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# Liquidators Can Disclaim Environmental Costs

Insolvency practitioners, employees with outstanding entitlements, the tax office and trade creditors will take some cheer from the result in the latest battle between Linc Energy Limited and the Queensland environmental regulator.

The company operated a demonstration underground coal gasification project. It had a mineral development licence, a petroleum facility licence and environmental authorities in respect of the project, which were subject to onerous decommissioning and rehabilitation conditions. Following reports that fugitive gases had contaminated the topsoil, an environmental protection order ("EPO" for short) imposed an onerous monitoring, testing and reporting regime and mandated the long-term operation of certain infrastructure. The compliance cost forced the company into external administration.

The liquidators disclaimed ownership of the site, the plant, the tenements and the environmental authority in accordance with the *Corporations Act* 2001 ("Corps Act" for short). They sought Court orders to confirm that the company was not bound by the liabilities imposed by the EPO.

The effect of the disclaimer is to terminate all the company's liabilities as well as its rights and interests in respect of those assets. The disclaimer effectively terminated the company's liability to comply with the EPO. The Corps Act is designed to allow insolvent companies to be relieved of burdensome obligations which inhibit the orderly administration of residual assets for the benefit of creditors. The liquidators were justified in declining to cause the company to perform its environmental liabilities.

Of course, the Commonwealth insolvency legislation prevails over State environmental laws to the extent of any inconsistency – *Constitution Act* s.109. The State environmental agency argued – and the Court at first instance agreed – that the Commonwealth and Queensland laws should be interpreted in a way that avoided inconsistency. It agitated for the statutory liability to be treated as a separate obligation distinct from ownership of the site. However, that would mean that company would be relieved of its assets but remain burdened by the associated liabilities.

We believe that the Department of Environment and Heritage Protection has applied for leave to appeal to the High Court. Alternatively, it may lobby the Queensland Parliament to change local environmental laws to take advantage of section 5G of the Corps Act to expressly displace the federal corporate insolvency laws. It remains to be seen whether the Commonwealth would disallow any such amendment by regulation.

See Longley v Chief Executive, Department of Environment and Heritage Protection[2018] QCA 32 for the Court of Appeal's reasons.

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