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THE 'CHAIN OF RESPONSIBILITY' LEGISLATION IN QUEENSLAND – FRAMEWORK

PRESENTATION TO TURNAROUND MANAGEMENT
ASSOCIATION, AUSTRALIA

23 NOVEMBER 2016

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OVERVIEW

1. Summary of legislation
2. Increased power to issue environmental protection orders (**EPOs**)
3. Clarifications under the Draft Guideline
4. Next steps

WHAT IS IT?

- *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld) (**CoRA**).
- Commenced on 27 April 2016.
- Makes a number of changes to the *Environmental Protection Act 1994* (Qld) (**EP Act**) to expand the scope of liability for corporations, their associated entities, officers, financiers and external administrators under the EP Act.
- Gives DEHP the power to issue an environmental protection order to a 'related person' of a person undertaking an activity.

PRE CORA - WHO WAS LIABLE UNDER EP ACT?

- Environmental authority (**EA**) holder or person undertaking activity
 - breach of condition of EA;
 - causing environmental harm;
 - causing contamination.
- Executive Officer Liability
 - ‘deemed liability’ for offence of corporation
 - ‘executive officer’ broadly defined:
 - *A person who is:*
 - *a member of the governing body of the corporation; or*
 - *concerned with, or takes part in, the corporation’s management,*
whatever the person’s position is called and whether or not the person is a director of the corporation.

ENVIRONMENTAL PROTECTION ORDERS

To

- may be issued to a person/entity undertaking an activity

When

- environmental harm being/likely to be caused
- non-compliances with environmental requirements
- secure compliance with general environmental duty

Requirement

- requires recipient to take certain actions
- requires recipient to not start or to stop an activity

WHO CAN EPOs BE ISSUED TO?

Prior to CoRA

DEHP could only issue EPOs to:

- entities undertaking activities with the potential to cause environmental harm; or
- holders of environmental authorities (**EAs**).

Under CoRA

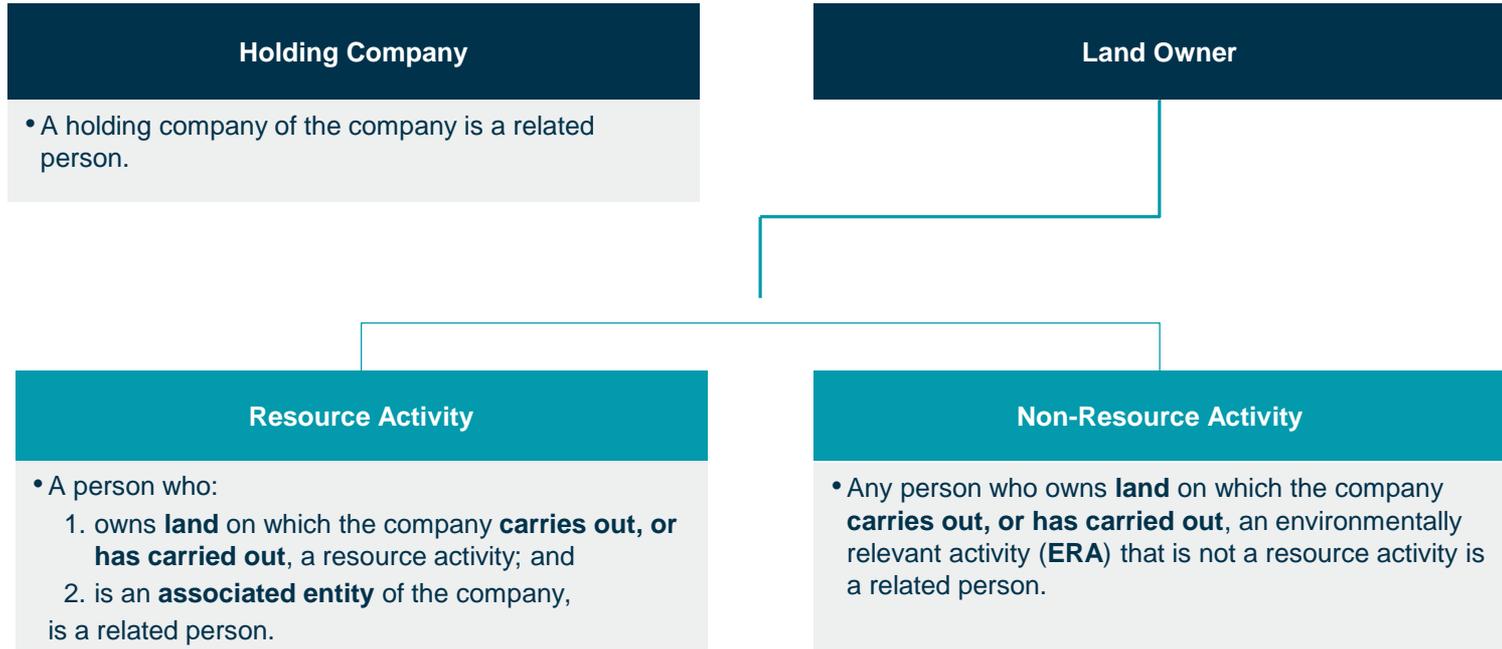
EPOs can now also be issued to a:

- 'related person' of any company, where an EPO is also issued to the company; and
- 'related person' of a 'high risk company' (being a company under external administration, or an associated entity of that company), irrespective of whether an EPO has also been issued to the company.

This is referred to as a 'CoRA EPO'.

WHO WILL BE A 'RELATED PERSON'?

Deemed related persons



WHO WILL BE A ‘RELATED PERSON’?

Related Persons if DEHP decides a ‘relevant connection’ exists

Significant Financial Benefit

- A person who is **capable of significantly benefiting financially, or has significantly benefited financially**, from the carrying out of an ERA **by the company**, may be declared by DEHP to have a relevant connection with the company.
- *A financial benefit obtained under a cultural heritage agreement, conduct and compensation agreement, or make good agreement for a water bore is not a relevant financial benefit.*

Position of Influence

- A person who is, or has been at any time during the previous 2 years, in a **position to influence the company’s conduct** in relation to the way in which, or extent to which, the company complies with its obligations under the EP Act, may be declared by DEHP to have a relevant connection with the company.
- A person may be in such a position alone or jointly with an associated entity, and whether by giving direction or approval, making funding available or in another way.

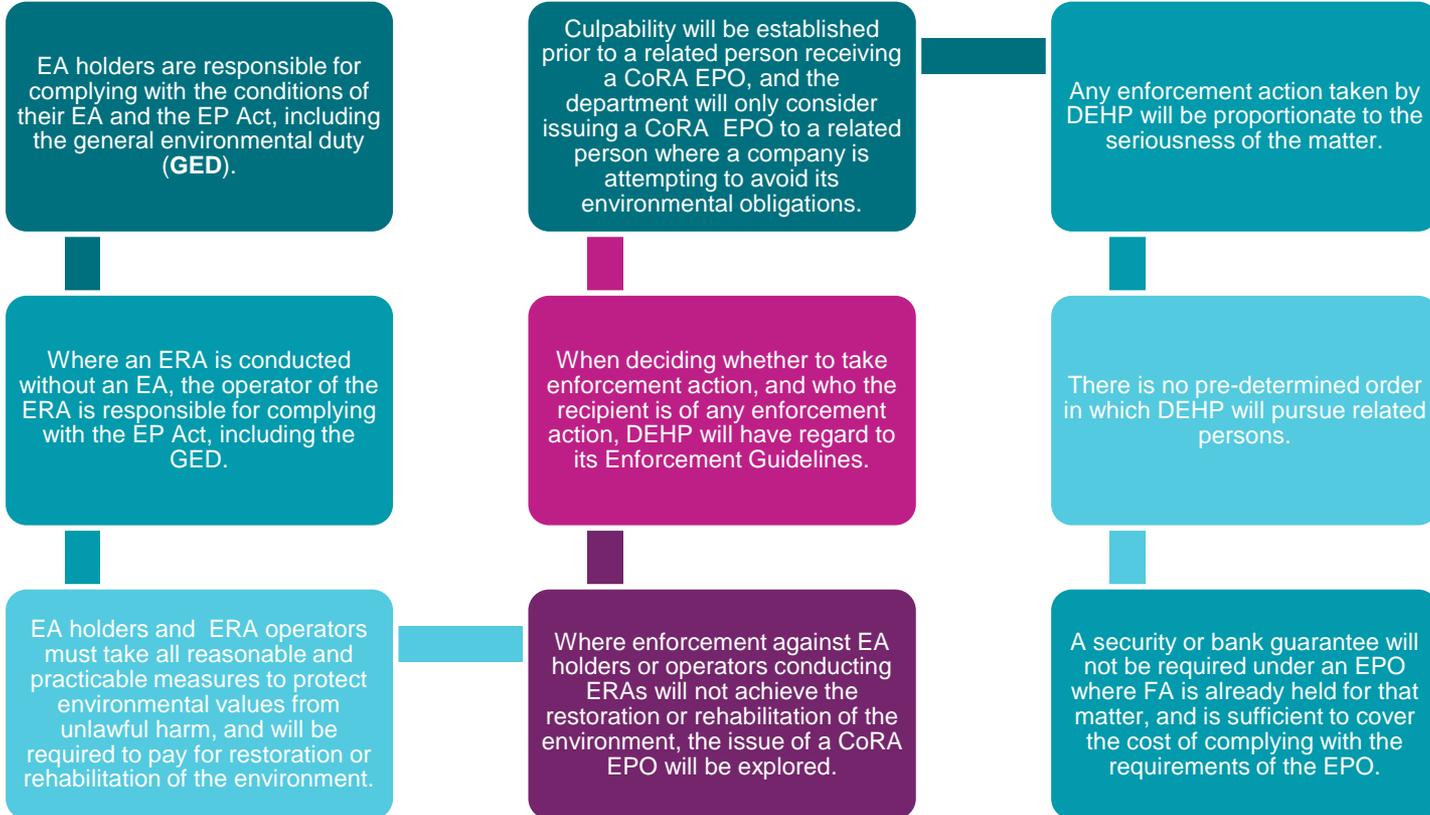
Relevant Factors

- In deciding whether the person has a relevant connection, DEHP may consider:
 1. the extent of the **person’s control** of the first company;
 2. whether the person is an **executive officer** of the company or a holding company;
 3. the extent of the person’s **financial interest** in the first company;
 4. the extent to which a legally recognisable structure or arrangement makes or has made it possible for the person to receive a financial benefit;
 5. any agreements or other transactions the person enters into with the company; and
 6. the extent to which dealings between the person and the company are at **arm’s length**; or on an **independent, commercial footing**; for the purpose of providing **professional advice**; or for the purpose of **providing finance**, including the taking of a security.

CONSIDERATIONS WHEN ISSUING EPOs TO 'RELATED PERSONS'

- DEHP ***must have regard to*** any relevant guidelines.
 - In November 2016, DEHP released a Draft Guideline which helps clarify when an EPO under CoRA will be issued to a related person.
- DEHP ***may consider*** whether the related person took all reasonable steps, having regard to the extent to which the person was in a position to influence the company's conduct, to ensure the company complied with its obligations under the EP Act, and made adequate provision to fund the rehabilitation and restoration of the land.

THE DRAFT GUIDELINE - KEY PRINCIPLES



THE DRAFT GUIDELINE – RELATED PERSON?

Who will be a related person?

Significant financial benefit	Position of influence	'Relevant connection' factors
<p>'significance' will be determined on a case-by-case basis.</p> <ul style="list-style-type: none">• may be considered in relation to the proportion of the benefit relative to the:<ul style="list-style-type: none">• total assets or benefit available from the activities carried out under the EA; or• costs of restoring/rehabilitating the environment/protecting it from harm.• only significant financial benefits from the period of time relevant to the incident being caused/mitigate/investigated will be considered	<ul style="list-style-type: none">• includes anyone in an official/unofficial capacity who is capable of influencing the company's conduct	<ul style="list-style-type: none">• in deciding questions of 'significant financial benefit' and 'position of influence', there is a table of factors which the DEHP may consider. These include; the extent of the person's control over the company and the extent of their financial interest in the company.

THE DRAFT GUIDELINE – WHEN WILL CORA EPO BE ISSUED?

When will an EPO be issued to a related person?

- Where enforcement action against the EA holder is not available or would not result in restoration of the environment and the protection of the environment from harm
- Where the company avoided, or attempted to avoid, its environmental obligations and the related person is culpable
- Where the related person has not taken all reasonable steps (having regard to the extent to which the person was in a position to influence the company's conduct) to ensure that the company complied with the EP Act and that there has been adequate provision to fund rehabilitation
- 'reasonable steps' will be considered on a case-by-case basis but factors to be considered include:
 - legal and practical ability to influence the company's conduct;
 - actual and expected knowledge of the company's environmental obligations;
 - exertion of power or influence, including any financial decision making; and
 - reliance on others to ensure environmental harm was avoided and whether this reliance was reasonable.

NEXT STEPS

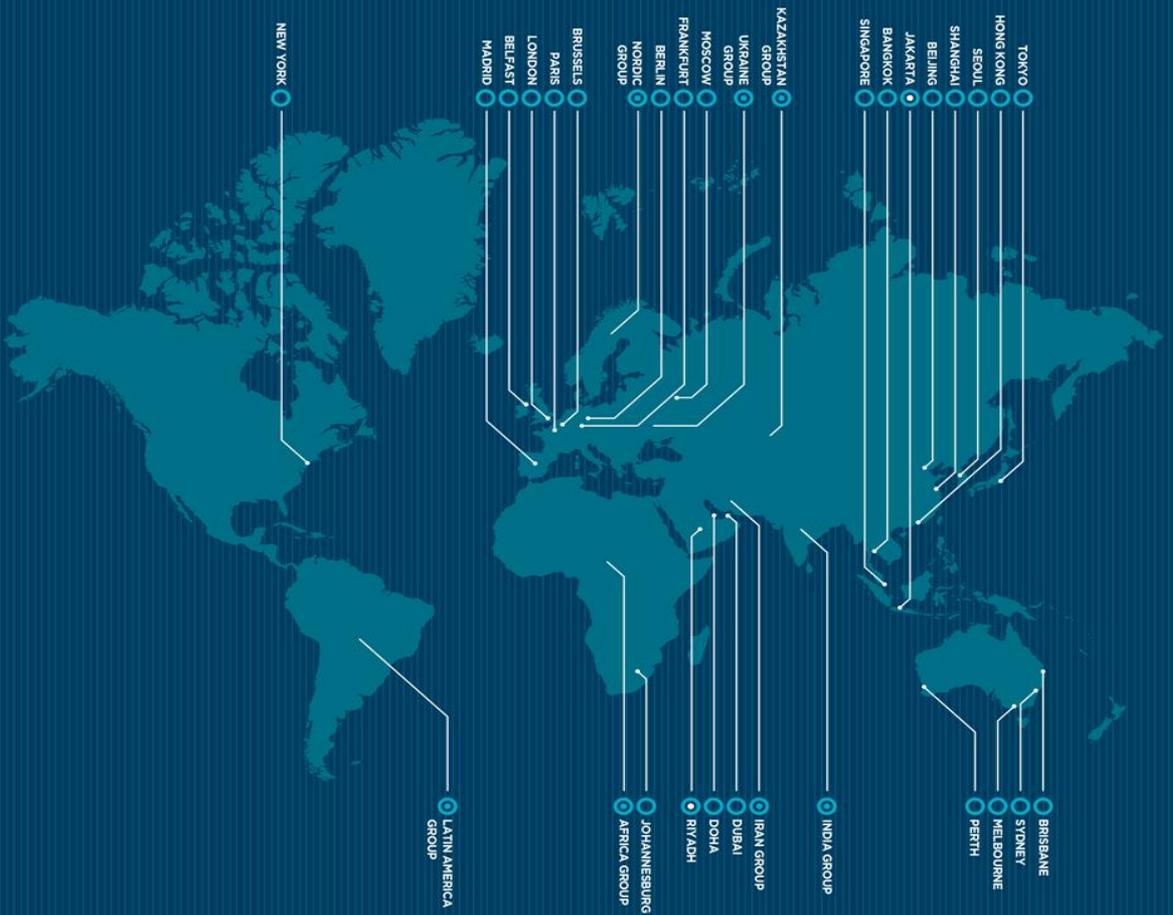
- The Draft Guideline has been released for consultation and will be open for comment until **25 November 2016**, with a view to commencing by the end of the year.
- The changes under CoRA are to be reviewed within 2 years of commencement.

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