

---

**AN EXAMINATION OF THE CONGRUENCE OF THE MINING SITE REHABILITATION TAX DEDUCTIONS & QUEENSLAND'S CHAIN OF RESPONSIBILITY LEGISLATION**

SALLY-ANN JOSEPH\*

*The Australian tax legislation provides an immediate deduction for expenditure incurred in rehabilitating a mining site. Notwithstanding the availability of this deduction, many mine sites remain un-rehabilitated due to the mining company declaring insolvency or otherwise lacking the necessary financial resources. This imposes a cost on state governments who are left to clean up the environmental damage. These costs are significant and an unnecessary burden on taxpayers. In response to this, the Queensland State Government recently enacted chain of responsibility legislation to make individuals or entities associated with non-complying companies responsible and accountable for environmental rehabilitation. This paper considers the interrelationship between the Queensland State's new environmental provisions and the Federal Government's income tax provisions. In doing so, the question whether interposed entities can access the tax deductions requires a comprehensive analysis of the mining site rehabilitation and environmental protection activities provisions is addressed. Recommendations are made to address the arising issues.*

I INTRODUCTION

The mining industry adds significant economic and social value through its royalties, investment, employment and community development. However, it also has the potential to cause considerable environmental harm. When mining companies fail to fully rehabilitate their mining sites at end-of-life, they cause environmental harm that at worst is irreversible and at best may take years to rectify. It is often left to taxpayers to fund the costs of rehabilitation thereby foregoing other services the public revenue could have provided. The potential consequence of this is a public welfare loss.

The potential for environmental disasters increases the more mining sites are left un-rehabilitated. There are currently more than 50,000 abandoned mine sites in Australia.<sup>1</sup> Increasingly, large mining companies are offloading their marginal assets to players who are smaller in both experience and resources. The new owners lack the financial ability to cover their statutory obligations with respect to rehabilitating mine sites.<sup>2</sup> Shifting the

---

\* Associate member, Asia-Pacific Centre of Environmental Law (APCEL), National University of Singapore.

<sup>1</sup> C Unger, A M Lechner, V Glenn, M Edraki and D Mulligan, 'Mapping and Prioritising Rehabilitation of Abandoned Mines in Australia', *Life-of-Mine Conference Proceedings* (July 2012) 259.

<sup>2</sup> For examples of \$1 sales, lack of capital to cover financial assurances and limited and/or dubious experience see Peter Ker, 'Old challenges loom at new coalface' *Sydney Morning Herald*, 9 April 2016, 4; Mark Willacy,

responsibility for environmental rehabilitation to companies with fewer resources greatly increases the risk that taxpayers will ultimately have to pay the costs of rehabilitating abandoned mine sites.

Therefore, it necessitates an obligation on governments to make mining companies more responsible for rectifying the damage they cause. This includes being more accountable for the costs of environmental rehabilitation and in increasing the transparency in how this is achieved, or is to be achieved. Both incentives (reward) and monetary redress (punishment) are practical solutions.

The Federal Government provides incentives in the form of an income tax deduction for expenditure incurred in rehabilitating mining sites and for certain costs incurred on environmental protection pertaining to mining sites. As a rule, only expenditure incurred in producing tax assessable income is generally deductible.<sup>3</sup> Therefore special provisions are required to make deductible expenditure that is not directly related to generating income and/or is incurred when the entity is no longer carrying on an enterprise. The provisions relating to rehabilitating mining sites and environmental protection activities are such special provisions. Another underlying rule is that typically expenditure is only deductible to the taxpayer who generated the income associated with that expenditure. It must also be acknowledged that providing tax deductions to individual taxpayers decreases the tax revenue available at the federal level. There is therefore a cost to taxpayers generally.

The Queensland Government's approach has been to adopt 'chain of responsibility' legislation as a means of injecting responsibility, accountability and transparency into the area of mining site rehabilitation. These provisions extend the range of the Queensland's environmental protection legislation so as to protect citizens financially when mining companies are unable or unwilling to rehabilitate their mining sites.

The first environmental protection order under this chain of responsibility legislation was issued in May 2016 to Peter Bond, founder and former chief executive of Linc Energy. Linc Energy went into voluntary administration in April 2016 after being committed to stand trial on five charges of wilfully and unlawfully causing serious environmental harm at the company's coal gasification plant at Chinchilla, Queensland. It should be noted that disclaiming the property does not have the effect of discharging the company in liquidation from compliance with any obligations under an environmental protection order.<sup>4</sup> This could well extend to other statutory obligations such as mining site rehabilitation requirements.

The question this paper poses is whether the extended reach of the Queensland State legislation extends the availability of the tax deductions (with respect to the rehabilitating

---

'Rio Tinto's \$1 sale of Blair Athol coal mine "puts risk back on taxpayer"' *ABC News Online*, 12 July 2016, <<http://www.abc.net.au/news/2016-07-12/rio-tinto-selling-massive-queensland-coal-mine-for-dollar/7588916>>; Mike Seccombe, 'Who foots the bill for open-cut mine rehabilitation?' *Saturday Paper*, 6 February 2016, <<https://www.thesaturdaypaper.com.au/news/politics/2016/02/06/who-foots-the-bill-open-cut-mine-rehabilitation/14546772002857>>; Joshua Robertson, 'Coal giants abandon unprofitable mines, leaving rehabilitation under threat' *The Guardian*, 29 January 2016, <<https://www.theguardian.com/environment/2016/jan/29/coal-giants-abandon-unprofitable-mines-leaving-rehabilitation-under-threat>>.

<sup>3</sup> This is income that is generated during the ordinary course of carrying on an enterprise. It can also include income arising from certain isolated transactions outside the ordinary course of business where there is the intention to make a profit.

<sup>4</sup> *Linc Energy (in liq) v Qld Dept of Environment and Heritage Protection* [2017] QSC 053.

mining sites and environmental protection activities provisions) to third persons or entities. That is, could Peter Bond get Linc Energy's tax deduction?

Resource and environmental authorities are prerequisites for mining operations. An overview of these, as they pertain to this article, is given in section II. Section III describes the Queensland State Government's 'chain of responsibility' legislation and its operation. This is followed by an analysis of the mine site rehabilitation and environmental protection tax deductions in section IV. The question posed by this paper is addressed in section V by analysing the interaction and congruence of the tax deductions and chain of responsibility legislations. Section VI outlines the issues arising from the analysis and makes recommendations. Concluding remarks are contained in section VII. The focus throughout is on responsibility for rectification of environmental damage, accountability for the costs of environmental rehabilitation and transparency in how this is achieved.

## II MINING OPERATIONS AUTHORITIES

Mining operations require two types of authorities for their initial approval and subsequent operation. These are a resource authority governed by state mining legislation and an environmental authority governed by state environmental protection<sup>5</sup> legislation.

The resource authority stipulates the type of product or resource that can be mined, the specified area in which operations are to be conducted and the period of time covered by the authority.<sup>6</sup> A mining lease covers the mining of minerals or coal and, according to the Department of Natural Resources and Mines, also applies to purposes associated with the mining and processing of mining output.<sup>7</sup> These include camps, workshops, treatment plants, storage sheds and water storage devices. Mining leases may also be granted for infrastructure such as power lines, pipelines, haul roads and conveyors used to service the mining operations.

An environmental authority provides the authority to perform an 'environmentally relevant activity'. These are activities that have the potential to contaminate the environment, such as mining.<sup>8</sup> As a licence to operate, an environmental authority imposes certain conditions, that state what is permitted or prohibited as part of the environmental authority's activity. One such requirement is preparing a plan of operations which includes a rehabilitation program.<sup>9</sup> The plan of operations is used to assess the amount and form of security, termed 'financial assurance'.

Financial assurance is required under both legislations. Under mining legislation, the security is for compliance with both the conditions imposed and the provisions of that Act as well as for rectification of any actual damage caused, whether it be a prospecting or exploration

---

<sup>5</sup> By whatever name called. For example in Queensland it is the *Environmental Protection Act 1994* and in NSW it is the *Environmental Planning and Assessment Act 1979*.

<sup>6</sup> See for example *Mineral Resources Act 1989* (Qld) s 6D 'Types of authority under Act'.

<sup>7</sup> Queensland Government, *Applying for a mining lease in Queensland* (Department of Natural Resources and Mines, September 2016) 1.

<sup>8</sup> Queensland Government, *Environmental authorities* (Department of Environment and Heritage Protection, 13 September 2016).

<sup>9</sup> See for example *Environmental Protection Act 1994* (Qld), s 287 read with s 288.

permit, a mining claim, a mineral development licence or a mining lease.<sup>10</sup> Under environmental protection legislation, the purpose of financial assurance is to<sup>11</sup>

‘provide the government with a financial security to cover any costs or expenses incurred in taking action to prevent or minimise environmental harm or rehabilitate or restore the environment, should the holder fail to meet their environmental obligations in the EA [environmental authority]’

Mining is generally a long-term activity. While financial assurance can be topped-up during the life of the mining operation, the amount of security needed can be difficult to estimate with any degree of accuracy. This is not only a cost factor but one of time too. In 2012 BHP Billiton sought a review of a South Australian Government executive decision regarding the expansion of the Olympic Dam project. In granting the approval, the Full Federal Court iterated a number of conditions,<sup>12</sup> one of which requires BHP Billiton to assess the long-term risks that tailings and rock storage facilities may pose to safety and environment. ‘Long-term’ was said to be ‘from closure to in the order of 10,000 years’.<sup>13</sup>

In 2013, a Queensland Audit Office report found that the financial assurance held by Queensland has historically been insufficient to cover rehabilitation costs.<sup>14</sup> Indeed, the ABC’s Lateline has calculated a \$3.2 billion shortfall in coal mining alone.<sup>15</sup> Further, the amount of security requested is not always the amount calculated as necessary for rehabilitation purposes. Notwithstanding it is mandatory for mining operations to provide financial assurance,<sup>16</sup> this is not always enforced. In respect to this requirement, it has been reported that no financial assurance is held by the Queensland Government in respect of the Texas Silver Mine, which went into liquidation in July 2015.<sup>17</sup>

Insight into the scale of potential shortfall can be gleaned from an inquiry into the state of Victoria’s Hazelwood Mine fire. This fire has had a devastating impact on the Latrobe Valley communities economically, socially and environmentally. With respect to mine rehabilitation, the inquiry also extended consideration to the Yallourne and Loy Yang mines. Together with Hazelwood, these three mines contribute approximately 95 per cent of Victoria’s base load electricity.<sup>18</sup> Table 1 sets out the current rehabilitation financial assurance held for each of these three mines, what the mine operators estimate rehabilitation

<sup>10</sup> *Mineral Resources Act 1989* (Qld), ss 26, 144, 83, 190, 277 respectively.

<sup>11</sup> Queensland Government, *Guideline: Financial assurance under the Environmental Protection Act 1994* (Department of Environment and Heritage Protection, 4 March 2016) 3. See also *Environmental Protection Act 1994* (Qld), s 292 read with s 298.

<sup>12</sup> *Buzzacott v Minister For Sustainability, Environment, Water, Population and Communities* (2013) 215 FCR 301.

<sup>13</sup> *Buzzacott v Minister For Sustainability, Environment, Water, Population and Communities* (2013) 215 FCR 301 at 361.

<sup>14</sup> Queensland Government, *Environmental regulation of the resources and waste industries* (Queensland Audit Office Report 15: 2013-14, 2013) 4. See also Parliamentary Committee, Queensland, *Inquiry into Auditor-General’s Report No 15: 2013-14: Environmental regulation of the resources and waste industries* (Agriculture, Resource and Environment Committee Report No. 53, December 2014).

<sup>15</sup> Mark Willacy, ‘Report warns of a funding black hole in the billions of dollars for the future environmental clean-up of Queensland’s coal mines’ *ABC Lateline*, 4 August 2016, <<http://www.abc.net.au/lateline/content/2016/s4513848.htm>>.

<sup>16</sup> *Environmental Protection Act 1994* (Qld) s 293.

<sup>17</sup> Parliamentary Committee, Queensland, *Environmental Protection (Chain of Responsibility) Amendment Bill 2016* (Agriculture and Environment Committee Report No. 16, 55<sup>th</sup> Parliament, April 2016) 31.

<sup>18</sup> Victorian Government, *Hazelwood Mine Fire Inquiry Report 2015/2016 Volume IV – Mine Rehabilitation* (Hazelwood Mine Fire Inquiry, 2016) 33.

costs will be and what is estimated as the costs a third party would expend without the mine operator's infrastructure and personnel.

Table 1: Financial assurance and rehabilitation costs for Latrobe Valley mines

Mine	Current security	Operator's estimate	Third Party estimate
Hazelwood	\$15 million	\$73.4 million	\$264m - \$357m
Loy Yang	\$15 million	\$53.7 million	\$221m - \$319m
Yallourne	\$11,460,500*	\$46m - \$91m	\$167m - \$262m

\* Lowered from \$15 million following review in 2004.

Source: Victorian Government, Hazelwood Mine Fire Inquiry Report 2015/2016 Volume IV – Mine Rehabilitation

The inadequacy of the financial assurance held may not be realised until the mine is closed or abandoned, irrespective of whether this is as the result of an environmental disaster or not. At this point the company may be unable or unwilling to perform their rehabilitation obligations. Yet there is no legal requirement for a state government to rehabilitate a mine site. This leaves three options available to the state government: not to rehabilitate the site at all; to rehabilitate the site only to the extent covered by what financial assurance is available; or to rehabilitate the site partially or fully at taxpayers' expense. To mitigate the third option, the Queensland State Government implemented 'chain of responsibility' legislation.

### III CHAIN OF RESPONSIBILITY LEGISLATION

#### A Overview

On 22 April 2016 the Queensland State Government, with bipartisan support, passed amendments to the *Environmental Protection Act 1994* (Qld) aimed at ensuring that mining sites operated by companies in financial difficulties continue to comply with their environmental obligations.<sup>19</sup> This was the *Environmental Protection (Chain of Responsibility) Act 2016* (Qld).<sup>20</sup>

Prior to this legislation two constraints were placed on the regulator.<sup>21</sup> First, the regulator could only deal with the entity (including a person) that directly held the environmental authority. Second, environmental protection orders could only be issued to the holders of the environmental authority. An 'environmental protection order' is a written statutory tool requiring specific actions within specific timeframes to remedy a risk or prevent further environmental harm. There is nothing to indicate that the area, subject to an environmental protection order, can be restricted. That is, it is possible that the order may extend not only to the site upon which the relevant activity was carried out but also to adjacent sites.

The chain of responsibility legislation broadens the scope for issuing environmental protection orders. That is, the liability to remediate affected sites is extended to 'related persons' who have a 'relevant connection' to the environmentally relevant activity.<sup>22</sup> In other words, environmental protection orders can now be issued to persons or entities that have a relevant relationship with the company carrying out the mining operations.

<sup>19</sup> The legislation is directed at 'environmentally relevant activities' of which mining operations is one such activity.

<sup>20</sup> Commenced on date of assent: 27 April 2016.

<sup>21</sup> In Queensland the regulator is the Department of Environment and Heritage Protection.

<sup>22</sup> *Environmental Protection Act 1994* (Qld), s 363AC.

### B *'Related Persons'*

Three instances give rise to a 'related person', where 'person' includes an entity such as a company.<sup>23</sup>

In the first instance, the holding company of the subsidiary mining company is a 'related person'. This adheres to conventional company law and requires no further explanation.

The second instance has a two-part requirement: the related person is an associated entity of the company and also owns the land on which the mining company carries out, or has carried out, its mining activity. An 'associated entity' is defined to cover entities in the same corporate group, or situations where one entity has control, influence or qualifying investments of material interest in another entity.<sup>24</sup> This is to ensure that only those entities, including individuals, who are able to influence and/or control the mining company can be in the chain of responsibility.

The third instance giving rise to a 'related person' is a legislative discretion. This is given to the administering authority, to decide if the individual or entity has a 'relevant connection' with the non-complying mining company.

### C *'Relevant Connection'*

There are two possible scenarios to having a 'relevant connection'.<sup>25</sup> The first is that the person is capable of 'significantly benefiting financially' or has 'significantly benefited financially', from the mining activities. Alternatively, the person is, or has been at any time during the previous two years, in a position to influence the company with respect to its environmental compliance obligations. In this context, 'person' includes a 'body of persons', that is, incorporated and unincorporated entities.<sup>26</sup> The person need not have acted alone but could have acted jointly with an associated entity of the mining company. Further, the concept of 'influence' is wide and extends to giving a direction or approval, making funding available, or 'in another way'.<sup>27</sup>

The legislation sets out a number of matters that could be considered in deciding whether a person has a 'relevant connection'.<sup>28</sup> The more obvious ones are control and financial interest, whether direct or indirect. 'Control' is defined in terms of practical influence.<sup>29</sup> 'Financial interest' is defined broadly to include both direct and indirect interests in the shares of a company, in security given by the company or income or revenue of the company. These interests can be legal or equitable thus ensuring that non-company business structures (such as trusts) cannot be used to avoid the operation of these provisions. The term 'financial benefit' is also defined broadly to encompass profit, income, revenue, a dividend, a distribution, money's worth or an advantage, priority or preference. This may be received, obtained, preferred on or enjoyed and may be received directly or indirectly. In particular,

---

<sup>23</sup> *Environmental Protection Act 1994* (Qld), s 363AB(1).

<sup>24</sup> As defined in the *Corporations Act 2001* (Cth), s 50AAA.

<sup>25</sup> *Environmental Protection Act 1994* (Qld), s 363AB(2).

<sup>26</sup> *Environmental Protection Act 1994* (Qld), Sch 4 definition of 'person' (b).

<sup>27</sup> *Environmental Protection Act 1994* (Qld), s 363AB(3).

<sup>28</sup> *Environmental Protection Act 1994* (Qld), s 363AB(4).

<sup>29</sup> *Corporations Act 2001* (Cth), s 50AA.

environmental protection orders will not be issued to persons who have only small interests in the non-complying mining company or its profits. This is to exclude shareholders and employees.

Covered in more detail is the position of the person as an executive officer of the mining company or its holding company. Considerations include agreements and transactions entered into, and whether the dealings are at arm's length, on an independent commercial footing or for the purpose of providing professional advice or finance. Thus the nature of the relationship between the person and the non-complying mining company is a relevant factor.

#### D *'High Risk Company'*

Special provisions relate to a 'high risk company'. This is essentially a company, or an associated entity of a company, that is being wound up, in receivership or under administration.<sup>30</sup> These special provisions are basically designed to circumvent the mining company in financial difficulty and permit an environmental protection order to be imposed directly on the related person.<sup>31</sup>

Thus the chain of responsibility provisions cannot be avoided by merely transferring operation of the mining activity from an externally administered company to another member of its corporate group or other associated entity. In addition the environmental protection orders may provide for joint and severable liability.<sup>32</sup> This ensures that compliance can be enforced against any related person. In the event that the related person fails to comply with the environmental protection order, an authorised person can be appointed to step in to take the required action under the environmental protection orders and also has the authority to issue a cost recovery notice.<sup>33</sup>

#### E *Significance of the Chain of Responsibilities Legislation*

The 'related person' test is the key mechanism that establishes the chain of responsibility. The related person and relevant connection test captures related parties who have profited from activities carried out under the environmental authority and/or have the ability to influence environmental performance on the site, whether financially or otherwise.<sup>34</sup> No new obligation has been imposed, but rather the scope of the existing obligation has been extended.

The Explanatory Memorandum states that the provisions are 'directed at both an existing and looming problem in ensuring the protection of the environment'.<sup>35</sup> It is therefore inconsequential when the relevant mining activities were carried out or when the relevant environmental harm was caused. To this end the legislation ensures two things. First, it holds accountable the people connected with the entity that is both responsible for causing environmental harm and unable or unwilling to carry out the necessary rehabilitation.

<sup>30</sup> *Corporations Act 2001* (Cth), s 9.

<sup>31</sup> *Environmental Protection Act 1994* (Qld), s 363AD.

<sup>32</sup> *Environmental Protection Act 1994* (Qld), s 363AE.

<sup>33</sup> *Environmental Protection Act 1994* (Qld), ss 363AG and 363AI, respectively, read with s 445 regarding authorised persons.

<sup>34</sup> Queensland Government, *Parliamentary Debates* (Legislative Assembly, 21 April 2016) 1459

<sup>35</sup> Explanatory Notes, *Environmental Protection (Chain of Responsibility) Amendment Bill 2016*, 2.

Second, that elaborate corporate arrangements designed to avoid responsibility are either prevented or circumvented.

By extending responsibility for the rectification of damage caused, the numbers of people or entities that can be held accountable for the costs of rehabilitation are likewise extended. It also makes for a more transparent system.

#### IV TAX DEDUCTION LEGISLATION

As the need to rehabilitate mining sites usually arises at the end-of-life stage of mining operations, incentives are needed to ensure that rehabilitation actually occurs. Subdivision 40-H of the *Income Tax Assessment Act 1997* (Cth) makes certain expenditure immediately deductible. This expenditure is in relation to mining site rehabilitation and environment protection activities. These are described and discussed in turn.

##### A Mining Site Rehabilitation

The income tax legislation provides an immediate deduction for expenditure incurred rehabilitating a mining site, subject to certain conditions.<sup>36</sup> It has been suggested that the policy intent behind the provision is ‘more commercial than environmental’, notwithstanding that ‘[r]ehabilitating a mining site serves an environmental purpose’.<sup>37</sup>

A special deduction is warranted, as expenditure incurred in mining operations is only otherwise deductible if the expenses relate to the carrying on of mining operations and in preparing a site for those operations, including buildings, services and other related necessary improvements.<sup>38</sup> The term ‘mining operations’ is itself a defined term and means the extraction of minerals from their natural site on a mining property and also covers mining operations for the purpose of obtaining petroleum.<sup>39</sup> What is considered a mining property is not stated.

The deduction covers the site where mining operations were carried on, where exploration or prospecting was conducted and where ancillary mining activities were conducted.<sup>40</sup> This covers searching for minerals, site preparation and the treatment and storage of minerals.<sup>41</sup> The term ‘mining site rehabilitation’ is defined explicitly as<sup>42</sup>

an act of restoring or rehabilitating a site or part of a site to, or to a reasonable approximation of, the condition it was in before \*mining and quarrying operations, \*exploration or prospecting or \*ancillary mining activities were first started on the site, whether by you or by someone else

This gives rise to a number of implicit restrictions with respect to the scope of the provision. Note that this provision only pertains to rehabilitation and does not extend to land

<sup>36</sup> *Income Tax Assessment Act 1997* (Cth) ss 40-735 to 40-745.

<sup>37</sup> Sally Joseph, ‘Income tax and environmental provisions – green gold or lead weight?’ (2013) 8(1) *Journal of the Australasian Tax Teachers Association* 169. See this article for a discussion and analysis of the legislative history and policy development of the mining site rehabilitation tax provisions.

<sup>38</sup> *Income Tax Assessment Act 1997* (Cth), s 40-860 ‘Meaning of mining capital expenditure’.

<sup>39</sup> *Income Tax Assessment Act 1997* (Cth), s 995-1 with reference to s 40-730(7).

<sup>40</sup> *Income Tax Assessment Act 1997* (Cth), s 40-735.

<sup>41</sup> *Income Tax Assessment Act 1997* (Cth), ss 40-730(4) and 40-740(1).

<sup>42</sup> *Income Tax Assessment Act 1997* (Cth), s 40-735(4).



improvements generally. Costs incurred that do not relate to rehabilitation may be deductible under other income tax provisions such as capital gains tax.

In the first instance the deduction is only available if the site is restored to its original or pre-mining condition or to a reasonable approximation thereof. Only if the original condition is not known, can the area surrounding the mine site be used as guidance. The Explanatory Memorandum made it clear that, while restoration includes rehabilitation, it does not extend to any redevelopment or other enhancement of the site.<sup>43</sup> Thus rehabilitating a mining site for industrial or commercial land use, or for a community benefit such as a golf course or other recreational use, would not qualify for the deduction. The specificity is potentially onerous. If, prior to mining operations, the land had been capable of sustaining the grazing of certain livestock, deductibility is only available if the land is returned to being fit for grazing of that particular livestock.<sup>44</sup> Not another type of livestock; not a different agricultural use such as crops.

What constitutes the ‘mine site’ is also limited. Importantly, it does not extend to ‘rehabilitating an area, not located at the mine site, damaged by the mining operations’.<sup>45</sup> This means it clearly excludes areas contaminated by runoff and seepage such as river systems affected by toxic substances and increasing salinity in surrounding agricultural land. Specifically ‘site’ covers the area where mining operations were carried on, exploration or prospecting was conducted and where ancillary mining activities were conducted.<sup>46</sup> ‘Ancillary mining activities’ is defined to include providing water, power and communications to the site, mineral treatment and storage facilities.<sup>47</sup> The ancillary activities also cover liquefying natural gas obtained from mining operations. However, it is unlikely that this extends to infrastructure to service the mining operations such as power lines, pipelines, haul roads and conveyors. Thus the meaning of ‘mine site’ for taxation purposes is narrower than that area included in the permit or lease covered by the resource authority.<sup>48</sup>

In 1997, five years after the mine site rehabilitation tax deduction was introduced, a minor policy change resulted in the broadening of the deduction to include dams and levees that are ‘essential for rehabilitation’<sup>49</sup> An example of being ‘essential for rehabilitation’ is securing a water supply for revegetation. In justifying the policy change the Explanatory Memorandum suggested that such construction has little or no residual value to the person or company rehabilitating the site and hence should not be treated as an enhancement or redevelopment.<sup>50</sup> This qualification to the construction of dams and levees therefore excludes tailings dams built to store mining waste and dams built for recreational purposes. That is, expenditure on dams with a broader environmental or social purpose is precluded.

The mine site does not need to be fully restored in order to access the tax deduction. It is legislated that ‘[p]artly restoring or rehabilitating such a site counts as mining site rehabilitation (even if you had no intention of completing the work)’ (original emphasis).<sup>51</sup>

<sup>43</sup> Explanatory Memorandum, Taxation Laws Amendment Bill (No. 2) 1991, 113.

<sup>44</sup> Ibid, 113.

<sup>45</sup> Ibid, 114.

<sup>46</sup> *Income Tax Assessment Act 1997* (Cth), s 40-735(1).

<sup>47</sup> *Income Tax Assessment Act 1997* (Cth), s 70-740.

<sup>48</sup> Discussed in Section 2 of this article.

<sup>49</sup> Explanatory Memorandum, Income Tax Assessment Bill 1996, 91.

<sup>50</sup> Explanatory Memorandum, Income Tax Assessment Bill 1996.

<sup>51</sup> *Income Tax Assessment Act 1997* (Cth), s 40-735(5).

Nevertheless certain expenditure is specifically excluded. This relates to acquiring land or an interest in the land, and to a bond or security, ‘however described’, for the purposes of funding mining site rehabilitation.<sup>52</sup> This would cover financial assurances. Further, the deduction of expenditure of a kind specifically excluded by another provision of the income tax legislation such as a penalty is also not allowable.<sup>53</sup>

### B *Environmental Protection Activities*

An immediate tax deduction is provided for expenditure incurred on environmental protection activities defined as<sup>54</sup>:

*Environmental protection activities* are any of the following activities that are carried on by or for you:

- (a) preventing, fighting or remedying:
  - (i) pollution resulting, or likely to result, from \* your earning activity; or
  - (ii) pollution of or from the site of your earning activity; or
  - (iii) pollution of or from a site where an entity was carrying on any \* business that you have acquired and carry on substantially unchanged as your earning activity;
- (b) treating, cleaning up, removing or storing:
  - (i) waste resulting, or likely to result, from your earning activity; or
  - (ii) waste that is on or from the site of \* your earning activity; or
  - (iii) waste that is on or from a site where an entity was carrying on any business that you have acquired and carry on substantially unchanged as your earning activity.

No other activities are environmental protection activities.

What constitutes ‘pollution’ and ‘waste’ has been dealt with in the literature.<sup>55</sup> It is suffice to note that the words take on their ordinary meaning,<sup>56</sup> with the Commissioner of Taxation confirming that, in the Commissioner’s opinion, pollution is limited to some sort of contamination.<sup>57</sup> This concurs with the definition included in the Explanatory Memorandum that introduced the provisions, namely ‘emissions which damage the environment or may be potentially dangerous’.<sup>58</sup> In addition, work of a preventative nature may qualify provided it meets the criterion of being for an environmental purpose.<sup>59</sup> Thus, removing storage tanks because they may leak contaminants and cause loss or injury to a future user of the site would qualify.

The section noted above specifically refers to ‘your earning activity’. This is defined to cover current, past and proposed activities that relate to producing assessable income, that is for the purpose of exploration or prospecting, and/or for the purpose of mining site rehabilitation.<sup>60</sup>

<sup>52</sup> *Income Tax Assessment Act 1997* (Cth), s 40-745.

<sup>53</sup> Explanatory Memorandum, Taxation Laws Amendment Bill (No. 2) 1991, 113.

<sup>54</sup> *Income Tax Assessment Act 1997* (Cth), subs 40-755(2).

<sup>55</sup> See Sally Joseph, ‘Environmental protection provisions – how useful are they?’ (2012) 41(1) *Australian Tax Review* 29.

<sup>56</sup> Australian Taxation Office, *Petroleum resource rent tax and income tax: treatment of geosequestration expenditure and receipts*, Taxation Ruling TR 2008/6, 27 August 2008, para 23; Explanatory Memorandum, Taxation Laws Amendment Act (No 5) 1992.

<sup>57</sup> Australian Taxation Office, *Environmental Protection Activity – Vegetating Area for Visual Effect and Prevention of Erosion*, Interpretive Decision ID 2003/17, 14 February 2003.

<sup>58</sup> Explanatory Memorandum, Taxation Laws Amendment Act (No 5) 1992, Glossary p 197.

<sup>59</sup> Explanatory Memorandum, Taxation Laws Amendment Act (No 5) 1992, p 80.

<sup>60</sup> *Income Tax Assessment Act 1997* (Cth), s 40-755(3).

The resource authority and the environmental authority<sup>61</sup> both require the rehabilitation of the mining site which may explain why the expenditure was incurred. However, that is not the test of this section. For the expenditure to be deductible under this provision, the expenditure must have been incurred for the sole or dominant purpose of carrying on environmental protection activities.<sup>62</sup> A residual or subsidiary purpose will not suffice.<sup>63</sup> Similarly, where the expenditure is partly for environmental protection apportionment will be necessary. The example provided in the Explanatory Memorandum involves a partially polluted site where the removal of the contaminated soil resulted in a large hole.<sup>64</sup> Trucking in fresh soil to fill the hole is allowable expenditure but using part of this fresh soil to level the site is not.

Eligibility for the deduction is dependent on any one of three scenarios.<sup>65</sup> First, the pollution or waste results, or is likely to result, from the income-producing activity. For the purposes of this article, the relevant ‘income-producing activity’ is mining. The second scenario relates to the locality of the pollution or waste. This is the site on which the ‘income-producing activity’ is, was or will be conducted. The third scenario relates to the source of the pollution or waste being the site on which the mining activity is, was or will be carried out. That is, where the mine site is a source of pollution of other sites, the tax deduction is available for expenditure to clean up those other sites, ‘wherever they are needed’.<sup>66</sup> Further, whilst provision is made for the locality or source to be a site of a predecessor business, given the nature of mining it is unlikely that mining will be conducted at a site different from that that was purchased from the predecessor. What is of particular relevance for this article is the fact that the area that can be cleaned up and/or rehabilitated and still qualify for the tax deduction is far broader than the qualifying area under the mining site rehabilitation provisions.

Further points need to be made regarding eligibility. It is not necessary that the taxpayer undertake the environmental protection activity. This can be done on behalf of the mining company taxpayer. Further, the owner of the site who leases the site to a third party or grants a right to a third party to use the site is considered to be ‘carrying on an income-producing activity’ on that site.<sup>67</sup> This has potential consequences for farmers and other landowners who own the land on which mining operations are conducted. As a result, more than one entity may use, or propose to use, a site to carry on an income-producing activity. In both cases, whoever incurs the expenditure is eligible for the immediate tax deduction.

The tax deduction does not extend to preventing, fighting or remedying pollution from someone else’s activities or someone else’s site even if such pollution is equivalent to the pollution from the site or activities in question.<sup>68</sup> The same applies to the treating, cleaning up, removing or storing of waste. That is, one cannot substitute someone else’s pollution or waste for one’s own. However, the Commissioner of Taxation does permit an exception.<sup>69</sup> This relates to pollution from the earning activity, the site of the earning activity or the

---

<sup>61</sup> Discussed in section 2 of this article.

<sup>62</sup> *Income Tax Assessment Act 1997* (Cth), s 40-755(1).

<sup>63</sup> Explanatory Memorandum, Taxation Laws Amendment Act (No 5) 1992, p 76-77.

<sup>64</sup> Explanatory Memorandum, Taxation Laws Amendment Act (No 5) 1992, p 77.

<sup>65</sup> For an examination of these scenarios see Joseph, above n 55.

<sup>66</sup> Explanatory Memorandum, Taxation Laws Amendment Act (No 5) 1992, 82.

<sup>67</sup> *Income Tax Assessment Act 1997* (Cth), subs 40-755(4).

<sup>68</sup> Australian Taxation Office, above n 56, para 95.

<sup>69</sup> *Ibid*, para 96.

predecessor's business site that cannot be distinguished from the same pollution emitted by others. An example of a 'same pollution' is carbon dioxide. The tax deduction extends to the expenditure in extracting from this common pool an amount equivalent to that which originated from the earning activities or site in question. Of course, eligibility is dependent on the expenditure being incurred for the sole or dominant purpose of carrying on 'environmental protection activities'.

As with the mining site rehabilitation provisions, there are similar exclusions relating to the acquisition of land or to a bond or security, 'however described' for performing environment protection activities.<sup>70</sup> In addition, a deduction under this provision is not available for capital expenditure incurred on constructing a structure or on structural improvements.<sup>71</sup> This does not prevent the expenditure being deductible elsewhere<sup>72</sup> and reiterates that the environmental protection provisions are provisions of last resort.

## V CONGRUENCE OF THE LEGISLATION

In simple terms the *Environmental Protection (Chain of Responsibility) Act 2016* (Qld) extends the responsibility for ensuring the rehabilitation of mining sites to any individual or entity (the related person) that has had the necessary relationship with the person or entity that caused the environmental degradation through their mining operations. On the other hand the *Income Tax Assessment Act 1997* (Cth) provides a tax benefit in the form of an immediate deduction for expenditure incurred in rehabilitating mining sites and/or in environmental protection activities, provided certain conditions are met.

The question then arises: is the related person entitled to claim the tax benefit? In answering this question, three operative tax provisions will be discussed in turn. The first considers the word 'you', the second examines the term 'you carried on' or 'you conducted', while the third looks at 'carried on by or for you'.

### A The Word 'You'

The income tax legislation states '[y]ou get an immediate deduction for certain capital expenditure on ... rehabilitation of mining or quarrying sites'.<sup>73</sup> For present purposes, it is assumed that the rehabilitation activity meets the legislative requirements.

The income tax legislation also advises that if a provision uses the expression 'you', it applies to entities generally, unless its application is expressly limited.<sup>74</sup> 'Entities', in turn, is defined to include individuals, body corporates, partnerships, trusts and unincorporated associations.<sup>75</sup> As stated in the note to this definitional provision, the term 'entity' covers all kinds of legal person and groups of legal persons who are treated as having a separate identity.

---

<sup>70</sup> *Income Tax Assessment Act 1997* (Cth), s 40-760.

<sup>71</sup> *Income Tax Assessment Act 1997* (Cth), s 40-760(1)(b).

<sup>72</sup> Such as under *Income Tax Assessment Act 1997* (Cth) Division 43 which deals with capital works.

<sup>73</sup> *Income Tax Assessment Act 1997* (Cth), s 40-725.

<sup>74</sup> *Income Tax Assessment Act 1997* (Cth), s 4-5. The same definition is used in the *A New tax System (Goods and Services Tax) Act 1999* (Cth), s 195-1 and the *Corporations Act 2001* (Cth), s 41.

<sup>75</sup> *Income Tax Assessment Act 1997* (Cth), s 960-100.

While the word ‘you’ or ‘your’ is used over 11,000 times in the income tax legislation,<sup>76</sup> its meaning has had limited judicial examination. In a recent decision regarding the construction of insurance policies, the Western Australian Court of Appeal stated, obiter, that the meaning of ‘you’ is ‘informed by its context and the nature or type of insurance in question’.<sup>77</sup>

The context and the nature of the transaction in question relates to expenditure incurred in rehabilitating a mining site. There is also nothing to suggest that the application of the word ‘you’ is expressly limited to any particular type of entity. Thus any entity, including an individual, who incurs expenditure on the rehabilitation of mining sites qualifies for ‘an immediate deduction for certain capital expenditure’.

This analysis also concurs with the intent behind replacing the word ‘taxpayer’ with ‘you’. As part of the Tax Law Improvement Project, which led to the introduction of the *Income Tax Assessment Act 1997*, the decision was made to use the word ‘you’ instead of ‘taxpayer’ in order to address the reader directly and to be more accessible.<sup>78</sup>

### B *The Term ‘You Carried on’ or ‘You Conducted’*

The income tax legislation states that the deduction is available for expenditure incurred<sup>79</sup> to the extent it is on \* mining site rehabilitation of:

- (a) a site on which you:
  - (i) carried on \* mining and quarrying operations; or
  - (ii) conducted \* exploration or prospecting; or
  - (iii) conducted \* ancillary mining activities.

What constitutes ‘mining site rehabilitation’ for the purposes of this legislation has been explained above.<sup>80</sup>

Thus the deduction is qualified by the words ‘to the extent’ the expenditure relates to the site on which ‘you carried on’ or ‘you conducted’ certain specified activities. The judicial focus of whether a business or certain activities were being carried on or conducted has generally focused on the business or activities aspect, rather than the ‘carried on’ or ‘conducted’ aspect. The question of whether a business is being carried on is a question of fact and degree. The courts have developed a series of indicators that are applied to determine the matter on the particular facts.<sup>81</sup> This may address the ‘what’ but it does not address the ‘who’, and it is the ‘who’ that is of relevance here. In other words, the test here is not directed at whether a business is being conducted. Rather what is relevant is whether there is a causal nexus between conducting the mining operations and the incurring of rehabilitation costs.

<sup>76</sup> A search of the legislation revealed 11 086 instances in *Income Tax Assessment Act 1997* (Cth) and 14 instances in *Income Tax Assessment Act 1936* (Cth). The term ‘taxpayer’ is used 75 times in *Income Tax Assessment Act 1997* (Cth) and around 2 500 times in *Income Tax Assessment Act 1936* (Cth).

<sup>77</sup> *Allianz Australia Insurance Ltd v Inglis* [2016] WASCA 25 at [27] per McLure P.

<sup>78</sup> The Author wishes to thank the anonymous Reviewer for pointing this out.

<sup>79</sup> *Income Tax Assessment Act 1997* (Cth), subs 40-735(1)(a).

<sup>80</sup> See fn 42 and accompanying text.

<sup>81</sup> See for example *Ferguson v Federal Commissioner of Taxation* (1979) 9 ATR 873 at 876-877 per Bowen CJ and Franki J. See also Australian Taxation Office, *Income tax: am I carrying on a business of primary production*, Taxation Ruling TR 97/11, 16 November 2011 for factors considered important in determining the question of business activity.

With no legislatively or judicially assigned meaning of ‘you carried on’ mining operations or ‘you conducted’ mining activities, the ordinary meaning will apply. The context dictates that this relates to the entity that not only undertook the activity but was also authorised to do so. That is, it is the entity that held the resource authority and the environmental authority, without which mining operations could not have commenced and subsequently been conducted. From a tax administrative perspective, this would be the entity that submitted tax returns with respect to the mining operations. That is, the taxpayer.

But in a consolidated tax regime, who is the taxpayer? Tax consolidation permits wholly owned corporate groups to operate as a single entity for income tax purposes.<sup>82</sup> These corporate groups can consist of companies, trusts and/or partnerships but does not include individuals. The ‘head company’ is that entity that owns all the other entities in the group.<sup>83</sup> The other entities are referred to as ‘subsidiary members’. The single entity rule therefore allows the head company of the consolidated group of which the mining company is a subsidiary member to be the ‘you’ in ‘you carried on’ or ‘you conducted’.

Two factors need to be noted. Firstly, tax consolidation is by election. There is no automatic trigger or threshold. Rather, a decision to consolidate for tax purposes must be made and the ATO formally notified of this decision. Secondly, the tax consolidation rules and the rules regarding ‘related persons’ in Queensland’s environmental protection legislation are distinct and disparate.

### C *The Term ‘Carried on by or for You’*

The tax legislation does not define the term ‘by or for you’ and therefore the words have their ordinary meaning. The Commissioner of Taxation has examined these words in an interpretive decision.<sup>84</sup> Interpretive decisions are neither advice nor rulings and cannot be relied upon. Their purpose is to assist tax administration staff in applying the law consistently and accurately to particular situations. As such an interpretive decision only provides an indication of how a provision might be applied.

Referring to the Macquarie Dictionary, an activity ‘is carried out “by” a person if it occurs directly through their agency’.<sup>85</sup> Thus, the taxpayer must have some involvement in the environmental protection activities. Considering the word ‘for’, an activity ‘is carried on “for” a person if it is performed by another to the benefit of or in place of the person’.<sup>86</sup>

The situation covered in this interpretive decision is that of a mine operator who sells the mining tenements and assets to another entity whereby that purchasing entity assumes all current and future liabilities. As such the mine operator has no interest in the land or mining tenements after the sale. Any subsequent environmental activities carried on by the purchaser or their agents are therefore not carried on for the benefit of, or in place of, the mine operator. As such it would appear that, if the taxpayer (in this case mine operator) no longer has an

---

<sup>82</sup> *Income Tax Assessment Act 1997* (Cth), s 701-1.

<sup>83</sup> *Income Tax Assessment Act 1997* (Cth), s 703-15.

<sup>84</sup> Australian Taxation Office, *Income Tax: Capital allowances: environmental protection activities – payment to purchaser of mining tenement to assume liability and indemnify taxpayer*, Interpretive Decision ID 2008/71, 23 May 2008.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

interest in the mine then any subsequent environmental protection activities will not be carried on 'for' the taxpayer.

#### D *The Mining Site Rehabilitation Tax Deduction and the Related Person*

In taking the preceding analysis to a conclusion, it can be asserted that only the taxpayer mining company or its head company in the case of a tax consolidated group is entitled to the immediate deduction for expenditure incurred in rehabilitating a mining site. The question as to whether the related person is also entitled to claim the tax deduction can now be answered.

If the head company in tax law is the holding company in company law, then the head company is a related person for the purposes of the chain of responsibility legislation. As a result, if an environmental protection order were served on the head company of the non-complying mining company then it would appear that the tax deduction is still available.

While the income tax legislation does provide for 'associated entities' such entities are not 'subsidiary members' of the tax consolidated group. It is therefore axiomatic that the concept of an 'associated entity' in company law is broader than 'subsidiary member' in tax law. It is the concept of 'associated entity' in company law that is relevant for the chain of responsibility legislation. Nevertheless, a number of the associated entity relationships relevant to the chain of responsibility legislation can be found in a tax consolidated group. However, the second aspect of the related person test must also be satisfied: that the associated entity owns the land on which the mining operations of the company were conducted. If a third subsidiary member of the tax consolidated group owned the land but was not an associated entity as defined, then the tax deduction would not be available.

Therefore, it is not inconceivable that an entity, other than the original taxpayer, could claim a tax deduction for expenditure on rehabilitating a mining site. But the instance where this is available is restricted to grouped entities and results from the single entity rule at the heart of the tax consolidation regime. Non-consolidated entities and individuals are not able to access this tax deduction

#### E *The Environmental Tax Deduction and the Related Person*

The situation is broader when considering environmental protection activities. In this instance the tax deduction is available if the expenditure relates to preventing, fighting or remedying pollution or treating, cleaning up, removing or storing waste associated with the taxpayer mining company's mining activities or mine site or incurred for the purpose of mining site rehabilitation.

Further, it is not necessary that the mining company undertake the environmental protection activities itself. It is sufficient if another entity performs the activities on behalf of, for the benefit of or in place of the mining company. However, for the related person to be this other entity, it would appear that the non-complying mining company must not be a 'high risk company'. This is because, under the reasoning of the interpretive decision<sup>87</sup> it would appear that high risk companies no longer have an interest in the mine site and therefore a related person cannot be said to be acting on behalf of, for the benefit of or in place of the non-complying mining company. However, in *Linc Energy Ltd (in Liq): Longley & Ors v Chief*

---

<sup>87</sup> See discussion in subsection 3.5.

*Executive Dept of Environment & Heritage Protection*<sup>88</sup> the Supreme Court held that the liquidators fell within the ambit of the definition of an executive officer and therefore obliged to the cause the company, even in liquidation, to comply with the environmental protection order. Thus, the environmental obligations of the company were found to continue despite the liquidators' disclaimer of the relevant land and licences of the company and the liquidators were obliged to procure Linc to comply. This puts the onus for rehabilitation back on the non-complying company.

As previously noted, the chain of responsibility legislation extends the scope of who can be issued with an environmental protection order to a 'related person'. To reiterate, an environmental protection order is a written statutory tool requiring specific actions within specific timeframes to remedy a risk or prevent further environmental harm.<sup>89</sup> Where this order relates to preventing, fighting or remedying pollution and/or treating, cleaning up, removing or storing waste pertaining to the rehabilitation of a mining site, any such expenditure would satisfy the requirements of the tax provision. Thus a related person, individual or entity, is entitled to claim the environmental protection tax deduction. However, it may not apply where the non-complying mining company is a high-risk company, depending on how the interpretive decision and/or the Queensland Supreme Court decision is interpreted.

## VI ISSUES AND RECOMMENDATIONS

The April 2016 Queensland State Government's chain of responsibility amendments to its environmental protection legislation created the opportunity to reassess the tax deduction provisions available when rehabilitating mining sites. While it is possible to elicit a number of issues from this analysis of the congruence of these state and federal legislations, five are particularly noteworthy. These relate first to the definitions of what is the site and what constitutes rehabilitation, second to the concepts of land and land ownership and lastly to the types of activities covered.

### A *Site*

The first definitional issue is in determining what constitutes a 'site' and concerns the extent of the area geographically. This has regard to the extent of rehabilitation under the income tax deduction provision versus the extent of damage deemed the responsibility of the related person under the chain of responsibility legislation.

The discussion has clearly shown that what constitutes a site for the income tax mining site rehabilitation provisions differ from that under the environmental protection provisions. The former is restricted to where the mining operations were conducted with some scope for ancillary mining activities.<sup>90</sup> Historically and currently, most mining operations use surface mining (referred to as open pit, open cast or open cut) and, to a lesser extent, underground mining techniques. Both methods require excavating large quantities of waste rock and vegetation to expose and mine the targeted commodity.<sup>91</sup> The site is potentially large which then equates to a large environmental footprint. It is this likely scar on the Earth's surface

---

<sup>88</sup> [2017] QSC 53.

<sup>89</sup> See discussion in subsection 3.1.

<sup>90</sup> See fn 46 and accompanying text.

<sup>91</sup> Massachusetts Institute of Technology, 'The Future of Strategic Natural Resources. Environmental Risks of Mining' <<http://web.mit.edu/12.000/www/m2016/finalwebsite/problems/mining.html>>.



that is the focus of mining site rehabilitation. However, increasingly liquefying or ‘gasifying’ techniques using drills and pumps are being adopted to access the mineral resource.<sup>92</sup> The surface footprint of such methods is significantly smaller; correspondingly, the environmental impacts are not as visible. But they are nevertheless significant. It was the environmental and safety concerns associated with Linc Energy’s Chinchilla coal gasification plant that triggered the first use of the chain of reasonability provisions.

Yet the act of mining causes environmental problems in areas other than the site of mining operations. That is, environmental damage is not confined to the area covered by the mining permit. Other affected areas include access to and from the mine site and areas connected via underground aquifers and waterways. The potential is that these can extend many kilometres from the actual mine site. Clean-up operations in these areas will not attract the mining site rehabilitation tax deduction. The environmental provisions tax deduction, on the other hand, is available.

Focusing now on the Queensland State legislation. *Mineral Resources Act 1989* (Qld) not only covers the site of mining operations but can also extend to outlying areas used to service the mining operations. The only requirement is that, when applying for a mining lease, the mining company clearly describes the boundaries by accurately measuring distances and erecting boundary posts.<sup>93</sup> However, this does not restrict the ambit of the *Environmental Protection Act 1994* (Qld). Indeed, there is no statutory geographical limitation on environmental protection orders. The extent of the order is determined by the specific action required.<sup>94</sup>

With respect to the concept of ‘site’, the environmental protection tax provisions align more closely with the chain of responsibility provisions. That is, the tax deduction encompasses expenditure on contaminated areas that extend past the actual site of mining operations. Notwithstanding this seeming alliance, this does not mean that these two legislations are synonymous. How they differ is explored in determining what ‘rehabilitation’ entails.

## B Rehabilitation

The second definitional issue relates to what is considered to be ‘rehabilitation’ and refers to the permissible outcome resulting from the rehabilitation activity. Again, the *Income Tax Assessment Act 1997* (Cth) is restrictive. For the mining site rehabilitation provisions, the area must be returned to a condition as close as possible to the original condition.<sup>95</sup> To reiterate, there is no scope for rehabilitating a mining site for industrial or commercial land use, or for a community benefit such as a golf course or other recreational use. That is, creating economic or social benefits forfeits the tax benefit, being the tax deduction. Even generating another environmental benefit such as creating a wildlife corridor is not permitted. There is certainly scope to extend the ambit of ‘rehabilitation’.

---

<sup>92</sup> Examples are coal liquefaction and coal seam gas.

<sup>93</sup> See generally *Mineral Resources Act 1989* (Qld), Ch 6 Pt 1.

<sup>94</sup> *Environmental Protection Act 1994* (Qld), s 360(2); Queensland Government, *Guideline: Environmental Protection Act 1994: Environmental Protection Order* (Department of Environment and Heritage Protection, 19 May 2014) 2.

<sup>95</sup> See fn 42 and accompanying text.

For the environmental protection tax provisions, the restriction is with respect to specified activities regarding pollution and waste.<sup>96</sup> While these are arguably the largest remnants from mining operations, they do not encompass all possible issues. Loss of ecosystems and biodiversity, erosion, sedimentation and subsidence are key examples. Unlike the mining site rehabilitation provisions, there is no requirement within the aforementioned provisions to restore the area to its original environmental condition.

One recommendation is for an environmental protection order to be the basis for a private ruling application. That is, the Commissioner of Taxation is given the discretion to allow the environmental protection tax deduction to apply to actions specified in the protection order. This does not contravene the ‘sole or dominant purpose of carrying on environmental protection activities’ requirement<sup>97</sup> as the only purpose of the environmental protection order is environmental protection.

### C Land

Traditionally land can be classified as public or private, depending on whether tenure is by government entities or not. A little less than two-thirds of land in Australia is privately owned.<sup>98</sup>

Land, and land tenure, is not a consideration with the income tax provisions. Nor should it be as income tax legislation is concerned only with income derived from the use of land, irrespective of its ownership. The chain of responsibility legislation also does not differentiate between public and private land. Again, nor should it as who owns the land should not be a consideration for environmental protection.

However, when it comes to the rehabilitation of mining sites, land tenure can form part of the equation. In New South Wales over 80 per cent of potentially contaminated sites are on private land.<sup>99</sup> Ten per cent of these, or 133 regulated sites, are considered ‘significantly contaminated’.<sup>100</sup> However, rehabilitation on public land are prioritised over private land, with owners of private land expected to contribute to the costs of any works undertaken on their land.<sup>101</sup> Where projects on private land are publicly funded, prior ministerial approval is required.

In Queensland, from around 15,000 abandoned mines, approximately 11,500 are located on private land.<sup>102</sup> Through the Department of Employment, Economic Development and Innovation, the Queensland Government maintains an abandoned mine program. Its primary purpose is human safety, hence the choice of department. This program deals with issues

---

<sup>96</sup> See subsection 4.2.

<sup>97</sup> See fn 61 and accompany text.

<sup>98</sup> Australian Bureau of Statistics, *Year Book Australia* (Commonwealth of Australia, 2002) para 14.20.

<sup>99</sup> Audit Office of New South Wales, ‘New South Wales Auditor-General’s Report, Performance Audit, Managing contaminated sites’, Report by Environmental Protection Authority, Department of Trade and Investment, Regional Infrastructure and Services, 2014, 24.

<sup>100</sup> *Ibid*, 42.

<sup>101</sup> NSW Government, ‘Derelict Mines Program, Funding Priority Guidelines’, NSW Department of Industry, Skills and Regional Development, Division of Resources and Energy, February 2016.

<sup>102</sup> Queensland Government, *Environmental regulation of the resources and waste industries* (Queensland Audit Office Report 15: 2013-14, 2013) 7.

arising from abandoned mines on state-owned land.<sup>103</sup> That is, abandoned mines on private land are not considered the responsibility of government but rather the owners of private land are considered to have primary responsibility for their land. Action on private land will only be taken if there is an associated public hazard and the department determines what rehabilitant action to take.

This is further complicated by the Queensland Government's current process of creating a single reference point for its five resources Acts by consolidating common provisions through the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld). Under the access to land provisions, 'private land' is defined as being either freehold land or an interest in land 'less than fee simple held from the State under another Act'.<sup>104</sup> At this point it does not differ from the concept of land under land ownership in the environmental legislation. But the Resources Common Provisions legislation goes further. It provides that land is not private land to the extent of an interest in, inter alia, a mining interest, a petroleum authority or a geothermal tenure under their respective Acts.<sup>105</sup> Interestingly, they are also excluded from being 'public land'.<sup>106</sup>

The state of Victoria takes a more balanced approach, giving the private landowner input into a process that affects them personally, on an economical, social and environmental basis. As with other States, the rehabilitation plan is part of the licence to operate.<sup>107</sup> The Victorian mining legislation requires the mining company to consult with the owner of private land in preparing the rehabilitation plan.<sup>108</sup> Further, both the private landowner and the local municipal council are consulted in determining the amount of financial assurance to be held.<sup>109</sup> However, the land need only be rehabilitated 'to the satisfaction' of the Minister<sup>110</sup> which may fall short of what the landowner considers 'satisfactory'. Nevertheless all is not lost, as the financial assurance may not be returned prior to the landowner and municipal council being consulted<sup>111</sup> and the landowner has a legislative right to request the Minister to take action to rehabilitate the land.<sup>112</sup> Thus the *Mineral Resources (Sustainable Development) Act 1990* (Vic), which replaced the *Mines Act 1958* (Vic), attempts to balance the competing rights of owners of private land and mining licensees.

The past few years has seen an increase in disputes between farmers, pastoralists and environmentalists on the one hand and mining companies, often with government support, on the other. The future of Australia's farmland seems increasingly at risk from mining and is exacerbated by concerns regarding the impact of new forms of mining. These are not new issues. Concerns were raised in a 1991 Industry Commission Report where it was argued that 'mining companies often devastated farming land, caused stock losses and left mining operations on properties for years, preventing the owner from selling his property'.<sup>113</sup> The

<sup>103</sup> Reported in Queensland Floods Commission of Inquiry, *Final Report* (Queensland Floods Commission of Inquiry, March 2012) 371.

<sup>104</sup> *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld), subs 13(1).

<sup>105</sup> *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld), subs 13(2).

<sup>106</sup> *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld), s 14.

<sup>107</sup> Refer to section 2 of this paper for a discussion on the authorities required for mining operations.

<sup>108</sup> *Mineral Resources (Sustainable Development) Act 1990* (Vic), s 79.

<sup>109</sup> *Mineral Resources (Sustainable Development) Act 1990* (Vic), s 80.

<sup>110</sup> *Mineral Resources (Sustainable Development) Act 1990* (Vic), subs 80(3).

<sup>111</sup> *Mineral Resources (Sustainable Development) Act 1990* (Vic), subs 82(2).

<sup>112</sup> *Mineral Resources (Sustainable Development) Act 1990* (Vic), s 83.

<sup>113</sup> Industry Commission, *Mining and Minerals Processing in Australia Volume 3: Issues in Detail, Report No 7* (Commonwealth of Australia, 25 February 1991) 96.

Australian Mining Industry Council, the forerunner to the Minerals Council of Australia, in 1989 conceded<sup>114</sup>

... it's no secret there are unpleasant stories of companies rampaging over private rural land with little regard for the primary producer, creating considerable environmental damage. There are cases of primary producers going to the wall because of mining on their land, of bitter confrontations between farmers and miners, and of inadequate legislation and painfully slow resolutions of conflict, amid communication breakdown on both sides.

It is arguable that issues will not be resolved 'given time'. Indeed, time will only exacerbate the public-private land dichotomy. A balance must necessarily be found between private property rights and rights to access minerals. An assessment of the Victorian Government's approach may lead to a best practice model that could be adopted by other state governments.

If mining companies and state governments both fail to rehabilitate private land, then it is recommended that the federal government extend the tax deductions to the owners of private land. Farmers and pastoralists are currently in limbo in relation to rehabilitation outcomes. Financial assistance in the form of immediate tax deductions for costs incurred will go some way to enable landowners to take back control of their property.

#### D *Land Ownership*

One test for being an 'related person' under the chain of responsibility provisions is that the person satisfies both conditions of being an associated entity of the non-complying mining company and owns the land on which the mining operations were being carried out.<sup>115</sup> What is important here is not the associated entity per se but rather whether this associated entity is the owner or lessee of the land on which the mining company carries out or did carry out its operations.

For the purposes of determining who is a 'related person', the owner of the land can be one of the following.<sup>116</sup> For freehold land, the person recorded as being entitled to the fee simple interest in the land; for land held under a lease, licence or permit it is the holder of such an instrument; and for trust land under the *Land Act* 1994 (Qld) it is the trustees of the land. Aboriginal and Torres Strait Islander land is excluded as is land subject to native title.

Mining companies need not own the land on which they conduct their operations. A mining lease is different from a lease of land on which mining activities are conducted. A mining lease is a legal contract to extract minerals or other deposits under specified conditions. While it provides an exclusive right over a specified area of land, any 'possession' is with respect to what is under the surface of the land rather than in the land itself.

A policy rationale for this dual requirement test of associate relationship and land ownership is not apparent. A plausible reason lies in the original drafting and subsequent amendment. When first drafted, a 'related person' could be (1) a holding company, (2) the owner of the land on which the relevant activity is or was carried out, and (3) a person with a relevant connection. The second category was considered to be too broad, as it would cause

<sup>114</sup> A Wheatley, 'Rural land access – moves to more rational rules' *The Mining Review* 8 December 1989, 9.

<sup>115</sup> See fn 23 and accompanying text.

<sup>116</sup> *Environmental Protection Act 1994* (Qld), subs 363AB(1) and sch 4 definition of 'owner of land'

landowners such as farmers and pastoralists to be ‘related persons’.<sup>117</sup> To resolve this, amendments were introduced to differentiate resource activities from other relevant activities. The purpose of the amendment was explained in the amended Explanatory Notes.<sup>118</sup>

The amendment is intended to make it clear that owners of land underlying a resource tenure, who may have little or no ability to influence the activities carried out on their land and who do not have the option of declining to allow those activities, will not be held responsible for any harm caused by the resource activities.

The above three categories still apply to other relevant activities while the requirement of being an associated entity was added to the second category only with respect to resource activities.<sup>119</sup>

Nevertheless, when it comes to resource activities, the owner of the land should not be a decisive factor as resource activities are concerned with what is under the land not the land itself. As discussed above, much mining occurs on private land, particularly agricultural land which, by definition, is owned by farmers and other primary producers. Generally these private landowners have little or no say in the matter. It is therefore recommended that, with respect to resource activities, any associated entity should be a ‘related person’ without the requirement to also be the landowner. This will extend the scope and application of the chain of responsibility legislation.

#### E *Types of Activities*

Differences exist between the federal and state legislations in the types of activities covered. Again, the Queensland environmental protection legislation is fundamentally broader in scope.

The chain of responsibility provisions cover ‘resource activities’. These are activities that are authorised and that involve mining, petroleum, geothermal or GHG (greenhouse gas) storage activities.<sup>120</sup>

The income tax mining site rehabilitation provisions, on the other hand, cover mining and petroleum activities.<sup>121</sup> For around one year the provisions also applied to ‘geothermal energy resources’. Inserted in 2013 as a consequence of the *Minerals Resource Rent Tax Act 2012* (Cth), they were repealed effective 30 September 2014 following the repeal of that legislation.<sup>122</sup> Nevertheless, geothermal energy resources remain a defined term in the tax legislation.<sup>123</sup>

<sup>117</sup> Parliamentary Committee (2016), p 7-8.

<sup>118</sup> Explanatory Notes For Amendments, Environmental Protection (Chain of Responsibility) Amendment Bill 2016, p 3.

<sup>119</sup> Queensland Government, above n 34, 1457.

<sup>120</sup> *Environmental Protection Act 1994* (Qld), s 107.

<sup>121</sup> *Income Tax Assessment Act 1997* (Cth), s 40-735.

<sup>122</sup> *Tax Laws Amendment (2012 Measures No 6) Act 2012* (Cth); *Minerals Resource Rent Tax Repeal and Other Measures Act 2014* (Cth).

<sup>123</sup> *Income Tax Assessment Act 1997* (Cth), s 995-1 definition of ‘geothermal energy resources’. The definition was moved from s 40-730(7A) on repeal of that subsection in 2014.

It should be noted that the term ‘mining entitlement’ is not used in the mining site rehabilitation provisions. It is, however, used elsewhere in the income tax legislation, namely in triggering a capital gains tax event<sup>124</sup> and in connection with replacement asset rollovers.<sup>125</sup> A mining entitlement is:<sup>126</sup>

- (a) an authority, licence, permit or entitlement under an \*Australian law or \*foreign law to mine for \*minerals in an area; or
- (aa) an authority, licence, permit or entitlement under an Australian law to extract energy from \*geothermal energy resources in an area; or
- (b) a lease of land that allows the lessee to mine for minerals, or extract energy from geothermal energy resources, on the land; or
- (c) an interest in a thing referred to in paragraph (a), (aa) or (b).

With respect to the storage of greenhouse gas emissions, it is worth noting the Commissioner of Taxation’s opinion on the application of the availability of the mine site rehabilitation tax deduction pertaining to ‘geological sequestration’. In Taxation Ruling 2008/6,<sup>127</sup> it is stated:

Therefore, generally, it [being section 40-735, the mine site rehabilitation provision] can apply to expenditure on geological sequestration only where the material geologically sequestered would otherwise have an ongoing effect of changing the condition of a site from what it was before ‘mining operations’, ‘exploration or prospecting’ or ‘ancillary mining activities’ were first started on the site. So section 40-735 will rarely apply to geological sequestration given the gaseous nature of the material usually geologically sequestered.

Nevertheless, geological sequestration will be an ‘environmental protection activity’. Specifically, where that sequestration is part of preventing, fighting or remedying pollution or treating, cleaning up, removing or storing waste and that pollution or waste and the conditions regarding ‘your earning activity’ and ‘site’ are met.<sup>128</sup>

While it is not suggested that the federal and state legislations be aligned, it is recommended that consideration be given to again extend the tax deduction to geothermal energy. Geothermal energy is an emerging resource activity in Australia. While there is currently limited commercial production, significant exploration is being conducted.

## E *Summary of Recommendations*

It is over 25 years since the immediate deduction for rehabilitating mining sites and expenditure on environmental protection activities were first implemented. Much has changed. The mining industry is no longer the giant it was and environmental impacts from mining are very much the elephant in the room. Going forward, extraction methods are changing making the mining site footprint smaller but the environmental impacts larger. It is recommended that consideration be given to what ‘site’ and ‘rehabilitation’ should mean in light of the current environment.

The practice of state governments in differentiating between public and private land and only resourcing the former has been highlighted. While extending the tax deduction to private landowners will not solve the problem, it may go some way to alleviating the problem. Extra

<sup>124</sup> *Income Tax Assessment Act 1997* (Cth), s 104-45 – Event D3 being granting a right to income from mining.

<sup>125</sup> *Income Tax Assessment Act 1997* (Cth), Subdiv 124-L.

<sup>126</sup> *Income Tax Assessment Act 1997* (Cth), s 124-710(2).

<sup>127</sup> Australian Taxation Office, above n 56, para 22.

<sup>128</sup> *Ibid*, paras 24 and 93.

safeguards for private land are highly desirable but this cannot be provided solely by the income tax legislation.

The chain of responsibility legislation is new and therefore relatively untried and untested. However, one issue is clearly evident– that of the dual requirement of being an associated entity and owner of the land. Given the nature of mining and its concern for licences and permits, the associated entity is seldom the owner of the land. The ownership aspect introduces unnecessary complexity and narrows who or what can be an associated entity.

A further anomaly between the two different legislations pertains to the types of activities covered. Specifically, the tax legislation has not been updated to take into account new forms of energy production. The fact that geothermal energy resources had a short life span in the tax legislation outside the capital gains tax provisions was noted. Therefore, it is recommended that geothermal energy resources be re-included in the definitions pertaining to the mine site rehabilitation provisions.

## VII CONCLUDING REMARKS

It is an inarguable position that many mining companies are walking away from their mines. Sometimes they are sold; sometimes they are abandoned. Few are being rehabilitated. When the mining site rehabilitation provisions were introduced, it was estimated to cost the Federal Government \$10 million per year.<sup>129</sup> This despite no reliable costing of the environmental protection provisions being made.<sup>130</sup> The actual cost of these tax expenditures remains unknown, as they are not reported in Treasury's annual tax expenditure statements. What is known is that the financial cost of rehabilitating mining sites is both large and exponential in nature.

Traditionally state governments have had three options when it comes to rehabilitating abandoned mining sites. They could do nothing; they could rehabilitate to the extent of financial assurance available; or they could rehabilitate the site partially or fully at taxpayers' expense. There is now a fourth option to enact chain of responsibility legislation. This legislation enables entities that have benefited from the operations that caused the need for rehabilitation to be held responsible for rectifying the damage, accountable for the associated costs and increasing the transparency of the process.

Mining companies that comply with their obligations are able to access tax deductions under the mining site rehabilitation and environmental protection provisions of the income tax legislation. However, when these entities are non-complying and interposed entities (or related persons) are issued with environmental protection orders, these interposed entities do not necessarily have the same access. Currently the mining site rehabilitation tax deduction is only available to interposed entities that are part of the consolidation group and comply with land ownership requirements. The environmental protection tax deduction is more widely available but only in relation to activities involving pollution and waste as prescribed in the legislation. However, whether related persons of high-risk companies can access this tax benefit is uncertain. Given that the chain of responsibility legislation is particularly directed at companies that are unable or unwilling to fulfil their rehabilitation responsibilities, clarification of this access is desirable.

---

<sup>129</sup> Explanatory Memorandum, Taxation Laws Amendment Bill (No. 2) 1991, 5.

<sup>130</sup> Explanatory Memorandum, Taxation Laws Amendment Bill (No. 5) 1992, 3.

With increasing media and community attention focused on rehabilitating mining sites, it is now opportune to reassess the incentives provided by the income tax legislation. Some changes to the environmental protection legislations have also been suggested. It is imperative that mining companies and the individuals and entities that have both controlled them and benefited financially from them are compelled to be more responsible for the environmental damage they cause, more accountable for the costs of environmental rehabilitation and more transparent in how this is achieved.