) ABC News http://www.abc.net.au/news/2016-01-22/callide-mine-sold/7108018 (accessed 7 April 2016).

from Anglo American is also problematic given the nature of the sale (by a subsidiary).[14]

The safety of financial assurances is also put at risk when a company declares bankruptcy. For example, Peabody Energy is the largest private coal company in the world and was once considered one of the world's most successful companies. It has 26 surface and underground mining operations across the United States and Australia including six mining operations in Queensland.[15] Peabody Energy (Australia) holds approximately AUD$809,000,000 for mining rehabilitation bonds in Australia (averaging approximately AUD$31,000,000 per mine) but the Peabody group has recently filed for bankruptcy protection in the United States. This could put future access to those bonds at risk.[16]

In the most notorious episode to date, in January 2016, Queensland tax payers were told they may have to foot the bill for the rehabilitation costs of the Yabulu nickel refinery site owned by Clive Palmer.[17] The DEHP had not taken a financial assurance

[14] Andrew Thorpe, 'Mine sales raise land rehabilitation doubts' (2016) Central Telegraph http://www.centraltelegraph.com.au/news/mine-sales-raise-land-rehabilitation-doubts/2928495/ (accessed 8 April 2016).

[15] Peabody Energy, 'Operations' (2016) http://www.peabodyenergy.com/content/102/operations (accessed 17 May 2016).

[16] J Thomson &P Ker, 'Top coal miner Peabody files for bankruptcy' (2016) *The Sydney Morning Herald* http://www.smh.com.au/business/energy/top-coal-miner-peabody-files-for-bankruptcy-20160413-go5jsn.html (accessed 17 May 2016).

[17] Mark Willacy, 'Clive Palmer refinery: Taxpayers face multi-million dollar bill to clean up Queensland Nickel site' (2016) http://www.abc.net.au/news/2016-01-20/clive-palmer-queensland-nickel-refinery-yabulu-clean-up-bill/7100932 (accessed 17 May 2016).

for the site because, for this type of activity, it is not legally required to do so. Rehabilitation requirements were included in the environmental authority but enforcing authority conditions is problematic once a company goes into liquidation.

In summary, prior to the 2016 Act, the existing legal framework was characterized by inadequate implementation and a poor enforcement track record by the DEHP. There was no safety valve against companies which went bankrupt and mine operators were able to avoid their rehabilitation costs by on- selling mines nearing their end of life to smaller companies that were unable to foot the rehabilitation bill. In the aftermath of several recent scandals, the Queensland government moved quickly in April 2016 to enact legislation to close some of these loopholes.

The Act

The *Environmental Protection (Chain of Responsibility) Amendment Act Qld 2016* attempts to close the loopholes – and expand the enforcement options – to prevent authority holders avoiding the costs of rehabilitation. The working rationale for these reforms is that a related person bears responsibility for any environmental harm caused, or likely to be caused, as a result of a company's activities so they should also be liable to undertake or pay the costs of action to address such harm.[18] The operative sections include a new Division (chapter 7, part 5, div 2) allowing the issue of orders to "persons related to companies" and an

[18] Queensland Government, Environmental Protection (Chain of Responsibility) Amendment Bill 2016: Explanatory Notes, Queensland Government, Queensland, 2016, p 6.

amendment to s 215 dealing with transfers of environmental authorities.

The new section 363AA defines relevant terms for the new Division. An 'associated entity' and a 'holding company' are defined by reference to the *Corporations Act* but 'related person' is a term specifically crafted for this Act. It includes a holding company of the company carrying out the activity, the owner of the land upon which the relevant activity is, or was, carried out and other persons determined by the administering authority under subsections (2) and (3) to have a 'relevant connection' to the company carrying out the activity.

This definition of 'related person' is open to criticism for drawing the net so widely but the discretion vested in the DEHP, to determine who is a person with a relevant connection, is narrowed by some additional criteria. A person may only be considered to have a 'relevant connection' to the company carrying out the activity if the person has either benefited financially from the relevant activity or was in a position to influence the company's compliance with its environmental obligations.[19] A 'financial interest' is defined to include both direct and indirect (including legal and equitable) interests in the shares of a company; in security given by the company or in income or revenue of the company.

Section 363AB(4) is a non-exhaustive list of other factors which may also be considered by the DEHP when deciding whether a

[19] Environmental Protection Act, 1994, Qld, s 363AB.

person has a 'relevant connection' to the company holding the environmental authority. These factors include:

- the extent of the person's control of the company carrying out the activity including both legal and practical ability to influence the decisions of that company;[20]
- whether an entity or person who had dealings with company was operating at arm's length or on a commercial footing;
- whether the dealings were for the purposes of providing professional advice; or
- whether the dealings related to providing finance or taking a security.

The Explanatory Notes suggest people engaged in arm's length transactions or in giving professional advice to the company may not have a relevant connection. Financial institutions providing a surety, however, are not excluded.[21]

Sections 363AC and 363AD are the crux of the new obligations. Section 363AC provides that, where an environmental protection order has been issued to a company, an environmental protection order may also be issued to a related person of that company. The environmental protection order issued to the related person may impose any requirements that could be imposed on the original recipient.

[20] The term 'control' is defined in section 50AA of the *Corporations Act 2001 (Cth)*.

[21] Explanatory Notes, pp. 7-8.

Section 363AD allows the administering authority to issue an environmental protection order to a related person or related persons of a high risk company (including externally administered companies under the *Corporations Act 2001 (Cth)* and their associated or related entities). A related person may be required to rehabilitate or restore the site upon which the relevant activity was carried out as well as any harm caused to adjacent sites. This section is designed to prevent companies from transferring the operation of the relevant activity from an externally administered company to another member of its corporate group or other associated entity to avoid their cleaning up responsibilities.[22]

Lastly, an amendment to s 215 allows the DEHP to amend an environmental authority to impose a condition requiring financial assurance where the environmental authority is transferred to another holder or where an environmental protection order is amended or withdrawn.

A comparison with Western Australia

The 2016 Act is specific to Queensland and is unlike related legislation in other states. It has already generated controversy in the financial and mining sectors. Concerns have been raised about the potential scope of the related person provisions which may catch landowners as well as financial institutions.[23] There is certainly some unchartered territory here.

[22] Explanatory Notes, p 6.

[23] Clayton Utz, 'Extended legal responsibility for environmental harm on the way in Queensland', 24/03/2016, available at:

A more conventional approach to dealing with companies whose activities generate environmental harm is to use a Pigovarian Tax. A Pigovarian tax is a tax levied on any market activities which generate negative externalities (costs not internalized in the market price). Ideally, a Pigovarian tax will be set to cover the entire cost of an activity's' negative externalities. [24]

A good example of this approach operating in the mining sector is Western Australia's *Mining Rehabilitation Fund Act 2012* (WA). The purpose of this Act 'is to provide a source of funding for the rehabilitation of abandoned mine sites and other land affected by mining operations carried out in, on or under those sites'. [25] To that end, the Act establishes a Mining Rehabilitation Fund (MRF) which is funded by an annual levy on tenement holders operating under the *Mining Act 1978* (WA) loosely based on the size of the land being disturbed and the type of disturbance from the mining activities.[26] This levy ensures useable funds are available to the government to implement and mitigate long-term cumulative impacts.[27] The MRF also serves as an incentive mechanism by

www.claytonutz.com/publications/news/201603/22/extended_legal_responsibility_for_environmental_harm_on_the_way_in_queensland.page

24 wikipedia.org/wiki/Pigovian_tax

25 Mining Rehabilitation Fund Act 2012 (WA), s. 6(1).

26 Boyd, p.476.

[27] N Sommer & A Gardner, 'Environmental securities in the mining industry: a legal framework for Western Australia', *Australian Resources and Energy Law Journal* vol 31, no.3, 2012, 242-266, at p.249.

offering discounted levies if a company can show progressive rehabilitation of any damage to the land.[28]

The main pitfall in Western Australia's MRF is that it is the only mechanism in force to rehabilitate land.[29] Unlike the Queensland reforms, there is no mechanism for dealing with insolvent companies. Perhaps the Queensland Government should be aiming to supplement the 2016 Act with a Pigovarian tax similar to Western Australia's MRF. These measures would complement each other by, firstly, extending the network of liability for financial assurances to cater for the risk of insolvency and, secondly, by providing an ongoing source of funding for rehabilitation works.

Both the new Queensland measures and the Western Australian MRF offer some promise for improving the level and adequacy of mine rehabilitation. Ultimately, however, as the QAO report plainly demonstrates, there needs to be a fundamental shift in the regulatory culture of the DEPH driven by a strong political will and adequate logistical support. Without this change of culture, the new measures may remain under or unenforced and mining rehabilitation funds, however raised, will remain inadequate. [30]

[28] S McDonald & S Young, 'Cross-sector collaboration shaping Corporate Social Responsibility best practice within the mining industry', *Journal of Cleaner Production*, vol 37, no.1, 2012, pp.54-67, at p.57.

[29] Sommer& Gardner, p.252.

[30] Alyson Warhurst and Ligia Noronha (2000) 'Corporate strategy and viable future land use: planning for closure from the outset of mining', *Natural Resources Forum* 24(2), 153-156, p155.

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