

ENVIRONMENTAL LAWS TRUMP LINC ENERGY CREDITORS

13 April 2017 | Australia

Legal Briefings - By **Peter Smith, Anthony Haly** and **Maritsa Samios**

Today the Queensland Supreme Court held that an insolvent company's environmental obligations under State law were unaffected by the liquidators' disclaimer of related property and resource tenures. This decision changes the previous understanding of liquidators' powers and the order of priority in which claims will be paid in a liquidation, and may have broader implications for insolvent companies that are subject to obligations under State laws.

As executive officers of the company under State environmental laws, the Court held that the liquidators are required to use available funds to cause the company to comply with its environmental obligations. The compliance expenses are to be paid ahead of the priority claims of employees and the liquidators' remuneration.

The Court found that the Commonwealth Corporations Act (relevantly, liquidators' disclaimer powers) does not prevail over the relevant provisions in Queensland's environmental laws to the extent of any inconsistency of laws. This unusual outcome is due to the operation of often overlooked provisions in the Corporations Act that operate to give precedence to State laws that operated when the States referred their corporations powers to the Commonwealth in 2001.

Herbert Smith Freehills acted for the Queensland Department of Environment and Heritage Protection, which opposed the direction sought by Linc Energy's liquidators that they are justified in not causing Linc to comply with certain environmental obligations.

This decision has significant implications for insolvency practitioners as it challenges commonly held views that environmental obligations can be avoided by liquidators disclaiming relevant property. The decision is also of more general interest as it highlights the possibility of State legislation having precedence to the Corporations Act when the laws conflict (in contrast to the operation of s109 of the Constitution).

BACKGROUND

Linc Energy operated an underground coal gasification (**UCG**) demonstration facility on land near Chinchilla in Queensland. The Department of Environment and Heritage Protection (**DEHP**) contends that Linc is responsible for contamination caused by its UCG operations.

Linc's creditors placed it into administration in April 2016, and shortly afterwards DEHP issued an Environmental Protection Order (**EPO**) to Linc. The EPO imposed various obligations on Linc, including requiring it to conduct environmental monitoring and reporting.

Linc entered liquidation in May 2016, and its liquidators sought to disclaim certain items of property, including the land on which the UCG demonstration facility was located, its resources tenures, and the environmental authorities under which it operated the facility. Linc's liquidators argued that, by disclaiming this property, Linc's environmental obligations had ceased.

Linc's liquidators also argued that they were not required to cause Linc to comply with any environmental obligations it may have, as they were not 'executive officers' of Linc under Queensland's environmental laws.

The issues for the Court included whether Linc's liquidators were justified in not causing Linc to comply with the EPO issued by DEHP, and the priority to be given to the costs of any environmental obligations in the liquidation. This case raised novel and untested questions of law on the scope of liquidators' powers under the Commonwealth Corporations Act, as well as the status of State laws that impose obligations on insolvent companies.

KEY FINDINGS

- Linc Energy's liquidators are 'executive officers' of Linc Energy under Queensland's environmental laws.
- Queensland's environmental laws relating to Environmental Protection Orders (EPOs) are inconsistent with the Corporations Act provisions that enable liquidators to disclaim property and be relieved from all liabilities in respect of the disclaimed property.
- Due to the operation of section 5G of the Corporations Act, the relevant provisions of Queensland's environmental laws take precedence over the Corporations Act disclaimer provisions (ss 568 and 568D).

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