

Explanatory Statement

ENVIRONMENT PROTECTION LEGISLATION AMENDMENT (CHAIN OF RESPONSIBILITY) BILL 2022

SERIAL NO. 66
LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

MINISTER FOR ENVIRONMENT, PARKS AND WATER SECURITY

GENERAL OUTLINE

This Bill amends the *Environment Protection Act 2019* (the Act) and *Environment Protection Regulations 2020* (the Regulations).

The purpose of the Bill is to introduce environmental 'chain of responsibility' (COR) laws. The Bill has been prepared in response to recommendation 14.30 of the 'Scientific Inquiry into Hydraulic Fracturing in the Northern Territory' (2018). The laws will only apply to the onshore petroleum industry at this time.

NOTES ON CLAUSES

Part 1 Preliminary matters

Clause 1. Short title

This is a formal clause which provides for the citation of the Bill. The Bill when passed will be cited as the *Environment Protection Legislation Amendment (Chain of Responsibility) Act 2022*.

Clause 2. Commencement

This clause sets out how the amendment Act will be commenced. In this case this will be done by notice given by the Administrator in the Northern Territory Government Gazette. If a provision of the Act does not commence before 1 July 2024 it will automatically commence on that day.

Part 2 Amendment of Environment Protection Act 2019

Clause 3. Act amended

This is a formal clause which provides that amendments are made to the Act. Its purpose is to clarify what laws are being amended by the following clauses.

Clause 4. Section 4 amended (Definitions)

This clause amends the definitions section of the Act.

It inserts and amends a number of definitions that are required to assist in the interpretation and application of the amendments.

Subclause (1) inserts a number of new terms including *associated entity*, *compliance notice*, *high risk entity* and *petroleum activity*. The term *compliance notice* for the purpose of the COR laws relates to an *environment protection notice* under section 176 the Act, or a *prescribed direction* in relation to compliance under a prescribed Act. Subclause (1) is also inserting terms that are only used in new Subdivision 2 in Part 9, Division 2, and new Division 2A in Part 9 of the Act which are

being inserted by clause 8. The actual definitions for these terms are provided in the new Subdivision and Division accordingly. For example, the term *contractor* and *monitor* is used in new Subdivision 2 so the definitions being inserted in section 4 by this clause make reference to new section 192B which is where these terms are explained. Additionally, the terms *prescribed approval*, *prescribed direction*, *relevant commencement* and *relevant decision-maker* are all inserted with the definition referring to new Part 9, Division 2A, section 192L, being the new definition section that is specific to the COR provisions. The phrase '*related person*', of a high risk entity is also being inserted with reference to new section 192M that provides the actual meaning of this phrase. Subclause (1) is relocating the definition of *executive officer* that currently exists in section 265(8) of the Act as the term will now apply to more than one section of the Act. Clause 14 is subsequently deleting the definition of *executive officer* from section 265(8) of the Act.

Subclause (2) is identifying that an *environment protection notice* can now mean a notice issued under section 176(1) and (2), with new subsection 176(2) inserted by clause 6 providing that an environment protection notice can be issued in accordance with the COR laws as provided under new Part 9, Division 2A.

Subclause (3) and (4) is amending the definition of *environmental officer* to identify that reference to this phrase in Part 9, Division 2A, the chain of responsibility provisions, includes reference to a person with similar functions that operate under a prescribed Act.

Clause 5. Part 9, Division 2, Subdivision 1 heading inserted

This is a formal clause to insert a heading for new Subdivision 1 before section 176, in Part 9, Division 2 with the new Subdivision 1 forming part of Part 9, Division 2 of the Act. The new heading accommodates the insertion of subdivisions in Part 9, particularly new Subdivision 2 being inserted by clause 8 that provides new powers for persons to enter land for the purpose of complying with an environment protection notice issued under the Act.

Clause 6. Section 176 amended (Environment protection notice – purpose and issue)

This clause amends section 176 of the Act. Section 176 currently outlines the purpose of environment protection notices and when these notices can be issued. The amendments will enable the Chief Executive Officer (CEO) to issue environment protection notices under the circumstance set out by the provisions for the COR laws as provided by new Part 9, Division 2A which is being inserted by clause 8.

Clause 7. Section 183 amended (Emergency environment protection notice issued by environmental officer)

This clause makes a minor amendment to section 183(3) of the Act.

Section 183 of the Act identifies the circumstances in which an environmental officer may issue an 'emergency' environment protection notice, and what requirements may be imposed through such a notice.

Section 183(3) provides that 'an emergency environment protection notice may be given to a person orally *in accordance with regulations*'. The Regulations do not currently identify any specific requirements associated with issuing an emergency environment protection notice orally. Further, due to the broad types of incidents that may result in such a notice being required to be issued orally, there is no intention or beneficial purpose to prescribe such requirements in the Regulations.

This amendment removes this unnecessary reference to the Regulations in the Act.

Clause 8. Part 9, Division 2, Subdivision 2 and Division 2A inserted

This clause inserts new Subdivision 2 in Part 9, Division 2 and new Division 2A in Part 9 after section 192 of the Act and which comprise of new section 192A – 192Z.

The new Subdivision 2 comprises new sections 192A – 192J which provide new powers for persons to enter land for the purpose of complying with an environment protection notice issued under the Act. These sections allow a person issued with an environment protection notice to enter land or premises to undertake works in compliance with the notice, and impose obligations associated with that entry.

The new Division 2A comprises three subdivisions and new sections 192K – 192Z which establish the new COR powers and provisions.

Subdivision 2. Powers of persons to enter land

New section 192A (Application) is a technical section that identifies when the subdivision applies. It is included to provide an avenue for a person or related person to enter land and premises in order to fulfil the obligations in an environment protection notice in instances where they do not have an existing right to enter the land, either due to them not being the current owner or occupier of the land, or holding an alternative right for access to the land (e.g. holder of petroleum title).

New section 192B (Power to enter land) gives a person that has been issued with an environment protection notice powers to enter land in order to comply with the notice. This power extends to ‘a *contractor*’ or an employee of the *contractor*, that may have been engaged by the person to undertake the works required by the notice (subsection (1)).

The new section also identifies that ‘a *monitor*’ or an employee of the *monitor*, engaged by the person issued with the notice, or the CEO, may also enter land or premises for the purpose of monitoring works being carried out in relation to compliance with an environment protection notice (subsection (2)). Engagement of a monitor is likely to be required where there are significant concerns about the potential environmental impacts being addressed or the management response that is required for those impacts.

Subsection (3) identifies that entry to land or premises is allowed where:

- the owner or occupier has given consent, or
- if no consent is granted, where the person has given the owner or occupier at least 10 business days written notice, or
- in an emergency where there is a risk of environmental harm if the required works are not conducted immediately.

Under subsection (4), if a person is entering land or a premises on the basis of an emergency, that person must give oral notice of the entry to the owner or occupier as soon as possible before or after the entry, and must give written notice within 10 business days of the oral notice, or entry, whichever occurred first. This acknowledges that the risks to the environment may be significant enough that giving 10 business days’ notice would result in a substantial increase to the resultant environmental harm, while still requiring notice to be given.

When advising an owner or occupier about entry, or proposed entry, onto land or premises, the person issued with the environment protection notice must provide the information that is contained

in the Regulations (subsection (5)). New regulation 254A, being inserted by clause 17, contains these information requirements. This ensures consistency in the information that is being provided and that minimum information requirements are met.

Subsection (6) provides that despite the general reference to entry of 'land' or 'premises', a person may only enter residential premises with the consent of the owner or occupier. It is unlikely that entry into residential premises would be required, unless the premises had been damaged in some way by a petroleum activity. This restriction ensures that a persons right to enjoy their own home is not overridden by a general power of entry provided under this section.

Subsection (7) identifies that the power to enter land or premises includes where the land is Aboriginal land and the person does not have a permit under the *Aboriginal Land Act 1978* to enter or remain on Aboriginal Land. This power is included for certainty and is consistent with section 165 of the Act.

Under section 4 of the Act, 'Aboriginal land' is defined with reference to section 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Commonwealth) which states:

Aboriginal land means:

- (a) land held by a Land Trust for an estate in fee simple; or
- (b) land the subject of a deed of grant held in escrow by a Land Council.

New section 192C (Notice to CEO) requires a person who proposes to enter land under section 192B to give notice of that proposed entry to the CEO. This ensures the CEO is aware that activity is occurring to ensure compliance with the environment protection notice, and can have oversight in the event the land owner or occupier has questions or concerns about the persons proposed entry or proposed activities.

The notice must be given at least 10 business days' prior to the proposed entry onto the land or premises, except in an emergency (subsection (2)). Under subsection (3), if a person is entering land or premises on the basis of an emergency, that person must give oral notice of the entry to the CEO as soon as possible before or after the entry, and must give written notice within 10 business days of the oral notice, or entry, whichever occurs first. This acknowledges that the risks to the environment may be significant enough that giving 10 business days' notice would result in a substantial increase to the resultant environmental harm, while still requiring notice to be given.

When advising the CEO about entry, or proposed entry, onto land or premises, the person issued with the environment protection notice must provide the name of any contractor or monitor engaged in relation to the works, and include the information prescribed in the Regulations (subsection (4)). New regulation 254A contains these information requirements. This ensures consistency in the information that is being provided and that minimum information requirements are met.

New section 192D (Powers on entry) identifies what a person may do having entered land or premises. It provides the minimum number of powers required for a person to fulfil their obligations under an environment protection notice.

The powers to undertake activities having entered the land or premises are provided to support the power of entry.

New section 192E (Duties on entry) identifies the duties of a person having entered land or premises. The duties are:

- the person must take reasonable steps to minimise disruption to the owners and occupiers of the land or premises,
- the person must not remain on the land or premises any longer than is reasonably necessary.

These duties are included to protect the activities of, and limit impact on, land owners and occupiers, while recognising that some disruption is likely where a person is complying with an environment protection notice.

New section 192F (Recovery of costs) identifies that a person is entitled to be paid reasonable compensation for loss or damage that results from an action taken by a person issued with an environment protection notice, their contractor or monitor (subsection (1)).

Subsection (2) identifies that the right to compensation is payable by the person issued with the environment protection notice. This provides the person that has suffered the loss or damage with clear advice about which party should be pursued for any claim. It is expected that the person issued with the notice would implement appropriate contractual arrangements to protect themselves from any claim that resulted from the actions of their contractor or monitor.

However, if the environment protection notice has been issued to a *related person* of high risk entity under the COR provisions, the entitlement for compensation does not extend to any loss or damage that may be suffered by the high risk entity itself (subsection (3)). This is because the high risk entity is the original obligation holder and should not have an avenue to seek redress when any loss or damage is a consequence of its failure to comply with legal obligations leading to the need to issue the environment protection notice to the *related person* in the first place.

Subsection (4) identifies that a claim for loss or damage may not be made against the Territory. This provides certainty that the issue of an environment protection notice does not itself give rise to a damages claim.

This section is in addition to any other legal avenues a person who suffers loss or damage may have under the Act or at law.

New section 192G (Offence to obstruct) establishes new offences. Subsection (1) establishes an offence for a person to intentionally obstruct another person from complying with an environment protection notice.

Subsection (2) establishes an offence for a person to intentionally obstruct a person that is acting as a monitor, or employee of the monitor, of works occurring in compliance with an environment protection notice.

Reference to a person in these sections is a broad reference that includes reference to a contractor, or employee of the contractor, engaged by the environment protection notice holder to undertake the required works. The penalty applied for both offences is that of an 'environmental offence level 2'. This penalty is specified in the *Environmental Offences and Penalties Act 1996* and is currently:

- for an individual, 154 to 1540 penalty units
- for a body corporate, 770 to 7700 penalty units.

Subsection (3) identifies that it is a defence if the person took reasonable steps and exercised due diligence to prevent the commission of the offence. The person has the legal burden of proof (on

the balance of probabilities) to show that the requirements of the defence have been met (subsection (4)).

These offences have been included in recognition that the person issued with the environment protection notice, or the contractor or monitor or their employees, may not have access rights to the land, and that the owner or occupier of the land may seek to prevent further activity occurring on the land, particularly if damage has already been caused due to concern that further damage may result.

The offences are designed to ensure that the person issued with the environment protection notice, or contractors engaged by the person issued with the notice or the contractor's employees, and the monitor and their employees, are able to fulfil their legal responsibilities as instructed by the CEO.

New section 192H (Offence to fail to give notice) establishes an offence if a person fails to give notice to a land owner or occupier, or the CEO, as required by sections 192B and 192C respectively.

It is an offence of strict liability with a penalty of 50 penalty units (for an individual), and an infringement notice may be issued. In accordance with section 29 of the *Sentencing Act 1995*, the penalty for a body corporate will be 250 penalty units.

The offence is designed to ensure that appropriate notice is given to the land owner, occupier and CEO about the proposed entry onto land.

New section 192J (Offence to fail to comply with duty on entry) provides that a person who has entered land or premises in accordance with the powers provided under section 192B has a duty under section 192E to minimise disruption to the owners and occupiers of the land or premises and is not to remain on the land or premises any longer than is reasonably necessary. Subsection (1) establishes an offence for intentionally failing to comply with this duty.

The offence has a penalty of 100 penalty units (for an individual). In accordance with section 29 of the *Sentencing Act 1995*, the penalty for a body corporate will be 500 penalty units.

Subsection (3) identifies that it is a defence if the person took reasonable steps and exercised due diligence to prevent the commission of the offence. The person has the legal burden of proof (on the balance of probabilities) to show that the requirements of the defence have been met (subsection (4)).

The offence is designed to acknowledge the importance of these duties and the commensurate impact on land owners and occupiers of having persons on their land.

Division 2A Chain of responsibility

New Division 2A in Part 9 of the Act comprises new sections 192K – 192Z providing the new powers and provisions for the COR laws. The new Part 9, Division 2A is inserted after the new Part 9, Division 2, Subdivision 2 providing powers for persons to enter land for the purpose of complying with environment protection notices, and comprises three subdivisions addressing different matters associated with the issue and operation of compliance notices for the purpose of the COR laws.

The Division generally uses the term 'compliance notice', which includes an environment protection notice and a prescribed direction (howsoever termed) that is prescribed for the purposes of the COR laws. This language ensures that the Division is read as applying to environment protection notices and other directions or notices that may be prescribed in the Regulations for the purpose of the COR laws.

Subdivision 1 Preliminary matters

Subdivision 1 of new Division 2A comprises new sections 192K to 192N. These sections contain a number of general matters that will apply to the new COR laws, including definitions that are specific to the new Division.

New section 192K (Purpose of Division) is a technical section that establishes the purpose of the Division which is to enable a compliance notice in relation to a *petroleum activity* to be issued in accordance with the powers and provisions set out by the Division. It specifically identifies that the new Division 2A applies to a petroleum activity to ensure that the laws introduced by the Division cannot be used for any other type of industry or activity. The term *petroleum activity* is defined broadly by the amendments to section 4 of the Act provided by clause 4, and includes an activity for which any of the following is required:

- an exploration permit under the Petroleum Act 1984
- a retention licence under the Petroleum Act 1984
- a production licence under the Petroleum Act 1984, and
- a permit or lease mentioned in section 119(1) of the Petroleum Act 1984.

New section 192L (Definitions) contains definitions for new terms and phrases for the purpose of the COR laws and which apply under the new Division. The section provides definitions for *holding entity*, *prescribed Act*, *prescribed approval*, *prescribed direction*, *prescribed environmental duty*, *relevant commencement*, and *relevant decision-maker*. Earlier amendments by clause 4 made reference to these new terms so it is identified in the 'Definitions' section of the Act, but the actual interpretation of these terms is provided in this section.

These definitions are required for interpretation and operation of the COR laws and allow the provisions of the laws to identify that they can apply to environment protection notices issued under the Act, or to other compliance instruments (i.e. *prescribed direction*) applicable under another law (i.e. *prescribed Act*) provided the relevant matters are prescribed in the Regulations for the purpose of new Division 2A.

A definition for *relevant commencement* is required for the COR laws so a person's behaviour three years prior to commencement of laws, or the prescribing of an Act for the purpose of laws, can be considered as part of operation of the laws. The commencement date for the laws under the Act is provided in subsection (a) of the definition. The commencement day for a prescribed Act is provided in subsection (b) of the definition, with commencement being the day the Act is prescribed for the purpose of the COR laws. A relevant commencement definition has been included to provide clarity and certainty about the point in time when the laws take effect so as to provide a temporal point from which a person's past behaviour over the previous three years can be considered. This clarity is necessary for the operation of the new sections provided in Subdivision 2 of Division 2A that provide the issuing powers for compliance notices in accordance with the COR laws.

A definition for *relevant decision-maker* has been included to provide clarity and certainty in terms of the decision-making power and who may issue a compliance notice or direction for the purpose of the COR laws, and whether the issuing power is provided under the Act through an environment protection notice, or under a prescribed Act through a prescribed direction. This is to ensure consistency across compliance decisions under respective laws.

The new definitions only apply to new Division 2A in Part 9 of the Act.

New section 192M (Meaning of *related person* of high risk entity) identifies what is meant by the term ‘related person’ as it is used in the amendments. It identifies circumstances under which a person can be, and cannot be, considered to be a related person of a high risk entity for the purpose of the COR laws.

Subsection (1) provides that a person is a related person of a high risk entity if the person:

- has had a ‘relevant connection’ to the high risk entity in accordance with new section 192N
- is a holding entity of the high risk entity
- is an associated entity of the high risk entity and the owner or occupier of land on which the entity has carried out a petroleum activity (within the last three years).

Importantly subsection (2) excludes persons acting as liquidators or administrators (or similar) in accordance with corporations and bankruptcy laws, and native title holders and Aboriginal persons responsible for land under the Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976* (subsection (4)) from being a related person.

These exclusion provisions provide assurance that the COR laws are not intended to apply to these persons. It is not the intention of these laws to inadvertently restrict persons that offer liquidation and administration professional services, from accepting roles with companies operating in the Territory where these roles are appropriate. The laws are also not intended to apply to persons who may be considered an ‘owner’ of land solely because of their cultural connection to the land. However, while a person may not be considered a related person of a high risk entity because they ‘fit’ with one of the circumstances identified in subsections (2) and (4), these provisions are not intended to protect such persons from being held accountable for environmental harm should they actually be considered to be a capable related person of a high risk entity. That is, a person can’t be considered to be a related person according to the COR laws only because they are an administrator or liquidator of a company that is a high risk entity, but that same person may ‘fit’ other circumstances set out in the section and therefore still be considered a related person, even if they are also an administrator. This is equally true for native title holders and Aboriginal persons. Subdivisions (2) and (4) are included to provide certainty for such persons being identified by the provisions, the certainty relates to the types of circumstances that should not render a person a related person, not to whether that person in a different circumstance is or was a related person.

Subsection (3) identifies that the period of three years mentioned in subsection (1)(c) may include a period of three years from just prior to the point of a decision being made to use the laws and that this period may include a period before the ‘relevant commencement’, with earlier amendments defining the term ‘relevant commencement’ in new section 192L. This subsection is included to allow retro active considerations to a persons behaviour. This allows the regulators to consider whether certain relationships existed prior to the laws commencing in order to determine whether the new laws can be applied.

New section 192N (Relevant connection to high risk entity) identifies those matters that should be considered by the relevant decision-maker when determining if a person has a relevant connection to a high risk entity, and therefore may be considered a related person of a high risk entity in accordance with section 192M.

It includes the way in which, and extent to which, the person has, within the preceeding three years, had the capacity to influence the decisions and behaviours of the high risk entity towards compliance with statutory requirements, and:

- the extent of the person's influence or control of the high risk entity (whether alone or jointly with an associated entity of the high risk entity, or by giving directions, approval or making funding available)
- the extent of the person's financial interest in the high risk entity
- whether the person is an 'executive officer' of the high risk entity, its holding company or other company with a financial interest in the high risk entity
- consideration of any agreements or other transactions with the high risk entity (other than land access agreements)
- the extent of the person's dealings with the high risk entity
- the extent of the person's cooperation and compliance with a requirement under the Act or a prescribed Act to provide information relevant to inform a decision by the relevant decision-maker.

Subsection (2) and (3) identifies matters that must be considered by the CEO; while subsection (4) identifies matters that must be considered to the extent relevant. Subsection (5) is provided for clarity in that a person with influence can be acting alone or jointly, with an associated entity of the high risk entity, or by giving directions, approval or making funding available. Subsection (6) identifies matters that the relevant decision-maker may consider when considering 'the extent of a person's dealings' under subsection (4)(d). It includes matters such as: how arm's length the dealings were; whether or not the dealings were at market value, independent and commercial footings; and the purpose of the dealings (e.g. professional advice, providing finance etc.). These matters are stipulated as the context of a person's dealings with another is an important factor when determining the relevance of a connection and its likely influence on the high risk entity. For example, this section allows a decision maker to consider the extent of any financial interest held by a person in a high risk entity. Whilst a decision-maker may be aware that there is a financial interest because there is a security, loan or mortgage in existence, this in itself is not necessarily a relevant consideration when deciding if a person has a relevant connection to the high risk entity and therefore can be considered a related person of the high risk entity.

The matters identified in this section are not limiting and the CEO is able to consider other matters that may be relevant to their determination (subsection (7)).

Subsection (8) identifies that the period of three years mentioned in this section may include a period of three years from just prior to a decision being made to use the laws and that this period may include a period before the 'relevant commencement', with earlier amendments defining the term 'relevant commencement' in new section 192L. This is included to apply retro active considerations to a persons behaviour. This allows the regulators to consider whether certain relationships existed prior to the laws commencing in order to determine whether the new laws can be applied.

Subsection (9) provides additional defintions for the operation of the COR laws in this section. These include definitions for *control*, *financial interest*, and *information requirement*. These terms are not referenced in the Act's section 4, or new section 192L as the definitions are only used in this section of the Act. The definition for a *information requirement* relates to existing provisions in the Act or a prescribed Act that relate to a person being required to provide information. A persons

cooperation in providing information is considered an important consideration when deciding on whether a person is a related person of a high risk entity.

Subdivision 2 Redirection to related persons by issue of compliance notices

Subdivision 2 comprises new sections 192P to 192X. These sections are the primary provisions of the COR laws, setting out the procedures for redirecting statutory obligation by way of issuing compliance notices to 'related persons'.

New section 192P (Purpose of Subdivision) is a technical section identifying the purpose of the subdivision, which is to establish the circumstances under which a compliance notice can be issued to a related person of a high risk entity.

New section 192Q (Matters to be considered in deciding to issue compliance notice to related person) identifies the matters that the *relevant decision-maker* should consider before deciding to issue a compliance notice to a related person.

Subsection (2) identifies matters that must be considered in issuing a notice. For an environment protection notice, this includes the objects of the Act; while for other types of compliance notices it includes the objects of the relevant prescribed Act. This recognises that different Acts have different objectives. It would be inconsistent to require the relevant decision-maker to consider the objectives of a prescribed Act when issuing a compliance notice generally under that Act, but then be required to consider the objectives of the Act when issuing the compliance notice to a related person of the high risk entity through the COR laws.

Other matters include the steps the person took to influence the high risk entity's behaviour in terms of meeting its legal obligations under the Act or a prescribed Act.

Subsection (3) identifies that the relevant decision-maker may consider any financial assurance held under the Act or a prescribed Act, such as an environmental bond or petroleum security. This ensures the relevant decision-maker is cognisant of whether other money is available to achieve the required remediation and rehabilitation objectives, before moving to issue a notice to a related person using the COR laws.

Subsection (4) clarifies that the matters identified in this section are not limiting and the relevant decision-maker is able to consider other matters that are relevant to their determination.

Subsection (5) prohibits the relevant decision-maker from issuing a compliance notice to a *related person* if a reasonable person would consider the issue of the notice to be oppressive, unjust or unreasonable in the circumstances. It will be for the Court to determine whether this 'reasonable person' test is met in the event a person challenged the issue of the notice. It is intended to recognise that there are circumstances where a person may otherwise be a 'related person of a high risk entity' but it is nevertheless inappropriate for the person to be issued with a notice. For example, on paper a person may have an interest in the high risk entity because they are a shareholder, but on closer inspection it becomes apparent that they have held no influence over the actions of the high risk entity or its behaviour on the ground, so it would not be appropriate to hold the person responsible for the high risk entity's statutory obligations.

Subsection (6) provides the meaning of *financial assurance* for the purpose of the section. It has been included in this section to clarify that it may refer to a environment protection bond under the Act or a security. The amendment has been included for certainty.

New section 192R (Issue of compliance notice to related person of high risk entity issued with notice) allows a compliance notice to be issued to a related person of a high risk entity where that

high risk entity has, within the preceding three years, been issued with a compliance notice and is non-compliant with that notice.

These laws will operate with a degree of retroactiveness in that the compliance notice may have been issued to the high risk entity within the three years just prior to the point of issuing a notice to a related person, and that this three year period may include a period of time before the 'relevant-commencement', as defined previously in new section 192L. This has been included to allow a compliance notice to be issued to a related person from commencement of the amendments or the prescribing of a prescribed Act, in instances where the high risk entity has failed to comply with said compliance notice, even if the said notice was issued prior to the commencement of the laws. However, the notice may only be issued to the related person if the relevant decision-maker was not aware of the high risk entity's non-compliance with the notice. This limits the retroactivity of the provisions so they are not considered unjust in their approach.

New section 192S (Issue of compliance notice to related person of high risk entity not issued with notice) allows the relevant decision-maker, in certain circumstances, to issue a compliance notice to a related person of a high risk entity where that high risk entity has not itself been issued with a compliance notice. Those circumstances are specified in subsection (1) and broadly require:

- the high risk entity to have failed to comply with the obligations contained in a prescribed approval or prescribed duty within the preceding three years and have a history of poor or non-compliance with their environmental management obligations, and
- the relevant decision-maker reasonably considers:
 - there is a risk of material or significant environmental harm at the site due to inappropriate management
 - that the high risk entity is not taking reasonable steps to fulfil their legal obligations
 - the high risk entity is in financial difficulty and likely to become insolvent or there is a real possibility that the costs of remediation and rehabilitation will fall to the Territory.

Subsection (2) clarifies that the powers of subsection (1) can apply even if a compliance notice has not been issued to the high risk entity for the non-compliance.

Subsection (3) also provides a degree of retroactiveness in the operation of the laws by allowing the relevant-decision maker to issue a compliance notice to a related person of a high risk entity from the relevant commencement date of the laws, for non-compliance by the high risk entity that may have occurred within the preceeding three years, including time prior to the commencement date, provided the CEO was not aware of that non-compliance before the commencement date of the laws. The retroactiveness of the provisions enable related persons involved in a high risk entity's behaviour to be issued with a compliance notice from commencement of the laws CoR for non-compliant actions which occurred before the commencement day, provided the actions were illegal with the environmental management laws of the day and are linked to the environmental harm in question. The retroactive nature of the provisions apply to a person's behaviour towards compliance and their duty of care obligations required by the laws of the day. This allows regulators to consider whether certain relationships existed prior to the laws commencing in order to determine whether the new laws can be applied.

Subsection (4) identifies that the section does not prevent the relevant decision-maker from issuing a compliance notice to the high risk entity irrespective of whether a compliance notice has been issued to a related person of the high risk entity. This is included for certainty.

New section 192T (Issue of compliance notice after compliance notice issued to related person of high risk entity) allows the relevant decision-maker to issue a compliance notice to multiple related persons of the high risk entity. Subsection (1) identifies that the relevant decision-maker may issue a compliance notice to a related person of a high risk entity even if a different related person of that same high risk entity has been issued with a compliance notice within the preceding three years in accordance with previous new sections 192R and 192S for a same or related matter. Subsection (2) identifies that the period of three years mentioned in subsection (1) refers to a period of three years that ceases immediately before the issue of the compliance notice under this section. This three period can include a period of time before the 'relevant commencement' of the laws, as defined previously in new section 192L, supporting the retroactive nature of the provisions provided in new sections 192R and 192S.

The section is included for certainty and to ensure that the relevant decision-maker can issue notices to a range of appropriate related entities in order to maximise the opportunity to ensure completion of rehabilitation and remediation requirements.

New section 192U (Issue of compliance notice to previous owner or occupier of land) allows a compliance notice to be issued to a former owner or occupier of land in certain circumstances. This section is designed to address circumstances where land is deliberately transferred in order to avoid environmental responsibilities; for example by transferring land to a phoenix company.

Subsection (1) identifies the circumstances where the relevant decision-maker can issue a compliance notice to a former owner or occupier of land (the original landholder) in accordance with previously identified new sections 192R, 192S or 192T. These circumstances include whether:

- the ownership or occupancy was transferred within the preceding three years
- the former owner or occupier was the owner or occupier when the environmental impact that is the subject of the compliance notice occurred, and
- the former owner or occupier is or was within the preceding three years a related person of the high risk entity.

This section is not relevant should the former owner or occupier of the land be the high risk entity. In such circumstances, the general powers to issue a compliance notice would apply.

Subsection (2) clarifies that if 'the original landholder', being either a former owner or occupier land, is issued with a compliance notice, the CoR laws as provided in this Division apply to this original land holder as if they were a related person of a high risk entity.

Subsection (3) identifies that the compliance notice can be issued to the former land owner or occupier even if it is a body corporate that has been, or is currently being, wound up. This is to ensure that winding up is not used as an avoidance mechanism.

Subsection (4) identifies that a period of 3 years identified in this section refers to a period of time that ceases immediately before the issue of a compliance notice to an original landholder, and that this time may include a period before the 'relevant commencement' of the laws as defined previously in new section 192L. This supports the retroactive nature of the CoR laws, enabling the regulators consideration of persons past behaviour and whether certain relationships existed prior to the laws commencing in order to determine whether the new laws can be applied.

Subsection (5) provides clarity that winding up of a body corporate, as mentioned in subsection (3), includes winding up activities that occur under the *Corporations Act 2001* (Cth) and the CATSI Act accordingly. This has been included for certainty. This subsection does not limit the concept of winding up to that stated in the subsection.

New section 192V (Provisions applying to issue of compliance notice) identifies the provisions that apply, or can be applied, to a compliance notice issued for the purpose of the COR laws.

Subsection (1) identifies that the power contained in a prescribed Act to issue a compliance notice includes a power to issue a compliance notice in accordance with the COR laws as provided in this new Part 9, Division 2A of the Act. This subsection also identifies that any provisions that apply to the issuance of a compliance notice (however described) in a prescribed Act, extend to any compliance notice issued for the purpose of the COR laws. These provisions include:

- the procedures in the prescribed Act associated with issuing the compliance notice
- compliance and enforcement powers provided in the prescribed Act
- the review powers for compliance notices in the prescribed Act.

The effect of subsection (1) is to apply the provisions of the prescribed Act and not the Act to notices issued under the prescribed Act but for the purpose of the COR laws. For example, if a related person of a high risk entity was issued a compliance notice under the *Petroleum Act 1984* for the purposes of the COR laws and wanted to seek a review of that notice, the review provisions in the Petroleum Act (and not those in the Act) would apply. Similarly, if the related person breached the compliance notice, then any enforcement of that breach would be undertaken in accordance with the relevant provisions of the Petroleum Act and not the provisions of the Environment Protection Act.

In contrast, if an environment protection notice under the Act is issued to a related person of a high risk entity for the purposes of the COR laws, then:

- any review of that compliance notice would be in accordance with the review power specified in the Schedule of reviewable decisions and affected persons provided under the Act (being a decision of the CEO to issue a compliance notice under new subsection 176(2) in accordance with the new Part 9, Division 2A COR laws, and
- a breach of that notice would be enforced through section 191 of the Act.

This provides certainty in the manner in which the COR laws are extended under the Act to prescribed Acts.

Subsection (2)(a) identifies that a compliance notice issued for the purpose of the COR laws can include any requirement that can be imposed on an environmental protection notice under Part 9, Division 2 of the Act (these are primarily contained in sections 178 and 179 of the EP Act), or any requirement that can be imposed on a compliance notice issued under a prescribed Act.

Subsection (2)(b) provides that conditions in a compliance notice issued to a related person of a high risk entity may differ from any conditions included in a notice issued to the high risk entity itself. This recognises that the conditions imposed on a high risk entity as the statutory obligation holder may not be appropriate when imposed on a related person of that high risk entity, or vice versa. The subsection is included for certainty.

New section 192W (Joint and several liability for compliance) identifies that where a compliance notice has been issued to multiple persons (two or more), the persons receiving the notice are jointly and severally liable for complying with the notice. This is to prevent those persons issued with the notice from attempting to avoid responsibility by reference to the notice issued to another person.

New section 192X (Enforcement of compliance by high risk entity not affected) identifies that nothing in this new Subdivision providing the COR redirection powers, affects any liability of a high risk entity under this Act or a prescribed Act for failing to comply with a compliance notice, prescribed approval or prescribed environmental duty.

As a consequence, the relevant decision-maker (e.g. CEO, a person authorised by the CEO, or an environmental officer) may continue to take any form of enforcement action against the high risk entity that originally held the legal responsibilities for complying with the Act, a compliance notice, duty or approval. For example, the Chief Executive may prosecute a high risk entity for failing to comply with an environmental approval, while at the same time issuing an environment protection notice to a related person of that high risk entity. This is included for certainty about the effect issuing a compliance notice to a related person through the new COR laws has on the obligations of the original holder of those obligations.

Subdivision 3 Corporations legislation displacement and excluded matter

Subdivision 3 comprises new sections 192Y to 192Z. These sections provide the *Corporations Act 2001* (Cth) displacement and excluded matter provisions for the purposes of the COR laws.

New section 192Y (Compliance notice to be excluded matter) identifies that a compliance notice issued under the new laws, whether as an environment protection notice of prescribed direction, is declared to be an excluded matter for the purposes of section 5F of the *Corporations Act 2001* (Cth). This has the effect of ensuring a compliance notice issued under the COR laws cannot be found to be invalid due to inconsistencies with the *Corporations Act 2001* (Cth).

New section 192Z (Displacement of other laws) provides that new subdivisions 1 and 2 are declared to be displacement provisions for section 5G of *Corporations Act 2001* (Cth). This has the effect of ensuring the COR laws and compliance notices issued under the COR provisions cannot be found to be invalid due to inconsistencies with the *Corporations Act 2001* (Cth).

Clause 9. Section 215 amended (CEO may accept enforceable undertaking)

Section 215 identifies that the CEO may accept an enforceable undertaking given by an environmental approval holder or the proponent of an action or strategic proposal to carry out remediation, rehabilitation or other activities, to rectify environmental harm resulting from a breach of the approval or a contravention of the Act. An enforceable undertaking may be accepted in lieu of, or following, civil or criminal proceedings associated with an alleged breach of the approval or Act.

This amendment identifies that a reference to an 'approval holder' in Part 9, Division 6 (Enforceable undertakings) of the Act includes a related person that has been issued a compliance notice in accordance with the COR laws provided in new Part 9, Division 2A. This ensures that an enforceable undertaking may be given for an alleged breach of the notice.

Clause 10. Section 216 amended (Enforcement orders)

Section 216 is a technical provision that enables the CEO to apply to the court to enforce the undertaking if the person is not complying with it.

The section identifies that the Court may make a range of orders associated with the undertaking, including payment of costs incurred by the CEO in taking action to minimise environmental harm resulting from the contravention and compensation to a person who has suffered loss or damage as a consequence of the contravention.

The court may also revoke the undertaking.

This clause is amending this section to identify that reference to 'approval holder' in the section means 'approval holder or a related person'.

The amendment is included for certainty to ensure the Act's enforcement order provisions also apply to the new COR laws.

Clause 11. Section 217 amended (CEO may do specified acts or things)

This section allows the CEO to take any action that a person has been ordered to take under section 217 if the person does not take the action.

The CEO may only take actions after giving written notice to the proponent or approval holder and providing them with an opportunity to rectify their failure to comply with the order.

The CEO would take these actions where the person failed to comply with the court order within a reasonable period of time and where it was necessary to limit environmental impacts. The clause also gives the CEO the power to recover the costs of taking the action through the court.

The CEO may also authorise another person to take an action on the CEO's behalf.

This clause is amending this section to identify that reference to 'approval holder' in the section means 'approval holder or a related person'.

The amendment is included for certainty to ensure the Act's enforcement order provisions also apply to the new COR laws.

Clause 12. Section 218 amended (Withdrawal or variation of enforceable undertaking by proponent or approval holder)

This section identifies that enforceable undertakings may be withdrawn or varied by a proponent or approval holder with the approval of the CEO.

This clause is amending this section to identify that reference to 'approval holder' in the section means 'approval holder or a related person'.

The amendment is included for certainty to ensure the Act's enforcement order provisions also apply to the new COR laws.

Clause 13. Section 219 amended (Withdrawal of acceptance by CEO of enforceable undertaking)

This section identifies that the CEO may withdraw from an enforceable undertaking if the CEO considers the undertaking is no longer in the interests of the Territory. It identifies processes that the CEO must follow in withdrawing from the undertaking, which includes providing written notice to the proponent or approval holder and an opportunity for them to make representations in relation to the proposed withdrawal.

This clause is amending this section to identify that reference to 'approval holder' in the section means 'approval holder or a related person'.

The amendment is included for certainty to ensure the Act's enforcement order provisions also apply to the new COR laws.

Clause 14. Section 265 amended (Criminal liability of executive officer of body corporate)

Clause 14 amends section 265 of the Act. Section 265 identifies the criminal liability of executive officers of bodies corporate.

The amendment removes the definition of 'executive officer' from this section. It is currently included in section 265 because it is the only reference to 'executive officer' in the Act.

The term 'executive officer' is used multiple times throughout the provisions of the COR laws provided in new Part 9, Division 2A. It is appropriate that a single definition of the term apply across the Act so the definition is now included in section 4 of the Act as per the amendments provided by clause 4 of the Bill.

Clause 15. Schedule amended (Reviewable decisions and affected persons)

Clause 15 amends the Schedule to the Act. The Schedule identifies those persons that can seek merits review of a decision under section 277 of the Act. The Northern Territory Civil and Administrative Tribunal (NTCAT) conducts the merit review.

The amendment ensures that a person issued with an environment protection notice under the COR laws can seek a review of the decision.

Part 3 Amendment of Environment Protection Regulations 2020

Clause 16. Regulations amended

This is a formal clause which provides that amendments are made to the *Environment Protection Regulations 2020*. Its purpose is to clarify what laws are being amended by the following clauses.

Clause 17. Parts 9A and 9B inserted

Clause 17 inserts new Part 9A and Part 9B into the Regulations after regulation 254. Part 9A consists of new regulation 254A, and Part 9B consists of new regulation 254B.

Part 9A Environment protection notices

New Regulation 254A (Information to be provided in notice of entry to land) identifies the information that must be provided for the purposes of those sections that require a notice to be provided (new sections 192B(5) and 192C(4), 192B(3)(b) or (4), or 192C(1) or (3)(b)). The information identified in the regulation is the minimum information that is required to be given and will ensure that land owners, occupiers and the CEO are consistently informed about the people that are accessing properties, when access is occurring, and the type of work that is anticipated to be carried out as part of that access.

Section 192B of the Act provides a power for a person that holds an environment protection notice to enter land to undertake those activities required to comply with the notice. The person proposing to enter the land must give notice to the land owner or occupier.

Section 192C requires the person proposing to enter land under section 192B to give notice of the proposed entry to the CEO.

Sections 192B(5) and 192C(4) identify that the notice to be given to the land owner, occupier or CEO must include the matters 'prescribed by regulation'. Subsections 192B(3)(b) or (4) and 192C(1) or (3)(b) identify when and to whom a person is required to provide written notice.

Part 9B Compliance notices

New regulation 254B (Prescribed enactments for section 192N of Act) prescribes certain Acts for the purposes of section 192N(4)(c) of the Act.

Section 192N identifies matters that the relevant decision-maker is to consider in determining if a person has a 'relevant connection' to a 'high risk entity'. Under section 192N(4)(c) the considerations can include consideration of agreements and transactions, other than certain agreements for access to land. Those land access agreements are the agreements contained in the legislation identified in this new regulation 254B, being:

- the *Petroleum Act 1984*
- the *Native Title Act 1995* (Commonwealth)
- the *Aboriginal Land Rights (Northern Territory) Act 1976* (Commonwealth), and
- the repealed *Petroleum (Prospecting and Mining) Act*

These Acts are prescribed as they contain specific statutory requirements for the owners of the land to grant access to the land. The existence of these types of statutory land access agreements by themselves do not establish an appropriate relationship for the owner of the land to be considered to have a 'relevant connection' to the high risk entity. For a person with one of these agreements to be considered a 'relevant connection', other criteria within section 192N would also need to be met.

Clause 18. Schedule 2 amended (Infringement notice offences and prescribed amounts)

This clause amends Schedule 2 to the Regulations by inserting a reference to the new offence at section 192H(1) to enable an infringement notice to be issued for the offence.

Section 192H establishes an offence for failing to give notice to a land owner or occupier or the CEO of proposed entry onto land in accordance with the powers of entry under new section 192B.

Part 4 Act repealed

Clause 19. Act repealed

This is a formal clause which provides that this Act is repealed on the day after it commences. As this is an amending Bill, once the proposed amendments to the *Environment Protection Act 2019* and *Environment Protection Regulations 2020* have been made by this Bill it no longer has any relevance and can be repealed.