

# Environmental Chain of Responsibility Laws

Environmental regulatory reform information paper

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<b>Contact details</b>	Department of Environment, Parks and Water Security
<b>Approved by</b>	Paul Purdon, Executive Director, Environmental Assessment and Policy
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<b>Acronym</b>	<b>Explanation</b>
CATSI	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</i>
CEO	Chief Executive Officer
CoR	Chain of responsibility
Cth	Commonwealth
DEPWS	The Department of Environment, Parks and Water Security
EMP	Environmental Management Plan (Petroleum)
EP Act	<i>Environment Protection Act 2019</i>
EPN	Environment protection notice
EP Regulations	<i>Environment Protection Regulations 2020</i>
NT	Northern Territory
QLD	Queensland
Vic	Victoria

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# 1. Introduction

The NT Government is committed to modernising the Territory's environmental laws<sup>1</sup>. It wants to make sure that the NT has the most up-to-date environmental law overseeing environmental protection and management while enabling ecologically sustainable development, recognising how important the environment is for everybody's wellbeing and prosperity.

The *Environment Protection Act 2019* (the EP Act) and supporting *Environment Protection Regulations 2020* (the EP Regulations) came into force 28 June 2020. The enactment of the new legislation was the first step in improving the Territory's environment protection and management framework: introducing an improved environmental impact assessment system, a statutory environmental approval, and contemporary compliance and enforcement provisions.

The Department of Environment, Parks and Water Security (DEPWS or the Department) is continuing to undertake legislative reforms to the Territory's environmental protection and management framework in accordance with Government's commitments. This includes progressing reforms to the environmental regulation of mining as a priority, to be followed by reforms to the management of waste and pollution, native vegetation clearing and contaminated land.

The NT Government is also implementing the recommendations of the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory, including the introduction of chain of responsibility (CoR) laws as part of the regulatory framework for managing onshore petroleum activities<sup>2</sup>. CoR laws are used to ensure compliance with already established statutory obligations when other compliance and enforcement tools are not being complied with or a statutory obligation holder is in financial difficulty and are unable to fulfil their obligations thereby leaving the government to pick up the tab.

The possible application of CoR laws to other activities including mining was introduced through initial consultation on the environmental regulation of mining<sup>3</sup>. This information paper provides further detail on the proposed legislative framework for environmental CoR laws for the Territory. The legislative framework outlined in this paper is proposed to apply to all activities and industries that have the potential to harm the environment. It will apply at all stages of the development cycle, including relevantly for the mining industry, during care and maintenance periods.

Stakeholders are invited to discuss the proposed framework with the Department and provide submissions on the proposed framework. Stakeholders will also be provided with an opportunity to review the draft legislation establishing the framework before its introduction into parliament.

To progress other elements of the environmental reform program, additional consultation papers will be released as part of separate engagement activities scheduled to occur over the next 12 – 18 months.

Further information about the broader environmental regulatory reform program, including about the recent consultation undertaken on the proposed framework for the regulation of mining activities, can be found on the Department's environmental reform news webpage<sup>4</sup>.

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<sup>1</sup> <https://depws.nt.gov.au/environment-information/environmental-policy-reform/environmental-regulatory-reform-program>

<sup>2</sup> Refer to recommendation 14.30 in the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory - [inquiry-reports](https://depws.nt.gov.au/inquiry-reports) (nt.gov.au)

<sup>3</sup> [https://depws.nt.gov.au/\\_data/assets/pdf\\_file/0011/956891/regulation-of-mining-activities-consultation-paper-122020.pdf](https://depws.nt.gov.au/_data/assets/pdf_file/0011/956891/regulation-of-mining-activities-consultation-paper-122020.pdf)

<sup>4</sup> <https://depws.nt.gov.au/environment-information/environmental-policy-reform/environmental-regulatory-reform-program/news>

## 2. Chain of responsibility

The concept of CoR is closely related to duty of care provisions such as those used in relation to work health and safety obligations.

CoR provisions originated in the transport industry<sup>5</sup>, where they were imposed on participants involved in the supply chain for heavy vehicles operating in the industry, to ensure all parties could be held legally accountable should their actions, inactions or demands result in an offence or harm under a relevant law.

The introduction of CoR laws in the transport industry was seen as a way to improve industry safety while providing a means to be able to investigate anyone involved in the supply chain (e.g. driver, employer, prime contractor, scheduler, loader, unloader, consignor, consignee or manager) to ensure that if they are found to be negligent in their responsibilities, they can be held accountable (e.g. unrealistic timeframes linked to remuneration for freight delivery influencing a driver's risk taking behaviour).

CoR laws are designed to encourage those individuals with the power to influence decisions up and down corporate structures to behave in a manner appropriate to their position's duty of care by ensuring all reasonable and practical steps are taken to comply with existing regulatory obligations (e.g. for the transport industry this was to ensure that freight delivery requirements did not impose pressure on drivers to speed or risk becoming fatigued to meet a deadline; in work health and safety laws it is about ensuring appropriate safety gear and protocols are in place and applied to prevent injury or death of employees).

## 3. CoR in environmental law

Traditionally environmental laws have imposed liabilities on company directors and executive officers for offences that have been committed by the corporation. That is, company directors and executive officers are deemed liable (or responsible) for the offence and, in many cases, the company director/executive officer becomes responsible for disproving their liability (reverse onus of proof). These types of liabilities are limited to where court proceedings are brought for an alleged offence by the company. They are generally ineffective in ensuring that companies complete required remediation or rehabilitation.

In usual circumstances, the company that causes environmental damage is to be responsible for any clean-up, remediation or rehabilitation that may be required as a consequence of their actions (i.e. the ecologically sustainable development principle 'polluter-pays'). However, sometimes it is not possible for the company to meet these obligations (e.g. due to financial difficulty and/or insolvency), and other financial regulatory mechanisms, such as environmental bonds, are insufficient, or the activity has not been required to supply a financial security (e.g. many landfills). In such cases, the costs associated with managing the environmental liabilities arising from the activity are typically inherited by governments and unfairly borne by the taxpayer.

Environmental CoR laws provide a mechanism that permits environmental liabilities and the costs associated with managing them to be 'redirected' to a 'related person' of the company (or person) responsible for the environmental liabilities.

Importantly, for environmental liabilities to be 'redirected' to a 'related person' through environmental CoR laws, the 'related person' has to be someone (an individual or company) that has been, or is, considered part of the company's corporate hierarchy because they have, or had, a position of influence over the company or otherwise may have benefited from the actions that have led to the existence of the

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<sup>5</sup> <https://www.nhvr.gov.au/safety-accreditation-compliance/chain-of-responsibility>

environmental liabilities (e.g. a parent company may hold influence or benefit from the actions of the subsidiary company).

While historically governments have taken on the risk for the potential failure or negligence of a company in terms of environmental liabilities, there is increasing expectation that governments should ensure companies deliver on their environmental and social responsibilities, and that environmental harm should be the responsibility of the polluter. As such, there is increased pressure being placed on both governments and corporations to ensure legislation and company affairs are arranged in a way that will ensure environmental liabilities are managed equitably and appropriately (e.g. insurance, capital security, risk strategies, regulation, financial assurance, accountability). Environmental CoR laws are increasingly being applied in other jurisdictions as they provide a means to encourage compliance with statutory environmental obligations while providing a level of protection to taxpayers from inheriting corporate liabilities.

In 2016 the Queensland Government enacted CoR laws, enabling 'environment protection orders' under the *Environment Protection Act 1994* (QLD) to be issued to related persons of an entity that is avoiding their environmental obligations and not rehabilitating or stabilising their sites to prevent environmental harm<sup>6</sup>.

In 2018 Victoria's *Environmental Protection Amendment Act 2018* (Vic) introduced provisions that allows corporate obligations associated with site management orders or environmental action notices to be redirected to or from a body corporate, to or from, a person or related entity or associated entity, providing there has been a level of control or influence. Victoria's laws came into effect 1 July 2021<sup>7</sup>.

Both Victoria and Queensland adopted their CoR legislative schemes in response to concerns about contaminated land and environmental liabilities associated with persons becoming insolvent and/or avoiding their environmental obligations<sup>8</sup>.

The Australian Government is also proposing to introduce similar powers within Australia's offshore petroleum regulatory framework by extending 'trailing liability' provisions<sup>9</sup>. The new provisions will allow the regulator to 'call back' a former titleholder to remediate an offshore petroleum asset when the current titleholder is unable to do so. The Australian Government's interest in this area arose because of circumstances surrounding an offshore petroleum platform, the 'Northern Endeavour', that the Australian Government was forced to assume responsibility for in terms of safety to the surrounding environment and the costs associated with decommissioning the platform because the existing titleholder went into liquidation<sup>10</sup>.

Environmental CoR laws are a compliance and enforcement tool and therefore operate outside of, and independently from, other environmental financial regulatory mechanisms such as environmental bonds, mining securities, levies, fees or residual risks payments. An environmental bond or security is an upfront refundable guarantee, a levy is designed to support industry, a fee supports the regulator, and a residual

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<sup>6</sup> Refer Part 5, Division 2 *Environment Protection Act 1994* (QLD)

<https://www.legislation.qld.gov.au/view/html/inforce/current/act-1994-062#ch.7-pt.5-div.2>

<sup>7</sup> Refer Part 2 *Environmental Protection Amendment Act 2018* (Victoria), Chapter 10, Part 10.7

[https://content.legislation.vic.gov.au/sites/default/files/79b87865-9bbe-376c-95fa-fc61b1b0d844\\_18-039aa%20authorised.pdf](https://content.legislation.vic.gov.au/sites/default/files/79b87865-9bbe-376c-95fa-fc61b1b0d844_18-039aa%20authorised.pdf)

<sup>8</sup> More information about these laws is available on the Queensland Parliament and Department of Environment and Science websites, and Victoria's Environment Protection Authority's website.

<sup>9</sup> Refer <https://www.ashurst.com/en/news-and-insights/legal-updates/proposed-changes-to-australias-offshore-oil-and-gas-decommissioning-framework/> and <https://www.industry.gov.au/regulations-and-standards/regulating-offshore-oil-and-gas-in-australian-commonwealth-waters/offshore-oil-and-gas-decommissioning-framework-review>

<sup>10</sup> [Consultation on the Offshore Petroleum and Greenhouse Gas Storage Amendment \(Titles Administration and Other Measures\) Bill 2021 - Department of Industry - Citizen Space](#)

risk payment is provided to manage long terms risks and costs when a site is surrendered and the operator wants to sever any future liabilities for the site and claim a refund for any bonds/securities held by the regulator. Each of these financial mechanisms have a separate purpose and the monetary amount applied is based on that purpose<sup>11</sup>. They do not take into account other matters such as negligence or a lack of compliance with statutory environmental obligations that occur throughout the duration of an action (a project's life).

## 4. Summary of recent consultation on CoR

Previous consultation activities undertaken as part of the environmental regulatory reform program and independent Scientific Inquiry into Hydraulic Fracturing in the Northern Territory demonstrated strong community expectations about the application of CoR laws to environmental liabilities. It is clear that the community and environmental groups expect that the Territory (taxpayers) should be protected by legislative provisions to avoid inheriting the financial burden associated with cleaning up, remediating and rehabilitating the environment, if the parties responsible for the harm fail to do so (either due to negligence or insolvency).

Recent consultation on CoR laws undertaken as part of the environmental regulation of mining activities reforms generally reiterated the findings from previous engagement activities. However, concerns were raised by both industry and environmental groups about the possibility of CoR laws acting as a disincentive to investment if introduced, or improperly introduced. These concerns were based on the view that such laws would have a negative effect on joint venture structures and limit opportunities to attract investors out of fear of having to assume financial responsibilities in the event a company invested in cannot meet its liabilities; or, insufficient detail being provided about who would be considered a 'related person' and the uncertainty that this would cause to potential investors. While these concerns were raised, some industry groups acknowledged that in practice the laws have not acted as a deterrent to investment or led to unintended consequences for persons such as financiers if a broad definition of 'related person' is applied.

Other matters that were raised related to:

- the laws appearing to not respect the purpose of creating corporations to limit liability
- the definition of a 'related person' and the existing broad definition in the *Corporations Act 2001* (Cth)
- liability hierarchies
- limitation time periods and how this might restrict the use of such laws, particularly in terms of mine sites that are in care and maintenance
- the acknowledgement that the laws do not impose any new or additional statutory obligations, with CoR laws only called upon when companies don't comply with their statutory obligations
- general misunderstandings of the concept of CoR and concern about the laws increasing the cost of doing business as they were mistaken for a type of fee or other type of financial mechanism.

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<sup>11</sup> An information paper addressing 'Financial Mechanisms in Environmental Regulation' will be prepared and provided to stakeholders in due course. This will discuss common elements of each type of financial mechanism and outline usual factors that are taken into account when determining applied monetary amounts and the rules that typically govern the use of financial contributions.

Apart from some general misunderstandings or fundamental opposition to such laws, the majority of stakeholders engaged with the mining reforms expressed support for CoR laws provided they are applied transparently and appropriately, with both industry representative and environmental groups recognising the benefit of CoR laws in being able to protect governments and taxpayers from inheriting financial environmental liabilities associated with non-compliance.

## 5. Overview of proposed legislative framework for CoR

An environmental CoR scheme is proposed to be incorporated into the new environment protection legislation through amendments to the EP Act and EP Regulations. The proposed CoR legislative framework has been informed by expert advice and review of similar schemes operating across Australia. It is intended to be able to be applied broadly, so that all activities that have the potential to harm the environment can be subject to the legislative powers if needs be.

Applying CoR laws will not impose any additional compliance obligations on regulated entities, whether they are individual persons or corporations. The laws will be a proactive regulatory tool that the regulator can use to address compliance issues and reduce the level of financial risk to government arising from negligent or poor management practices. The proposed broad application of the laws reflects community sentiment and changing attitudes in society about corporate responsibilities, and government's increasing awareness of the financial burdens associated with mismanagement of the environment by companies operating within its jurisdiction. It will also ensure a harmonised and consistent approach is adopted between different industries that all have the potential to harm the environment and cause ongoing environmental liabilities.

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). It is proposed the CoR legislative framework will operate by being attached to compliance notice powers that exist within the EP Act, or a prescribed Act. For example, the EP Act provides powers to issue an 'environmental protection notice' (EPN) to a person to secure compliance with a statutory obligation under the EP Act.

In summary, the proposed environmental CoR laws will:

- allow the statutory authority to 'redirect' statutory compliance obligations to or from a body corporate or person, to or from a person defined as a 'related person'
- identify that a 'related person' must be a 'related person' of a 'high risk company' before the statutory authority can redirect the statutory compliance obligations
- allow statutory compliance obligations to be redirected to a 'related person' of a 'high risk company' by issuing an EPN as provided by Part 9, Division 2 of the EP Act
- define a 'related person' and 'high risk company' for the purpose of applying the CoR powers
- apply enforcement provisions that can secure compliance by a 'related person' with redirected obligations as if they were the person to whom the obligations originally belonged
- allow statutory compliance obligations required by prescribed Acts to be redirected in accordance with the CoR legislative framework



- identify the matters that must be prescribed in the EP Regulations when prescribing an Act for the purpose of the CoR laws (e.g. the Act, the relevant compliance notice and statutory decision making authority under the prescribed Act).

Figure 1 provides an overview of the proposed CoR legislative framework.

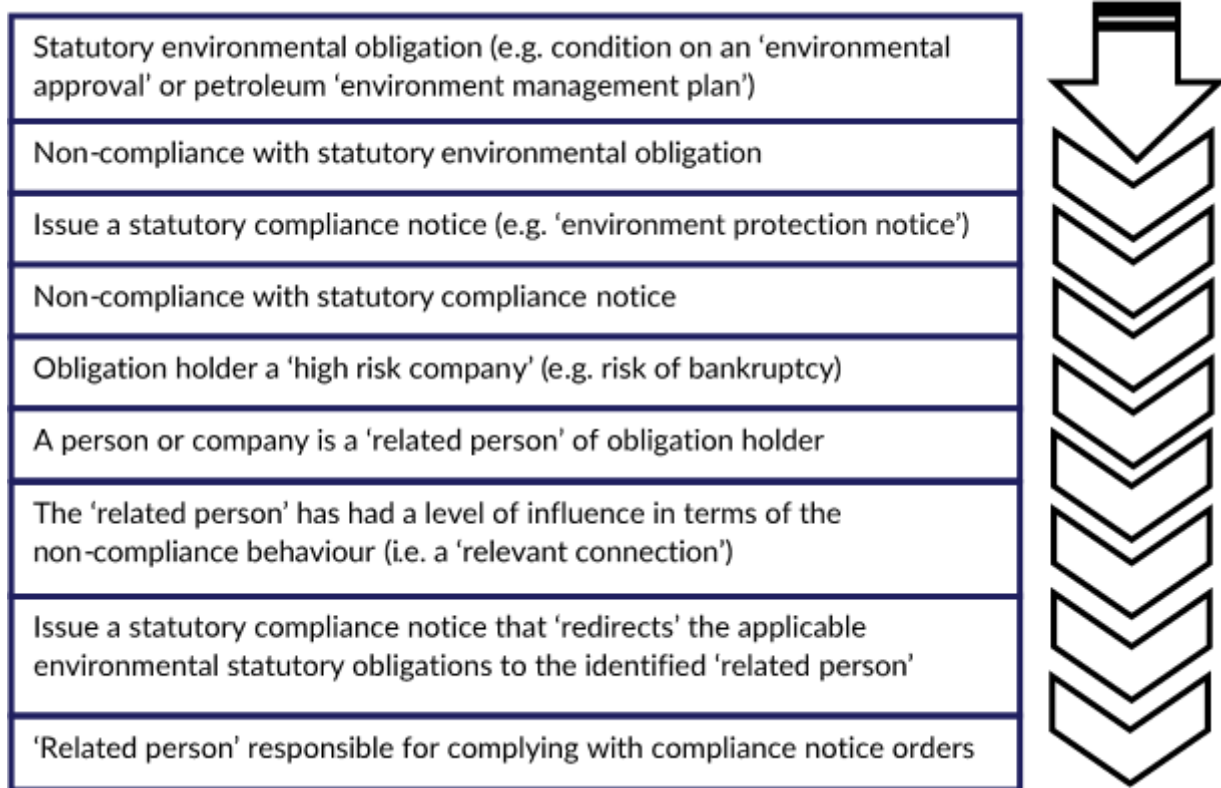


Figure 1: Overview of CoR legislative framework

The CoR legislative framework will be supported by a number of definitions and appropriate parameters that guide when and how the CoR powers may be applied. The proposed parameters around who can be considered a 'related person' for the purpose of redirecting obligations will ensure that persons who have had no control or influence, irrespective of whether they are an investor or financier, cannot be held accountable under the CoR laws for the non-compliance that has led to the enforcement action.

## Definition of related person

The connection for a 'related person' is inherently reliant on the concept of influence and whether a person or company has been in a position to influence behaviour, or benefit financially, from the actions that have led to the breach of statutory obligations and compliance concerns. This approach reflects liability hierarchies used in other jurisdictions when addressing environmental harm and contaminated land, where the person responsible, the land owner, or notional owner, can all be pursued for accountability depending on the circumstances and level of influence.

The definition of 'related person' to whom statutory obligations may be redirected is proposed to include:

- a person who has, or had, a 'relevant connection' to the statutory obligation holder
- a holding company of the statutory obligation holder in accordance with the *Corporations Act 2001* (Cth)

- an owner of land where a statutory obligation holder conducts an activity if the activity is not a mining, extractive or onshore petroleum type activity (as these are subject to specific tenure/titling arrangements)
- an owner of land where an activity occurs if the person is an associated entity of the statutory obligation holder in accordance with the *Corporations Act 2001* (Cth)
- an officer or executive officer who has, or had, a 'relevant connection' to the statutory obligation holder
- a related entity in accordance with the *Corporations Act 2001* (Cth) who has, or had, a 'relevant connection' to the statutory obligation holder.

To support the operation of the proposed definition of 'related person', the legislative framework will also identify who/what is considered a 'relevant connection' for the purpose of being a 'related person'.

### A relevant connection

The circumstances for when a person is considered to have a 'relevant connection' and can therefore be considered a 'related person' under the CoR legislative framework is proposed to include the capacity of the person over the previous three years to have influenced the behaviour that has led to the compliance concern, and:

- the extent of the person's financial interest in the statutory obligation holder
- the level of cooperation to provide information relevant to the compliance concern
- whether the person is an officer or executive officer of the statutory obligation holder
- the existence of any contracts or agreements and level of personal dealings with the statutory obligation holder
- the level of a person's control of the statutory obligation holder in accordance with section 50AA of the *Corporations Act 2001* (Cth).

The proposed CoR legislative framework will include certain exclusions and other parameters that will ensure certain professionals or persons that have had no authority or influence, but do appear to have a 'relevant connection' because of the existence of a contract or standing as an officer, will not be 'captured, or rather, be considered a 'related person' for the purpose of redirecting obligations. For example:

- a person employed as a liquidator, receiver or administrator in accordance with the *Corporations Act 2001* (Cth) will not be considered a 'related person' even though they can be classed as an officer
- a small business restructuring practitioner operating in accordance with Australian Government laws designed to support small businesses near or in insolvency will not be considered a 'related person'
- a person who is related entity in accordance with the *Corporations Act 2001* (Cth) but clearly has had no influence or control over actions that have led to the breaches of statutory obligations relevant to the enforcement action and use of the CoR laws will not be considered a related person.

This will ensure a person who is not responsible for the non-compliance cannot mistakenly be held liable under the CoR laws, and subsequently have responsibility for addressing the statutory compliance issues being imposed upon them.

## Definition of high risk company

The CoR's redirection powers will be limited in use to statutory obligations and compliance concerns belonging to a company (or person) that is classified as a 'high risk company'. The definition of 'high risk company' is proposed to include when a company/person:

- is an externally-administered body corporate within the meaning given by section 9 of the *Corporations Act 2001* (Cth)
- has failed to comply with a previously issued compliance notice issued under the EP Act or a prescribed Act
- has failed to comply with an environmental approval under the EP Act or environmental management plan (EMP) under the *Petroleum (Environment) Regulations 2016* if there is reasonable concern the company/person is in financial difficulty and/or is divesting their capital resources to avoid paying for their statutory environmental obligations.

## Alignment with the *Corporations Act 2001* (Cth)

The proposed CoR laws have been designed to complement the Commonwealth's *Corporations Act 2001* and respect the traditional approach of the law taken towards corporate entities and insolvency by aligning relevant definitions with the *Corporations Act 2001* (Cth) (e.g. 'holding company', 'associated entity', 'related entity', 'control', etc.). In instances where an aligned term is particularly broad (i.e. 'related entity'), the CoR legislative framework will adopt limiting parameters that can protect a person's interests if they are a 'related entity' but realistically have not had any ability to influence behaviour in terms of adherence to environmental obligations. This is important because the proposed laws are not intended to act as a disincentive to potential financiers. The laws are intended to address instances where corporate law fails to prevent relevant interested parties from avoiding or limiting liabilities for environmental harm that has been caused by clear occurrences of undesirable or excessive risk-taking behaviour.

In addition to aligning certain terms with the *Corporations Act 2001* (Cth), relevant terms are also proposed to align with the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI) as appropriate. This approach recognises that CATSI corporations may be operating in the Territory and subject to environmental statutory obligations.

## Decision making powers

The decision making power to issue an EPN under the EP Act will reside with the Chief Executive Officer (CEO). It is proposed that the decision to redirect statutory obligations by issuing an EPN to a 'related person' in accordance with the adopted CoR laws will also reside with the CEO.

For any prescribed Acts, the decision making power to redirect obligations will reside with the usual statutory authority responsible for making decisions to issue a compliance notice under the prescribed Act.

## Time periods for using the CoR powers

The period of time to allow the redirection of statutory obligations is proposed to align with the EP Act's existing 3 year limitation period for bringing enforcement action. If a prescribed Act has an existing

limitation period that is specified as greater than 3 years, it is proposed the prescribed Act's limitation period will apply.

In circumstances where there is a clear chain of responsible related persons, the CoR framework will permit the redirection of previously redirected statutory obligations. This power will assist in addressing phoenix company practices whereby an accountable person transfers land to another 'related person' who then goes into administration as a deliberate means to offload the environmental liabilities and avoid complying with statutory environmental obligations. It is proposed that the re-redirection can occur within 3 years from the issuance of the preceding redirection notice and/or within 3 years of the transfer of land and/or corporate insolvency. This provision will only allow the redirection to another 'related person' where it can be shown that this new 'related person' had an ability to influence the behaviour of the original statutory obligation holder.

## Review of redirection decisions

It is proposed to adopt the existing review and appeal provisions for the issuance of EPNs or other compliance notice as already provided for in the EP Act or prescribed Act respectively.

## 6. Next steps

You can arrange a meeting to discuss the CoR legislative framework as outlined in this paper by contacting the Environment Policy team on 8924 4051 or via email [environment.policy@nt.gov.au](mailto:environment.policy@nt.gov.au).

You are also encouraged to provide written feedback on the proposed CoR legislative framework. The Department is particularly interested in your feedback on the proposed application of the framework through the EP Act and prescribed legislation and the key design parameters, including proposed definitions that define when and how CoR powers would apply.

Please email your written submission to [environment.policy@nt.gov.au](mailto:environment.policy@nt.gov.au) by 4 August 2021.

Unless you advise us otherwise, we will treat any written comments you make as public documents and they may be published on our website or be cited in any other documents that we prepare.

If you do not wish for your comments to be made public, please identify this clearly in any written correspondence you provide.

Consultation will inform the drafting of amendments to the EP Act to introduce a CoR legislative framework. Stakeholders will be invited to provide submissions on the draft legislation prior to its introduction into the Northern Territory Legislative Assembly.

Further information relating to the proposed timing of this project can be obtained by contacting the Environment Policy team on 8924 4051 or via email [environment.policy@nt.gov.au](mailto:environment.policy@nt.gov.au).