

Chain of responsibility laws offer a new tool to pay for remediation of contaminated sites

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Outline

1. Factual context of CoRA laws:
 - Linc Energy
2. Policy context: smart regulation
3. Context within Qld environmental legal system
4. Chain of responsibility (CoRA) to EPA
5. Case law on CoRA
6. 2-year review in late 2018
7. Discussion

Factual context:

50,000 abandoned mine sites across Australia

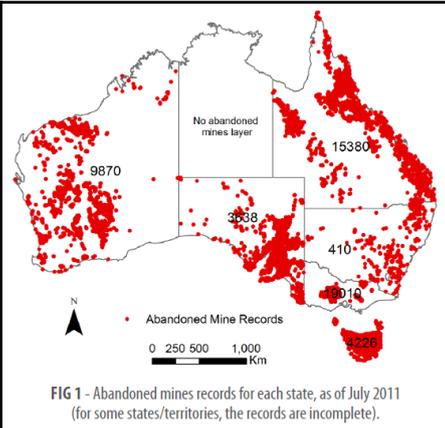


FIG 1 - Abandoned mines records for each state, as of July 2011 (for some states/territories, the records are incomplete).

Source: Unger C, Lechner A, Glenn V, Edraki M and Mulligan D, "Mapping and prioritising rehabilitation of abandoned mines in Australia", Proceedings Life-of-Mine Conference, 10-12 July 2012, Brisbane, The Australasian Institute of Mining and Metallurgy, pp 259-266.

A Queensland Government review in 2007 estimated that there were 15,000 abandoned mines in the State, which would cost an estimated \$1 billion to rehabilitate.

Queensland Auditor General, *Environmental Regulation of the Environmental and Waste Industries* (Queensland Audit Office, Brisbane, Report 15: 2013-14), pp 1 and 7.

Case study: Linc Energy

Linc Energy fined \$4.5 million for serious environmental harm at underground coal gasification plant

By Ellie Sibson

Updated 11 May 2018, 6:18pm

A gas company has been fined a record \$4.5 million for causing serious environmental harm at its underground coal gasification plant on Queensland's western Darling Downs.

Linc Energy was found guilty by a District Court jury in Brisbane last month after a 10-week trial.

The company was charged with five counts of wilfully and unlawfully causing serious environmental harm between 2007 and 2013 at Hopeland near Chinchilla.

Linc Energy mismanaged the underground burning of coal seams, which caused rock to fracture and allowed the escape of toxic gases which contaminated the air, soil and water on site.



PHOTO: Linc Energy did not defend itself because it is in liquidation. (Linc Energy)

RELATED STORY: Gas company 'knew it was causing damage but allowed it to continue'

RELATED STORY: Linc Energy orders \$4.5m fine for environmental damage

Source: ABC News <http://www.abc.net.au/news/2018-05-11/linc-energy-fined-4.5-million-for-serious-environmental-harm/471110>

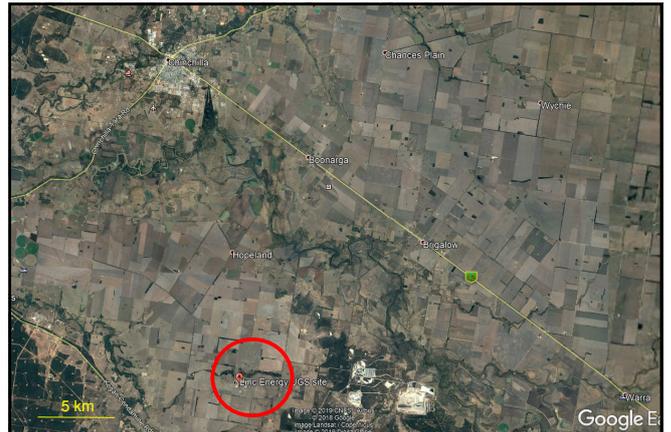
Linc Energy background and financial position

8. Linc Energy was incorporated in Australia in 1996 and listed on the Australian Stock Exchange (ASX) in 2006. In December 2013 Linc Energy was listed on the Singapore Exchange (SGX). It is no longer listed on the ASX, but it remains listed on the SGX.
9. Linc Energy carried on a Queensland-based business, headquartered in Brisbane and operating in the coal, oil and gas sectors. Linc Energy derived its primary revenue from providing conventional production techniques and its proprietary advanced technologies to extract value from the development of those natural resources.
10. In addition to directly holding coal assets across Queensland, Linc Energy was also focused on the research and development of proprietary technologies for the extraction of heavy oil and the gasification of otherwise abandoned coal to create a synthesis gas; i.e., underground coal gasification (UCG) technology.
11. In August 2010 Linc Energy sold its Carmichael coal mine located in the Galilee Basin, Queensland to the Adani Group for \$500 million, with a \$2 per tonne royalty. It subsequently agreed terms to sell the royalty to the Adani Group for a further \$155 million in August 2014. In February 2015 Linc Energy sold the majority of its remaining coal interests to United Mineral Group.
12. In the period from 1 July 2012 to the date of appointment of administrators on 15 April 2016, Linc Energy generated total revenue of \$11 million (before other income). Total losses during that period amounted to \$518 million.
13. The deterioration of Linc Energy's net asset position in the three years preceding the financial year ended 30 June 2015 had been principally caused by a decline in the value of Linc Energy's investments in its subsidiaries in the United States, which reflected continued depressed oil prices.
14. As at the date of appointment of administrators on 15 April 2016, the claims of Linc Energy's creditors totalled approximately \$325 million. The figure of \$289,379,192 stated on page 12 of the 439A Report was calculated in error, as it failed to take into

Affidavit of Grant Sparks (Chartered Accountant), 24 Oct 2016 in Supreme Court proceedings by liquidators



The Linc Energy underground gasification site was located 20km south of Chinchilla, 250km West of Brisbane



Source: GoogleEarth (2011 image)



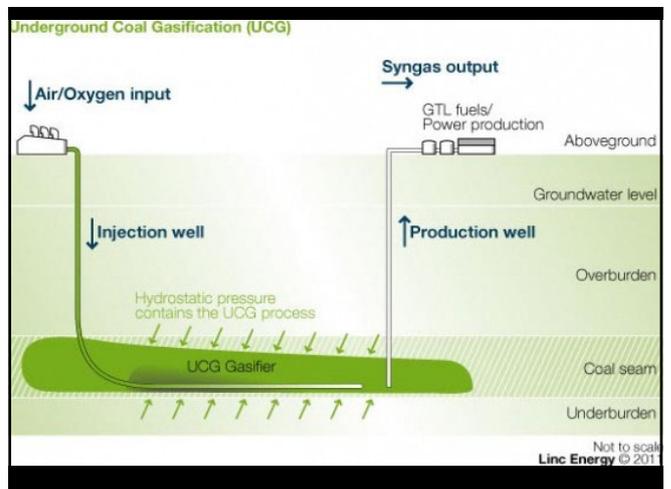
Source: GoogleEarth (2011 image)



© Linc Energy Pty Ltd



Gas burning at Linc Energy's underground coal gasification plant near Chinchilla (date unknown)
Source: ABC 7.30 <https://www.abc.net.au/news/2017-02-09/linc-energy-1/8256842>



Not to scale
Linc Energy © 2011

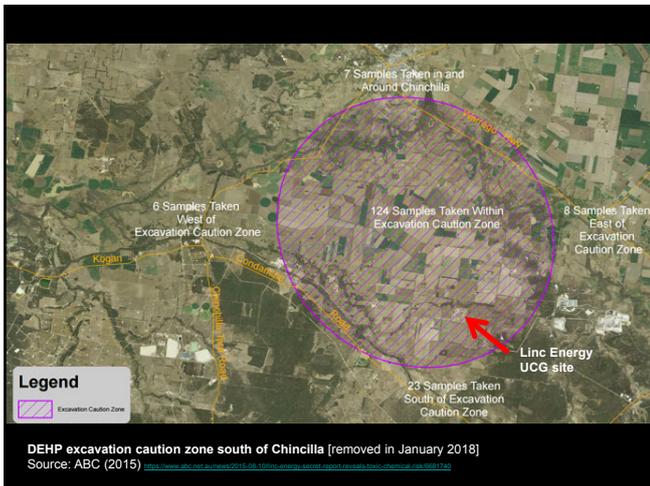
“The process operated [by Linc Energy] is known as Underground Coal Gasification or UCG. It is an aspect of the fracturing of coal seams colloquially known as fracking. The term fracking also covers a number of other processes. This actual process involves the setting fire to a coal seam underground and production of various gases that are used in particular processes, 10 particularly the generation of power or, in relation to the Linc system, the conversion of the gas to liquid products, including fuel. That process is known as Gas to Liquid or GTL.”

Shanahan DCJ sentencing remarks (11 May 2018) in imposing a \$4.5m fine on Linc Energy for offences from 2007-2013.



PHOTO: The decommissioned Linc Energy UCG site at Hopeland. (ABC: Nathan Morris)

Source: ABC News <https://www.abc.net.au/news/2015-05-11/linc-energy-ucg-site-444-million-for-remediation/6582774>



Financial assurance and proceedings in the Land Court of Queensland

24. Over the period between about 10 December 2009 until about 12 October 2012, Linc Energy provided the State of Queensland with the following undertakings by way of financial assurance for any required rehabilitation of the Chinchilla Site:
 - (a) An undertaking from Bank of Western Australia Ltd for a bond in the sum of \$339,441 by way of financial assurance for MIN100657607.
 - (b) An undertaking from the Commonwealth Bank of Australia trading as Bankwest for a bond in the sum of \$1,451,878.21 by way of financial assurance for MIN100657607.
 - (c) An undertaking from the Bank of Western Australia Ltd for a bond in the sum of \$1,825,844 by way of financial assurance for PEN100232408.
25. On 4 March 2015, the DEHP made decisions (the **Original Decisions**) pursuant to sections 305 and 306 of the *Environmental Protection Act 1994* (Qld) (the **EP Act**) to increase the amount of financial assurance held to the following amounts:
 - (a) \$24,435,272.01 in respect of MIN100657607.
 - (b) \$4,644,786.04 in respect of PEN10023408.

The Original Decisions were to take effect on 4 April 2015. Exhibited hereto and marked “M” is a true copy of the documents which record and state the Original Decisions.
26. On or around 18 March 2015 Linc Energy lodged applications for review of the Original Decisions.

Affidavit of Grant Sparks (Chartered Accountant), 24 Oct 2016 in Supreme Court proceedings by liquidators

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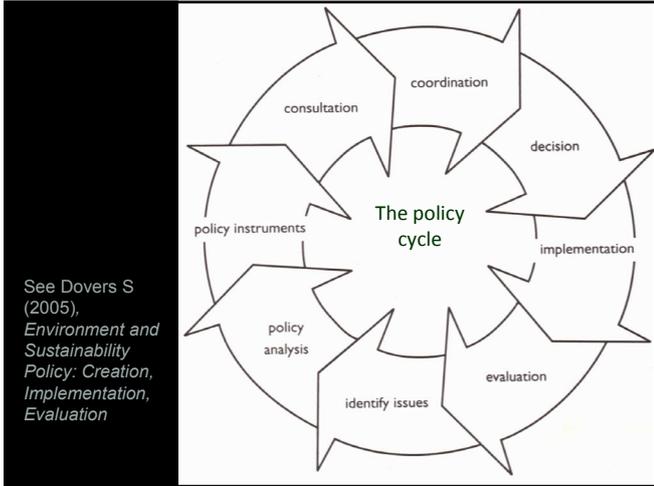
Policy context

“... a tendency to ignore basic policy knowledge from other areas is a weakness of much environment and sustainability policy thinking.”



Emeritus Professor Stephen Dovers

Dovers, S. *Environment and Sustainability Policy: Creation, Implementation, Evaluation* (The Federation Press, Sydney, 2005), p 18.



See Dovers S (2005), *Environment and Sustainability Policy: Creation, Implementation, Evaluation*

“... we stress the critical importance of *designing instrument combinations* and [considering] how such permutations might be inherently complementary, inherently counterproductive, or essentially context-specific in nature.”

Gunningham & Grabosky, *Smart Regulation* (1998), p377.

For smart regulatory design for effective and efficient environmental policy we should:

“[Recognise] the desirability of preferring complementary instrument mixes over single instrument approaches while avoiding the dangers of ‘smorgasbordism’ (i.e., wrongly assuming that all complementary instruments should be used rather than the minimum number necessary to achieve the desired result.”

Gunningham & Grabosky, *Smart Regulation* (1998), p376.

- Regulatory design principles:
1. Prefer policy mixes incorporating a broader range of instruments and institutions.
 2. Prefer less interventionist measures.
 3. Ascend a dynamic instrument pyramid to the extent necessary to achieve policy goals.
 4. Empower participants which are in the best position to act as surrogate regulators.
 5. Maximise opportunities for win-win outcomes.
- Gunningham & Grabosky, *Smart Regulation* (1998), Ch 6.

CoRA reflects the old regulatory adage:

“Speak softly and carry a big stick”

American Political Science Review Vol. 96, No. 4 December 2002

Speak Softly and Carry a Big Stick? Veterans in the Political Elite and the American Use of Force
CHRISTOPHER GELPI AND PETER D. FEAVER Duke University

CoRA reflects a policy of what the military term “defence in depth”

Source: <http://electriccanvas.blogspot.com/2013/02/city-castles.html>

Environmental Protection Act 1994 (Qld) contains multiple regulatory tools

- environmental protection policies.
- an EIS process for mining and petroleum activities.
- a system for development approvals integrated into the *Planning Act 2016* (Qld) for ERAs
- environmental authorities for mining; petroleum extraction; and GHG storage.
- a general environmental duty and a duty to notify of environmental harm
- environmental evaluations and audits
- environmental protection orders;**
- financial assurances
- contaminated land management
- criminal prosecution for environmental offences and executive officer liability (including monetary benefit orders)
- investigative powers of authorised officers including power to give an emergency direction;
- civil enforcement provisions to restrain breaches of the Act.

Regulatory issue / problem		Regulatory tool to ensure rehabilitation of site			
		Conditions of approval	Financial assurance / security	Administrative or court orders to licensed operator or director	Chain of responsibility laws
Operator's honesty	Honest	✓	✓	✓	✓
	Dishonest	✓	✓	✓	✓
Sufficiency of assets or security to rehabilitate site held by operator or others directly liable (e.g. company directors)	Sufficient	✓	✓	✓	✓
	Insufficient	✗	✗	✗	✓

Figure 1: The gap in past regulatory tools that the chain of responsibility laws attempt to fill. Note: "Administrative or court orders" include clean-up orders made prior to or after prosecution.

Environmental Protection (Chain of responsibility) Amendment Act 2016 (CoRA)

363AC Order may be issued to related person

- When issuing an environmental protection order to a company under division 1, or if an environmental protection order issued to a company under division 1 is in force, the administering authority may also issue an environmental protection order under division 1 to a **related person** of the company.
- The order may impose any requirement on the related person that is being, or has been, imposed on the company, as if the related person were the company.

See EPA, soft page 305.

"The chain of responsibility will not attach itself to genuine arm's length investors, be they merchant bankers or mum-and-dad investors. It will not impact contractors or employees. This legislation targets those who stand to make large profits, those who are really standing behind the company and whose decisions have put the environment at risk."

First reading speech for the CoRA Bill by Steven Miles MP, then Minister for Environment and Heritage Protection and Minister for National Parks and the Great Barrier Reef, Queensland Parliament, Record of Proceedings, 15 March 2016, p. 693.

DEHP Guidelines 44 pp

<https://www.ehp.qld.gov.au/assets/documents/compliance/cm-ql-cora-env-protect-order.pdf>

Department of Environment and Heritage Protection
Guideline
Environmental Protection Act 1994
Issuing 'chain of responsibility' environmental protection orders under Chapter 7, Part 5, Division 2 of the Environmental Protection Act 1994

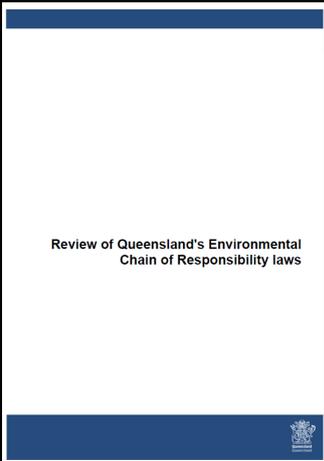
This guideline provides information on how the department of approach making a decision to issue an environmental protection order to related persons under Chapter 7, Part 5, Division 2 of the Environmental Protection Act 1994 associated with the Environmental Protection (Chain of Responsibility) Amendment Act 2016. It has been prepared under the Environmental Protection Regulation 2009 and takes effect from 27 January 2017.

Table of contents	
1.0 Introduction	3
1.1 Relationship with Enforcement Guidelines	3
1.1.1 Culpability	4
1.1.2 Proportionality to the seriousness of the breach	4
2.0 Key principles	5
2.0 Environmental Protection Orders generally	5
3.1 CoRA Environmental Protection Orders	6
4.0 Who is a related person of a company?	7
4.1 Landowners	7
4.1.1 When will a person have a relevant connection with the company?	7
4.1.2 Significant financial benefit	8
4.2 Parties to consider in determining whether a person has a relevant connection with the company	10
5.0 When will a CoRA EPO be issued to a related person?	15
5.1 Reasonable steps	15
5.1.1 Legal and practical ability to influence the company's conduct	16
5.1.2 Extent of actual and expected knowledge	17
5.1.3 Nature of position to influence	18
5.1.4 Influence on others	19
6.0 How a bank guarantee or security be required under an EPO if the department already holds Financial Assurance?	21
6.1 When is financial assistance?	21
6.2 When will a bank guarantee or security be required?	22
6.3 How will a bank guarantee or security be required under a CoRA EPO be calculated?	23
7.0 Joint and several liability	23
8.0 What happens if the related person is not the owner of the land on which action is required?	24
9.0 Can actions be taken in place of a related person if they fail to act?	24
10.0 Review of decisions and appeals	25

Page 1 of 44 (2017/01/27) Version 1.0 - Issues 27 Jan 2017

Linc Energy

- Liquidators disclaimed land (and EPO) under s 568 of the *Corporations Act 2001 (Cth)* – EPO **not** under CoRA held to be inconsistent with (and invalid)
 - Linc Energy Ltd (in Liq): Longley & Ors v Chief Executive DEHP* [2017] QSC 53 (Jackson J)
 - Longley v Chief Executive, DEHP* [2018] QCA 32
 - HCA dismissed special leave application by Qld
- CEO (Peter Bond) – EPO under CoRA
 - Bond v Chief Executive DEHP* [2016] QPEC 40 (Everson DCJ).
 - Bond v Chief Executive, DEHP* [2017] QCA 180
- R v Linc Energy (in Liq)* prosecution (\$4.5m fine in 2018)
- R v various executive officers of Linc* (awaiting trial)

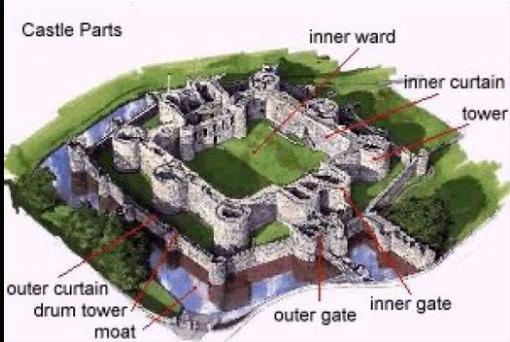


2-year review of CoRA tabled in the Qld Parliament, 26 Oct 2018

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Source: <http://electrickatvass.blogspot.com/2013/02/day-castles.html>

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	Insufficient	✗	✗	✗	✓

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