

Environmental Chain of Responsibility Laws

Background

Environmental chain of responsibility (COR) laws are a regulatory approach that has been developed to ensure that the costs to remediate and rehabilitate environmental harm and impacts is borne by the corporate entities responsible, not taxpayers. The laws are used to extend corporate liabilities for environmental harm to 'accountable' persons who are not the original statutory approval holder. 'Accountable' persons are those that have had the capacity to influence actions or decisions of the statutory approval holder, or have otherwise benefited from the actions or decisions they've influenced. These actions or decisions have led directly to the environmental liabilities (e.g. a parent company may hold influence or benefit from the actions of the subsidiary company).

The Scientific Inquiry into Hydraulic Fracturing in the Northern Territory (the Inquiry) recommended:

That prior to the grant of any further production approvals, the Government enacts provisions establishing a chain of responsibility for gas companies and related parties to ensure compliance with environmental obligations (recommendation 14.30).

Consultation on Draft Bill

The Department of Environment, Parks and Water Security (DEPWS) released the Consultation Draft 'Environment Protection Legislation Amendment (Chain of Responsibility) Bill 2022' (Consultation Draft Bill) for public consultation from 17 June – 3 August 2022. Seven written submissions were received.

Stakeholders who provided submissions were Arid Lands Environment Centre (ALEC), Association of Mining and Exploration Companies (AMEC), Australian Petroleum Production and Exploration Association (APPEA), Environment Centre NT (ECNT), Geological, Exploration and Mining Services Association NT (GEMSA NT), Lock the Gate Alliance (Lock the Gate), and the Northern Land Council (NLC).

The finalised 'Environment Protection Legislation Amendment (Chain of Responsibility) Bill 2022' amending the *Environment Protection Act 2019* (EP Act) and the *Environment Protection Regulations 2020* (EP Regulations) to incorporate chain of responsible laws is planned for introduction into Parliament during the 11 – 13 October 2022 Sittings of the Legislative Assembly.

Responses to Issues Raised In Stakeholder Submissions

Issue	Response
<p>The limited application of the laws to petroleum activities.</p> <ul style="list-style-type: none">The laws should apply equally to all industries that have the potential to harm the environment, particularly the mining and extractive industries.	<p>The proposed laws remain limited in application to petroleum activities.</p> <ul style="list-style-type: none">The mining industry is already undergoing significant reforms into how the environmental impacts of mining will be regulated.

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<ul style="list-style-type: none"> Inconsistent with Government’s regulatory reform objectives. Missed opportunity for Government to apply broadly in era of demonstrating corporate social responsibility. Implements recommendation 14.30 from the Inquiry. 	<ul style="list-style-type: none"> Recommendation 14.30 of the Inquiry is for COR provisions to be applied to the petroleum industry. In the wake of the consultation process, the Government has decided to follow the Inquiry’s recommendation. Government has not ruled out expanding COR laws to other industries in the future, including the mining and extractive industry. The COR laws have been drafted in a way to facilitate ready expansion of the laws to other industries that can cause harm to the environment, including the mining and extractive industry should Government decide to do this in the future.
<p>Concern about the exclusion of a liquidator etc. in the definition of related person.</p>	<p>Liquidators etc. are intentionally excluded from the definition of related person so they do not inadvertently restrict those persons that offer professional liquidation and administration services from operating in the Territory.</p> <ul style="list-style-type: none"> Under the proposed laws, it is intended only that a person acting in their capacity as a liquidator etc., is excluded as a related person, not that the person is excluded from being a related person because they are a liquidator etc. A person acting as a liquidator can be held liable as a related person if they fit other relevant criteria of the laws.
<p>Financial interest considerations and concern that the ‘financial benefit’ aspect of the relevant connection provisions is obscured.</p> <p>Obstruction of the ‘financial benefit’ aspect of considering whether a person is a related person for the purpose of the COR laws.</p>	<p>The proposed laws continue to refer to financial interest, with this provision provided in its own subsection within the section. The collective considerations of the section remain the same.</p> <ul style="list-style-type: none"> The financial benefit provision of the NT’s COR laws use the term ‘financial interest’ which aligns with the <i>Corporations Act 2001</i> (Cth). This approach is considered preferable as it allows scope to consider financial interests from both a positive and negative perspective, providing for increased robustness by the relevant decision-maker

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	<p>when considering if a person is a related person for the purpose of the COR laws, and whether it would be unfair, unjust or oppressive to issue a compliance notice to the person as a related person because of their financial interest.</p>
<p>Discretion in the laws and requirement for statutory guidelines, review and evaluation of the laws.</p>	<p>No changes to the proposed laws.</p> <ul style="list-style-type: none"> • The EP Act provides powers to include statutory guidelines for any matter under the Act so it is not necessary to specifically include a guideline provision for the COR laws. • Review and evaluation of legislative frameworks is an ongoing role for the regulator. Stipulating review timelines in legislation is unnecessary and potentially leads to inefficient and unintended consequences for the regulator. • The regulator will be informed by the Department's publically available Compliance and Enforcement Framework, and internal administrative procedures for environmental officers and relevant decision-makers to ensure consistency across decisions.
<p>Perceived risks about the COR laws acting as a disincentive to investment, and the reality of corporate environmental, social and governance (ESG) expectations in today's world.</p>	<p>No changes to the proposed laws.</p> <ul style="list-style-type: none"> • Submissions expressed diverging views on potential impact of COR laws to the attractiveness of the Territory as an investment destination, particularly with regard to mining and extractive industry activities. • Impacts to investment attractiveness are yet to be substantiated, and the laws are a compliance tool. Persons should be complying with the environmental laws of the day and uphold duty of care obligations and environmental, social and governance arrangements expected of corporations. • Tax payers should not be left to bear the financial burden of environmental harm should the polluter responsible for the

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	<p>harm fail to do so (polluter-pays ecological sustainable development principle).</p> <ul style="list-style-type: none"> • The laws are drafted with as much certainty as possible while allowing discretion in decision-making, recognising the laws are a compliance instrument essentially of last resort, and the circumstances surrounding the possible use of the laws will be unique to each situation requiring appropriate discretion to choose to use, or not to use the laws. • Greater assurance to Aboriginal and Torres Strait Island peoples who are concerned about potential environmental harm on their lands, may be provided by the laws encouraging increased trust and ease in negotiating ILUAs.
<p>The decision-making powers for the COR laws residing with the Chief Executive Officer (CEO) not the Minister.</p>	<p>For clarity, the proposed laws now refer to the 'relevant decision-maker'. Under the EP Act, and in most instances prescribed Acts, the decision making power remains with the CEO.</p> <ul style="list-style-type: none"> • Using revised term increases clarity about the decision making powers under a prescribed Act. • Decisions in relation to COR compliance notices are appropriate to remain with the CEO. • COR powers are a compliance tool and decisions made using the powers are in relation to compliance directions. It is not considered appropriate for the Minister to be required to make these types of decisions as it is one of the day to day functions of the regulator as part of their compliance and enforcement duties. It would be unnecessarily burdensome and inefficient to allocate these types of decisions to the Minister. • Decisions made under the COR powers are subject to review and appeal provisions provided by the EP Act, or prescribed Act, whichever is relevant.

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<p>Three year limitation period.</p>	<p>The proposed laws contain a three year limitation period for the COR laws.</p> <ul style="list-style-type: none"> • The three year limitation period aligns with existing provisions provided by the EP Act. • The laws allow consideration of a person’s behaviour three years prior to the issuance of a COR compliance notice, which may include a period before the commencement of the laws, or the prescribing of a prescribed Act. • This approach is considered to align with the overall objective of protecting the environment and society from environmental harm and potential financial liabilities. • The petroleum industry has known since Government’s response to the Inquiry of Government’s commitment to introduce COR laws. • Others undertaking activities that the COR laws won’t apply to should be complying with their environmental obligations and behaving in a manner appropriate to their duty of care and corporate ESG responsibilities, regardless of the existence or not of COR laws.
<p>Interaction and placement of the COR laws amongst other regulatory instruments such as financial insurances and assurances, fit and proper person tests and applicant suitability.</p>	<p>The COR laws being introduced by the proposed amendments will operate independently to other financial instruments and front end regulations.</p> <ul style="list-style-type: none"> • COR laws are a reactive compliance tool that incentivise compliance behaviours of persons and regulated entities. • Financial assurances are a front end proactive regulatory tool that only apply to certain matters and circumstances. • Insurance provides a level of protection for loss or damage for events outside of one’s control. Not complying with the law (when COR laws would be used), is not an event

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	<p>covered by insurance. Insurance does not cover illegal activity.</p> <ul style="list-style-type: none">• COR laws are a safeguard if fit and proper person tests and applicant suitability provisions fail to identify issues with these persons.