SUPREME COURT OF QUEENSLAND

CITATION:	*Linc Energy Ltd (in Liq): Longley & Ors v Chief Executive Dept of Environment & Heritage Protection* [2017] QSC 53
IN THE MATTER OF:	**LINC ENERGY LIMITED (IN LIQUIDATION) ACN 076 157 045**
PARTIES:	**STEPHEN GRAHAM LONGLEY, GRANT DENE SPARKS AND MARTIN FRANCIS FORD AS LIQUIDATORS OF LINC ENERGY LIMITED (IN LIQUIDATION) ACN 076 157 045** (applicants) v **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT & HERITAGE PROTECTION** (respondent)
FILE NO/S:	BS11363/16
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	13 April 2017
DELIVERED AT:	Brisbane
HEARING DATE:	2 & 21 March 2017
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** 1. **The court directs the applicants that the liquidators are not justified in causing Linc Energy Limited (in liquidation) not to comply with the environmental protection order issued by the respondent on 13 May 2016.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP VOLUNTARILY – CONDUCT AND INCIDENTS OF WINDING UP – EFFECT OF WINDING UP ON OTHER TRANSACTIONS – DISCLAIMER OF ONEROUS PROPERTY – where a company was the proprietor of land and held a Mineral Development Licence and Petroleum Facility Licence in respect of that land – where the company held an Environment Authority issued under the *Environmental Protection Act* 1994 (Qld) in association with each of the licences – where the respondent issued an environmental protection order under the *Environmental Protection Act* 2007

(Qld) to the company in administration – where the company entered voluntary winding up and the applicants were appointed as liquidators – where the applicants gave notice disclaiming the land licences, the Environment Authorities and the land the subject of the licences under s 568 of the *Corporations Act* 2011 (Cth) – whether the company's obligation to comply with the environmental protection order could be terminated as a liability in respect of disclaimer property

CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – INCONSISTENCY OF LAWS (CONSTITUTION, S 109) – PARTICULAR CASES – OTHER MATTERS – where the applicants argued they would be entitled to terminate their obligations arising under the *Environmental Protection Act* 2007 (Qld) by way of a disclaimer under ss 568 and 568D of the *Corporations Act* 2011 (Cth) – where the applicants argued that the *Corporations Act* 2011 (Cth) prevailed over the *Environmental Protection Act* 2007 (Qld) to the extent of any inconsistency by reason of s 109 of *The Constitution* – where s 5G of the *Corporations Act* 2011 (Cth) provided that provisions of the *Corporations Act* 2011 (Cth) do not apply where they are inconsistent with a state law in force immediately prior to the coming into operation of the *Corporations Act* 2011 (Cth) – whether s 5G(11) of the *Corporations Act* 2011 (Cth) has the effect that s 568D(1) of the *Corporations Act* 2011 (Cth) does not operate in Queensland to the extent necessary to ensure that no inconsistency arises

Corporations Act 2001 (Cth)
Corporations Ancillary Provisions Act 2001 (Qld), s 9
Corporations (Queensland) Act 1990 (Qld), s 5
Environmental Protection Act 1994 (Qld)

Bell Group NV v State of Western Australia (2016) 331 ALR 408, considered
HIH Casualty Insurance Ltd (in liq) v Building Insurers' Guarantee Corporation and anor (2003) 202 ALR 610, discussed
Loo v Director of Public Prosecutions (2005) 12 VR 665, not followed
Victoria v The Commonwealth ("The Kakariki") (1937) 58 CLR 618, considered

COUNSEL: L Kelly QC & C Wilkins for the applicant
B O'Donnell QC & E Hoiberg for the respondent
P Dunning QC SG & F Nagorcka & J Hewson for the Attorney-General (Qld)
No appearance for the Commonwealth of Australia

SOLICITORS: Johnson Winter & Slattery for the applicant
Herbert Smith Freehills for the respondent
Crown Solicitor for the Attorney-General (Qld)

1. **Jackson J**: The applicants are the liquidators of Linc Energy Ltd (in liq) ("the company"). They apply for directions under s 511 of the *Corporations Act* 2001 (Cth) ("CA") in relation to the company's liabilities under the *Environmental Protection Act* 1994 (Qld) ("EPA"). Because the winding up of the company started before 1 March 2017, the recent repeal of s 511 of the CA[1] does not apply in this case.[2]

2. The application is for directions whether the applicants would be justified in:
   (a) not causing the company to comply with the environmental protection order issued by the respondent on 13 May 2016; and
   (b) not causing the company to comply with any further environmental protection orders issued by the respondent.

3. Although brought as an application for directions under s 511 of the CA, the respondent was joined as a party to the application and opposed the directions sought.

4. The questions arise from what was the company's pilot underground coal gasification project at Chinchilla. The company was the proprietor of Lot 40 on Crown Plan DY85 in the local government area of Western Downs being all that land contained in Title Reference 14776054 ("the Chinchilla land"). It held Mineral Development Licence No 309 ("MDL309") in respect of the land granted under the *Mineral Resources Act* 1989 (Qld) ("MRA"). It also held Petroleum Facility Licence 5 ("PFL5") granted under the *Petroleum & Gas (Production and Safety) Act* 2004 (Qld) ("PGA").

5. In association with MDL309, the company held Environmental Authority MIN100657607 ("MDL309EA") issued under the EPA. In association with PFL5, the company held Environment Authority PEN100232408 ("PE5EA") issued under the EPA. Accordingly, both the MDL309EA and PFL5EA (collectively "the EAs") relate to the area of the Chinchilla land.

6. On 15 April 2016, the applicants were appointed administrators to the company under s 436A of the CA.

7. On 13 May 2016, the respondent issued an environmental protection order ("EPO") to the company in administration as the recipient. There is a dispute as to whether the EPO was issued in respect of the Chinchilla land, MDL309, PFL5 or the EAs.

8. On 23 May 2016, at a meeting convened under s 439A of the CA, the company's creditors resolved that the company be wound up. Accordingly, under s 446A of the CA the company was to have taken to have passed a special resolution under s 491 that it be wound up voluntary. The applicants were appointed as liquidators.

9. On 30 June 2016, the applicants gave notice disclaiming the Chinchilla land, MDL309, PFL5 and the EAs.

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1 *Insolvency Law Reform Act* 2016 (Cth), Sch 2, s 170.
2 *Corporations Act* 2001 (Cth), s 1635.

10. The notice of disclaimer was made under s 568(1) of the CA.

11. The respondent went into possession of the land and facilities thereafter.

12. The respondent contends that, notwithstanding the disclaimer, the company is obliged to comply with the EPO and the applicants are obliged under s 493 of the EPA to ensure that the company complies with the EPO where there are funds available in the winding up to do so.

13. Accordingly, the applicants apply for directions as to their obligations in the circumstances.

14. At the centre of the dispute lies the question whether the disclaimer of the Chinchilla land, MDL309 and PFL5 as well as the EAs had the effect of discharging the company from future compliance with any obligations under the EPO.

15. The applicants' central argument is that if relevant provisions of the EPA would otherwise operate to make the company liable to comply with the EPO they are inconsistent with the termination of that liability by s 568D of the CA as a liability in respect of disclaimer property. If so, to the extent of the inconsistency, the applicants submit that they are invalid by reason of s 109 of *The Constitution*.

16. The Attorney-General of the Commonwealth of Australia did not elect to intervene pursuant to s 78A of the *Judiciary Act* 1903 (Cth), but the Commonwealth as a creditor gave notice of intention to appear on the application. Curiously, the Commonwealth did not in fact appear at the hearing of the application yet expected written submissions it had filed to be considered. Because the submissions of the other parties traversed the written submissions that were filed by the Commonwealth, I have taken them into account.

17. The respondent disputes the alleged invalidity on a number of grounds.

18. The Attorney-General for the State of Queensland elected to intervene and made submissions in support of the respondent's position.

Sections 568 and 568D

19. Division 7A of Pt 5.6 of CA contains the provisions relating to disclaimer. Section 568(1) provides:

> "(1) Subject to this section, a liquidator of a company may at any time, on the company's behalf, by signed writing disclaim property of the company that consists of:
> (a) land burdened with onerous covenants; or
> (b) shares; or
> (c) property that is unsaleable or is not readily saleable; or
> (d) property that may give rise to a liability to pay money or some other onerous obligation; or
> (e) property where it is reasonable to expect that the costs, charges and expenses that would be incurred in realising the property would exceed the proceeds of realising the property; or
> (f) a contract;

whether or not:

(g) except in the case of a contract – the liquidator has tried to sell the property, has taken possession of it or exercised an act of ownership in relation to it; or

(h) in the case of a contract – the company or the liquidator has tried to assign, or has exercised rights in relation to, the contract or any property to which it relates."

20. Section 568D provides for the effect of a disclaimer under s 568 as follows:

"(1) A disclaimer is taken to have terminated, as from the day on which it is taken because of subsection 568C(3) to take effect, the company's rights, interests, liabilities and property in or in respect of the disclaimer property, but does not affect any other person's rights or liabilities except so far as necessary in order to release the company and its property from liability.

(2) A person aggrieved by the operation of a disclaimer is taken to be a creditor of the company to the extent of any loss suffered by the person because of the disclaimer and may prove such a loss as a debt in the winding up."

21. Read together, s 568D(1) and s 568(1) express a scheme under which a liquidator has power to disclaim some types of property so as to terminate the company's interest in and liabilities in respect of the disclaimer property. To identify whether a particular liability has been terminated it is necessary to identify both the particular disclaimer property and to ask whether the liability is one in respect of that property.

22. The applicants contend that the company's liabilities in respect of the relevant disclaimer property include any liabilities under the EPO. The respondent disputes that there is any relevant disclaimer property for the liabilities under the EPO.

23. First, the applicants contend that the EAs are relevant property and disclaimer property. The respondent contends (with the support of the Attorney-General) that the EAs are not property at all.

24. However, as the applicants' arguments were developed orally and by the submissions of the Commonwealth it was also argued that the relevant disclaimer property is the Chinchilla land, MDL309 and PFL5.

25. Second, the parties dispute whether any liabilities under the EPO are "in respect of"[3] the relevant property, whatever that is. The respondent and the Attorney-General contend that the EPO was issued to secure compliance with s 319 of the EPA and did not create liabilities in respect of the Chinchilla land, MDL309, PFL5 or the EAs. The applicants and the Commonwealth submit that the obligation to comply with the EPO and any liability or liabilities in respect of any non-compliance are liabilities in respect of the Chinchilla land, or liabilities in respect of MDL309 or PFL5, or liabilities in respect of the EAs.

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3 Compare *Wilmott Growers Group Inc v Wilmott Forests Limited (Receivers and Managers appointed) (in liq)* (2013) 251 CLR 592, 608 [54] and *Technical Products Pty Ltd v State Government Insurance Office* (1989) 167 CLR 45, 47.

26. Third, even if any of the liabilities under the EPO are liabilities in respect of relevant disclaimer property, the respondent and the Attorney-General contend that those liabilities were not terminated by the applicants' disclaimer. They submit that s 109 of *The Constitution* does not apply to the sections of the EPA creating those liabilities. That is because if s 568D(1) would otherwise be directly inconsistent with the relevant sections of the EPA, s 5G(11) of the CA has the effect that s 568D(1) does not operate in this State to the extent necessary to ensure that no inconsistency arises.

Stay of proceedings

27. The applicants made an unexpected submission in their final further written submissions in reply, filed after two days of oral hearing. The point did not appear beforehand.

28. As stated above, ten days after the respondent issued the EPO the company's creditors resolved that the company be wound up. Accordingly, under s 446A of the CA the company was taken to have passed a special resolution under s 491 that it be wound up voluntary.

29. From that time, s 500 of the CA applied to the winding up, so that after the passing of the deemed resolution for voluntary winding up, any sequestration against the property of the company is void and no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

30. The applicants appear to raise whether the EPO is a sequestration against the property of the company but do not ultimately press the submission. The applicants do submit, however, that the EPO is a civil proceeding, so that the respondent requires leave to proceed before he could proceed on it.

31. In my view, this point has no significance in deciding whether the applicants are entitled to the directions for which they apply. As will appear later, the particularly relevant provisions of the EPA in the present case are ss 319, 358, 361 and 505. Any prosecution for an offence of contravening s 361 would not be a civil proceeding. An application for an order under s 505 of the EPA or other order would be a civil proceeding, in a general sense. But whether or not the respondent would require leave to proceed before bringing a civil proceeding under s 505 does not answer the relevant questions on which directions are sought. I decline to entertain that question further on the application for directions under s 511 of the CA that has been made.

Disclaimer generally

32. The effect of disclaimer under s 568 of the CA is, inter alia, that the company's interest in and liabilities in respect of the disclaimer property terminate under s 568D. Some brief explanation of that effect is relevant context when considering questions about the interaction of the provisions of the EPA relied on by the respondent and ss 568 and 568D.

33. Disclaimer has been part of this State's company insolvency laws since at least 1931. The concept was borrowed directly from the law of personal bankruptcy.[4] So, s 277 of the *Companies Act* 1931 (Qld) provided that the provisions of the *Bankruptcy Act* 1924 (Cth) relating to a disclaimer by a trustee of onerous property applied in like manner in winding up a company. It was not until s 296 of the *Companies Act* 1962 (Qld) that the direct link to bankruptcy law was broken by setting out the power to disclaim and the effect of disclaimer by a liquidator in full in the text of the legislation. Section 296(2) provided that the effect was to determine the rights interest and liabilities of the company, and the property of the company, in or in respect of the property disclaimed. The similarity to the text of s 568D is apparent.

34. Where, as in the case of the Chinchilla land, disclaimer property is land held from the State, the effect of disclaimer is similar to an escheat.[5] Where the disclaimer property is personal property, the effect of disclaimer is similar to title passing bona vacantia.[6] In this case, it is not necessary to explore those processes in any detail, either in general, or as applied to the Chinchilla land or MDL309 or PFL5 in particular. They are all accepted to constitute property that could be disclaimed with the effect that title passed by processes similar to escheat or bona vacantia.

35. As already mentioned, the respondent and the Attorney-General both dispute that the EAs constituted property within the meaning of s 568 and s 568D. But if they are incorrect, and the EAs could be disclaimed, it was not argued that any different processes would apply to the EAs.

Section 493 of the EPA

36. Another question in dispute relates to the applicants' potential liabilities under s 493 of the EPA. That section is contained in Ch 10 Pt 2 of the EPA. It provides:

> "(1) The executive officers of a corporation must ensure that the corporation complies with this Act.
> (2) If a corporation commits an offence against a provision of this Act, each of the executive officers of the corporation also commits an offence, namely, the offence of failing to ensure the corporation complies with this Act.
>
> Maximum penalty—the penalty for the contravention of the provision by an individual.
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> (3) Evidence that the corporation committed an offence against this Act is evidence that each of the executive officers committed the offence of failing to ensure that the corporation complies with this Act.
> (4) However, it is a defence for an executive officer to prove—

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4 The original pathway was that disclaimer was introduced to personal bankruptcy law by the *Bankruptcy Act* 1869 (UK), s 23, and crossed over to company insolvency law by the *Companies Act* 1929 (UK), s 267.

5 *Australia and New Zealand Banking Group Ltd v State of Queensland* [2016] FCA 1566 [11]-[14]; *Stacks Managed Investments Pty Ltd v State of New South Wales* [2016] NSWSC 1349, [11]-[13]; cf *National Australia Bank Ltd v New South Wales* (2009) 182 FCR 52. In Queensland, note that escheat is affected by the *Property Law Act* 1974 (Qld), s 20.

6 *Menzies v Paccar Financial Pty Ltd (No 4)* (2014) 101 ACSR 25, 44; *Rams Mortgage Corporation Ltd v Skipworth and Another (No 2)* (2007) 239 ALR 799, [6].

(a) if the officer was in a position to influence the conduct of the corporation in relation to the offence—the officer took all reasonable steps to ensure the corporation complied with the provision; or
(b) the officer was not in a position to influence the conduct of the corporation in relation to the offence."

37. The expression "executive officer" used in that section is defined in Sch 4 of the EPA as follows:

> "Executive Officer, of a corporation means –
> (a) …
> (b) …
> (c) if paragraphs (a) and (b) do not apply—a person who is—
> (i) a member of the governing body of the corporation; or
> (ii) concerned with, or takes part in, the corporation's management;
> whatever the person's position is called and whether or not the person is a director of the corporation".

38. The applicants contend that they are not executive officers within the meaning of s 493. That is disputed by the respondent and the Attorney-General. It will be necessary to consider that question if the company is liable to comply with the EPO.

Property

39. Section 9 of the CA defines property, in part, as follows:

> "Property means any legal or equitable estate or interest (whether present or future or vested or contingent) in real or personal property of any description and includes a thing in action, and:
> (a) …
> (c) In Pt 5.5 (voluntary winding up) has a meaning affected by section 489F; and
> …
> (d) In Pt 5.6 (winding up generally) has a meaning affected by section 513AA; …"

40. It is not necessary to consider the effect of either para (c) or (d) of the definition in this case.

41. Having regard to the text of s 568(1) there is no doubt that the Chinchilla land was property that was land within the meaning of s 568(1)(a) provided it was burdened with onerous covenants. It might also have been property that may give rise to a liability to pay money or some other onerous obligation within the meaning of s 568(1)(d) or property where it is reasonable to expect that the costs charges and expenses that will be incurred in releasing the property would exceed the proceeds of releasing the property within the meaning of s 568(1)(e).

42. Second, it is also not in dispute that MDL309 and PFL5 were property that may give rise to a liability to pay money or some other onerous obligation within the meaning

of s 568(1)(d) of the CA or where it is reasonable to expect that the costs, charges and expenses that would be incurred in realising the property may exceed the proceeds of realising the property within the meaning of s 568(1)(e).

43. However, the parties' submissions (apart from the Commonwealth) focussed on whether either of the EAs was property. It is necessary, therefore, to identify that question more closely.

44. The applicants submit that the EPA sets up a statutory framework for an environmental authority under Ch 5, provides in Pt 9 of Ch 5 that an environmental authority may be transferred subject to the satisfaction of certain requirements, and provides in s 308 for the respondent to charge an annual fee for an environmental authority. Accordingly, the applicants submit that each of the EAs is property within the meaning of s 568(1) of the CA because a holder who satisfies certain conditions is entitled to carry out relevant valuable activity, the environmental authority is transferable and it has value because it affects the value of the associated mining authority and because the Chief Executive is entitled to charge substantial fees for the environmental authority.[7]

45. The respondent submits that neither of the EAs is property because neither confers any property rights. An environmental authority confers a freedom from liability (for carrying out otherwise prohibited activity) but no property rights. It is akin to a personal licence that cannot be transferred and is distinguishable from those forms of licence that have been held to constitute property.

46. In any event, the respondent submits (and was initially supported by the Attorney-General) that the company's liabilities under the EPO are not liabilities in respect of any disclaimer property, because the EPO was issued under s 358 of the EPA to secure compliance with the company's general environmental duty under s 319 of the EPA. If that submission were accepted, it may not be necessary to resolve the dispute whether the EAs are disclaimer property.

Section 319

47. Section 319 of the EPA provides as follows:

> "(1) A person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm (the general environmental duty).
> * Note – * See section 24(3) (Effect of Act on other rights, civil remedies etc.).
> (2) In deciding the measures required to be taken under subsection (1), regard must be had to, for example –
> (a) the nature of the harm or potential harm; and
> (b) the sensitivity of the receiving environment; and
> (c) the current state of technical knowledge for the activity; and
> (d) the likelihood of successful application of the different measures that might be taken; and

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7 *In re Celtic Extraction Ltd (in liq); In re Bluestone Chemicals Ltd (in liq)* [2001] Ch 475, 486-489 [24]-[33].

(e) the financial implications of the different measures as they would relate to the type of activity."

48. The Attorney-General submits that the obligations under the EPO were "provoked" by activity undertaken by the company which caused environmental harm, irrespective of whether the company owned the Chinchilla land or held a resources authority such as MDL309 or PFL5.

49. Section 319 prohibits carrying out an activity that is causing or in the future is likely to cause an outcome, namely environmental harm, unless all reasonable and practicable measures are taken to minimise the harm. It does not operate expressly on past activities.

50. Non-compliance with or breach of s 319 is not an offence, per se.[8] There is no express power in the court to order compliance with s 319, per se, because that is not an offence or a threatened or anticipated offence against the Act.[9] Further, a breach of s 319 does not confer a private cause of action in damages.[10] For present purposes another important, if obvious, point is that s 319 is not engaged, according to its terms, if a person is not carrying out an activity.

51. The Attorney-General made a broad submission that although s 319 is cast in the form of a prohibition upon carrying out an activity, properly construed it is a positive obligation to comply with a general environmental duty. This submission is not supported either by the text of s 319 or by its context in the EPA as previously summarised. More specifically, the legal effect of s 319 under the EPA seems to be twofold. First, an environmental protection order may be issued to secure compliance with the general environmental duty under s 358 as discussed below. Second, compliance with the general environmental duty provides a defence to a charge of unlawfully causing serious or material environment harm.[11]

52. However, it is not necessary to express any concluded view about the Attorney-General's wider submission in this case, for reasons that will become apparent in due course.

Power to issue an EPO

53. Section 358 of the EPA provides:

> "The administering authority may issue an order (an environmental protection order) to a person—
> (a) if the person does not comply with a requirement to conduct or commission an environmental evaluation and submit it to the authority; or

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8 However, it is an offence to wilfully and unlawfully cause serious environmental harm or unlawfully cause serious environmental harm, or wilfully and unlawfully cause material environmental harm or unlawfully cause material environment harm: *Environmental Protection Act* 1994 (Qld), s 437(1), 437(2), 438(1) and 438(2). Each of the terms "environmental harm", "material environmental harm" and "serious environmental harm" is separately defined: *Environmental Protection Act* 1994 (Qld), ss 14, 16, and 17.

9 Compare *Environmental Protection Act* 1994 (Qld), s 505(1).

10 *Environmental Protection Act* 1994 (Qld), s 24(3).

11 *Environmental Protection Act* 1994 (Qld), s 493A(3).

(b) if the person does not comply with a requirement to prepare a transitional environmental program and submit it to the authority; or
(c) if the authority is satisfied, because of an environmental evaluation conducted or commissioned by the person, unlawful environmental harm is being, or is likely to be, caused; or
(d) to secure compliance by the person with—
  (i) the general environmental duty; or
  (ii) an environmental protection policy; or
  (iii) a condition of an environmental authority; or
  (iv) a development condition of a development approval; or
  (v) a prescribed condition for carrying out a small scale mining activity; or
  (vi) a condition of a site management plan; or
  (vii) an audit notice; or
  (viii) a surrender notice; or
  (ix) a rehabilitation direction; or
  (x) a regulation; or
  (xi) an accredited ERMP; or
(e) if the person is, or has been, contravening any of the following provisions—
  (i) section 363E;
  (ii) section 440Q;
  (iii) section 440ZG;
  (iv) a provision of chapter 8, part 3E or 3F; or
(f) in the circumstances stated in division 2."

54. Section 360 provides:

"(1) An environmental protection order—
  (a) must be in the form of a written notice; and
  (b) must specify the person to whom it is issued; and
  (c) may impose a reasonable requirement relevant to a matter or thing mentioned in section 358; and
  (d) must state the review or appeal details; and
  (e) must be served on the recipient.
(2) Without limiting subsection (1)(c), an environmental protection order may—
  (a) require the recipient to not start, or stop, a stated activity indefinitely, for a stated period or until further notice from the administering authority; or
  (b) require the recipient to carry out a stated activity only during stated times or subject to stated conditions; or
  (c) require the recipient to take stated action within a stated period."

55. It is an offence for a recipient either to contravene an environmental protection order or to do so wilfully.[12] Because that would be an offence, the court may make an order to remedy or restrain a threatened or anticipated contravention of an environmental protection order.[13]A proceeding for such an injunction would be a civil proceeding.

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12 *Environmental Protection Act* 1994 (Qld), s 361(1) and (2).
13 *Environmental Protection Act* 1994 (Qld), s 505(1).

56. A question arose in the present proceeding whether an environmental protection order may secure compliance with the general environmental duty by requiring action by a person even if the person is not engaging or intending to engage in any activity in the future. Both the respondent and the Attorney-General made that submission.

57. The text of ss 319, 358 and 360 does not support that construction clearly. Interpolating the words from s 319 into the relevant part of s 358, the text of s 358 would provide that the administering authority may issue an environmental protection order to secure compliance by a person with the general environmental duty, that is, "not [to] carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm".

58. However, there are some wide powers under s 360. First, an environmental protection order may impose a reasonable requirement relevant to a matter or thing mentioned in s 358. Second, an environmental protection order may require the recipient to stop a stated activity. By definition, only an activity that has already started can be stopped. But something already stopped does not need to be stopped. Third, an environmental protection order may require the recipient to take stated action within a stated period.

59. There is no text which expressly provides that an environmental protection order may require a stated activity be carried out to remedy or prevent further environmental harm from a past activity that was a breach of s 319 but which has been stopped. The respondent submits that the words "to minimise the harm" in s 319 can be pressed into that service, but in doing so divorces those words from their context in s 319 that prohibits a person from carrying out an activity.

60. The respondent submits that it will best achieve the purpose of s 319 to construe the power to issue an order under ss 358 and 360 as extending to a power to require a person to act to minimise environmental harm from past activities, so that is the construction to be preferred. However, to approach the question of construction in that way risks overlooking the objectively ascertained intention of the Parliament contained in the intricate and interrelated provisions of the EPA as context for the construction of ss 319, 358 and 360.

61. It must not be overlooked, as previously stated, that it is deliberately provided in the EPA that failure to comply with or breach of s 319 is not an offence, per se, does not confer a private cause of action and is not a sufficient basis, per se, for an order to remedy or restrain the non-compliance.

62. If there is at least "material environmental harm", things are different. A person who unlawfully causes material environmental harm commits an offence.[14] To be material, the harm must cause loss or damage to a value of more than the threshold amount of $5000.[15] But, causing such harm is not unlawful if the general environmental duty was complied with.[16] At the point where an offence of causing material environmental harm is threatened, an order to remedy or restrain the activity

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14 *Environmental Protection Act* 1994 (Qld), s 438(2).
15 *Environmental Protection Act* 1994 (Qld), s 16.
16 *Environmental Protection Act* 1994 (Qld), s 493A(3)

may be made.[17] And if the offence has already been committed an order to remedy and restrain the harm may be made.

63. It is against that complex structure that the respondent submits that (necessarily, even if an offence of causing material environmental harm is not threatened or has not been committed) he may issue an environmental protection order under s 358 to secure compliance with the general environmental duty in respect of past activities and that failure to comply with the order is an offence.

64. In my view, at the least, it is not completely clear that an environmental protection order under s 358 can be made to secure compliance with the general environmental duty under s 319 based on past activities that have ceased.

65. However, although both the respondent and the Attorney-General addressed this question in submissions, the applicants did not submit that the EPO was invalid as a purported exercise of power to issue an environmental protection order to secure compliance with the general environmental duty.

66. This was so even though the applicants submit that the company had ceased activities before the EPO was issued. Unfortunately, this is not common factual ground. The respondent submits that the company had not ceased activities for the purpose of s 319 at the date of the issue of the EPA. Usually, an application of this kind is not an appropriate vehicle to resolve a disputed question of fact.[18]

67. The applicants, in any event, submit that the EPO in this case was issued, at least in part, to secure compliance with a condition of an environmental authority, under s 358(d)(iii) of the EPA. Their submissions, in part, were directed to whether the EAs were disclaimer property and whether their disclaimer operated under s 568 and 568D of the CA inconsistently with any liabilities in respect of the disclaimed EAs under the EPO. Those submissions assume that there was a law of the State creating liabilities under the EPO that was engaged in a way that under that law the liabilities were in respect of the EAs or one of them. Whether the source of the power to issue the EPO was to secure compliance with the general environmental duty under s 319 or to secure compliance with a condition of an environmental authority, the relevant State laws that create the liabilities that the applicants contend are terminated are s 358 and 361 of the EPA.

68. But there is another possibility disclosed by the supporting affidavits filed for the purpose of establishing the facts for the direction sought under s 511 of the CA. It is that even if the obligations and any liabilities imposed under the EPO are supported solely by ss 319, 358 and 361 of the EPA, as the respondent and the Attorney-General submit, those obligations and liabilities operate in respect of disclaimer property because of the terms of the EPO itself.

The terms of the EPO

69. Among other requirements, the EPO in the present case provides in part that the company must not without the respondent's prior written approval "materially alter, or dispose of any infrastructure on the site that is necessary to ensure compliance with

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17 *Environmental Protection Act* 1994 (Qld), s 505.

18 *No 5 Lorac Avenue Pty Ltd v Brooke* (1995) 16 ACSR 247, 257.

the requirements of [the] EPO and that may be required for the ongoing management of environmental risks and/or site rehabilitation" ("site infrastructure").

70. As well, it provides that "[a]ll infrastructure that is necessary to ensure compliance with the requirements of [the] EPO and that may be required for the ongoing management of environmental risks and/or management of environmental risks and/or site rehabilitation must be maintained in a functional and operable manner."

71. It is not suggested that the site infrastructure is not property.

Notice of disclaimer

72. The notice of disclaimer given by the applicants stated that they disclaimed the Chinchilla land, MDL309, PFL5 and the EAs. As well, it stated that it disclaimed a number of other items including various tanks, compressors, pumps, computers, electrical installations, water quality tester, a water sampler, consumables, a low pressure flare, a shipping container of electrical distribution for the plant and a trailer.

73. The evidence did not directly correlate whether these items or any other items that are fixtures to the Chinchilla land are part of the site infrastructure. However, in the absence of any evidence to the contrary, and having regard to the facts and circumstances set out in the "Grounds" of the EPO, I infer that some of the site infrastructure consists of the fixtures and other items of property stated to be disclaimed in the notice of disclaimer.

Liabilities in respect of the site infrastructure as disclaimer property and the EPO

74. It follows, in my view, that the EPO purports to prohibit any disposal of and to oblige the company to continue to maintain property stated to be disclaimed in the notice of disclaimer. None of the parties submit that the EPO and the obligations under it not to dispose of and to maintain the site infrastructure were invalid, apart from any invalidity that might result from the operation of s 109 of *The Constitution*.

75. Under s 361 of the EPA, non-compliance with the EPO is an offence by the company. The maximum penalty is 4500 penalty units or 6250 penalty units if the contravention is wilful. A reference to a penalty unit is a reference to a fine of that number of penalty units and a penalty unit is valued at $110 or such other amount as prescribed.[19] Where the offender is a corporation, the maximum fine is five times that for an individual.[20]

76. Under s 505 of the EPA, the court may make an order to remedy or restrain a threatened or anticipated non-compliance with an environmental protection order.

77. Given the terms of the EPO, ss 358 and 361 of the EPA have the effect of impairing the liquidators' right to disclaim the site infrastructure as disclaimer property under s 568 and 568D of the CA so as to terminate the company's interest in the site infrastructure and the company's liabilities in respect of that property. So would the exposure of the company to an order made under 505 of the EPA to prevent or remedy a breach of s 361.

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19 *Penalties and Sentences Act* 1999 (Qld), s 5 and 5A.

20 *Penalties and Sentences Act* 1999 (Qld), s 181B(3).

78. It is unnecessary to deal separately with s 505 of the EPA in order to decide this case. None of the parties directly submits that exposure of the company to a liability to a fine upon a prosecution under s 361 for non-compliance with the EPO is not a liability of a kind that can be terminated under s 568D of the CA. The company cannot be imprisoned and any liability to a fine would have to be met from the property of the company. I note, in passing, that exposure to an order under s 505 of the EPA for a threatened or anticipated offence of non-compliance with an environmental protection order under ss 358 and 361 of the EPA would be a civil liability, in a general sense.

79. I have not overlooked that the respondent submits that, if there is relevant property, the liabilities that s 568D of the CA might terminate include those of the applicants as executive officers under s 493 of the EPA. But no separate consideration was given in argument to the operation of s 493. In particular, no consideration was given to the point that the exposure of the applicants to a prosecution for an offence against s 493 might extend beyond a fine to imprisonment in the case of a wilful contravention. Also any fine would not be met from the company's property, unless the applicants were entitled to treat it as an expense or to an indemnity. Accordingly, I have not focussed on s 493 in the discussion that follows.

80. I proceed on the footing that the obligations under the EPO not to dispose of and to maintain the site infrastructure and the liabilities for non-compliance with those obligations under ss 358 and 361 of the EPA are liabilities in respect of the disclaimer property of the site infrastructure.

81. This conclusion may make it unnecessary to consider the additional arguments advanced by the parties as to whether those liabilities and any other liabilities under ss 358 and 361 for non-compliance with other obligations imposed under the EPO also would be liabilities in respect of the Chinchilla land, or MDL309 or PFL5, or the EAs.

Whether the EAs are property

82. Logically, the respondent's first contention is that the EPO was not based on the EAs, but was based solely on the general environmental obligation under s 319 of the EPA and the power to issue an EPO to secure compliance with the general environmental obligation under s 358 of the EPA.

83. Alternatively, the respondent advances the contention that even if the EPO was based on the EAs, in part, the EAs are not property within the meaning of ss 568 and 568D of the CA. The suggested consequence is that if the EAs are not property, then any liability under ss 358 and 361 for non-compliance with the obligations imposed under the EPO that is based on the EAs, even in part, cannot be a liability in respect of disclaimer property.

84. However, as I have concluded that the EPO directly prohibits the disposal of and obliges the company to maintain the site infrastructure that is disclaimer property, it is unnecessary also to decide the question whether the EAs are property within the meaning of s 568 and s 568D in order to engage the question as to the effect of the interaction between ss 568 and 568D of the CA and ss 358 and 361 of the EPA.

85. The answer to the question of the effect of that interaction that I have reached below means that it is not necessary to answer the question whether the EAs are property in order to give a direction whether the applicants are justified in not causing the company to comply with the EPO.

86. I have considered whether, in any event, I should give a direction to the applicants that they are justified in treating the EAs as property that has been disclaimed. The parties (except for the Commonwealth) devoted extensive and wide ranging submissions to that question. That the applicants did so was logical, because their position is that the EPO was based on the EAs, at least in part. As well, the applicants have a keen eye to the respondent's threat that he might issue a further EPO in the future requiring some form of clean up or remediation. That is why they seek a direction about whether they would be justified in not causing the company to comply with a future EPO.

87. The respondent's position on these points is inconsistent. He submits that the EPO is wholly based on the general environmental duty, not the EAs. If that is right, it seems it should be unnecessary to decide whether the EAs are or are not property. He also submits that no direction should be given under s 511 of the CA about a future EPO, because the basis in fact for any such EPO is not established and whether one might be issued is hypothetical. The inconsistency in the respondent's position is that he also submits that the court should make a declaration as to whether the EAs are property as one of the four principal questions debated. But he has not cross applied for declaratory relief. And the applicants have only applied for a direction under s 511 as to their justification in causing the company not to comply with the EPO or a future EPO.

Direct inconsistency and s 5G(3) Item 1 of the CA

88. The introduction of the CA was the product of a constitutional shift of the legislative bases of the laws for the incorporation of and regulation of a company. Much of the detail is not important in this case. It is enough to note two features. First, a consequence of the Parliaments of the States referring the power to enact the text of the CA to the Parliament of the Commonwealth under s 51(xxxvii) of *The Constitution* was that, when the CA was enacted, any inconsistency between the now Commonwealth law and any State law would be resolved under s 109 of *The Constitution*.

89. Second, that operational outcome led the Sates to refer and the Commonwealth Parliament to enact a scheme of provisions whose purpose was to affect what might otherwise have been the operation of s 109. Broadly speaking, the scheme operates in a way that recognises and turns upon the legal discourse that has developed as to the operation of s 109.

90. High Court authority has developed a taxonomy under which a law of a State may be regarded as inconsistent with a law of the Commonwealth either directly or indirectly.[21]

91. Section 5E of the CA deals with indirect inconsistency. Section 5E(1) provides:

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21 *Victoria v The Commonwealth ("The Kakariki")* (1937) 58 CLR 618.

"(1) The Corporations legislation is not intended to exclude or limit the concurrent operation of any law of a State or Territory."

92. Section 5G deals with direct inconsistency. Section 5G(3) provides, in part:

"(3) This section applies to the interaction between:
(a) a provision of a law of a State or Territory (the ***State provision***); and
(b) a provision of the Corporations legislation (the ***Commonwealth provision***);
only if the State provision meets the conditions set out in the following table:

Conditions to be met before section applies [operative]		
Item	**Kind of provision**	**Conditions to be met**
1	a pre-commencement (commenced) provision	(a) the State provision operated, immediately before this Act commenced, despite the provision of: (i) the Corporations Law of the State or Territory (as in force at that time); or …

93. Although there are other items in the table under s 5G(3), the present case turns on Item 1.[22] I will later identify relevant provisions that affect the application of Item 1 to the present case but at the outset it may be accepted as common ground that ss 358 and 361 of the EPA were each a "State provision" within the meaning of Item 1. Similarly, there is no dispute that ss 568 and 568D of the *Corporations Law of Queensland* were relevant provisions of "the Corporations Law of the State" within the meaning of Item 1. Further, there is no dispute that the time immediately before the CA commenced was immediately before 15 July 2001.

94. So the application of s 5G(3) under Item 1 turns on whether those State provisions "operated, immediately before …[the CA commenced on 15 July 2001], **despite** [those] provision[s] of the *Corporations Law* of [Queensland]" (emphasis added).

95. Sections 568 and 568D of the *Corporations Law*, as part of the *Corporations Law of Queensland*, contained the same provisions[23] as were re-enacted as laws of the Commonwealth in ss 568 and 568D of the CA, as set out previously.

96. The precise question under s 5G(3) Item 1 becomes, therefore, whether ss 358 and 361 of the EPA operated despite ss 568 and 568D of the *Corporations Law*.

Before the CA commenced

97. In one sense, it cannot be doubted that ss 358 and 361 of the EPA operated immediately before the CA commenced. Those provisions were in force. They

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22 A curious point is that the Commonwealth submitted that s 5F of the CA did not apply but made no submission about the application of s 5G.

23 Those provisions of the *Corporations Law*, ss 568 and 568D, had remained the same since introduced by amendments made by the *Corporate Law Reform Act* 1992 (Cth), ss 108 and 109.

applied to create obligations or liabilities according to their terms. However, the hypothesis that is relevant under Item 1 is one that turns on the interaction of the provisions of State law of the EPA and the relevant provisions of the *Corporations Law*. At the time, they were all laws of the State.

98. Sections 568 and 568D of the *Corporations Law* could only have interacted with ss 358 and 361 of the EPA if a company the subject of liabilities in respect of disclaimer property under those sections was in liquidation and a disclaimer was made. On that hypothesis, would the EPA provisions have operated despite the *Corporations Law* provisions?

99. It will be necessary to consider the effect of a specific provision of another State Act that affects the answer to that question. As will appear later, the answer may be thought surprising. To explain why, it is appropriate first to identify whether, except for that provision, the relevant provisions of the EPA would have operated despite the provisions of the *Corporations Law.*

100. Under State law, the answer to that question would have been resolved as a matter of statutory interpretation of laws of the Parliament of Queensland being the usual principles of the common law of Australia as to statutory interpretation as affected by any relevant statute applying in this State. Inconsistency according to the principles that apply under s 109 of *The Constitution* would have had nothing to do with it.

101. Under the usual principles, one consideration would have been that the EPA, as a contrary later enactment, might have impliedly repealed the earlier inconsistent provisions of the *Corporations Law*. That principle, expressed in latin as *"leges posteriores priores contrarias abrogant"*, stretches back as far as Coke's Institutes.[24] Its ongoing vitality has never been questioned. So, two hundred years on from Coke, in the mid-nineteenth century, Dr Lushington elegantly summarised the relevant considerations:

> "What words will constitute a repeal by implication, it is impossible to say from authority or decided cases. If, on the one hand, the general presumption must be against such a repeal, on the ground that the intention to repeal, if any had existed, would be declared in express terms; so on the other, it is not necessary that any express reference be made to the statute which is to be repealed. The prior statute would I conceive be repealed by implication, if its provisions were wholly incompatible with a subsequent one, or if the two statutes together would lead to wholly absurd consequences, or if the entire subject-matter were taken away by the subsequent statute. Perhaps the most difficult case for consideration is where the subject-matter has been so dealt with in subsequent statutes, that, according to all ordinary reasoning, the particular provision in the prior statute would not have been intended to subsist, and yet if it were left subsisting no palpable absurdity would be occasioned."[25]

102. And in the early days of the High Court, Griffith CJ restated the general principle in *Goodwin v Phillips* as follows:

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24 1 Inst 25b.

25 *The India* (1864) Browning and Lushington 221, 224; 167 ER 345, 346.

> "…where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act."[26]

103. The principle has not changed since the early days of the High Court.[27]

104. F A R Bennion,[28] points out, however, that the principle "is subject to the countervailing principle expressed in the maxim *generalia specialibus non derogant"*, that is, a (later) general enactment will not derogate from an (earlier) special enactment. Again, that principle was accepted in *Gooodwin v Phillips*, in a passage from O'Connor J's reasons that has been much cited since:

> "Where there is a general provision which, if applied in its entirety, would neutralize a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply."[29]

105. Thus, another consideration would have been whether s 568 and 568D, as special provisions dealing with the subject of liabilities in the winding up of a corporation, would continue to operate notwithstanding the later introduction of liabilities under ss 358 and 361 of the EPA generally applying to and creating liabilities for persons, including corporations and insolvent corporations in winding up.

106. On the one hand, it is important not to understate the fundamental constitutional precept inherent in the power of a later Parliament to enact a law that repeals, whether expressly or by implication, a contrary earlier law. Queenslanders, perhaps, need little reminder. The sovereign power of the Parliament of the State of Queensland under an "uncontrolled" constitution includes power to repeal any law. As the Privy Council rather bluntly put it in *McCawley's Case*, even the Constitution of Queensland may be amended by a later "Dog Act".[30] I interpolate that this reasoning is subject to any restrictions arising under *The Constitution* as to the limits of the legislative powers of the State,[31] but they are not relevant for this purpose.

107. On the other hand, both of these principles operate against the backdrop that "[e]very attempt should… be made to reconcile the competing statutes. It is only if the

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26 *Goodwin v Phillips* (1908) 7 CLR 1, 7. That passage was referred to by Holmes JA (as her Honour then was) in *Reardon v Deputy Commissioner of Taxation* (2013) 275 FLR 9, [34].

27 *Mathieson v Burton* (1971) 124 CLR 1, 10 cited in *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 353-354 [9].

28 *Bennion on Statutory Interpretation* (5 ed, 2008, LexisNexis UK), p 304.

29 *Goodwin v Phillips* (1908) 7 CLR 1.

30 *McCawley v The King* (1920) 28 CLR 106, 116.

31 For an example, see *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

competing provisions are irreconcilable that one Act will be taken to have overridden the other."[32] As it was put by Fullagar J in *Butler v Attorney-General* (although in dissent in that case):

> "… where the comparison to be made is between two State Acts, there is a very strong presumption that the State legislature did not intend to contradict itself, but intended that both Acts should operate. It will often be found that the two may reasonably and properly be reconciled by reading the one as subject to the other. In other words it will commonly be found that the appropriate maxim is not *leges posteriores priores contrarias abrogant* but *generalia specialibus non derogant*."[33]

Section 5 of the Corporations Queensland Act 1990

108. The package of legislation comprising the *Corporations Law of Queensland* was enacted by the *Corporations (Queensland) Act* 1990 (Qld) together with the *Corporations (Consequential Amendments) Act* 1990 (Qld).

109. Section 7 of the *Corporations (Queensland) Act* 1990 (Qld) ("Act of 1990") provided that s 82 of the "Corporations Act"[34] as in force immediately before the repeal of that section applied as a law of Queensland and that as so applying it may be referred to as the *Corporations Law of Queensland*.

110. Section 5 of the Act of 1990 was an important provision in the resolution of any construction question involving the operation of the *Corporations Law of Queensland*. It provided:

> "An Act enacted, or an instrument made under an Act, after the commencement of this section is not to be interpreted as amending or repealing, or otherwise altering the effect or operation of, this Act or the applicable provisions of Queensland."

111. Of course, because a sovereign Parliament under an uncontrolled constitution may not bind the power of its successors, a provision such as s 5 of the Act of 1990 does not exclude the possibility of implied repeal. That point was made by Dixon J in *South Eastern Drainage Board (SA) v Savings Bank of South Australia*.[35]

112. Nevertheless, s 5 of the Act of 1990 would have supported the conclusion that ss 568 and 568D of the *Corporations Law* were intended to operate so that ss 358 and 361 of the EPA would not repeal or otherwise alter or affect their operation.

113. Applying that conclusion would have supported the further conclusion that ss 358 and 361 of the EPA would not have operated despite the provisions of the Corporations

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32 Pearce and Geddes, *Statutory Interpretation in Australia* (7 ed, 2011, LexisNexis Butterworths) [7.12].

33 (1961) 106 CLR 268, 276. See also *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 146.

34 "Corporations Act" was defined to mean the *Corporations Act* 1989 (Cth): s 3 *Corporations (Queensland) Act* 1990 (Qld).

35 (1939) 62 CLR 603, 625.

Law immediately before the commencement of the CA for the purposes of s 5G(3) Item 1.

114. A similar process of reasoning, based on s 5 of the *Corporations (Victoria) Act* 1990 (Vic), was accepted in relation to State provisions of an Act of the Parliament of Victoria providing for criminal proceeds confiscation[36] in *Loo v Director of Public Prosecutions*.[37]

115. From that reasoning, it would follow that s 5G(3) of the CA would not apply to ss 358 and 361 of the EPA.[38] If so, it would be unnecessary to further consider the effect of the balance of s 5G. The appropriate step, instead, would be to turn immediately to the question of constitutional inconsistency under s 109 of *The Constitution*.

Section 9 of the Corporations Ancillary Provisions Act 2001

116. However, the Attorney General and the respondent rely on another provision as affecting whether ss 358 and 361 of the EPA operated despite the provisions of the *Corporations Law of Queensland* immediately before the commencement of the CA. Section 9 of the *Corporations (Ancillary Provisions) Act* 2001 (Qld) ("Act of 2001") provides, in part:

> "(1) Any provision of a relevant law of the State that—
>
> (a) makes (or, if not in force, would make on coming into force) provision in relation to a matter in a way that is inconsistent with a provision or provisions of a national scheme law of this jurisdiction; or
>
> (b) but for the operation of section 5 of the old application Act would have made (or, if not in force, would have made on coming into force) provision in relation to a matter in a way that is inconsistent with a provision or provisions of a national scheme law of this jurisdiction;
>
> is declared by this subsection to have effect despite the provision or provisions of the national scheme law of this jurisdiction with which it is inconsistent and as if the relevant law, or (in the case of a relevant law that is not an Act) the Act under which the relevant law was made, had itself provided expressly for this outcome.
>
> *Note—*
> *Section 5G of the Corporations Act applies to a provision of a State law that is inconsistent with a provision of the Corporations legislation to which part 1.1A of that Act applies if that provision operated, immediately before the commencement of that Act, despite the provision of the old Corporations Law or the old ASIC Law that corresponds to the Commonwealth provision.*"

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36 *Confiscation Act* 1997 (Vic), ss 70 and 72.

37 (2005) 12 VR 665, 681-682 [28] and 686 [36].

38 Similar reasoning was followed in *Re Summit Design & Construction Pty Ltd* (1999) 33 ACSR 301, 306 [26].

117. There are two other provisions of the Act of 2001 that are important. Section 9(4) provides:

> "(4) For subsection (1), a provision of a relevant law of the State is inconsistent with a provision of a national scheme law[39] of this jurisdiction if it would be inconsistent within the meaning of section 109 of the Commonwealth Constitution if the national scheme law were an Act of the Commonwealth."

118. As well, under s 2(1) of the Act of 2001, s 9(1) came into force immediately before the commencement of the CA.

119. These provisions have a fundamental effect.

120. First, because s 9(1) of the Act of 2001 came into force immediately before the commencement of the CA, it has the effect of declaring a provision of the law of the State to have effect "despite" the Corporations Law, if the two laws satisfy the condition of inconsistency under s 9(1)(b) of the Act of 2001.

121. Second, the condition of inconsistency is satisfied if, but for the operation of s 5 of the Act of 1990, the provisions of the law of the State (here ss 358 and 361 of the EPA) would have made provision in a way that is inconsistent with a provision or provisions of the national scheme laws (here ss 568 and 568D of the *Corporations Law*).

122. Third, the measure of inconsistency is that provided for under s 109 of *The Constitution*, not that applying under the common law of Australia (as affected in Queensland by any statute applying) in respect of the laws of the State.

123. An evident purpose of these provisions is to take away the effect of s 5 of the Act of 1990 in assessing whether a provision of State law "is inconsistent" and would have had effect despite the relevant provision of the *Corporations Law*, immediately before the commencement of the CA.

124. Another evident purpose is that some provisions of State law that, apart from s 9 of the Act of 2001, would not have been considered to be inconsistent with provisions of the *Corporations Law* were to be declared to operate "despite" the *Corporations Law* immediately before the commencement of the CA.

125. The ultimate purpose, and effect, is to make such provisions fall within s 5G(3) Item 1 of the CA, so that their operation may be protected from the application of direct inconsistency under s 109 of *The Constitution* by virtue of the other provisions of s 5G, including s 5G(11).

126. These purposes are not fully articulated in the explanatory note for the Bill that became the Act of 2001. And nothing else in the context of the CA or Act of 2001 by way of extrinsic material that may be looked at to provide or confirm an interpretation[40] assists as to why the drafter of s 9(1) intended to reverse the existing conditions as to the interaction of provisions of State laws and provisions of the CA.

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39 "National scheme law" is defined to include the *Corporations Law.*

40 *Acts Interpretation Act* 1954 (Qld), s 14B

Direct inconsistency

127. The next step is to apply the constitutional test of inconsistency under s 109 of *The Constitution* in order to determine under s 9(1) whether ss 358 and 361 of the EPA would have been inconsistent with s 568 and 568D of the *Corporations Law*.

128. The most recent decision of the High Court on direct inconsistency under s 109 is *Bell Group NV v State of Western Australia*.[41] That case reaffirms the continuing relevance of the question of whether the State law would "alter, impair or detract from the operation of a law of the Commonwealth Parliament",[42] a test first articulated in 1937 in *The Kakariki*.[43]

129. On the analysis above, ss 568 and 568D of the *Corporations Law* would have operated as provisions that terminate the company's interest in and liabilities in respect of relevant disclaimer property such as, for example, in this case the site infrastructure that the company was prohibited from disposing of and obliged to maintain under the EPO.

130. A prohibition against disposing of and an obligation to maintain property under an EPO, as in this case, would have been supported by ss 358 and 361 of the EPA creating liability for an offence that would be committed by a prohibited disposal. Those sections would have obliged the company to comply with the EPO in respect of the infrastructure as disclaimer property in a way that would have been directly inconsistent with the liquidators' power to terminate the company's interest in and liabilities in respect of the disclaimer property under ss 568 and 568D. That inconsistency arises because the laws of the State would have altered, impaired or detracted from the operation of the Commonwealth laws.

131. It is not surprising perhaps, but there is no dispute between the parties that if liability to comply with the EPO would amount to a liability in respect of relevant disclaimer property, the power in ss 568 and 568D of the CA to disclaim that property and terminate the company's liability under the EPO is inconsistent with ss 358 and 361 of the EPA.

132. For present purposes, the answer to the question of inconsistency does not change because of the adjustments required to answer the question under s 9(1) and 9(4) of the Act of 2001. Immediately before the CA commenced, there was no material difference between ss 568 and 568D of the *Corporations Law of Queensland* and the sections of the same numbers under the CA. The same is true for ss 358 and 361[44] of the EPA.

Provisional conclusion as to the application of section 5G and Item 1

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41 (2016) 331 ALR 408.

42 (2016) 331 ALR 408, 422 [51].

43 *Victoria v The Commonwealth ("The Kakariki")* (1937) 58 CLR 618, 630; and see *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 523-524 [36]-[39].

44 The amendments made by the *Environmental Protection and Other Legislation Amendment Act* 2014 (Qld), s 72 were not material.

133. Accordingly, s 9(1) of the Act of 2001 declared ss 358 and 361 to operate despite the provisions of the *Corporations Law* and it follows that s 5G(3) Item 1 applied s 5G to the interaction of those sections and ss 568 and 568D of the CA.

134. If that reasoning is right, some significant consequences follow. They include that it may be difficult to escape the conclusion that *Loo v Director of Public Prosecutions*[45] was wrongly decided.

Is *Loo v Director of Public Prosecutions* binding?

135. As previously mentioned, *Loo* concerned the scheme under the *Confiscation Act* 1997 (Vic) to deprive a person who had committed a criminal offence of the profits of their criminal exploits, including a power to create a charge over property belonging to someone else as though it were the property of the person. Where such a person was a company, the question arose whether the scheme provisions operated consistently with the winding-up provisions of Ch 5 of the CA.

136. Specifically, it was necessary to consider whether ss 68 and 70 of the *Confiscation Act* 1997 (Vic), as State provisions that were pre-commencement commenced provisions within the meaning of s 5G(3) Item 1, operated despite the provisions of the *Corporations Law of Victoria* immediately before the CA commenced.

137. Winneke P said:

> "Counsel submits that there is no provision in the *Confiscation Act* which permitted the provisions of that Act to operate despite the provisions of the *Corporations Law of Victoria*. In particular, counsel referred to the provisions of s 5 of the *Corporations (Victoria) Act* 1990, which embodied the *Corporations Law of Victoria* when the *Confiscation Act* was enacted in December 1997. As I have previously noted, s 5 is the provision which, by subs (1), says that Acts enacted after the commencement of the *Corporations (Victoria) Act* are not to prevail over the *Corporations Law*, unless an Act 'provides expressly' that it should have effect despite the provisions of the Law (that is subs (2)). Appellant's counsel submits that these provisions make it clear that condition (a) of "item 1" in the table appended to s 5G of the *Corporations Act* cannot be met because there is no provision in the *Confiscation Act* which "provides expressly" for that Act, or any provision of it, to have effect despite any provision of the *Corporations Law of Victoria*. In other words, so it is submitted, ss 70 and 72 of the *Confiscation Act* are not provisions "which operated immediately before the commencement of the [*Corporations Act* 2001 (Cth)] despite the provisions of the *Corporations Law of Victoria* that correspond to [Ch 5 of the Corporations legislation]" within the meaning of condition (a) of item 1 in the table appended to s 5G of the *Corporations Act*…
>
> I am of the opinion that [counsel] is correct in submitting that the conditions prescribed in item 1 of the table in s 5G(3) of the *Corporations Act* have not been met, and that therefore s 5G does not apply to avoid any direct inconsistency between ss 70 and 72 of the *Confiscation Act* and the winding-up provisions of the Corporations legislation."[46]

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45 (2005) 12 VR 665.

46 *Loo v Director of Public Prosecutions* (2005) 12 VR 665, 681-682 [28] and 686 [36].

138. This reasoning is directly applicable to s 5G(3) Item 1 in any context not distinguishable from *Loo*. In my view, that would include this case.

139. In *Australian Securities Commission v Marlborough Gold Mines Ltd*,[47] the High Court said:

> "Although the considerations applying are somewhat different from those applying in the case of Commonwealth legislation, uniformity of decision in the interpretation of uniform national legislation such as the [Corporations] Law is a sufficiently important consideration to require that an intermediate appellate court — and all the more so a single judge — should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong."[48]

140. In my view, *Loo* is plainly wrong. The reason is that the court in that case was apparently not informed of and did not consider the effect of s 9(1) of the *Corporations (Ancillary Provisions) Act* 2001 (Vic), which is the counterpart of the equivalent Queensland provision in s 9 of the Act of 2001. Accordingly, I must depart from *Loo* and give effect to s 9 of the Act of 2001 in finding that s 5G(3) Item 1 applies s 5G of the CA in the present case.

Section 5G(11) and provisions that must operate more widely than in one State

141. Once s 5G(3) applies s 5G of the CA to ss 358 and 361 of the EPA, the next step is that s 5G(11) provides that:

> "(11) A provision of the Corporations legislation does not operate in a State or Territory to the extent necessary to ensure that no inconsistency arises between:
> (a) the provision of the Corporations legislation; and
> (b) a provision of a law of the State or Territory that would, but for this subsection, be inconsistent with the provision of the Corporations legislation."

142. No challenge was made as to the validity of a law of the Commonwealth cast in this form.[49]

143. If s 5G(11) applies according to its text, the result would be that to the extent necessary to ensure no inconsistency with ss 358 and 361 of the EPA, s 568 and 568D of the CA would not apply in the State of Queensland. However, the applicants submit that s 5G(11) does not apply, in effect because ss 568 and 568D are not laws capable of operating in a differential way as between the State of Queensland and the other States and Territories of the Commonwealth.

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47 (1993) 177 CLR 485.
48 (1993) 177 CLR 485, 492.
49 Compare *University of Wollongong v Metwally* (1984) 158 CLR 447, 455-456 and *HIH Casualty Insurance Ltd (in liq) and ors v Building Insurers' Guarantee Corporation and anor* (2003) 202 ALR 610, 643 [80].

144. The genesis of this argument lies in the reasons of Barrett J in *HIH Casualty Insurance Ltd (in liq) v Bulding Insurers' Guarantee Corporation and anor*.[50] In that case there were State provisions, described as "cut through provisions" under which a number of State authorities that had discharged HIH's liabilities under insurance contracts were entitled to have recourse to the benefit of re-insurance contracts made between HIH and third parties. The question arose whether the cut through provisions as laws of the State granting the authorities rights to stand in the shoes of HIH were inconsistent with the laws of the Commonwealth providing for the rateable distribution of the property of the company under ss 555, 556 and 562A of the CA.

145. Barrett J considered the application of both s 5F and s 5G of the CA to the State provisions in question. I have set out the relevant parts of s 5G above. Section 5F has two subsections that appear to operate in a similar way to s 5G(11).

146. First s 5F(2) provides:

> "(2) By force of this subsection:
> (a) none of the provisions of the Corporations legislation (other than this section) applies **in the State** or Territory in relation to the matter if the declaration is one to which paragraph (1)(a) applies; and
> (b) the specified provision of the Corporations legislation does not apply **in the State** or Territory in relation to the matter if the declaration is one to which paragraph (1)(b) applies; and
> (c) the provisions of the Corporations legislation (other than this section and the specified provisions) do not apply **in the State** or Territory in relation to the matter if the declaration is one to which paragraph (1)(c) applies; and
> (d) the provisions of the Corporations legislation (other than this section and otherwise than to the specified extent) do not apply **in the State** or Territory in relation to the matter if the declaration is one to which paragraph (1)(d) applies." (emphasis added)

147. Second, s 5F(4) provides:

> "(4) By force of this subsection, if:
> (a) the Corporations Law, ASC Law or ASIC Law of a State or Territory; or
> (b) a provision of that Law;
> did not apply to a matter immediately before this Act commenced because a provision of a law of the State or Territory provided that that Law, or that provision, did not apply to the matter, the Corporations legislation, or the provision of the Corporations legislation that corresponds to that provision of that Law, does not apply **in the State** or Territory to the matter until that law of the State or Territory is omitted or repealed." (emphasis added)

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50 (2003) 202 ALR 610.

148. A question arose in *HIH* as to how those subsections might apply to the provisions of the Corporations legislation contained in ss 555, 556 and 562A of the CA. Barrett J said:

> "The directions in ss 555, 556 and 562A of the *Corporations Act* as to the application of assets and payment of claims in the winding up of a company that that Act itself causes to be incorporated 'in this jurisdiction' and therefore to be a body corporate cannot be regarded as applying 'in' any particular state or territory 'to' (or 'in relation to) the 'matter' of such application and payment. The directions apply 'in' the whole of the area to which the Commonwealth Act's territorial operation extends. And they do so in a way that is geographically indiscriminate, so that, unless there is some clear provision to the contrary, a particular thing that must be done in obedience to them cannot be regarded as something to be done "in" one particular state or territory rather than any other and an act of statutory compliance or implementation does not in any sense belong to one state or territory rather than any other. The fact that a particular liquidator has his office in Sydney or Hobart, or that the bulk of the work in relation to a particular winding up is done in Adelaide or Perth does not mean that compliance with and implementation of ss 555, 556 and 562A take on some character identifiable with the particular state. Wherever relevant acts may be performed, effectuation of ss 555, 556 or 562A occurs under and by virtue of the *Corporations Act* as it applies throughout the whole of its territorial reach.
>
> Sections 5F(2) and 5F(4) can therefore produce no meaningful result so far as operation of state and territory cut-through provisions in relation to due administration of ss 555, 556 and 562A of the *Corporations Act* is concerned. Even if s 5F(2) or (4) purported or appeared to produce the result that ss 555, 556 or 562A did not apply 'in' a particular state or territory 'to' (or 'in relation to') some 'matter' identified in the cut-through provision, the section would in reality lead nowhere because application and administration of ss 555, 556 and 562A are not things in relation to which any *Corporations Act* provision applies in a territorially defined or territorially ascertainable way."[51]

149. Barrett J reached a similar conclusion to the application of s 5G(11):

> "It is also necessary, in the present context, to discard s 5G(11) (dealing with 'Other cases') since it adopts the s 5F approach of declaring that the *Corporations Act* 'does not operate in a state or territory'. For reasons already discussed in relation to s 5F, non-application of the *Corporations Act* in a political and geographical subdivision of 'this jurisdiction' can have no effect on the operation of ss 555, 556 and 562A of the Commonwealth Act and their requirements as to particular applications of company property and the affording of precedence to particular debts and claims in a particular winding up."[52]

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51 (2003) 202 ALR 610, 646 [91]-[92].
52 (2003) 202 ALR 610, 647 [94].

150. Simplifying, the argument is that although the text of s 5G(11) does not exclude any provision of the CA, the effect of Barrett J's reasoning is that the application of the principal insolvency sections of the CA cannot be limited to operate in a particular State, so that s 5G(11) does not apply to them.

151. There is no textual support for this limit upon the operation of s 5G(11). There is no contextual support for it in the other provisions of the CA so far as the submissions before me revealed. There is no extrinsic material referred to by any of the parties that bears on the question. There is no purpose or object of s 5G(11) identified by any of the parties that would be best achieved by the interpretation preferred by Barrett J.[53]

152. The turning point of the analysis of Barrett J was that because the general insolvency provisions apply nationally their application in a State cannot be limited, so that claims or liabilities are not administered parri passu or otherwise in the priorities provided for under the provisions of the CA.

153. In my view, the logic of that proposition is not sustainable. There are laws other than the CA that affect the payment of claims and liabilities in the administration and winding up of an insolvent company. A well known example, although it was a Commonwealth law, was that until 2006 priority was accorded to tax liabilities under s 215 of the *Income Tax Assessment Act* 1936 (Cth). That a Commonwealth law or a State law creates a carve-out from the parri passu principle and other priorities under the CA does not make the administration and winding up of an insolvent company impossible. Further, the situs of a claim or debt either in this country or outside of it is not a necessary criterion for the administration and winding up of a company under the CA.

154. The applicants provided me with the arguments advanced in the High Court in *Bell Group NV (in liq) and ors v State of Western Australia*[54] as to the operation of ss 5F and 5G of the CA. As the case was decided, nothing was said about these points. Although I have read the arguments in the transcripts that were provided to me by the applicants, I do not find it necessary to deal with them.

Section 493 and the definition of "executive officer"

155. If, as I have concluded, the company remains liable to comply with the EPO, the question arises whether the applicants are personally liable to see that it does so under s 493 of the EPA. That section provides:

> "(1) The executive officers of a corporation must ensure that the corporation complies with this Act.
>
> (2) If a corporation commits an offence against a provision of this Act, each of the executive officers of the corporation also commits an offence, namely, the offence of failing to ensure the corporation complies with this Act.
>
> Maximum penalty—the penalty for the contravention of the provision by an individual.

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53 *Acts Interpretation Act* 1901 (Cth), s 15AA.

54 (2016) 331 ALR 408.

> (3) Evidence that the corporation committed an offence against this Act is evidence that each of the executive officers committed the offence of failing to ensure that the corporation complies with this Act.
>
> (4) However, it is a defence for an executive officer to prove—
>
> (a) if the officer was in a position to influence the conduct of the corporation in relation to the offence—the officer took all reasonable steps to ensure the corporation complied with the provision; or
>
> (b) the officer was not in a position to influence the conduct of the corporation in relation to the offence."

156. The applicants submit that s 493 does not apply to them. The argument turns on the operation of the definition of "executive officer" in the Dictionary as follows:

> "executive officer, of a corporation, means—
>
> (a) if the corporation is the Commonwealth or a State—a chief executive of a department of government or a person who is concerned with, or takes part in, the management of a department of government, whatever the person's position is called; or
>
> (b) if the corporation is a local government—
>
> (i) the chief executive officer of the local government; or
>
> (ii) a person who is concerned with, or takes part in, the local government's management, whatever the person's position is called; or
>
> (c) if paragraphs (a) and (b) do not apply—a person who is—
>
> (i) a member of the governing body of the corporation; or
>
> (ii) concerned with, or takes part in, the corporation's management;
>
> whatever the person's position is called and whether or not the person is a director of the corporation."

157. The applicants submit that as liquidators they are not members of the governing body of the company, because the governing body is the board of directors. So much was not disputed. Next, they submit that they are not concerned with and do not take part in the company's management. Their powers are derived from their office for the purpose of winding up the affairs of the company and they are not managing an ongoing undertaking or business.

158. The purpose of s 493 is to secure compliance with a corporation's liabilities or obligations under the EPA. The mechanism by which the purpose is to be achieved is to oblige the executive officers "to ensure" that compliance and to make failure to do so an offence. Exposure to the offence is intended to deter an executive officer from not ensuring compliance by the corporation.

159. The reach of s 493 is directly affected by the scope of the definition of "executive officer". There are some drafting infelicities. An obvious example is that the drafter did not perceive that neither the Commonwealth nor the State is a corporation, but this case is not concerned with par (a), only par (c). There is no dispute that a company is a corporation within the meaning of par (c).

160. In a general sense, the distinction the applicants seek to draw between a liquidator and a person who takes part in the management of a company faces a number of difficulties. I put to one side the particular case of a special purpose liquidator.

161. By definition, the company appointed the applicants as liquidators "for the purpose of winding up the affairs and distributing the property of the company".[55] The liquidators' powers in this case include to "carry on the business of the company so far as, in the opinion of the liquidator[s], required for the beneficial disposal or winding up of that business"[56] and the particular powers to do the many things set out in s 477(2) of the CA. There are some restrictions in later subsections of s 477, but s 477(6) bears setting out in full:

> "(6) Subject to this Part, the liquidator must use his or her own discretion in the management of affairs and property of the company and the distribution of its property."

162. This is not a new provision. It existed before the CA, in the *Corporations Law*,[57] the *Companies (Queensland) Code*[58] and the *Companies Act* 1962 (Qld).[59] The office and functions of a liquidator in the modern form stem from the *Joint Stock Companies Act* 1856 (UK).[60] The concept that a liquidator manages the affairs of a company in winding up is too well established to question generally.

163. As well, it is important to bear in mind that the powers of management of a company before winding up (or administration) are vested in the directors.[61] In most cases, even the general meeting are not to interfere.[62] The powers of the directors ceased on the appointment of the applicants as liquidators.[63]

164. The applicants nevertheless submit that for the purposes of s 493 the definition of "executive officer" should be construed so as not to reach a liquidator appointed with the identified powers ("the narrow construction").

165. One basis of the applicants' submission as to the narrow construction is that the change in status of the company on going into winding up and the purpose of the appointment of liquidators to wind up the affairs of the company limit the scope of a liquidators' powers in a way that that supports the narrow construction.

166. In my view, this argument is not sustainable. The limit on the exercise of a liquidator's power to the purpose of winding up the affairs and distributing the property of a company does not relieve the company from its obligations. The extension by statute of an obligation of a corporation to an executive officer of the corporation does not, per se, differentiate between obligations incurred before the commencement of the winding up and post-commencement obligations. And it does

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55 *Corporations Act* 2001 (Cth), s 499.
56 *Corporations Act* 2001 (Cth), s 477(1)(a).
57 *Corporations Law*, s 479(4).
58 *Companies Code*, s 379(4).
59 *Companies Act* 1962 (Qld), s 237(4).
60 McPherson, *The Law of Company Liquidation* (2nd ed. 1980, The Law Book Company Ltd), p 18.
61 *Corporations Act* 2001 (Cth), s 198A.
62 *Capricornia Credit Union Ltd v Australian Securities and Investment Commission* (2007) 159 FCR 69.
63 *Corporations Act* 2001 (Cth), s 499(1).

not differentiate, per se, between an obligation that is beneficial to the winding up process and one that might not assist in that process.

167. A second basis for the applicant's submission as to the narrow construction is that the criminal liability raised under s 493(2) of the EPA requires that in choosing between a wider and narrower interpretation of the meaning and scope of operation of s 493, by reference to the width of the definition of "executive officer", the court should choose the narrower interpretation.[64] The answer is that in construing remedial legislation the rule that a penal statute is to be strictly construed is a rule of last resort.[65]

168. A third basis is that in *Re Home and Colonial Insurance Company Ltd*,[66] Maugham J considered, although he did not make a final decision, that a liquidator was not an officer because the company was not a going concern. But the context in that case was the construction of the company's constitution as to whether an article that relieved directors and other officers from liability operated to relieve the liquidator when the company was not a going concern. It is of no assistance in the present case. To the contrary effect, cases in other contexts generally would support the conclusion that a liquidator is in a general sense an executive officer.[67]

169. The respondent's first ground of opposition to the narrow construction is that the liquidators' role involves managing the affairs of the company both as a matter of law and as a matter of fact. The meaning of s 493 does not, however, turn on what the applicants have done in their capacities as liquidators as a matter of fact. And while it must be accepted that usually liquidators have ample powers to manage the affairs of the company, that does not address the applicants' arguments in favour of the narrow construction.

170. The respondent's second ground of opposition is that the purpose of the EPA is best achieved by not excluding liquidators of a company from the meaning of "executive officer".[68] The general purpose of the EPA, as disclosed by its object provision, is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.[69] If the narrow construction were accepted there would be no-one with a personal statutory obligation to ensure that the obligations of the company under the EPA were met during the liquidation.

171. The third ground of opposition to the narrow construction is that the admissible extrinsic material in aid of the construction of s 493 is consistent with the inclusion of a liquidator within the meaning of "executive officer". The respondent relied on the explanatory note to the Bill for the EPA and a departmental guideline.

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64 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 210-211 [45] and 260 [227].

65 *Waugh v Kippen* (1986) 160 CLR 156, 164-165; Compare, for example, *Powercoal Pty Ltd v Industrial Relations Commission* [2005] NSWCA 345, [116].

66 [1930] 1 Ch 102, 126.

67 *re Powertrain Limited (in liq)* [2015] EWHC B26 (Ch), [13].

68 *Acts Interpretation Act* 1954 (Qld), s 14A.

69 *Environmental Protection Act* 1994 (Qld), s 3.

172. As to the explanatory note, it said no more than that the policy behind executive officer liability is to pierce the corporate veil. In my view, characterising the purpose of s 493 at that level of abstraction does not assist one way or the other in deciding the applicants' argument as to the width of the operation of the section. As to the departmental note, it is not relevant in the construction of the Act. There is no equivalent to the principle known in the United States of America as the "Chevron doctrine" in the law of statutory interpretation in Australia.[70]

173. In my view, the dispute as to the operation of s 493 is not difficult to resolve. To limit the operation of that section by construing the definition of "executive officer" to exclude a liquidator would be unwarranted. There is no support for it in the text. There is no support for it in the context of the rest of the EPA or in other relevant materials that may be taken into account in interpreting s 493. It would not best achieve the purpose of s 493, or the EPA more widely, as revealed by the objects section, or by looking at the public purposes of the EPA as a whole. Lastly, without the limit contended for, s 493 does not operate absurdly or otherwise cause legal difficulty.

174. The applicants' suggested narrow construction must be rejected.

Furthering the purpose

175. At a number of points, both sides of the dispute in the present case urge that a particular construction for which they contend ought to be preferred because it best achieves the statutory purpose of the sections of legislation that they propound.

176. As previously noted, there are specific provisions of the relevant interpretation Acts that prescribe such an approach to some questions of construction.[71] As well, it has long been a principle applied in the common law of interpretation of statutes that a beneficial construction is to be given to a remedial statute that has a "high" public purpose.[72]

177. These submissions on both sides are also couched about with examples or illustrations as to how a failure to adopt the construction urged would undermine the operation that would best achieve the purpose and scheme of the legislation contended for. So the applicants submit that to accept the respondent's contentions would undermine the statutory process for winding up a company under the CA. On the other hand, the respondent submits that failure to accept his submissions would allow those who cause environmental harm to escape scot free if a company causes environmental harm and then goes into liquidation. As well, the respondent submits that there are cases in which the courts have accepted that protection of the environment is a higher order of purpose that the administration of insolvent companies for the benefit of creditors.[73]

178. I have not focussed on these submissions, generally speaking, throughout these reasons, although I have acknowledged them at some points. There are a few reasons

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70 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 151-153 [40]-[44].

71 *Acts Interpretation Act* 1901 (Cth), s 15AA; *Acts Interpretation Act* 1954 (Qld), s 14A.

72 For example, *Marks v GIO Australia* (1998) 196 CLR 494, 528 [99].

73 *Scottish Environment Protection Agency v Joint Liquidators of the Scottish Coal Company Ltd* [2013] CSIH 108, [144].

why. First, at least as between State Acts, to adopt a construction that would best achieve the purpose of one statute by not furthering the purpose of another contradictory statute would be a futile exercise.

179. Second, any inconsistency between a law of the State and a law of the Commonwealth is to be resolved under s 109 of *The Constitution.* The question is not resolved by best achieving the purpose of one statute at the expense of the other.

180. Third, in my view, where there are recognisable public purposes for two Acts, to resolve any construction questions as to their operations by the court's opinion as to which is the more important is a slippery slope. The relevant Parliament, not the court, has given each of the Acts the public purpose that it serves. By what criteria is the non-elected Judge to discern which of them is the more important unless Parliament has said so, either expressly or by implication?

181. The construction of statutes is primarily a text based constitutional function of the courts. The intention of Parliament is to be ascertained from the text in the relevant context. What part of the recognised context for that function permits or qualifies a Judge to decide that (or to act on an opinion that) one statutory purpose is to be treated as more important than another, unless that emerges from the statutes themselves? In my view, the judicial oath to act without favour extends to doing so as between the public values of competing statutory purposes, except for the discernible intention of Parliament taken from the text of the statutes and the admissible context in construing the statutes in question.

Conclusion

182. In my view, on the facts as identified above, the liquidators are not justified in causing the company not to comply with the environmental protection order issued by the respondent on 13 May 2016.

183. In reaching that conclusion, it will be appreciated that I have confined my analysis and the direction I give to the specific set of facts as to the disclaimer property in the site infrastructure set out above. I have not found it necessary to decide whether the EAs are disclaimer property. I have not found that the conclusions I have reached will apply to any EPO issued in the future, quite possibly under some power other than to secure compliance with the general environmental duty under s 319.

184. In my view, it is undesirable and inappropriate to do so. The purpose of the directions power under s 511 of the CA is to give liquidators as officers of the court the protection of acting in accordance with the direction. It does not operate as a res judicata or issue estoppel in most cases. The effect is confined to the statement of facts on which the direction is predicated. It is not helpful to speculate as to the effect of any future EPO, if it is issued in relation to other facts or other provisions.