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Office of the President

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Geoff Robson
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Department of Environment and Heritage Protection

Via email: Geoff.Robson@ehp.qld.gov.au, SCConsultation@ehp.qld.gov.au

Our ref BP:MD:WD

Dear Mr Robson

Draft Statutory Guideline - Issuing 'chain of responsibility' environmental protection orders under the *Environmental Protection Act 1994*

Thank you for your Department's request for input on the draft statutory guideline for issuing 'Chain of Responsibility' (CORA) environmental protection orders (the Guideline) which is proposed to be issued under the recently amended *Environmental Protection Act 1994*.

The Society's working group has considered the draft Guideline, and makes the following comments:

- the Society reaffirms the view set out in the previous submission of 28 September 2016, that the twin pillars of culpability and being in a position to influence the actions of the environmental authority (EA) holder or other person causing environmental damage should be the relevant threshold issues for consideration of whether there is a "relevant connection" for the purposes of issuing a CORA EPO;
- the Society reinforces its suggestion that the Department consider removing the element of 'significant financial benefit' from the legislation. The working group has identified several scenarios where a person may meet the significant financial benefit threshold yet could not be considered culpable or be in a position to influence the EA holder. It is the Society's view that 'significant financial benefit' is not an appropriate indicator as to whether a person or entity might be culpable or have influence.

  Examples where persons or entities might derive a significant financial benefit but would not fulfil the test of culpability or ability to influence include:

  - a bank or financial institution which has entered into a lending agreement with a borrower. Existence of a contract (regardless of its value) or lending agreement does not, in and of itself, lead to the lending party attaining influence over the borrower or its operations;

- a financier who may provide a loan in exchange for a benefit (such as equity) with respect to the company or borrowing entity. This can be akin to a shareholder arrangement with no director position or influence.

In the absence of removing 'significant financial benefit' in its entirety, the Society renews its recommendation to amend the legislation so that a person may only meet the significant financial benefit threshold where they also have some level of culpability in relation to the particular environmental matter.

Points from 8 September and 18 November working group meetings

The Society confirms its position on the following points, as outlined at the working group meetings on 8 September and 18 November 2016:

- the position of influence consideration should not oblige a bank under debt-restructuring arrangements to actively monitor compliance with environmental requirements;
- with regard to the "all reasonable steps" decision under s363ABA, the Guideline could provide that the relevant threshold for related persons who meet the significant financial benefit test must be whether the person has an ability to control and the authority to make decisions. For example, a shareholder may have a 30% interest in a company, but hold no director or other position that would enable him or her to exercise control. In these circumstances, the shareholder has a very limited ability to actually influence the day to day running of the company. Accordingly, the applicable threshold for reasonable steps should be very low.

Part 4.1.1 - Significant financial benefit

Additionally, the Society proposes that if significant financial benefit remains a criteria for relevant connection, the concept of "significant" be assessed by reference to the significance of the benefit vis a vis the size and profitability of the company. On that basis, salaries to employees and directors fees at market rate should not be considered to be a significant financial benefit (although they may be significant to the individual in their personal circumstances) as what should be relevant is the actions or inactions of those individuals and their ability to influence the conduct of any relevant company. The Society notes, for example, that a director (in receipt of fees) of a related company may have no influence over the actions of the "culpable" company.

The Society is concerned that the difference in the proposed approach between a bank which provides financial services and the case where a bank, or other institution, becomes a major investor, is not sufficiently clear. If the Department does not wish to exclude 'significant financial benefit' as an element raising suspicion of culpability, then the Society strongly suggests that the Guideline specify that the 'position of influence' element is not satisfied where a bank has merely provided a loan, in addition to the noted exemption relating to the provision of professional advice (described in the examples on page 10 of the Guideline). Approval for or provision of a loan by a financial institution (the quantum of which might be regarded as 'significant' in the context of a project) does not, in and of itself, enable that institution to access information or exert influence in relation to the borrower's environmental compliance obligation.

The Society recommends that the example appearing under the words "Alternatively" on page 9 of the draft Guideline be amended as follows:

> *"Alternatively*
>
> A bank ~~enters into a lending agreement with a company becoming~~ becomes a major investor in a company, whether by a lending agreement or otherwise, ~~and~~ deriving significant dividends and capital gains from the company …"

The Society proposes that the relevance of holding shares be clarified further, including clearly stating that merely holding shares without any requisite degree of influence does not amount to a relevant connection for the purposes of the Department's consideration. The Guideline presently includes examples from the two ends of the spectrum – the executive director with a substantial shareholding and the retired investor shareholder who simply receives dividends from the company. However, there is a range of other factual scenarios between these two examples and further guidance on how the Department will assess the "grey areas" in between is required in order to ensure that the Guideline gives the necessary guidance and level of certainty to potential related persons.

The Society also recommends that further clarification is required in relation to the relevance of dividends. In the example of "Jane Bloggs" on page 9 of the Guideline, there is a reference to the amount of the dividend received being a "significant financial benefit, having regard to … the cost of taking action to minimise the risk of environmental harm from the incident." The Society considers that the relativity of the dividend amount to the cost of environmental mitigation is irrelevant. The amount of the dividend is also irrelevant to the question of being a major shareholder. The relevant enquiry is the ability of such a person to influence the activities of the company in all of the circumstances.

Executive officer example – page 9

The example used states that the non-executive director's fees do not include incentives or bonuses. The Society considers that when assessing the 'significant financial benefit' element (if it is to be retained), it is relevant to consider the entire remuneration package of a person as a whole.

The Society also considers that it would be helpful to include an example of an executive officer under this heading.

However, as noted, the Society considers that the 'significant financial benefit' element is fundamentally flawed.

Non-executive directors and position to influence

The ability of a non-executive director to influence day to day activities of the company should be viewed through the context of such a director's legal duties as has been established through case law interpreting duties under sections 180 and 181 of the *Corporations Act 2001*. Such a director's actual ability to influence outcomes needs to be taken into account. For example if a non-executive director has exercised diligence in his or her role in ensuring that the company's policies are properly established and funded, and that reporting processes are in place, he or she should not be made responsible for failures of executive management to properly execute such policies or failing to properly inform the board of issues arising.

Limitation of liability for certain persons

The following persons should not be held personally responsible for environmental harm, unless this harm was caused, after their appointment, as a result of their direction, act or omission:

1. An administrator, liquidator, receiver and/or receiver and manager, as defined by section 9 of the *Corporations Act 2001*; and/or
2. An administrator, Official Receiver, Official Trustee, registered trustee or "the trustee" as defined by section 5 of the *Bankruptcy Act 1966* (collectively to be referred to as "insolvency practitioner").

The Society is also conscious that receivers will also often be placed in a position of conflicting statutory duties, such as between employee entitlements and rehabilitation obligations, with limited funds available to them. The Guideline should recognise this parlous position and the balance that will inevitably need to be struck by the receiver should be affirmed if done in good faith.

Paragraph 4.2 - Matters to consider in determining whether a person has a relevant connection with the company

The matters in Table 1.1 of the draft Guideline are not helpful in determining the relevance of a person's particular role or responsibilities (e.g. non-executive director v CEO v senior executive v line manager) and the person's resulting ability to influence matters within the company.

The key concern of the Society is that there should be no assumptions made based on these matters and the actual role and responsibility of the particular person must be taken into account.

The concern with Table 1.1 is that merely listing these matters does not give guidance on when a finding will be made of 'significant financial benefit' or 'position to influence'. It would be helpful if the table indicated whether the existence of these matters would be relied upon to support or exclude a finding of 'significant financial benefit' or 'position to influence'.

This list would appear to encourage a "tick a box" or isolationist approach to assessing 'relevant connection' rather than a holistic consideration of all of the facts relevant to a person's ability to influence the activities of a company. It may be an onerous task to investigate each matter (for example, the mere existence of an agreement between a company and a third party) if in isolation, each matter is considered to be an indicia of a relevant connection.

On page 13, the third dot point, the Society recommends the following changes:

- the department must give consideration to any evidence relevant to the decision ~~that a potentially related person produces in relation to any relevant consideration~~.

Paragraph 6.2 – When will a bank guarantee or security be required?

A possible outcome of issuing an EPO is to require a bank guarantee or other security for compliance with the EPO. Unlike financial assurance, a bank guarantee is open ended. It is

therefore necessary that guidance is provided, including a formula or explanation of the required quantum, so that a recipient might understand the basis of the potential liability.

Appendix 4 – Possible Evidence Table – Relevant connection

The Society has concerns with Appendix 4 of the Guideline, as the column for 'possible evidence' appears to be merely a list of certain types of facts and does not provide any guidance on how EHP will assess or weigh those facts or even whether those facts are relevant to a particular consideration or test under the Act. For example, the table suggests a measure of the position of influence of an individual who is an executive officer is the size, nature and complexity of the company's business. This, in our view, does not assist an executive officer to know how and when they may incur an additional liability under the CORA scheme.

Appendix 4 – reference to professional advisors

The Society has some significant concerns that professional advisors such as lawyers, accountants and other consultants could be considered to have a relevant connection merely on the basis of offering independent advice (legal or otherwise) to an EA holder (see example relating to professional advice in Appendix 4, page 33 of Guideline). Professional advisors are already exposed to the EA holder under the law of negligence for their advice. It seems to us inappropriate to extend the liability of arm's-length service providers as proposed in the Guideline.

In this regard the Society notes that at the recent working group meeting on 8 September 2016, it was acknowledged that merely being a third party supplier of goods did not, of itself, place the supplier in a position of influence or significant financial benefit as contemplated by the legislation. This acknowledgement was made in the context of the pipeline supplier example on page 8 of the Guideline.

The Guideline should not state or imply that the provision of independent advice, in the absence of any other relevant factors for the 'relevant connection' decision, is an indicator of the potential related person being in a position to influence the EA holder.

It is inconsistent to treat third party suppliers of services differently to those who supply material objects, on the basis of offering services rather than goods. The Society notes that all these comments apply to all third party service providers and not just lawyers as advisors. It is difficult to see how providing independent advice to a company can ever amount to a "position to influence". It is a matter for the client, not the professional advisor, as to whether the advice is accepted.

The Society also notes that if professional advisors were to be included as having a 'relevant connection' merely on the basis of offering independent legal or other advice, it may deter those advisors from accepting an engagement when approached by an EA holder for their advice.

As a matter of public interest, there should never be a disincentive for a person to seek independent professional advice, particularly legal advice, in relation to its obligations under legislation and how to meet those obligations.

General comments - Use of examples throughout the Guideline

The Society also makes the following general comments:

- It would be helpful if the key examples used in the Guideline in relation to 'significant financial benefit' were then reprised under Part 5.0 of the Guideline (Related person / Reasonable steps) so that we can understand the ultimate conclusion with respect to issuing an EPO to, for example, Jane Bloggs (page 9 of the Guideline). This is a further example of how considering elements holistically could enable the Department to more effectively ascertain responsibility under the legislation.
- In relation to Part 5.0 of the Guideline:
    - There is no example provided of when a financier will be considered a major investor and therefore, what reasonable steps might be taken by such a financier to demonstrate that it endeavoured to meet its compliance obligations.
    - There is no shareholder example provided. Guidance is required as to when a shareholder will be required to "take reasonable steps". Will it be when a shareholder holds 50% + 1 of the shares in a company? However, even a major shareholder does not always have access to information from a company in relation to its environmental practices. Unless a shareholder has a board position, it is unlikely to be in a position to:
        - know whether there was an environmental risk and if there was any evidence that the risk was not being managed; and
        - influence the company.
    - Greater guidance is required in relation to landowners. A landowner could include a mortgagee in possession, and it is not clear when a mortgagee in possession might be a 'related person'.
    - Greater guidance is also required in relation to landlords, who are mentioned briefly on page 14 of the Guideline. A lease may include a general obligation on a tenant to comply with all environmental laws, however, it is unclear what steps a landlord may need to take if there is any ability to influence the tenant through lease conditions. As for shareholders, a landlord is unlikely to have access to information but if for some reason the landlord is aware of environmental issues, what steps is a landlord required to take to ensure that the tenant is complying with its legal obligations? Such issues may arise for commercial activities such as a tyre shop or a mechanics workshop.
- The Society notes that the Guideline presently states (at 5.1) that "there are no generic lists of reasonable steps".
- However, this is unhelpful for persons who may be considered to have a significant financial benefit but do not have access to information about the company's environmental practices and are therefore not aware of the environmental risks associated with the company's activities.

- It would be helpful if for each example provided of potential culpability, there was guidance given on the test to determine reasonable steps for each of the following categories:
    - Financier or other investor
    - Shareholder
    - Executive officer or other employee
    - Director including non-executive director
    - Landholder, leaseholder and tenant
    - Mortgagee in possession
    - External administrators
- The factors provided in Appendix 5, which are intended to clarify if a related person took 'reasonable steps' and therefore should (or should not) be issued with an EPO, do not adequately clarify the position. There is no information provided to assist a 'related person' to self-assess if the steps taken in good faith will be sufficient for the purposes of the Guideline.

If you wish to discuss this correspondence please call or email our Government Relations Principal Advisor, Mr Matt Dunn on 3842 5862 or m.dunn@qls.com.au.

Yours faithfully

Bill Potts
President