APPENDIX
Questions taken on notice at public hearing in Brisbane, on 12 July 2017, of the Senate Environment and Communications Reference Committee Inquiry into the rehabilitation of mining and resources projects as it relates to Commonwealth responsibilities.

Our responses to the two points of discussion have been broken into the questions as understood by us relevant to each discussion. Answers are provided to the questions below.

Please let us know if there are other matters the Committee wishes to have addressed.

Discussion 1:

> CHAIR: So if you have got these ongoing mines that currently the EPBC Act does not apply to, because they were pre-existing, with the chain of responsibility you would still be able to get liability for people there.
> Ms Pointon: There needs to be some kind of duty to prevent environmental harm generally and I'm not sure that the EPBC Act would provide for the sufficient offence provision so that you could use the chain of responsibility act to make somebody liable, whereas the Environment Protection Act has multiple offence provisions for causing environmental harm. Even if it wasn't subject to an authority under the EP act you could actually take enforcement action for that activity being a threat to the health of the environmental community under the chain of responsibility powers. The EPBC Act, as far as I understand, regulates activities, in that you have to apply for assessment of them and there are no general offence provisions in there. I could be wrong about that so it might be worth taking that as a question on notice.

Questions taken on notice:

1. **Do the 'Chain of Responsibility' laws in the *Environment Protection Act 1994* (Qld) apply to mines that pre-dated the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act)?**

2. **Does the EPBC Act contain general offence provisions that apply even where the action itself is not required to be referred under the EPBC Act, due to the activity pre-dating the Act for instance?**

Discussion 2:

> Senator WATERS: Can you run me through the proposed reforms about how companies disclose their liabilities? It seems to me that the whole issue is shrouded in secrecy. We don't know how much the bonds are, we don't know how much the shortfall is and we don't know whether companies properly account for this liability on their own balance sheets or tell their shareholders. You went into this a little bit in your submission. Can you elaborate on that for us and talk about whether there's scope for national reforms to corporations laws or what have you that might mandate a bit more transparency and might require companies to disclose the true status of their liabilities?
> Ms Pointon: Sure. I probably can't provide a lot of detail around this, I have to admit. As Rick Humphries mentioned earlier, there are the obligations to notify shareholders of the risk that a company faces in not meeting the rehabilitation conditions required of them. It seems that it is an explicit element that should be disclosed to shareholders.
> Senator WATERS: It's not at the moment?
> Ms Pointon: I'm not sure whether that is the case, sorry, but I can take the question on notice.
> Senator WATERS: Thank you.
> CHAIR: Relatedly, whether there are required changes to ASIC processes and the Corporations Act to require that.
> Ms Pointon: Exactly. I'm happy to take that question on notice.

Question taken on notice:

3. **What are reforms needed to the disclosure of liabilities by companies?**

<u>Responses to questions taken on notice</u>

1. **Do the 'Chain of Responsibility' laws in the *Environment Protection Act 1994* (Qld) apply to mines that pre-dated the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)?**

In summary, yes, the 'Chain of Responsibility' laws under the *Environmental Protection Act 1994* (Qld) (**EP Act**) may apply to mining activities that pre-dated the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) as far as the activities are subject to the provisions of the EP Act.

The *Environment Protection (Chain of Responsibility) Amendment Act 2016* (Qld) (**Chain of Responsibility laws**) amended the EP Act to provide additional grounds for the regulator, being the Department of Environment and Heritage Protection, to issue environmental protection orders to 'related persons' of companies that have caused, or may cause, environmental harm under the EP Act.[1]

Essentially the Chain of Responsibility laws empower the regulator to 'pierce the corporate veil', in addition to the existing powers of executive officer liability under section 493 of the EP Act. Previously, the regulator may have been limited in its options for taking enforcement action against a holder of an environmental authority for causing, or threatening to cause, environmental harm. If the holder found itself in financial hardship and was unable to arrange for works needed to avoid or remediate environmental harm the Queensland Government would be left with this responsibility and the associated costs. This is especially relevant at the end of mine life, where production is scaled back and therefore profits of the holder may reduce, but costly rehabilitation obligations arise.

The Chain of Responsibility laws enable the regulator to take enforcement action against related persons of a company, who may have been responsible for, or who may have profited from the relevant activities. This could include parent companies or landowners. The provisions ensure that the government is no longer automatically left with the environmental clean-up costs of companies that are failing financially.

The Chain of Responsibility laws apply to any activity within the jurisdiction of the EP Act for which an environmental protection order may be issued. This includes activities that have not been referred under the EPBC Act as 'controlled actions', for example because they occurred prior to the commencement of the EPBC Act, or because they occurred prior the listing of a matter as a matter of national environmental significance (**MNES**), or because the activity may not have a significant impact on MNES and yet may still trigger enforcement under the EP Act.

The Chain of Responsibility laws are therefore retrospective in effect, in that they can be used to take enforcement action against a related person even where the action that caused environmental harm or a threat of environmental harm occurred prior to the commencement of the Chain of Responsibility laws.

2. **Does the EPBC Act contain offence provisions that apply even where the action itself is not required to be referred under the EPBC Act, due to the activity pre-dating the Act for instance?**

The EPBC Act contains offence provisions for taking an action that will result in a significant impact on a MNES without assessment under the EPBC Act.[2] However, EPBC Act part 4 provides for cases in which approval under the EPBC Act is not required, and therefore the action is exempt from the offence provisions.

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[1] *Environmental Protection Act 1994* (Qld) chapter 7, part 5, division 2.
[2] For example, see *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 15A, 15C, 17B, 18A, 22A, 24A, 24C, 24E,

If an action is a lawful continuation of a use of land, or has already obtained necessary authorisation at the time of commencement of the EPBC Act or of listing of a new MNES that the activity may affect, the action is exempt from requiring approval under the EPBC Act.[3]

Therefore, if a resource activity was being undertaken as a lawful activity on land, with all necessary authorisations in effect prior to the commencement of the EPBC Act, or prior to the listing of an MNES that the activity affects, the activity would not require referral for assessment under the EPBC Act. The impacts of this activity on a MNES would also not be subject to the offence provisions of the EPBC Act.

3. What are reforms needed to the disclosure of liabilities by companies, to the public and to their shareholders?

We recommend that the *Corporations Act 2001* (Cth) (**Corporations Act**) and the related Australian Accounting Standards Board AASB 137 – Provisions, Contingent Liabilities and Contingent Assets (**AASB 137**) should be amended to clarify the reporting obligations with respect to the liabilities of rehabilitation requirements for resources operators, including rehabilitation obligations that may accrue in the future.

Specifically, reporting obligations for the following matters should be mandated:

(a) the estimated rehabilitation liabilities if resources operations were to cease immediately;

(b) the amount of any financial assurances provided to regulators, including the amount prior to any discounting;

(c) the activities the subject of any financial assurance calculation;

(d) the form of any financial assurances provided; and

(e) if not cash, the financial institution(s) that provided any financial assurances.

This information is not only in the interests of shareholders, it is also in the public interest, as the public, via taxes and the risks to surrounding and downstream landholders, are also exposed to risk if companies become financially unviable.

Requirements for reporting under the Corporations Act are largely regulated by the Australian Accounting Standards Board (**AASB**) which, pursuant to section 334 of the Corporations Act, has the power to make accounting standards provided that they are not inconsistent with the Corporations Act. Section 296 provides that a financial report for any given financial year must comply with the accounting standards. Any responsibility will vary depending on whether a company is a small proprietary company or a small company limited by guarantee.

Currently we understand that in practice resource companies do not report the costs of their rehabilitation obligations as liabilities on their balance sheets. Rehabilitation costs are generally considered a 'contingent liability' subject to accounting standard AASB 137. The Accounting Guidance Note 2010/1 (Revised) (**Note 2010/1**), which provides clarification on the scope and purpose of AASB 137, provides:

> *"1. Many agencies have obligations to dismantle, remove and restore items of property, plant and equipment (often referred to as 'make good'). For example, agencies that lease premises may be required to restore premises to its original condition at the conclusion of the lease…*
>
> *2. Accounting standards require these obligations to be recorded as liabilities for budget purposes (see budget implications) although funding would not normally be provided to agencies until such time as payments are required to be made."*

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[3] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 43A and 43B.

AASB 137 identifies how the restoration is to be recognised and measured in a financial report. Note 2010/1 provides the following summary:

> *"An entity will be required to establish a provision for restoration costs only when the following criteria are satisfied:*
>
> - *An entity has a* ***present obligation (legal or constructive) as a result of a past event;***
> - *It is* ***probable that an outflow of resources embodying economic benefits will be required*** *to settle the obligation; and*
> - ***A reliable estimate*** *can be made of the amount of the obligation.*
>
> *If these conditions are not met, no provision should be recognised"*

Under these requirements, rehabilitation obligations not yet activated may not be reported as liabilities due to an interpretation that they cannot be reliably estimated.[4] Walker (2011) states:

> "*the estimation uncertainty creates a setting where management can plausibly withhold bad news. This situation affords management either to withhold disclosure to protect their proprietary information for economic advantage or the opportunity to enhance firm value through disclosure."*

By requiring that rehabilitation obligations are reported as liabilities, this information will be subject to the existing independent audit process required of financial reports by most companies.[5]

Further, requiring publication of the calculations behind the amounts and forms of financial assurances provided to regulators would provide greater accountability and transparency of the activities of authority holders and government regulation to shareholders and the public. The financial assurance frameworks have been found to be substantially flawed in Queensland and New South Wales by the Audit Offices of these respective states.[6] The risks surrounding the inadequacies of these frameworks have been substantially unknown by the general public until their exposure via these Audit Office reports and significant media attention in recent years. This risks and the site-specific application of the rehabilitation and financial assurance frameworks must be exposed to shareholders and the public if there are to be any improvements to the regulation of rehabilitation and financial assurance frameworks in Australia, and public confidence in this regulation.

[4] Ferguson, Andrew and Walker, Andrew, *Restoration and rehabilitation provisions in the Australian materials and energy sectors; Estimation and valuation implications*, University of Technology, Sydney, 11.

[5] *Corporations Act 2001* (Cth) s301.

[6] Queensland Audit Office, *Environmental regulation of the resources and waste industries*, Report 15: 2013-2014, 4; NSW Audit Office, *Performance Audit Program 2016-17*.