

19 April 2016

The Hon Curtis Pitt MP
Treasurer
Level 9, Executive Building, 100 George Street
BRISBANE QLD 4000

Via email: treasurer@ministerial.qld.gov.au

Dear Treasurer

Environmental Protection (Chain of Responsibility) Amendment Bill 2016 (Qld)

I write to raise with you the Australian Institute of Company Directors' (AICD) concerns with the *Environmental Protection (Chain of Responsibility) Amendment Bill 2016 (Qld)* (the Bill).

The AICD is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of over 38,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

The AICD is concerned that the Bill risks unintended consequences for the Queensland economy, including significant uncertainty for directors of organisations with Queensland operations. While we have raised these issues through the recent Inquiry into the Bill by the Queensland Parliament Agriculture and Environment Committee (the Committee), given the potential for broader economic impacts we feel it prudent to raise them with you directly.

The AICD appreciates the background to the draft legislation and is supportive of its general objectives, including that companies causing environmental impacts through their operations comply with environment protection orders and fund relevant remediation costs.

As we have outlined to the Committee, however, the Bill casts an excessively wide net through its broad definitions of a 'related person' and a 'relevant connection'.

The Bill would provide the Department of Environment and Heritage Protection (DEHP) with powers to compel a very broad category of 'related persons' to satisfy the environmental obligations of companies operating in Queensland. This opens up the potential of liability to directors, other officers and investors (amongst others), and contravenes principles underpinning corporate structures as well as important legal rights and principles.

Even if amended to accommodate the recent Committee recommendations, the Bill would create risks for directors of Queensland-situated companies about exposure to criminal and direct liability based on activities by companies with whom they have, or have had, governance roles. These liability risks would arise even where directors have taken responsible, appropriate and evidence-based decisions on environmental management and remediation issues, and where no culpability can be demonstrated.

The Bill would create excessive uncertainty for those in governance roles and as such may act as a deterrent to board roles in Queensland operating companies. If passed, the Bill would also erode progress on the issue of director liability achieved by Queensland as part of the COAG reform of directors' personal liability for corporate fault.

The AICD has raised further concerns about the Bill's erosion of important legal principles through the retrospectivity of certain provisions, the lack of defences for directors acting with due care and diligence, proposed unfettered administrative authority without rights of review, and encroachment on the right to protection against self-incrimination.

We note the release on Friday last week of the Queensland Parliament's Agriculture and Environment Committee report on the Bill. We note the Committee could not agree whether or not the Bill should be passed with a set of proposed amendments and states:

Many submitters raised concerns about section 363AB(4). For example, the Chamber of Commerce and Industry Queensland in its submission commented that:

At its broadest, the Bill could potentially hold any relatable person with substantial financial resources accountable, despite not having any control over the activities that caused the environmental harm, in the event that the environmental authority defaults. While this is not the intent of the legislation, it is open for such an interpretation to be formed.

And

Additionally, the Bill omits the provision of requiring the administering authority to pursue the 'most' related person or the person with the 'most' relevant connection. Therefore, any of the related persons may be equally liable.

The Committee also comments that:

Submitters noted the very broad latitude provided in this section for the administering authority (DEHP) to identify a relevant connection between a party and a company, and have raised many valid concerns about the scope for the proposed subsection and the risk of unintended consequences.

The Committee's recommendation for the development of a statutory guideline for the DEHP's application of its powers in certain circumstances would not resolve these concerns. The law would still be such that persons with no culpability would be at risk.

The AICD also raised concerns about the potential for the Bill to act as a disincentive for investment in companies regulated by the Environmental Protection Act. We have encouraged consideration of alternative means to achieve the Bill's objectives.

I would be pleased to provide you or your advisers with a briefing on the AICD's concerns. Please contact me on (02) 8248 8446 or lpetschler@aicd.com.au, or Lysarne Pelling, Senior Policy Advisor, on (02) 8248 2708 or at lpelling@aicd.com.au for further information.

Yours sincerely



LOUISE PETSCHLER
General Manager Advocacy