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Legacy matters: proactively managing risk for abandoned or unexpected mining environmental liabilities

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Abstract

In recent years there has been a concerted effort within a number of Australian jurisdictions to strengthen regulatory frameworks for the minerals and resources industry, with a particular focus on ensuring that operators fulsomely address rehabilitation and environmental liabilities to prevent taxpayers being left to foot the clean-up costs. 'Chain of responsibility' laws under Queensland's Environmental Protection Act 1994 (Government of Queensland 1994) have expanded the scope of liability for environmental obligations to 'related persons' of companies (which can include parent companies, directors, executives, shareholders, joint venture partners, financers, landholders and external administrators). In Victoria, the Mineral Resources (Sustainable Development) Act 1990 (Government of Victoria 1990) imposes additional responsibilities on the operators of 'declared mines' (being mines deemed to pose a significant risk of harm to the community, environment and infrastructure) and has recently been amended to introduce a 'trailing liabilities' scheme for the declared mines, allowing the minister to require 'relevant parties' on or after 6 May 2022 to complete rehabilitation where the current licensee has not or cannot do so. These mining-specific mechanisms supplement Victoria's separate Environment Protection Act 2017 (Government of Victoria 2017), which allows for regulatory directions to be issued not only to polluters but also to former owners and occupiers of contaminated land in certain circumstances. Alongside common law claims on the basis of negligence and nuisance (both public and private), these legislative regimes can, and have, resulted in protracted litigation brought by both regulators and third parties regarding environmental liabilities; in some cases piercing the corporate veil to hold directors and executives personally accountable. With closure and rehabilitation being an inevitability for all mines, this paper provides an overview of the Queensland and Victorian regimes and litigation risks, and distils from them key measures that mining operators can implement to proactively plan for the end of a mine's life cycle while identifying and managing environmental and compliance risks.

Keywords: *chain of responsibility, mine rehabilitation, contamination, mine closure, closure liability, closure legacy, regulatory compliance*

1 Introduction

The minerals and resources industry is no stranger to finality. It is an industry built around the extraction of finite resources, and it is therefore an inevitability for all mines that they will reach the end of their operating life and require closure. However, the environmental legacy of mining operations, and the responsibility to rehabilitate and remediate sites, often endures long after closure.

In Australia, mining rehabilitation obligations are predominately regulated at the state- and territory-level by an often-complex framework of both mining-specific and environmental legislation. These laws impose the obligations on mining tenure and/or environmental authority holders, embodying the 'polluter pays principle' – that those who generate pollution and waste should bear the cost of its containment, avoidance and abatement as well as the cost of reparations for any damage it causes (Byrne 2020). Originally an economic theory, the principle is designed to correct improper cost allocation and holds that the costs of

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pollution are external costs which must be internalised by the polluter as their cost of doing business (Joseph 2014), rather than being shifted to the community as a whole (de Sadeleer 2002).

Initially, these regulatory frameworks were underpinned by the assumption that mining operators would have sufficient financial capacity to fulfil their rehabilitation obligations, with any default risk addressed by provision of a sufficient rehabilitation bond or other financial surety to the government to complete outstanding work (Department of Energy, Environment and Climate Action 2023). Across the last decade, however, a number of Australian jurisdictions have extended rehabilitation obligations in the context of mines and other industrial sites to related persons and entities to avoid a worst-case scenario – taxpayers being left to foot the bill where operators default in their clean-up responsibilities (be that due to, for example, financial difficulties, insolvency or even intentional avoidance by hiding behind elaborate corporate structures).

In this paper we focus on two such regimes in Queensland and Victoria, which serve as leading examples of general and targeted regimes, respectively, for extending rehabilitation obligations to related persons and entities:

1. the 'chain of responsibility' scheme under Chapter 7, Part 5, Division 4 of the *Environmental Protection Act 1994* (Government of Queensland 1994) (Queensland EP Act)
2. the newly-introduced 'trailing liabilities' scheme for 'declared mines' under Part 7C of the *Mineral Resources (Sustainable Development) Act 1990* (Government of Victoria 1990) (Victorian MRSD Act), which is complemented by the existing remedial notice powers available under the *Environment Protection Act 2017* (Government of Victoria 2017) (Victorian EP Act).

In Part 3 of this paper, we survey several case studies that illustrate how complex environmental liabilities can result in protracted litigation brought by regulators and third parties both under statutory regimes and at common law. These case studies also serve to show that significant contamination and the associated unforeseen clean-up liabilities sometimes only emerge decades later.

Finally, in Part 4, we address key takeaways from the legislative regimes and case law to assist mining operators and their directors/executives to manage known and unknown risks and liabilities that may emerge during the mine rehabilitation and closure process.

2 The Queensland and Victorian mining rehabilitation frameworks: extending responsibility for rehabilitation

2.1 Queensland Environmental Protection Act: chain of responsibility

Under the Queensland EP Act, an environmental enforcement order (EEO) is the primary administrative tool available to the Department of the Environment, Tourism, Science and Innovation (DETSI) to secure environmental compliance and prevent environmental harm. EEOs combine the powers previously available under environmental protection orders (EPOs), direction notices and clean-up notices to respond to environmental harm events (Government of Queensland 2024).

Following several mining operators going into liquidation in 2015 without completing required rehabilitation work or leaving adequate funds available to allow the work to occur, the Queensland Government introduced 'chain of responsibility' (CoRA) provisions in a bid to 'address the real prospect that substantial clean-up costs could be left behind by operators who have failed to clean up after themselves' and 'better protect the environment, the community and taxpayers from the decisions and actions of business that fail to take steps to meet their proper responsibilities' (Miles MP 2016).

From 27 April 2016, the amendments to the Queensland EP Act expand the powers of DETSI to issue EEOs (formerly EPOs) to a 'related person' of a company (CoRA EEO), where:

1. That company has avoided, or attempted to avoid, its environmental obligations.

2. The related person was in a position to influence the company's conduct and failed to take all reasonable steps to ensure the company complied with its environmental obligations.
3. Enforcement action against the company is either not available or viable [Department of the Environment, Tourism, Science and Innovation (DETSI) 2025a].

CoRA EEOs may be issued to related persons of a company in either of the following circumstances:

- where an EEO has been, or is being, issued to the company under s 358 of the Queensland EP Act (Queensland EP Act, s 369P)
- where the company is a 'high risk company' as defined in s 369M of the Queensland EP Act (Queensland EP Act, s 369Q), being a company or associated entity of a company in external administration [as per s 9 of the *Corporations Act 2001* (Commonwealth of Australia 2001)].

CoRA EEOs may also be issued to 2 or more related persons. In such circumstances, the CoRA EEOs will specify whether the related persons are jointly and severally liable for complying with, and meeting the costs of, the order, in accordance with s 369R of the Queensland EP Act.

2.1.1 Who is a 'related person'?

Pursuant to s 369N(1), a 'related person' of a company includes:

- the holding/parent company of a company
- landowners of land on which a company carries out a resource activity, so long as the landowner is an associated entity of the company
- persons with a 'relevant connection' to the company.

Under s 369N(2), a person may have a relevant connection to the company if they:

- are capable of significantly benefitting financially, or have significantly benefitted financially, from the carrying out of a relevant activity by the company
- are or have 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 Queensland EP Act.

2.1.1.1 What is a 'significant' financial benefit?

Section 369N(8) of the Queensland EP Act broadly defines a financial benefit received by a person as including:

> *'…profit, income, revenue, a dividend, a distribution, money's worth, an advantage, priority or preference, whether direct or indirect, that is received, obtained, preferred on or enjoyed by the person.'*

Whether a financial benefit is 'significant' is a complex exercise that turns on the particular circumstances. However, matters that may be considered include:

- the proportion of the benefit relative to the total assets or benefits available from the operations
- the proportion of the benefit relative to rehabilitation costs
- any abnormality of the benefit received.

For example, a benefit received as a wage may be considered 'significant' if it was above normal market value. So, too, may a sizeable shareholding and dividends when compared to the company's net profit and the costs of meeting its environmental obligations to prevent serious or material environmental harm. Conversely, a non-executive director paid at normal market value and who receives a performance bonus which is relatively modest in comparison to the company's profits may not be considered to have a relevant connection solely on the basis of significant financial benefits (DETSI 2025a).

2.1.1.2 Position of influence

As for whether a person holds a position of influence, DETSI (2025a) explains that it is:

> *'…any position in which a person is capable of influencing the decisions or actions of the company in relation to its compliance with the [Queensland EP Act] whether in an official (e.g. appointed company director) or unofficial capacity (e.g. someone acting as …a shadow director).'*

The critical question is the extent of that influence on a company's environmental conduct, and this will also inform DETSI's determinations as to culpability and taking reasonable steps (addressed below). As such, the position may differ between executive officers of the same company. A managing director with responsibility for the day-to-day allocation of funds, who was aware of a potential environmental issue and could have allocated funds to prevent environmental harm occurring, may be considered to have a relevant connection on the basis they were in a position to influence the environmental actions of the company. However, a human resources executive with no decision-making responsibility in relation to addressing potential environmental issues would likely be found to lack the requisite influence (DETSI 2025a).

Depending on the facts and circumstances of the environmental liabilities in question, there is scope for DETSI to take the position that a range of parties other than the mining licence holder (including directors, executives and senior management, shareholders with sizeable shareholdings, parent and associated companies, major financiers or investors, joint venture partners and external administrators) have a 'relevant connection' to a company for the purposes of the CoRA EEO powers such that it is appropriate that they contribute to the necessary investigations and clean-up works.

2.1.2 Culpability and reasonable steps

Despite finding that a person may qualify as a related person, DETSI will not issue a CoRA EEO if it cannot establish that a person was culpable for an act or offence, including committing the act, forming any relevant intention or creating the material circumstances leading to the alleged offence (DETSI 2025a).

Additionally, a person found to be culpable will not be issued with a CoRA EEO if they took all reasonable steps in the circumstances pursuant to s 369O(b). In its statutory guidelines regarding its approach to issuing CoRA EEOs, DETSI (2025a) identifies several key factors it may consider in determining whether such steps were taken (although other factors may of course be considered). These are outlined in Table 1.

Table 1 ‘All reasonable steps in the circumstances’ – key factors (continued next page)

Factor	Summary of matters that may be considered (non-exhaustive)
Legal and practical ability to influence the company’s conduct	The nature and duration of the relationship between the related person and the company The potential for the related person to exercise decision-making powers to direct the company’s conduct The potential for the related person to provide advice or expertise to influence the company’s conduct
Extent of actual and expected knowledge	The nature and duration of the relationship between the related person and the company Whether the related person: was informed, or ought to have kept themselves informed, about the environmental obligations in the Queensland EP Act maintained, or was expected to maintain, an understanding of: the nature of the company’s operations the environmental risks associated with the company’s operations The steps the related person took to keep themselves informed about the environmental obligations, the nature of the company’s operations and the environmental risks associated with the company’s operations
Exertion of position of influence	Whether the related person took steps to: oversee the design, resourcing and operation of the relevant activities undertaken by the company oversee the design, resourcing, implementation, monitoring and review of an effective environmental risk management system that was aimed at ensuring compliance with the relevant environmental obligations facilitate processes for company management to be informed of potential environmental compliance issues Whether the related person responded in a timely way to information received about any potential environmental compliance issues Whether the person is entitled to enforce their powers or rights under a commercial contract entered into between the person and the company (e.g. a bank exercising its right to enforce a security)
Financial decision-making	Whether the related person: exercised their financial decision-making powers in such a way that adequate funds were available for the company to comply with its environmental obligations and ensure that environmental harm was/is avoided made decisions to expend, or not, money to ensure that environmental harm was/is avoided made/is making available funds to help prevent/remedy environmental harm or meet rehabilitation requirements
Reliance on others	Whether the related person ensured that competent and qualified persons were engaged to undertake environmental activities on behalf of the company Whether the related person provided clear and correct instructions to those engaged to undertake environmental activities on behalf of the company and took action to ensure those instructions were followed Whether the related person reasonably relied on the advice or expertise of others

As DETSI (2025a) explains, 'what is reasonable for one related person will arise from the context of their specific role, powers, responsibilities or other relationship to the company and may differ greatly from the steps which would be reasonable for another related person.' For example, all partners of an incorporated joint venture may be related persons on the basis of significant financial benefit, but the reasonable steps expected to be taken by a minority partner shown to have limited ability to influence the joint venture's conduct (both under the terms of the joint venture agreement and practically) may be less onerous in comparison with a majority partner.

Executive officers, having established information channels with respect to a company's environmental obligations and performance or sophisticated environmental risk management systems, may attract greater expectations as to the reasonable steps to be taken. Whether executive officers have then taken those steps may be influenced by their efforts to keep themselves informed, attending to monitoring, review and updates to systems and timeliness in responding to potential environmental compliance issues (DETSI 2025a).

2.1.3 Avenues for review and appeal

CoRA EEOs are subject to the same review and appeal mechanisms that apply to all EEOs. The recipient of a CoRA EEO may seek an 'internal review' by DETSI of the decision to issue it as prescribed in s 521, with the review decision-maker empowered to confirm, revoke or vary the original decision. That review decision may then be further appealed to the Planning and Environment Court pursuant to s 531. In addition to confirming or varying the decision appealed against, the court is also empowered by s 539 to set aside the decision and substitute its own decision.

2.2 Victorian Mineral Resources (Sustainable Development) Act: declared mines and trailing liabilities

In Victoria, the Minister for Energy and Resources may declare that a specified mine is a 'declared mine' where satisfied that there are geotechnical, hydrogeological, water quality or hydrological factors within the mine that pose a significant risk to public safety, the environment or infrastructure, as defined in s 7C of the Victorian MRSD Act. To date, only 3 mines have been designated as 'declared mines'; the Yallourn, Hazelwood and Loy Yang open cut brown coal (lignite) mines located in the Latrobe Valley.

Given their scale and complex geotechnical and hydrogeological risks, declared mines are subject to greater regulatory oversight under Part 7C of the Victorian MRSD Act, including the additional requirement that declared mine licensees prepare a declared mine rehabilitation plan that comprehensively sets out planned rehabilitation activities to manage potential risks through to post-closure.

To further bolster the declared mines regime, the Victorian Government introduced a trailing liabilities scheme on 11 February 2026, described as:

> *'…a new tool to require those who deriv[e] greatest financial benefit from mining projects to be responsible for remediating the rehabilitation risks and liabilities caused by the project… [and] a measure of last resort to provide financial assurance to the State of Victoria where there is no feasible alternative to enforce existing rehabilitation obligations against the current or former declared mine licensee'* (D'Ambrosio MP 2025).

2.2.1 Persons subject to being 'called back'

Section 84AZZQ empowers the Minister for Energy and Resources to 'call back' a person via remedial direction to carry out or pay the costs of rehabilitation and post-closure work in circumstances where a declared mine licensee has failed, or will not be able, to meet a rehabilitation or closure requirement, and will be unlikely to meet outstanding rehabilitation costs. Whether a person may be subject to call back is determined on or after 6 May 2022, which is the date the Victorian Government committed to introducing the scheme, as explained by D'Ambrosio MP (2025). Under ss 84AZZN and 84AZZO(1), those persons include:

- a related body corporate of the declared mine licensee (including parent and subsidiary entities)

- a person who was formerly a holder of the licence, or a related body corporate of that former holder
- a person determined by the minister to be subject to call back only if reasonably appropriate to do so.

In making such a determination, the minister must consider under s 84AZZO(2) whether the person has or may receive a significant financial benefit from work authorised under the declared mine licence, the degree of influence they have or had over rehabilitation compliance, and whether the person acts or acted jointly with the declared mine licensee such that it would be reasonable for them to contribute to rehabilitation.

The mere fact that a person holds a particular position vis-à-vis the declared mine licensee is not sufficient, with employees, contractors, shareholders and banks or other financial institutions that have provided financial accommodation on commercial terms explicitly excluded under s 84AZZO(3) from any determination by the minister on that basis alone. As noted during the second reading of the bill before the Victorian Legislative Assembly:

> *'Other parties such as companies or their directors would only be captured if they benefitted significantly financially from the declared mine, substantially influenced the licensee's compliance with their rehabilitation obligations, or acted jointly with the declared mine licensee'* (D'Ambrosio MP 2025).

The minister must provide a person with an opportunity to provide submissions on the proposed determination prior to making any determination, in accordance with s 84AZZP. The scheme also requires that consultation occur prior to the issuing of any remedial direction in s 84AZZR, including with the person proposed to be subject to the call back, the Premier, the Treasurer, the declared mine licensee (unless it has been wound up) and the owner or occupier of the relevant declared mine land.

2.2.2 Compliance with remedial directions

Once a person has been called back and issued with a remedial direction, failure to comply with the direction is an offence under s 84AZZX. As noted in the explanatory memorandum for the scheme, the intended purpose of this offence is to ensure that persons cannot 'easily and unreasonably' avoid their obligations and defeat the purpose of the scheme (Government of Victoria 2025). For the same reason, the scheme places the onus on the person accused of non-compliance to prove they have taken all reasonable steps to comply in order to defend the charge under s 84AZZX(2).

Pursuant to s 84AZZY, the minister may also seek injunctive relief to compel compliance or restrain any contraventions of the remedial direction.

2.2.3 Secrecy of trailing liabilities information and documents

Given the commercial, operational and other sensitivities around information and documents that might be provided to the minister or obtained during the determination process, s 84AZZZ restricts divulging, communicating or publishing such information other than with the prior consent of the person who provided it (or the minister, where consent is unreasonably withheld), in connection with the administration of the Act, for the purpose of any legal proceedings under the Act or for a prescribed purpose.

2.2.4 Lack of avenues for review and appeal

Unlike the CoRA scheme in Queensland, the Victorian MRSD Act does not provide any direct avenues for review or appeal of a decision by the minister that a person is subject to call back or to issue a remedial direction. For example, there is no provision for a merits review of these decisions by the Victorian Civil and Administrative Tribunal (VCAT), unlike various other ministerial decisions and directions under the Victorian MRSD Act [including the decision to issue a remedial notice under s 110: Victorian MRSD Act, s 110(4)].

However, a person may still be entitled to seek judicial review of any decision by the minister that the person is subject to call back or to issue a remedial direction to the person, under the *Administrative Law Act 1978* (Government of Victoria 1978) or at common law.

While the lack of express review rights for trailing liability decisions may be in keeping with the Victorian Government's intention to prevent the scheme's purposes from being undermined through protracted court proceedings, and ensuring that someone other than the taxpayer promptly steps in to meet a declared mine's rehabilitation costs, it places a significant burden on the person called back (particularly given the scale of the Latrobe Valley mines and their associated geotechnical, hydrogeological and environmental risks).

Given the recent introduction of the scheme, and the fact that all 3 declared mines are currently either still operating or are in an active process of final rehabilitation, the scheme remains untested and it is unlikely that the industry will receive further clarity on the practical operation of the trailing liability provisions in the near future.

2.2.5 Potential application of trailing liabilities scheme to other mining/extractive industry sites

As noted above, at present the trailing liabilities scheme only applies to the 3 declared mines in the Latrobe Valley. It remains open to the minister to declare other mines within Victoria under s 7C of the Victorian MRSD Act, which would then draw those mines into the scope of the scheme.

Additionally, during the public consultation process undertaken in 2023 regarding the proposed introduction of the trailing liabilities scheme, the Department of Energy, Environment and Climate Action invited submissions on whether the scheme should be limited to declared mines or extended to other resources sectors. On this basis, although there are no current proposals to further extend the application of the trailing liabilities scheme under the Victorian MRSD Act beyond declared mines, it cannot be ruled out that the Victorian Government might seek to do so in future.

2.3 Victorian Environment Protection Act: Notices to Investigate and Environmental Action Notices

While trailing liability provisions under the Victorian MRSD Act only apply to declared mines, powers to extend the rehabilitation obligations applicable to a range of industrial activities (including mining operations) can also be found in the Victorian EP Act; specifically, through 2 types of remedial notices that may be issued to persons other than the original polluter:

- notices to investigate, requiring recipients to investigate potential contamination, pollution or waste, issued under s 273
- Environmental Action Notices (EAN), requiring recipients to act to clean up contamination, pollution or waste, issued under s 274.

The Environment Protection Authority (EPA) can issue these notices to a range of persons, including:

- persons 'reasonably believe[d] [to have] caused or permitted' the contamination, pollution or waste which is the subject of the notice
- the current owners or occupiers of the land
- the owners or occupiers at the time the contamination, pollution or waste came into being.

In practice, the EPA commonly issues remedial notices to the current owners or occupiers of the relevant land (provided they are solvent) where they are the party with legal access to the land and have the practical capacity to undertake investigations and clean-up works. Where the current owners and occupiers incur costs complying with notices in respect of contamination for which they were not responsible, ss 273(5) and 274(6) of the Victorian EP Act permit them to recover those costs from the historical polluter via court proceedings. These provisions have particular significance for companies that acquire an interest in mining operations with a lengthy operational history.

In the event that previously unknown historical contamination, pollution or waste is identified, the purchaser (as the current owner or occupier of the land) may be issued with an EAN and required to conduct costly investigations and clean-up works. While the purchaser is entitled to seek its reasonable compliance costs from other relevant persons, this may provide its own challenges where the historical polluter is unknown or no longer in business, or where they purported to transfer the relevant liabilities contractually (including, possibly, to the purchaser). Another relevant consideration is whether the purchaser has the appetite to commit significant time, resources and money to commencing proceedings seeking to recover its costs.

Conversely, for a company that has sold or otherwise divested its interest, it may be approached years or even decades later and issued with an EAN or asked to reimburse reasonable compliance costs long after its departure from the site.

Given these risks it is not uncommon for the allocation of risks and liabilities to be addressed contractually when selling or acquiring minerals and resources assets. There is, relevantly, no prohibition on contracting out of either historical or future environmental and contamination liabilities under the Victorian EP Act. In the context of any sale, it is particularly important that:

- purchasers undertake thorough due diligence
- sale agreements address both known and unknown environmental and mine rehabilitation liabilities
- warranties and indemnities are carefully drafted to contemplate and address the various regulatory and common law mechanisms through which liabilities may arise in future.

2.3.1 Avenues for review and appeal

Similar to the Queensland EP Act, both internal and external review procedures are available for remedial notices issued under the Victorian EP Act.

Upon receiving a remedial notice (e.g. a notice to investigate or an EAN), the recipient can apply to the EPA for an internal review of the decision to issue the notice, unless that decision was made by a delegate of the EPA (Victorian EP Act, s 429). In response to an internal review application, the EPA can either affirm or vary the decision, or set it aside and substitute it with another decision that the EPA considers appropriate.

A recipient of a remedial notice can also apply to VCAT for a merits review of the decision to issue the notice (Victorian EP Act, s 430). Similarly to the outcomes of an internal review application, VCAT can decide to affirm or vary the decision, or set it aside (with VCAT having discretion as to whether to issue a new notice or to return the matter to the EPA for reconsideration).

2.3.2 Redirection of obligations under remedial notices

In certain circumstances the EPA can also redirect obligations under an EAN or site management order to related or associated entities, or to individual officers of a company, where the entity that originally received the EAN or site management order:

- is being or has been wound up within the 2-year period before the direction is made
- has failed to comply with the EAN or site management order (Victorian EP Act, ss 283 and 284).

For example, obligations under an EAN may be redirected towards a director of a company where they (among other things):

- knew or ought reasonably to have known of the circumstances that led to the EAN being issued
- were in a position to influence the company in relation to its compliance with the EAN
- failed to exercise due diligence to ensure that the company complied with the EAN.

3 Litigation risks for mining operators

With respect to rehabilitation and contamination issues, the statutory frameworks and common law provide a variety of bases on which regulatory authorities and private parties can bring litigious claims against mining operators.

As seen in the Linc Energy cases (explored in Section 3.1), in addition to being equipped with the power to make directions to achieve compliance, environmental regulators are also empowered to prosecute criminal offences against operators and their executives.

Further, while private parties may have traditionally been limited to bringing claims grounded in common law such as negligence, public and private nuisance or trespass, statutes like the Victorian EP Act now also provide statutory avenues for seeking compensation from historical polluters and compelling their compliance with clean-up notices, as sought in the Spotless and Yarra City Council Proceedings (see Sections 3.2 and 3.3).

Additionally, over the past decade there has been an increase in class action filings concerning large-scale historical environmental contamination, such as the Aqueous Film Forming Foam (AFFF) class actions addressed in Section 3.4. These 'mass tort' claims allege negligence and statutory breaches and are filed against the occupiers or controllers of sites at the time contamination is alleged to have occurred – in some cases, dating back almost half a century.

Although they do not concern mining operations or mine rehabilitation arrangements specifically, the following cases illustrate the breadth of claims that may be brought in relation to significant environmental liabilities and historical contamination in industrial settings.

3.1 The Linc Energy cases: chain of responsibility and liability for directors/executives

Linc Energy Ltd (Linc) operated an underground coal gasification plant at a site in the Hopeland area near Chinchilla, Queensland, under the authority of a mineral development licence granted under the *Mineral Resources Act 1989* (Government of Queensland 1989), a petroleum facility licence granted under the *Petroleum and Gas (Production and Safety) Act 2004* (Government of Queensland 2004) and environmental authorities issued under the Queensland EP Act. Certain non-compliant activities led to considerable environmental harm and contamination of groundwater and soil at the site.

In April 2016 administrators were appointed to Linc. In mid-May 2016 Linc was issued with an EPO (Linc EPO) requiring it to undertake certain works, not do certain things (such as releasing hazardous contaminants without authorisation), and retain and maintain any infrastructure necessary to ensure compliance with the requirements of the order and which might be required for the ongoing management of environmental risks and site rehabilitation.

Liquidators were subsequently appointed after creditors resolved to wind up the company, and in late-May 2016 Linc's CEO and managing director Peter Bond was issued with an EPO (Bond EPO) on the basis of being a 'related person' of a 'high risk company' under the CoRA scheme. The EPO required Mr Bond to take action to rehabilitate or restore the site and to provide a bank guarantee or other security in the sum of AUD 5.5 million to secure his compliance with the EPO. The decision to issue the EPO to Mr Bond was subsequently confirmed on internal review. Several proceedings arose from these events:

- Criminal proceedings were brought against Linc, in which it was found guilty of 5 counts of wilfully and unlawfully causing serious environmental harm and fined AUD 4.5 million, the highest fine imposed by an Australian court for environmental offending (DETSI 2025b) – *R v Linc Energy Ltd (in liquidation)*.
- A series of unsuccessful appeals were launched by Mr Bond to set aside or stay the Bond EPO in the Planning and Environment Court [*Bond v Chief Executive, Department of Environment and Heritage Protection* (2016) QPELR 771; (2018) QPEC 15; (2018) QPEC 31; (2022) QPELR 191] and Court of Appeal [(2018) 2 Qd R 112; (2019) QCA 137].

- An application was made by the liquidators for a judicial direction regarding compliance with the Linc EPO after disclaiming the land, licences and environmental authorities pursuant to the Corporations Act 2001 (Commonwealth of Australia 2001), with the Court of Appeal finding that they were justified in not causing Linc to comply: *Longley v Chief Executive, Department of Environment and Heritage Protection* (2018) 3 Qd R 459.
- Criminal proceedings were brought against several Linc directors pursuant to s 493(2) of the Queensland EP Act relating to failures to ensure Linc complied with the statute. These charges were ultimately dropped following the Court of Appeal finding in *R v Dumble* (2021) QCA 161 that executive officers will only be liable if the harm came to fruition during their tenure.

Despite these proceedings, the Hopeland site is now classified as an 'abandoned' operating plant and is being managed and progressively decommissioned by the Queensland Government as part of its Abandoned Mine Lands Program (Government of Queensland 2025). Nevertheless, these proceedings illustrate the risk of personal exposure for directors and executives in respect of environmental liabilities, under both the CoRA regime and through criminal prosecutions.

3.2 Spotless proceedings: historical contamination, due diligence and corporate decision-making

Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No 12) (2007) VSC 377 concerned a sizeable apartment development built between 2001 to 2002 without a certificate of environmental audit (as required by the planning permit and environmental audit overlay) first being obtained. The developer, Premier Building & Consulting Pty Ltd (Premier), had purchased the underlying land in 1999 and received a 'soil report' from the vendor that only identified low-level contamination.

Significant soil and groundwater contamination was later discovered (in March 2003), with the contaminants identified as being chemicals used in dry cleaning operations historically conducted by companies within the Spotless Group on the adjoining land between 1963 and 1979, as well as on the development site itself for around 12 months in the late 1970s. Premier, as occupier of the development site, was issued with EPA clean-up notices under s 62A of the *Environment Protection Act 1970* (Government of Victoria 1970) (Historical Victorian EP Act) (being the predecessor to s 274 of the Victorian EP Act).

Premier sued Spotless Group Ltd (Spotless) and a number of Spotless Group entities in nuisance and negligence and sought statutory compensation under s 62A(2) and s 15 of the *Water Act 1989* (Government of Victoria 1989) (Water Act).

For the common law claims of negligence and nuisance:

- In issue was whether Spotless, as the ultimate holding company, was vicariously or derivatively liable for the acts of its operating subsidiaries, with the court finding there was no basis to pierce the corporate veil or infer agency or joint enterprise (and the nuisance and negligence claims against Spotless Group therefore failed).
- The negligence claim also failed for want of proof of specific negligent acts, knowledge or a duty to investigate or remediate in the circumstances.
- The nuisance claim also failed because one of the contaminants could have derived from operations on either site and the continuing nuisance case lacked the requisite knowledge of the existence of the contaminants.

In the case of the statutory claims under the Historical Victorian EP Act and the Water Act:

- The court distinguished between s 62A of the Historical Victorian EP Act and s 15 of the Water Act.
- With respect to the former, the court held that Spotless, as the ultimate holding company, caused the pollution as its control was 'absolute' and it made the operational decisions to introduce, store and use the contaminants at the site. As such, it was liable to compensate Premier for its reasonable, good-faith compliance costs under the clean-up notices.

- With respect to the latter, the Water Act did not impose liability on persons who merely 'caused or permitted' pollution, and those claims failed against the Spotless parties on the findings made.

The court ordered that Spotless compensate Premier for its reasonable costs incurred in good faith in complying with the EPA clean-up notices, pursuant to s 62A(2). The Spotless proceedings demonstrate the broad reach of the Victorian EP Act provisions, with a holding company's strategic decisions to introduce and use contaminants on a site being sufficient to have 'caused' pollution within the meaning of the statute, notwithstanding that the day-to-day operations were carried out by a subsidiary and the corporate veil could not be pierced at common law.

3.3 Yarra City Council proceedings: historical contamination and transfer of liabilities

Yarra City Council v Metropolitan Fire and Emergency Services Board (2017) VSCA 194 concerned historical contamination of a site in Richmond where several decades earlier the former City of Richmond had operated a municipal works depot, including a tar distilling plant and associated storage tank. In 2005 an infilled bluestone pit was found to be the source of significant coal tar pollution during redevelopment works.

The Metropolitan Fire and Emergency Services Board (MFESB) purchased the site from the State of Victoria in 2004. Plans to construct a training and administration facility were halted when the coal tar contamination was uncovered. The EPA subsequently issued clean-up notices to the MFESB in December 2006 and July 2007, which led to the incurring of sizeable remediation costs.

The MFESB sought compensation from Yarra City Council under s 62A of the Victorian EP Act:

- in its own right and as the statutory successor to the City of Richmond under a 1994 Order in Council, contending that the council was the 'person who caused or permitted' the pollution
- alternatively, as a person who 'appears to have abandoned' industrial waste.

At first instance the primary judge found in favour of the MFESB on both arguments.

On appeal, the court held that Yarra City Council bore liability under s 62A(1)(b) because the Order in Council transferred the City of Richmond's contingent liabilities to Yarra City Council, making it the proper successor against whom compensation could be sought once the MFESB incurred costs under the EPA notices. However, the Court of Appeal set aside the alternative basis of liability under s 62A(1)(c), finding that Yarra City Council (on the facts) did not 'appear to have abandoned' the buried coal tar and the trial judge should first have considered the exercise of the s 62A(2) discretion and other relevant matters.

Ultimately, the council was required to reimburse sizeable clean-up and associated costs in respect of an industrial site which they had divested a number of years ago. This was the result of contamination arising from operations on that land several decades prior. Accordingly, the MFESB litigation again emphasises the potential reach of the Victorian EP Act statutory provisions.

3.4 Aqueous Film Forming Foam class actions: litigation exposure to mass environmental contamination torts

Mass tort claims are factually and legally complex, and in the case of historical claims they require the court to determine the state of knowledge held, or that ought to have been held, by an owner or occupier of land at which contamination was alleged to have occurred at various points in the past. These claims have brought to light the breadth of possible liability exposure mining operators may have in relation to their actions, or actions under their control, during their period of operation.

Claimants continue to ask courts to determine issues such as:

- the roles, or level of authority, that will constitute the 'direction, mind and will' of the owner or occupier of land

- whether certain risk(s) that an occupier or owner was, or ought to have been, aware of are the same as, or substantially equivalent to, the risk(s) which have ultimately eventuated in the circumstances and caused loss or damage to the claimants
- whether the state of scientific knowledge concerning contaminants, their environmental and human health risk characteristics, and appropriate storage and transportation, from time to time have any real bearing upon liability
- whether the spread of a contaminant in groundwater will satisfy a threshold for a 'continuing' nuisance, enabling claimants to seek compensation for claims which may otherwise be time-barred.

While not concerned with mine closure, the AFFF class actions [Bartlett v Commonwealth of Australia (Department of Defence), NSD 1388/2018; Hudson v Commonwealth of Australia (Department of Defence), NSD 115/2017; Smith v Commonwealth of Australia (Department of Defence), NSD 1908/2016] demonstrate this ongoing potential exposure for owners and occupiers when dealing with contamination of land, surface water and groundwater alleged to have been caused by activities on an adjacent site.

In these class actions, claims were brought by property owners proximate to 11 different Department of Defence-owned and occupied bases. The claimants alleged that the Department of Defence's historical use of AFFF for firefighting purposes at the bases from the 1970s to the early 2000s led to contamination of the groundwater, soil and surface water on and under their properties, in addition to depreciation of property prices due to a 'stigma' of the area being subject to contamination. While the AFFF class actions did not proceed to judicial determination (with a settlement ultimately being reached), a number of claims alleging similar contamination and liability brought by individuals, businesses and government authorities remain ongoing.

While owners and occupiers of mine sites are limited in their ability to proactively take steps against the contamination from, and transport of, unknown contaminants, best practice should be employed in the operation, closure and rehabilitation process to identify and manage any soil and groundwater contamination and limit any offsite migration, including by seeking advice from suitably qualified technical specialists and environmental auditors.

4 Key takeaways to manage risk for the known and unknown

With governments expanding the scope of responsibility for rehabilitation through measures such as the CoRA scheme in Queensland and the trailing liabilities scheme in Victoria, related and parent companies, directors and executives face potential exposure to rehabilitation and remediation costs.

Ultimately, the best way for mining operators and their directors/executives to manage and mitigate risks and liabilities in the mine rehabilitation and closure process is through early and proactive closure planning, and the effective implementation of environmental risk management systems. Key measures include:

- preparing an environmental management plan linked to environmental risks and compliance requirements, to prevent environmental impacts during the development and operations phases of a mine
- preparing rehabilitation and closure plans that comprehensively address environmental risks, have built-in flexibility to adequately account for changed circumstances, and are constantly reviewed and updated to remain in line with regulatory requirements and best practice
- establishing effective information channels for directors/senior management to be kept adequately informed of, and in a position to actively influence, operational decision-making on relevant environmental risks
- proactively and progressively remediating identified environmental impacts and contamination during the operations phase of a mine, leveraging the lower overhead costs during this phase to reduce overall cost and shorten the closure schedule

- maintaining strong data and information management systems to store and track knowledge/supporting documentation relating to environmental risks and an operator's response to those risks
- implementing robust environmental risk management systems that are appropriate for the risks associated with an operator's operations, and continued review and upgrading of these systems
- regular monitoring of contaminants and possible contaminants, particularly in light of ongoing scientific developments that may highlight previously unknown environmental risks
- ensuring environmental risks and rehabilitation planning and implementation are led internally by competent and suitably qualified persons, with the support of relevant technical consultants and other subject matter experts
- periodically obtaining external advice and audits as necessary to assess the strength of an operator's systems, procedures and compliance with rehabilitation obligations, and responding to any risks raised in such advice in a timely manner
- undertaking thorough due diligence during the acquisition, and appropriate risk management during the divestment, of a mine, and adequately accounting for liabilities and necessary warranties and indemnities in the associated contracts.

5 Conclusion

The consequences of failing to proactively manage end-of-life rehabilitation and environmental obligations can be severe, with common law causes of action supplemented by an increasingly robust statutory toolkit available to both regulators and private parties. The net can be cast wide and potentially reach several decades back in time.

Mine operators, and the individuals and companies that support their day-to-day operations, should ensure they implement robust systems and procedures that not only meet regulatory compliance but also safeguard against the significant legal, financial and reputational risks that attend the end of a mine's life cycle.

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