

## **New Guidelines for the Issuing of Environmental Protection Orders**

The *Environmental Protection Act 1994* ("**the Act**") deals with, amongst other things, the issuing of Environmental Protection Orders ("**EPO's**").

In April 2016, amendments were made to the Act as a result of the introduction of the *Environmental Protection (Chain of Responsibility) Amendment Act 2016*. Due to the amendments, EPO's can now be issued to a 'related person' of a company, in addition to the offending person or company.

On 27 January 2017, the Department of Environment and Heritage Protection ("**Department**") released a Guideline providing information about how the Department will approach issuing EPO's to 'related persons'.

### **What are EPO's?**

Before understanding the matter of EPO's being issued to 'related parties', it is important to understand EPO's generally.

The Department may issue an EPO to a person or company in a number of circumstances, for example:

1. if the person or company does not comply with a requirement to conduct or commission an environmental evaluation and submit it to the authority;
2. if, because of an environmental evaluation conducted or commissioned by the person or company, unlawful environmental harm is being, or is likely to be, caused; or
3. to secure compliance by the person or company with other various environmental duties, policies and conditions prescribed by the Act.

An EPO may require the person or company to stop (or prevent from commencing) an activity indefinitely, carry out a certain activity or take action as specified by the Department.

EPO's can now be issued not only to the person or company that engaged in the conduct resulting in the issuing of the EPO, but also to a person who is 'related' to a company who engaged in such conduct.

### **What does the Guideline say about issuing EPO's to 'related parties'?**

The Guideline, most importantly, explains the circumstances in which a person will be deemed to be a 'related party' of an offending company. These circumstances are as follows:

1. the person is a holding company of the offending company; or
2. the person owns land on which the offending company carries out, or has carried out, a relevant activity other than a resource activity; or
3. the person is an associated entity of the offending company and owns land on which the offending company carries out, or has carried out, a relevant activity that is a resource activity; or
4. the administering authority decides under this section the person has a relevant connection with the company.

Whilst points 1 through to 3 are relatively straightforward (but no less important to note), point 4 requires further elaboration. As the Guideline explains, a relevant connection may arise in two circumstances:

1. Firstly, where the person is capable of significantly benefitting financially from the carrying out of the activity by the offending company, or has already benefitted financially. As explained in the Guideline, what amounts to a 'significant' financial benefit depends on the circumstances. Generally, however, a benefit may be 'significant' if it is important, notable or of consequence, taking into account:
  - 1.1. the proportion of the benefit relative to the total assets or total benefit available;
  - 1.2. the proportion of the benefit relative to the costs of restoring or rehabilitating the environment; or
  - 1.3. the abnormality of the benefit.
2. Secondly, where the person is, or has been in the previous two years, in a position to influence the offending company's conduct insofar as it relates to the offending company's compliance with the Act.

## **Conclusion**

The powers of the Department under the Act have been greatly broadened as a result of the introduction of the *Environmental Protection (Chain of Responsibility) Amendment Act 2016* and the recently released Guideline. Together they provide invaluable direction about when the Department will exercise such power.

Clearly, the ability to issue an EPO to a related party will put landlords, company directors and (most likely) trust beneficiaries in the firing line. If you own land on which an activity which poses a risk of environmental harm is being carried out, or you are a director, manager or have some other interest in a company conducting such activity, you will need to be careful to exercise diligence to ensure that environmental harm does not occur.

If you have any concerns, or require any advice about the issuing of EPO's please contact our accredited property law specialist and partner, Nigel Hales on 4036 9700.