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25 November 2016

Mr Geoff Robson
Executive Director, Strategic Environment and Waste Policy
Environmental Policy and Planning
Department of Environment and Heritage Protection
SCConsultation@ehp.qld.gov.au

RE: Draft statutory guideline on issuing 'Chain of Responsibility' environmental protection orders under the *Environmental Protection Act 1994*

Dear Mr Robson,

The Property Council welcomes the opportunity to provide input into the development of a statutory guideline that will prescribe how the Department issues environmental protection orders to 'related persons' under the 'Chain of Responsibility' amendments to the *Environmental Protection Act 1994* (the Act) passed earlier this year.

As the 'Chain of Responsibility' provisions have been in effect for seven months, the development of a guideline to provide direction on the interpretation of the new law is warmly welcomed by industry.

The amendments have made 'related persons' responsible for remedying environmental defaults of companies. As written, under section 363AB(1)(b) of the Act, owners of land - other than native title holders and owners of land on which a resource activity is being undertaken - are deemed to be related persons and hence Chain of Responsibility environmental protection orders (CoRA EPOs) may be issued to them. The legislation does not recognise the fact that the owner of the land on which a company carries out an environmentally relevant activity may not necessarily have a responsibility for these activities.

Given that the thousands of Queensland landowners (who are not native title holders or do not have resource related activity on their land) have a clear interest in how the new CoRA provisions will be interpreted, it is disappointing that landowner representatives were excluded from the working group established by the Government to assist in drafting this guideline.

The Property Council of Australia is the leading advocate for Australia's biggest industry – property. Here in Queensland, the Property Council represents over 360 member companies who have significant landholdings across the residential, commercial, retail, retirement living, industrial, tourism and education sectors. As such, the focus of this submission is on the impact of the draft guideline on landowners.

Impact on landowners

The Property Council supports the general approach of the Guideline set out in sections 2.0 and 3.0, which clarify the general principles when a CoRA EPO will be issued to a related person,

including that merely being a related person will not of itself trigger the issue of a CoRA EPO (principle 7), and that culpability is required.

The Property Council notes that the Guidelines attempt to create a three step process for determining whether a CoRA EPO should be issued:

- Firstly, culpability must be determined (this is not contained in the legislation);
- Secondly, whether or not the person is a related person is determined; and
- Thirdly, the reasonable steps taken by the person are to be considered.

The Property Council welcomes the acknowledgement that culpability is required, although the drafting of the Guideline needs some additional clarification about how culpability is determined, whether the Enforcement Guideline's definition is included in the Guideline, and how culpability and 'reasonable steps' are related.

While there is no express defence, the chief executive may take into account whether the related person has taken all reasonable steps to ensure environmental compliance, when deciding whether or not to issue a CoRA EPO. The Property Council remains concerned that while the chief executive must take into account the Guideline, taking into account the 'reasonable steps' is still discretionary – that is, there is no certain defence available for landowner.

In addition, the Property Council suggests that further examples are required to demonstrate how culpability may be established for a landowner, and what 'reasonable steps' are required to be taken. This is critical because without some assurances that landowners are not expected to become 'environmental police', investment in property in Queensland will suffer.

The property industry is Queensland's largest industry, accounting for 11.4% of the state's economic activity. The sector employs 240,000 Queenslanders, more than manufacturing and mining combined. The industry is also the largest contributor to government coffers in Queensland, paying 49.8% of all State taxes and local government rates, fees and charges.

Realities of property leases

The most common situation where a CoRA EPO may be relevant to commercial landowners is where the landowner leases land to a company which is undertaking an environmentally relevant activity or otherwise causing environmental harm. In that situation, the tenant has exclusive possession, to the exclusion of the landowner. The basic premise of most commercial leasing is that the tenant, with its exclusive possession, is the best person to manage environmental risk and liability, and the courts have generally been reluctant to require landlords to interfere in their tenants' businesses.

Consequently, the lease will generally require the tenant to comply with laws, but usually does not permit the landowner to audit the tenant's activities to any extent nor to take them over, except in extreme situations of final default. The landlord is unlikely to inspect the tenant's environmental authority, and hence is unlikely to know in any detail what the tenant's legal rehabilitation obligations are, if any. This is standard practice throughout Queensland.

The Property Council submits that usual commercial and industrial property practice should be acknowledged in the Guideline. Landowners under existing leases cannot be expected to undertake steps which they are not legally authorised to do under existing leases. Landowners negotiating new leases now should not be required to change usual commercial practice to give themselves additional rights of inspection and audit for their tenants, which would arguably be contrary to the essence of a lease, with its grant of exclusive possession to the tenant. Given that

many tenants of industrial or service station sites are large multinational corporations, landowners will also likely find it difficult to radically change the usual structure of a commercial lease.

Issues which must be addressed for landowners in the Guideline include:

- The extent of due diligence required to be undertaken on tenants by landowners;
- Confirmation that landlords are not required to attempt to renegotiate existing leases;
- Confirmation that the tenant's exclusive possession, in a normal 'arm's length' commercial situation, is to be respected, and that landlords are not expected to interfere in or carry on an unrelated tenant's business for them; and
- Confirmation that landlords are not expected to commence court action to enforce general 'comply with laws' clauses under leases, in order to demonstrate that they have taken reasonable steps to ensure tenants' environmental compliance.

Impact on financiers

The Property Council supports the effort that has been made to clarify that ordinary 'arm's length' commercial bank/customer relationships do not give rise to a related person relationship, as continued and predictable investment by the banking sector is crucial for the ongoing health and stability of the property sector. The Property Council notes however that additional clarity around some of these examples, particularly in situations where banks become equity participants as part of debt restructures, and those which relate to the position of insolvency practitioners, would benefit from more clarification. If a security cannot be enforced safely, financiers will not be able to lend. This will have a significant impact on the Queensland economy.

Future legislative amendments

The Property Council welcomes the increased clarity which the Guideline will bring to the interpretation of the CoRA. However, given the extremely broad scope of the legislation (particularly in relation to landowners) the Property Council encourages the Government to continue to listen to and act upon community and industry comment about further potential clarifying changes to the legislation.

The Government should not be liable for funding remediation works caused by the environmentally damaging activities of private entities. Similarly, other individuals and companies who have no responsibility for these activities should also not be liable for these costs.

To ensure the 'chain of responsibility' mechanism is accurate and targeted to those with actual responsibility, the Property Council strongly recommends that the Government consider removing Section 363AB(1)(b) from the Act. This action was a bipartisan recommendation of the Parliamentary Committee's investigation into this legislation.

The 'relevant connection' test, outlined in Section 363AB(2)-(6), provides a far more comprehensive and accurate measure of determining a 'related person'. This section captures all individuals or companies who have benefitted financially from carrying out the relevant environmental activity or have been able to influence the company's conduct in this area. Any landowners who actually have any relevant control over the defaulting company would be caught under this definition. As such, this section should be used instead of the earlier wide-ranging landowner definition 363AB(1)(b).

If you would like any further information, please do not hesitate to contact me on 07 3225 3000, or cmountford@propertycouncil.com.au.

Yours sincerely

Chris Mountford
Queensland Executive Director