SUPREME COURT OF QUEENSLAND

CITATION:	*Longley & Ors v Chief Executive, Department of Environment and Heritage Protection & Anor; Longley & Ors v Chief Executive, Department of Environment and Heritage Protection* [2018] QCA 32
PARTIES:	**In Appeal No 4657 of 2017:** **STEPHEN GRAHAM LONGLEY** (first appellant) **GRANT DENE SPARKS** (second appellant) **MARTIN FRANCIS FORD** (third appellant) **v** **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND HERITAGE PROTECTION** (first respondent) **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (second respondent) **In Appeal No 6449 of 2017:** **STEPHEN GRAHAM LONGLEY** (appellant) **GRANT DENE SPARKS** (appellant) **MARTIN FRANCIS FORD** (appellant) **v** **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND HERITAGE PROTECTION** (respondent)
FILE NO/S:	Appeal No 4657 of 2017 Appeal No 6449 of 2017 SC No 11363 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 53 (Jackson J)
DELIVERED ON:	9 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	20 September 2017
JUDGES:	Gotterson and McMurdo JJA and Bond J

ORDERS:

In Appeal No 4657 of 2017

1. **Allow the appeal.**
2. **Set aside the order made on 13 April 2017.**
3. **The appellants be directed that they are justified in not causing Linc Energy Limited (in liquidation) to comply with the Environmental Protection Order issued by the respondent Chief Executive on 13 May 2016, insofar as that order required anything to be done or not done at a time after 30 June 2016.**
4. **The parties are to file and serve any written submission as to the costs of the appeal within 10 days of the date of this judgment.**

In Appeal No 6449 of 2017

1. **Allow the appeal.**
2. **Set aside the order made on 31 May 2017, whereby the respondent Chief Executive was to have his costs as costs in the liquidation of Linc Energy Limited (in liquidation).**
3. **The Chief Executive bear his own costs of the proceeding before the primary judge.**

CATCHWORDS:

CORPORATIONS – WINDING UP – 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 resource tenements in respect of that land – where the company held an environmental authority issued under the *Environmental Protection Act* 1994 (Qld) in relation to each of the resource tenements – where the first respondent issued an environmental protection order to the company prior to the appointment of the appellants as liquidators of the company – where the appellant liquidators gave notice disclaiming the land, the resource tenements and the associated environmental authorities under s 568 of the *Corporations Act* 2001 (Cth) – whether the company's liability to comply with the environmental protection order is a liability in respect of property which the liquidators disclaimed by the disclaimer notice – whether the disclaimer terminated the company's liability to comply with the environmental protection order

CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – INCONSISTENCY OF LAWS (CONSTITUTION, S 109) – GENERALLY – LEGISLATIVE STATEMENT OF EFFECT OF INCONSISTENCY – where the appellants submit that the company's liability to comply with an environmental protection order arising under the *Environmental Protection*

Act 1994 (Qld) were terminated by a disclaimer under s 568 of the *Corporations Act* 2001 (Cth) – where any inconsistency between the operation of the relevant sections of the *Corporations Act* 2001 (Cth) and the *Environmental Protection Act* 1994 (Qld) would be resolved in favour of the relevant sections of the *Corporations Act* 2001 (Cth) by s 109 of the *Constitution* – whether s 5G of the *Corporations Act* 2001 (Cth) operates to avoid any inconsistency between the operation of the relevant sections of the *Corporations Act* 2001 (Cth) and the *Environmental Protection Act* 1994 (Qld)

CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – APPLICATIONS TO COURT FOR DIRECTIONS OR ADVICE – where the appellant liquidators applied to the court for directions pursuant to s 511 of the *Corporations Act* 2001 (Cth) – whether the appellant liquidators should be directed that they are justified in not causing the company to comply with an environmental protection order – whether the first respondent's costs of the proceeding before the primary judge should be treated as costs in the liquidation of the company

Constitution of Australia, s 109
Corporations Act 2001 (Cth), s 5(3), 5G, s 9, s 511, s 556, s 559, s 568, s 568C, s 568D
Environmental Protection Act 1994 (Qld), s 201, s 215(2)(c), s 257, s 258, s 262, s 266, s 274, s 278, s 293, s 308, s 319, s 358 , s 360, s 361, s 362, s 363, s 363AB, s 363AC, s 493, s 505(1), s 575
Mineral Resources Act 1989 (Qld), s 181, s 228, s 391A
Petroleum and Gas (Production and Safety) Act 2004 (Qld), s 446

BE Australia WD Pty Ltd (subject to a deed of company arrangement) & Ors v Sutton (2011) 82 NSWLR 336; [2011] NSWCA 414, considered
Bell Group NV (in liq) v Western Australia (2016) 90 ALJR 655; [2016] HCA 21, considered
Farrow Finance Company Ltd (in liq) v ANZ Executors & Trustee Co Ltd (1997) 23 ACSR 521, not followed
Global Television Pty Ltd v Sportsvision Australia Pty Ltd (In liq) (2000) 35 ACSR 484; [2000] NSWSC 960, cited
HIH Casualty and General Insurance Ltd (in liq) v Building Insurers' Guarantee Corporation (2003) 202 ALR 610; [2003] NSWSC 1083, approved
Re Crust "N" Crumb Bakers (Wholesale) Pty Ltd [1992] 2 Qd R 76, cited
Re Middle Harbour Investments Ltd (in liq) [1977] 2 NSWLR 652, applied
Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers appointed) (In liq) (2013) 251 CLR 592; [2013] HCA 51, applied

Workers' Compensation Board (Qld) v Technical Products Pty Ltd (1988) 165 CLR 642; [1988] HCA 49, cited

COUNSEL:

In Appeal No 4657 of 2017:

B Walker SC, with C A Wilkins, for the appellants
B O'Donnell QC, with E Hoiberg, for the first respondent
P Dunning QC, with F Nagorcka, for the second respondent

In Appeal No 6449 of 2017:

B Walker SC, with C A Wilkins, for the appellants
B O'Donnell QC, with E Hoiberg, for the respondent

SOLICITORS:

In Appeal No 4657 of 2017:

Johnson Winter & Slattery for the appellants
Herbert Smith Freehills for the first respondent
Crown Law for the second respondent

In Appeal No 6449 of 2017:

Johnson Winter & Slattery for the appellants
Herbert Smith Freehills for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by McMurdo JA and with the reasons given by his Honour.

[2] **McMURDO JA:** The appellants are the liquidators of Linc Energy Limited (in liquidation) ("Linc"). For some years, Linc operated a pilot underground coal gasification project on land which it owned near Chinchilla. The project was operated under the authority of a mineral development licence ("MDL") granted under the *Mineral Resources Act* 1989 (Qld) ("the MRA"), a petroleum facility licence ("PFL") granted under the *Petroleum and Gas (Production and Safety) Act* 2004 (Qld) and environmental authorities issued under the *Environmental Protection Act* 1994 (Qld) ("the EPA").

[3] On 13 May 2016, which was shortly prior to the appointment of the appellants as liquidators, an environmental protection order ("EPO") was directed to Linc by the first respondent, the Chief Executive of the Department of Environment and Heritage Protection ("Chief Executive"), pursuant to s 358 of the EPA. It was issued upon the stated ground that it was to have Linc comply with what is called, in the EPA, the general environmental duty. That is a duty, imposed by s 319 of the EPA, which is owed by a person in carrying out any activity that causes or is likely to cause environmental harm. The duty is to take all reasonable and practicable measures to prevent or minimise the harm from the carrying out of that activity.

[4] By the EPO, Linc was required to undertake certain work on its site, in the nature of the sampling and monitoring of gas and groundwater and to submit reports of that work to the Chief Executive. Linc was required not to do certain things on the site, such as releasing hazardous contaminants without the authorisation of the Chief Executive. And Linc was ordered to retain and maintain any infrastructure on the site, which was necessary to ensure compliance with the requirements of the EPO and which might be required for the ongoing management of environmental risks and site rehabilitation.

[5] On 30 June 2016, the appellants gave notice disclaiming the land, the MDL, the PFL and the environmental authorities which it held for the site, pursuant to s 568(1) of the *Corporations Act* 2001 (Cth) ("the CA"). In consequence, the appellants claimed, Linc became relieved from the requirements of the EPO, because they were "liabilities … in respect of the disclaimer property", in the terms of s 568D of the CA.

[6] The Chief Executive said otherwise, contending that Linc remained bound to comply with the EPO, notwithstanding the disclaimer, and that the appellants were bound by the EPA to cause Linc to do so.

[7] In the context of that dispute, the appellants applied under s 511 of the CA,[1] seeking a judicial direction that they would be justified in not causing Linc to comply with the EPO or any further environmental protection order which might be issued. The Chief Executive was the respondent to that application. The Attorney-General for the State of Queensland intervened and made submissions in support of the Chief Executive's position. The Commonwealth of Australia, as a creditor of Linc, was granted leave to be heard,[2] and made written submissions which supported the appellants' case.

[8] In the hearing before the primary judge, the Chief Executive and the Attorney-General accepted that the appellants had validly disclaimed the land, including any plant and equipment on the land, and Linc's MDL. (The PFL was irrelevant because it had expired prior to any relevant event.) They disputed that the environmental authority, which had issued in relation to Linc's MDL, was property which was capable of being disclaimed under s 568 of the CA.

[9] By their admissions that the appellants had validly disclaimed the property constituted by the land, the plant and equipment on the land and the MDL, they accepted that, at least from that point in time, Linc would not be carrying out any activity on the land. Indeed, upon receipt of the notice of disclaimer, an officer of the Department of Environment and Heritage Protection wrote to the appellants to say that "the State will now move to secure the site and to take control of it", and that any ownership of removable plant and equipment on the site had vested in the State.[3] The letter further advised the appellants that no one was to enter the site without the State's prior written consent.

[10] Nevertheless, the Chief Executive and the Attorney-General argued, and the primary judge decided, that Linc remained obliged to meet the requirements of the EPO, and that the appellants were obliged to cause Linc to do so. The primary judge held that there was a direct inconsistency between the operation of ss 568 and 568D of the CA and the operation of ss 319 and 358 of the EPA, and it was to be resolved by giving effect to the EPA provisions. The State law would have been invalid to the extent of the inconsistency,[4] except that, the primary judge held, s 5G of the CA rolled back the operation of its provisions, so that there was no inconsistency. His Honour concluded that Linc remained obliged to meet the requirements of the EPO, and the appellants were to cause Linc to do so.[5]

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1 Section 511 was repealed by s 170 of Schedule 2 of the *Insolvency Law Reform Act* 2016 (Cth) as and from 1 September 2017. However, by s 1617 of Schedule 2 of that Act, the repeal did not affect these proceedings and this appeal, and s 511 continues to apply to this case, because the proceedings were commenced before that date.

2 Under r 2.13(1)(a) of Schedule 1A of the *Uniform Civil Procedure Rules* 1999 (Qld) ("Rules for proceedings under *Corporations Act* or *ASIC Act*").

3 Which the letter said resulted from s 228 of the MRA.

4 Under s 109 of the *Constitution*.

5 *Linc Energy Ltd (in liq): Longley & Ors v Chief Executive Dept of Environment & Heritage Protection* [2017] QSC 53 at [182] ("Primary Reasons").

[11] I have reached a different conclusion. In my view, once the land, the plant and equipment and the MDL had been disclaimed, there was no cause, and indeed no entitlement, for Linc to carry out any activity on the site, so that there was no occasion for it to perform the general environmental duty. Linc was no longer obliged to perform the requirements of the EPO, because they were liabilities in respect of disclaimed property and thereby terminated upon the disclaimer, according to s 568D. Some of the effects of a valid disclaimer could not be severed from the others, so that s 5G cannot be applied to roll back the effect of the disclaimer in terminating the liabilities under the EPO. And in any case, upon its proper construction, s 5G did not affect the operation and constitutional paramountcy of the disclaimer provisions.

The EPA

[12] Although Linc's environmental authority was issued under the EPA, the necessity for it came from its MDL and from s 391A of the MRA, which provides that a decision to grant, vary or renew a mining tenement, or to recommend that a mining tenement be granted, varied or renewed, is not to occur unless there has been issued an environmental authority under the EPA, "for all activities authorised, or to be authorised, under the mining tenement".

[13] Similarly, for its PFL, Linc required an environmental authority under the EPA, according to the relevantly identical terms of s 446 of the *Petroleum and Gas (Production and Safety) Act* 2004 (Qld).

[14] Linc thereby held two environmental authorities, one for its activities under its MDL and one for its activities under PFL. By the time of the events in question, only the former was relevant.

[15] The relevant environmental authority[6] was originally issued in January 2011 and later amended. It was issued for an activity described by its reference to two mining development licences (including that relevant to the present case) and further described as follows:

> "Mining activity ... investigating the potential development of a mineral resource by large bulk sampling or constructing an exploratory shaft, adit or open pit[.]"

[16] The authority was subject to extensive conditions, one of which required the development and implementation of an environmental management system "to control and manage environmental risks and impacts related to the activities authorised on this authority." Another was that the holder of the environmental authority had to submit to the "administering authority" (the Chief Executive) a copy of a decommissioning plan for each underground coal gasification generator prior to its being decommissioned. The plan was to detail a proposed procedure to extinguish each generator and a program of monitoring the groundwater content.

[17] Although the EPA makes no specific provision for the transfer of an environmental authority issued for a "resource activity",[7] it contemplates that if the holder of the resource tenure changes, the holder of the environmental authority will also change.[8]

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6 numbered MIN100657607.

7 Defined by s 107(c) of the EPA to include any "mining activity", a term defined by s 110 to be an "activity that is an authorised activity for a mining tenement under the [MRA]." A mineral development licence is a "mining tenement" as that term is defined in Schedule 2 of the MRA.

8 As the Chief Executive submitted to the primary judge, referring to s 215(2)(c), s 293 and Schedule 4 of the EPA, by which the "holder" of an environmental authority for a resource activity is defined to be the holder of the relevant tenure.

Further, an environmental authority has a value as is indicated by the liability of its holder to a substantial annual fee.[9]

[18] The connection between a mining tenement and its associated environmental authority is illustrated by several provisions of the EPA. Section 278 empowered the Chief Executive to cancel or suspend an environmental authority in certain circumstances, one being that where the authority was issued for a "resource activity", and a relevant tenure for the authority had not been granted under "resource legislation".[10] Division 1 of Ch 5 Pt 10 of the EPA provides for the surrender of an environmental authority. Section 257 permits the holder of an authority to apply for its surrender in certain circumstances, including where the holder is to surrender also the mining tenure to which the environmental authority relates. By s 258, the Chief Executive may require the holder of an environmental authority to make a surrender application in circumstances which include the cancellation of a relevant mining tenure for the authority or a surrender of part of the area of a relevant tenure.[11] Section 262 requires a surrender application to be accompanied by a final rehabilitation report, if the environmental authority contains conditions about rehabilitation. The Chief Executive must decide to approve or refuse a surrender application.[12] By s 274, if the Chief Executive decides to refuse a surrender application for an environmental authority for a resource activity, the Chief Executive may give the applicant a written direction, described as a "rehabilitation direction", to carry out further rehabilitation within a certain period.

[19] Notwithstanding that connection between a mining tenement and its associated environmental authority, s 201 of the EPA provides that an environmental authority continues in force although the relevant resource tenure expires or is cancelled. In that circumstance, the ongoing effect of an environmental authority could be significant where the holder is called upon to perform conditions of the authority. As I have noted, there was an issue before the primary judge (which he found unnecessary to decide) as to whether the environmental authority was itself property which was capable of being disclaimed by the applicants under s 568 of the CA. But that issue was relevant only to whether the obligations under the EPO were liabilities in respect of the disclaimed property. There was and is no issue in this case about Linc's present obligation to perform any condition of the environmental authority (if it has not been disclaimed).

[20] Section 358 of the EPA empowers the Chief Executive, as the "administering authority" to issue an EPO. Section 358 relevantly provides:

> "**358 When order may be issued**
>
> 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
>
> (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

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9 EPA s 308.

10 Defined by Schedule 4 of the EPA to include the MRA.

11 EPA s 258(a) and (e).

12 EPA s 266.

(d) to secure compliance by the person with—

(i) the general environmental duty; or

...

(iii) a condition of an environmental authority; or

...

(ix) a rehabilitation direction ..."

[21] The term "rehabilitation direction" in s 358(d)(ix) of the EPA refers to a direction which may be given by the Chief Executive in the context of a proposed surrender of an environmental authority for a resource activity under s 274.[13] That is not relevant in the present case, there having been no application for a surrender of the environmental authority and the EPO having been issued for the (different) purpose which is described in s 358(d)(i).

[22] Section 360 of the EPA relevantly provides:

"**360 Form and content of order**

(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

...

(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."

[23] The EPO which is the subject of this case was issued upon the stated ground that it was an order to secure compliance by Linc with the so called general environmental duty.[14] It was not expressed, even in the alternative, to be an order to secure compliance with a condition of Linc's environmental authority.[15]

[24] Section 319 of the EPA defines and imposes the general environmental duty, as follows:

"**319 General environmental duty**

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13 See above at [18].
14 EPA s 358(d)(i).
15 EPA s 358(d)(iii).

(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

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

[25] Importantly, it is in the carrying out of an "activity" that the duty imposed by s 319 is owed. The text of s 319 does not suggest that this is also a duty to remedy a harm which has been caused by carrying out an activity, at least where the relevant person is no longer carrying out any activity to which the duty could attach.

[26] By s 361 of the EPA, a recipient of an EPO who contravenes the order commits an offence. If the recipient wilfully contravenes the order, there is a distinct offence committed under s 361(1), for which there is a higher potential penalty, including a term of imprisonment. By s 505(1), a proceeding may be brought in the Planning and Environment Court[16] for an order to remedy or restrain an offence, or a threatened or anticipated offence, against the EPA.

[27] Section 493 of the EPA makes the "executive officers" of a corporation accountable for the corporation's compliance with the EPA. By s 493(1), the executive officers must ensure that the corporation complies with the EPA, and by s 493(2), if a corporation commits an offence against a provision of the EPA, each of the executive officers also commits an offence, namely, the offence of failing to ensure the corporation's compliance. By s 493(4), it is a defence for an executive officer to prove that the officer took all reasonable steps to ensure the corporation complied with the EPA or that the officer was not in a position to influence the conduct of the corporation in relation to the offence. The term "executive officer" is defined to mean, in the case of a corporation such as Linc, a "member of the governing body of the corporation" or a person who is "concerned with, or takes part in, the corporation's management."[17] The primary judge held that the appellants, as liquidators, fell within that second category.[18] In that way, he effectively concluded that they were to take all reasonable steps to have Linc comply with this EPO.[19]

[28] The EPA does not provide that an EPO prevents its recipient from disposing of the place or business to which the order relates. Instead, the EPA requires the recipient

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16 Defined as the "Court" by Schedule 4 of the EPA.
17 EPA Schedule 4.
18 Primary Reasons at [155]-[173].
19 Ibid.

to give a notice of the existence of the EPO to the proposed buyer, and to notify the administering authority of the agreement for sale. It provides, by s 362, as follows:

> "**362 Notice of disposal by recipient**
>
> (1) This section applies if the recipient of an environmental protection order proposes to dispose of the place or business to which the order relates to someone else (the ***buyer***).
>
> (2) Before agreeing to dispose of the place or business, the recipient must give written notice to the buyer of the existence of the order.
>
> Maximum penalty—50 penalty units.
>
> (3) If the recipient does not comply with subsection (2), the buyer may rescind the agreement by written notice given to the recipient before the completion of the agreement or possession under the agreement, whichever is the earlier.
>
> (4) On rescission of the agreement under subsection (3)—
>
> (a) a person who was paid amounts by the buyer under the agreement must refund the amounts to the buyer; and
>
> (b) the buyer must return to the recipient any documents about the disposal (other than the buyer's copy of the agreement).
>
> (5) Subsections (3) and (4) have effect despite anything to the contrary in the agreement.
>
> (6) Within 10 business days after agreeing to dispose of the place or business, the recipient must give written notice of the disposal to the administering authority.
>
> Maximum penalty for subsection (6)—50 penalty units."

[29] Further, an EPO does not require its recipient to continue to carry out the activity to which it relates. Instead, s 363 of the EPA provides:

> "**363 Notice of ceasing to carry out activity**
>
> Within 10 business days after ceasing to carry out the activity to which an environmental protection order relates, the recipient must give written notice of the ceasing to carry out the activity to the administering authority.
>
> Maximum penalty—50 penalty units."

[30] Division 2 of Ch 7 Pt 5 of the EPA empowers the administering authority to issue an EPO to a "related person" as that term is defined by s 363AB. In broad terms, that is an entity or person who was in a position to influence a company's conduct to ensure that the company complied with its obligations under the EPA and make adequate provision to fund the rehabilitation and restoration of land where environmental harm has resulted from an activity carried out by that company. By s 363AC, when issuing an EPO to a company, or if an EPO issued to a company is in force, the administering authority may also issue an EPO to a related person of the company. The evident purpose of these provisions, as stated in the explanatory notes to the Bill which

introduced it,[20] was to "facilitate enhanced environmental protection for sites operated by companies in financial difficulty [so as to] avoid the State bearing the costs for managing and rehabilitating sites in financial difficulty."[21] These provisions were not engaged in the present case: the only EPO was that issued to Linc as the company which was carrying out the relevant activity.

The EPO in this case

[31] When this EPO was issued in May 2016, there was another EPO which had been issued to Linc in respect of this site in November 2012. That EPO was also challenged at the outset of this proceeding, until the Department advised that it was "finalised and no longer in effect."[22]

[32] The notice of the (relevant) EPO began with this statement:

> "The EPO is issued in respect to *the activities* of Linc Energy Ltd at 357 Kummerows Road, Chinchilla, Queensland on land described as Lot 40 on DY 85 … on mineral development licence MDL309 and petroleum facility licence PFL5 ("the site")." (emphasis added)

The notice then stated:

> "This EPO is issued on the following grounds:
>
> - to secure compliance by Linc Energy Ltd ("Linc") with the general environmental duty".[23]

[33] That was the only stated ground for the EPO, and no other ground has since been advanced by the Chief Executive.

[34] The notice then set out, as the facts and circumstances said to form the basis for that ground, the following:

> "On 25 February 2016, Linc submitted to the Department its annual return for environmental authority ("EA") EPPR00514913 ("MDL EA"). That annual return included Linc's "Chinchilla UCG Demonstration Plant – Current Status, Decommissioning and Rehabilitation Plan" dated 8 February 2016 ("Rehabilitation Plan").
>
> Linc's Rehabilitation Plan identifies several relevant matters, including Linc's intention to adopt a different strategy for rehabilitating the underground environment than was originally intended and committed to in applying for and amending its MDL EA.
>
> Linc originally intended to operate its gasifiers … so that the shutting down of those gasifiers would remove the contaminants from the gasifiers and their immediate surrounds. That approach relied on contaminants created by the UCG process being kept within the immediate vicinity of the gasifier. Linc's Rehabilitation Plan now proposes to use a combination of venting and monitored natural attenuation to rehabilitate the subsurface."

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20 *Environmental Protection (Chain of Responsibility) Amendment Bill* 2016.

21 *Environmental Protection (Chain of Responsibility) Amendment Bill* 2016, Explanatory Memorandum at 1.

22 By letter to the applicants dated 15 December 2016.

23 Which the notice identified by reference to s 319 of the EPA.

[35] The EPO notice then described ways in which contaminants were said to have escaped from gasifiers, resulting in a contamination of groundwater and soil, and expressed the Department's concern that Linc's rehabilitation plan was inadequate. This section of the notice concluded as follows:

> "Given the above, the department considers that:
>
> (a) the existing monitoring infrastructure used for determining compliance with the MDL EA is insufficient to ensure that environmental harm is prevented and/or minimised; and
>
> (a) existing sampling information and additional regular monitoring is required to provide the necessary information to take action to prevent and/or minimise any environmental harm that may result from contaminants being outside, or being able to migrate away from, Linc's gasifiers."

[36] The notice described what was said to be a need for existing infrastructure on the site to be retained and maintained by Linc, in order to facilitate the further rehabilitation of the site. It said:

> "There remains the possibility that contaminants will need to be removed from the subsurface through groundwater extraction and, possibly, through a pump and treat program. Linc has previously contemplated the need for this as a final step in rehabilitation even where operational controls had not been compromised. As such, it is an imperative that existing infrastructure that is necessary to achieve these forms of treatment are adequately kept and maintained on the site. This includes keeping and maintaining the infrastructure put in place by Linc to manage odour impacts from its site.
>
> Further, there remains the possibility that gas phase contaminants will need to be removed from the subsurface through pipework and dealt with via flaring under the EA conditions. Linc has contemplated the need for this in its current Rehabilitation Plan. As such, it is an imperative that this existing infrastructure is adequately kept and maintained on the site."

[37] There followed an extensive section of the notice under the heading "Requirements", which included the following in respect of the infrastructure:

> "Linc must not, without the administering authority's prior written approval, materially alter or dispose of any infrastructure on the site that is necessary to ensure compliance with the requirements of this EPO and that may be required for the ongoing management of environmental risks and/or site rehabilitation.
>
> All infrastructure that is necessary to ensure compliance with the requirements of this EPO and that may be required for the ongoing management of environmental risks and/or site rehabilitation must be maintained in a functional and operable manner."

[38] The next requirement of the EPO was the provision of what was described as "Audit Report 1". This report, which was required within 20 business days of the issue of the EPO, was to identify relevant bores, wells and piezometers on the site and to

describe their condition. Within 10 business days after Linc submitted Audit Report 1, it was to have a suitably qualified person monitor the groundwater quality and levels at all bores and wells on the site as well as the pressures of all bores, wells and piezometers. The EPO required that this monitoring be repeated at six monthly intervals until the administering authority said otherwise. The results of all monitoring were to be reported by Linc to the administering authority.

[39] The EPO required another report, again within 20 business days of its issue, which it described as "Audit Report 2". This report was to identify the results of all data collection and testing which had been conducted by Linc on the site from 1 July 2015.

[40] The EPO then listed a number of other requirements, each of which described what was to be done (or in one case not done) by Linc on the site from then on. For example, there was a requirement in these terms:

> "All material produced to surface via process infrastructure must be treated through a gas / water separation process to ensure the liquid phase material is separated from the gas phase material prior to treatment, disposal or storage."

[41] After setting out the requirements of the EPO, the notice informed Linc of the requirements of ss 362 and 363 of the EPA:

> "If you propose to dispose of the place or business to which the EPO relates, you must advise the buyer of the existence of this EPO.
>
> If you cease to carry out the activity to which this EPO relates, you must give written notice of ceasing to carry out the activity to the department within 10 days of ceasing the activity."

[42] Save perhaps for the requirements for Audit Report 2, each requirement of the EPO was one which required Linc to be on the site. The EPO was premised upon Linc carrying on a relevant activity on the site, as permitted by its MDL and the environmental authority which had issued for the exercise of Linc's rights under the MDL. Unambiguously, the EPO was issued for the stated purpose of securing compliance with the general environmental duty, which was a duty to be discharged in the course of carrying out an activity. The EPO did not require Linc to continue to carry on any relevant activity. Linc's authority to do so derived from the MDL and the environmental authority associated with it.

Disclaimer of property by a liquidator

[43] A liquidator is able to disclaim a property in the circumstances and with the effect set out in Division 7A of Ch 5 Pt 5.6 of the CA (ss 568-568F).

[44] Section 568(1) provides:

> "**568 Disclaimer by liquidator; application to Court by party to contract**
>
> (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."

[45] The term "property" is defined in s 9 of the CA as "any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action." In *Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers appointed) (in liq)*,[24] French CJ, Hayne and Kiefel JJ said that the word "property" in this context cannot be given a narrow meaning, but "should be understood as referring to the company's possession of any of a wide variety of legal rights against others in respect of some tangible or intangible object of property."

[46] Section 568(1A) of the CA provides that a liquidator cannot disclaim a contract (other than an unprofitable contract or a lease of land) except with the leave of the Court. Where the court's leave is not required, the Court may set aside a disclaimer of property upon the application of a person who has, or claims to have, an interest in that property.[25] Under that provision the Court may by order set aside the disclaimer and if it does so, may make such further order as it thinks appropriate.[26] By s 568C, a disclaimer takes effect if, and only if, an application to set aside the disclaimer is unsuccessful or no such application is made.

[47] It may be noted that the Court has no power to set aside the disclaimer in part, so as to order that the disclaimer have some effect but not all of the effect for which the CA provides.

[48] Section 568D of the CA is as follows:

"**568D Effect of disclaimer**

(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

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24 (2013) 251 CLR 592 at 603 [36]; [2013] HCA 51 ("*Willmott Growers*").

25 CA s 568B.

26 CA s 568B(2).

> 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."

[49] It is common ground that the EPO imposed requirements which could be described as liabilities of Linc. But there is a substantial issue as to whether they were "liabilities … in respect of [any of] the disclaimer property."

[50] A disclaimer of property under these provisions operates only prospectively in terminating the company's rights and obligations in relation to the property disclaimed.[27]

[51] As I have discussed, the EPO required some things to be done within 20 business days of the date of its issue (13 May 2016), so that the date for the fulfilment of those requirements had arrived when the applicants disclaimed any relevant property on 30 June 2016. At the hearing before the primary judge, there were submissions for the Chief Executive and the Attorney-General that those requirements could not fall within the operation of s 568D, because the disclaimer could operate only prospectively. The Chief Executive's submission in that respect was repeated in the outline of his argument in this Court,[28] to which there was no submission in reply.

[52] In *Willmott Growers*, Keane J observed that in consequence of s 568D(1), "the disclaimer of a company's rights automatically operates to release the company from its ongoing correlative liabilities".[29] The purpose of a liquidator's power of disclaimer was described in *Re Middle Harbour Investments Ltd (in liq)*,[30] by Bowen CJ in Eq, as being to enable a liquidator "to rid … the company … of burdensome financial obligations which might otherwise continue to the detriment of those interested in the administration; it is given to enable … the liquidator to advance the prompt, orderly and beneficial administration … of the winding up of its affairs."[31] Similarly, in *Global Television Pty Ltd v Sportsvision Australia Pty Ltd (In liq)*,[32] Santow J said:

> "… the disclaimer provisions are intended to enable insolvency administrators to relieve themselves of ongoing liabilities which so prolong the administration and delay the dividend …"[33]

[53] Consistently with that being the purpose of the power of disclaimer, a liquidator cannot confine the effect of a disclaimer. Once there is a valid exercise of the power in s 568 the disclaimer has all of the consequences which are prescribed by s 568D.

[54] The liabilities which are terminated by a disclaimer are those which are "in respect of" the disclaimer property. The words "in respect of" can have a wide meaning, but

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27 *Willmott Growers* at 613 [71] per Gageler J.

28 First respondent's outline of argument at [27].

29 *Willmott Growers* at 625 [118]. See also 613 [70] per Gageler J.

30 [1977] 2 NSWLR 652 at 657.

31 Cited by Keane J in *Willmott Growers* at 626 [124].

32 (2000) 35 ACSR 484; [2000] NSWSC 960 at [65].

33 Cited in *Willmott Growers* by Keane J at 626 [124] and by Spigelman CJ (Sheller JA and Brownie AJA agreeing) in *Sims and Anor v TXU Electricity Ltd* (2005) 53 ACSR 295 at 299-300 [18]; [2005] NSWCA 12.

this depends upon the context.[34] In *Willmott Growers*, Keane J described the necessary connection between the disclaimed property and the liability as follows:[35]

> "[T]he policy of prompt realisation of the company's assets is consistent with the view that what may be disclaimed is property of the company, whether real or personal, the continued enjoyment of which depends on meeting ongoing obligations."

The disclaimer in this case

[55] The applicants' notice of disclaimer, as lodged with the Australian Securities and Investment Commission,[36] listed property which included the Chinchilla land, the MDL, the environmental authority associated with the MDL, and items of plant and equipment such as tanks, pumps and water sampling equipment. According to the notice, this was all property of which it was reasonable to expect that the costs, charges and expenses that would be incurred in realising the property would exceed the proceeds of its realisation.[37] The factual basis for that statement is not in dispute and was established by an affidavit from one of the appellants (Mr Sparks), who said that the advice to the appellants was that the land would have a value in the range of $950,000 to $1,200,000, if the land required no remediation. But he said that the appellants formed the view that the cost to remediate the site would be "significantly greater" than its value. Indeed there was evidence from Mr Broadfoot, an officer of the Department, that estimates provided to the Department for "different remediation options" ranged from $13 million to $78 million in cost and from eight to 30 years as the time required for the exercise.

[56] Immediately upon receipt of the notice of disclaimer,[38] Mr Goldsworthy, an officer of the Department, wrote to the applicants as follows:

> "I refer to my telephone discussion with Stephen Edds today in which I confirmed receipt of the two Notices of Disclaimer of Onerous Property dated 30 June 2016. I note that your covering letter of that date says that those notices have been lodged with ASIC.
>
> As discussed, as those notices have taken effect, the State will now move to secure the site and to take control of it. I am advised that ownership of the machinery, equipment and removable improvements (plant) on the area of the Mineral Development Licence that has been disclaimed now vests in the State by reason of s 228 of the Mineral Resources Act 1989 (Qld).
>
> If there is any need for you, your servants or anyone purported to be authorised by you, to enter the site, it will be necessary for you first to obtain written consent to that occurring."

[57] Section 228(3) of the MRA provides that upon termination of a mineral development licence, "the ownership of machinery, equipment and removable improvements" on the area of that mineral development licence vests in the State.

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34 *Workers' Compensation Board (Qld) v Technical Products Pty Ltd* (1988) 165 CLR 642 at 653-654 per Deane, Dawson and Toohey JJ; [1988] HCA 49.

35 *Willmott Growers* at 627 [125].

36 Pursuant to CA s 568A(1)(a).

37 CA s 568(1)(e).

38 There were two notices of disclaimer: one addressed to the responsible Minister and another to an officer of the Department, relevantly in the same terms.

[58] There has been no departure from that position on the part of the Department. As I will discuss, at least until the hearing in this Court, the Department agreed that the Chinchilla land, the MDL and the plant on the site had been disclaimed and that Linc's property in the land and the plant had vested in the State. Both before the primary judge and in this Court, that was and is the position of the Attorney-General.

Inconsistent laws

[59] If the requirements of the EPO constituted liabilities in respect of property which has been disclaimed, there is a tension between the operation of ss 319 and 358 of the EPA and the operation of ss 568 and 568D of the CA. It is said by the respondents that the former would require Linc (and its liquidators) to comply with the EPO. But according to the latter, Linc's obligations (and thereby those of the appellants) would have terminated. This is an apparent direct inconsistency between the State law and the Commonwealth law which, subject to what might be the effect ss 5G(8) and 5G(11) of the CA, would be resolved in favour of the Commonwealth law by s 109 of the *Constitution*. The primary judge held that s 5G(11) applied, with the result that the operation of ss 568 and 568D was rolled back to enable the EPA provisions to operate, and Linc and its liquidators were thereby bound to comply with the EPO.

[60] The background to Pt 1.1A of Ch 1 of the CA, of which s 5G is part , is the agreement of the States for the referral of powers to the Commonwealth, in order to facilitate the enactment of the CA in 2001. The purpose of Pt 1.1A has been described as the intended preservation, against what would otherwise be the prevailing force of the CA as a law of the Commonwealth, of not only special State legislation governing bodies such as co-operatives and incorporated associations, but also then existing State legislation which a State had expressed to prevail over its own *Corporations Law*.[39] Professor Saunders has summarised the provisions of Pt 1.1A as follows:[40]

> "One of the main perceived disadvantages of enabling the Commonwealth itself to enact the *Corporations Law* was the potential effect of s 109 of the *Constitution* on other State legislation in the event of conflict or perceived conflict. Arguably, the problem was exacerbated in relation to the *Corporations Law* because of its range and the extent to which it has become intertwined over a period of 150 years with the rest of the corpus of State legislation and administration. Potential for conflict between the *Corporations Law* and other State laws existed also under the previous regime. The nature of actual inconsistency was more limited and its consequences less severe, however. In the absence of overriding Commonwealth law, inconsistency was handled by interpretation provisions in the State application laws and understandings in the Corporations Agreement.
>
> The danger that Commonwealth legislation might inadvertently cover an unsought State field is relatively easily overcome through a statement of intention. Section 5E of the *Corporations Law* accordingly denies any intention "to exclude or limit the concurrent operation of any law of a State". Direct inconsistency is another matter, which is tackled through a suite of provisions. Section 5F of the *Corporations Law* enables the States to exclude its operation in relation to a matter, in

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39 Ford, Austin and Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, LexisNexis (2007), [3.101].

40 "A New Direction for Intergovernmental Arrangements", (2001) 12 *Public Law Review* 274 at 284.

> whole or in part, subject to Commonwealth counter- exclusion by regulation. Section 5G provides for the roll-back of the *Corporations Law* in certain circumstances, including those in which State legislation would previously have operated despite the *Corporations Law*. Section 5I enables the roll-back to be extended by Commonwealth regulation to other cases of potential inconsistency." (footnotes omitted)

[61] Section 5G(1) of the CA provides that the section has effect despite anything else in the Corporations legislation.[41] By s 5G(2), it is provided that the section does not apply to a provision of a law of a State or Territory that is capable of concurrent operation with the Corporations legislation.

[62] Section 5G(3) defines the circumstances in which there will be an interaction between a provision of the law of the State or Territory, described as "the State provision", and a provision of the Corporations legislation, described as "the Commonwealth provision", to which s 5G applies.

[63] The engagement of s 5G in this case required the satisfaction of the conditions set out against Item 1 in the table within s 5G(3). One of those conditions required the relevant provisions of the EPA to have operated, immediately before the commencement of the CA, despite the provisions of the *Corporations Law* of Queensland, which corresponded with the presently relevant provisions of the CA. As the primary judge held, the satisfaction of that condition was governed by s 9(1) of the *Corporations (Ancillary Provisions) Act* 2001 (Qld).[42] Section 9(1) had the result that immediately prior to the enactment of the CA, the relevant provisions of the EPA had operated despite the predecessors of the relevant provisions of the CA which were then in the *Corporations Law* of Queensland. The necessary preconditions to the application of s 5G being satisfied, the question then was whether any of the ss 5G(5) to 5G(11) applied to the present case.

[64] More particularly, the question for the primary judge was whether the operation of the relevant provisions of the CA were not to operate by reason of s 5G(11), as follows:

> "(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.
>
> Note 1: A provision of the State or Territory law is not covered by this subsection if one of the earlier subsections in this section applies to the provision: if one of those subsections applies there would be no potential inconsistency to be dealt with by this subsection.
>
> Note 2: The operation of the provision of the State or Territory law will be supported by section 5E to the extent to which it can operate concurrently with the provision of the Corporations legislation."

[65] The respondents now argue also that the operation of s 568 and 568D was affected by s 5G(8) which is as follows:

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41 A term which is defined by s 9 of the CA to include the CA.

42 Primary Reasons at [140].

"(8) The provisions of Chapter 5 of this Act do not apply to a scheme of arrangement, receivership, winding up or other external administration of a company to the extent to which the scheme, receivership, winding up or administration is carried out in accordance with a provision of a law of a State or Territory."

The issues for the primary judge

[66] There was one issue as to what constituted the property which had been disclaimed. The appellants argued that the disclaimed property included the environmental authorities, most relevantly the authority which was associated with Linc's MDL, which was strongly disputed by the Chief Executive and the Attorney-General.

[67] But there was no issue as to the disclaimer of the Chinchilla land, the relevant plant and equipment and the MDL. It was common ground that these were all items of property for the purposes of s 568 of the CA and that the factual circumstances had permitted their disclaimer. However the argument in this court for the Chief Executive seemed to depart from that common ground, so that it is necessary to set out what was said to the primary judge on the subject.

[68] In the Chief Executive's statement of contentions, filed ahead of the hearing, this was said:

"9. On 30 June 2016, the applicants:

(a) *disclaimed* the Chinchilla Site and a number of related assets, including MDL 309 and PFL 5; and

(b) *purported to disclaim* the [environmental authorities].

10. The respondent contends:

(a) the [environmental authorities] are not "property of the company" within s 568(1) of the CA and are therefore incapable of being disclaimed; and

(b) as a consequence, the [environmental authorities] remain in effect." (emphasis added)

In the Chief Executive's written submissions,[43] there was the same distinction made between the land and the MDL on the one hand and the environmental authorities on the other:

"1. …

(c) Linc's statutory obligation to comply with the EPO issued by the Respondent to Linc on 13 May 2016 … is not terminated under s.568D of the *Corporations Act* by the applicants' disclaimer of the freehold land, the mineral development licence (**MDL 309**) or (if capable of disclaimer) the [environmental authorities]".

In the same submissions, this was said:

"47. The Respondent accepts that the Chinchilla land and MDL309 were each "property" for the purposes of s.568. The Respondent

43 Dated 20 February 2017.

does not accept that PFL5 was property for the purpose of s.568. That is because that licence expired on 31 December 2014, 18 months before the disclaimer, such that there was no "property" left to disclaim at 30 June 2016.

48. In a nutshell, the Respondent's submission is that:

(a) liability on Linc under s.361 to comply with the 2016 EPO (and upon the liquidators pursuant to s.493 to ensure compliance) is not a liability "in respect of" the Chinchilla land, nor is it a liability in respect of MDL309, within the meaning of s.568D. If the [environmental authorities] are "property" for the purposes of s.568 (contrary to the Respondent's argument), then the liability to comply with the 2016 EPO is not a liability "in respect of" the [environmental authorities];

(b) alternatively, if it is held that liability to comply with the 2016 EPO would otherwise amount to a liability "in respect of" the Chinchilla land, MDL309 or the [environmental authorities], then the power in s.568D to terminate liability to comply with the 2016 EPO is inconsistent with ss.319, 361 and 493 of the EP Act and, pursuant to s.5G(11) of the Corporations Act, s.568D does not apply to the extent of that inconsistency. Consequently, the Applicants are unable to terminate liability to comply with the 2016 EPO by disclaimer under s.568D … ."

The same document contained these further submissions for the Chief Executive:

"65. The Commonwealth submits that if the 2016 EPO were not terminated, this would have the effect that the company's rights of ownership in respect of the land and MDL309 have ceased, but Linc would still be obliged to ensure that activities were carried out on the site.

66. However, such a result is not unusual. As mentioned above, the legislation allows for mining activities to be carried out on land owned by a third party. The fact that Linc no longer owns the freehold land can therefore hardly be grounds for objection."

There followed these passages, suggesting that provisions of the EPA were inconsistent with s 568D of the CA, but not with s 568:

"73. The Respondent relies on the analysis in the Attorney-General's written submissions at paras 45 to 88. If those submissions are correct, the legal consequence is that *any* power to disclaim under s.568D which would terminate Linc's liability to comply with the 2016 EPO creates an inconsistency between s.568D, and ss.319, 361 and 493 of the EP Act. That inconsistency is to be resolved in favour of the EP Act, pursuant to s.5G(11) of the Corporations Act. Consequently, the disclaimer of property under s.568 does not have the effect of terminating Linc's liability to comply with the 2016 EPO."

[69] Similarly, the case for the Attorney-General was (and remains) that there was a valid disclaimer of property constituted by the land and the MDL but that the effect of the disclaimer was qualified by the operation of the EPA. It was said that Linc's rights and interests in the disclaimed property had been terminated, but without a termination of Linc's obligations under the EPO, either because they were not liabilities in respect of the disclaimed property or because s 568D was not to operate to the extent that it was inconsistent with the relevant provisions of the EPA.

[70] The relevant parts of the written submissions for the Attorney-General before the primary judge were as follows:

> "2. …
>
> (a) The applicants' disclaimer of the Chinchilla site, the mineral development licence ('MDL') and the petroleum facility licence ('PFL') did not terminate Linc's obligations to comply with the environmental protection order ('EPO'), as such freestanding statutory obligations in the EPO directed personally to Linc were not a liability in respect of property, rather Linc's property ownership was only incidental in the relevant sense;
>
> …
>
> 13. Therefore, the relevant enquiry involves firstly, identifying the disclaimer property (here being, the Chinchilla Site and the MDL) and then asking whether the liabilities under the EPO were "in respect" of that property[.]
>
> …
>
> 80. To the extent that any direct inconsistency would otherwise arise between ss 319, 361 and 493 of the *EP Act* and ss 568 and 568D of the CA, ss 568 and 568D do not operate in Queensland to the extent necessary to ensure that the inconsistency does not arise. Sections 568 and 568D of the CA therefore do not operate in Queensland to the extent that they would release Linc from its obligations under s 319 of the *EP Act* to comply with the general environmental duty or its obligation under s 361 of the *EP Act* to comply with the EPOs in Queensland. They also do not operate in Queensland to release the appellants from their duty under s 493 of the *EP Act* to ensure that Linc does so comply."

[71] There was an issue before the primary judge about the operation of s 493 of the EPA, namely whether it resulted in the appellants being required to ensure that Linc complied with the EPO.

[72] There was also an argument by the appellants to this effect: by s 500 of the CA, any sequestration against the property of the company was void and no action or rather civil proceeding was to be proceeded with or commenced against the company except by leave of the court. The applicants suggested that the EPO was a civil proceeding such that the respondent required leave to proceed from the Court before taking any step to enforce the EPO. As the primary judge noted, there was as yet no such proceeding before him.[44]

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44 Primary Reasons at [31].

The primary reasons

[73] The primary judge held that any inconsistency between the provisions of the EPO and the disclaimer provisions of the CA was to be resolved in favour of the former, by the operation of s 5G(11). He further held that s 493 of the EPA applied to the applicants as liquidators of the company which had received the EPO. He concluded that the applicants would not be justified in causing the company not to comply with the EPO and directed the applicants accordingly.

[74] The primary judge discussed, but found it unnecessary to decide, whether the environmental authority was property of Linc which was capable of being disclaimed. He made no specific finding that the land and the mineral development licence had been disclaimed.

[75] The judge discussed whether the EPO was invalid, in that it was a purported exercise of the power to secure compliance with the general environmental duty under s 319 although it was, as he described it, "based on past activities that had ceased", and he doubted that an EPO could issue upon that basis.[45] The judge noted that the applicants had contended, but that the respondents had not conceded, that Linc had ceased activities on the site before the EPO was issued. He said that a proceeding of this kind was not the appropriate vehicle to resolve a disputed question of fact.[46] In any event, he observed, the applicants had not submitted that the EPO was invalid as a purported exercise of a power to secure compliance with the general environmental duty in relation to activities which had ceased.[47]

[76] The judge noted an argument for the applicants that the EPO had issued, at least in part, to secure compliance with the conditions of Linc's environmental authority, under s 358(d)(iii) of the EPA.[48] Again, the judge found it unnecessary to determine that question.

[77] The judge found it unnecessary to consider whether each of the requirements of the EPO imposed a liability in respect of disclaimed property. Instead, he focussed upon the requirements of the EPO in respect of infrastructure on the site. He referred to the requirement that Linc should not, without the respondent's prior written approval, materially alter or dispose of any infrastructure on the site that was necessary to ensure compliance with the requirements of the EPO and the ongoing management of environmental risks and/or site rehabilitation. He noted the further requirement to maintain such infrastructure in a "functional and operable manner".[49] Observing that there was no argument that the site infrastructure was not "property", the judge referred to the notice of disclaimer as including items such as the tanks, pumps and water samplers to which I have referred. He inferred that at least "some of the site infrastructure consists of the fixtures and other items of property stated to be disclaimed in the notice of disclaimer."[50]

[78] That finding then provided the basis for the judge's consideration of the question of inconsistency. The judge said:

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45 Ibid at [64].
46 Ibid at [66].
47 Ibid at [65].
48 Ibid at [67].
49 Ibid at [69]-[70].
50 Ibid at [73].

> "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 s 505 of the EPA to prevent or remedy a breach of s 361.
>
> ...
>
> 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."

The judge then added:

> "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 [environmental authorities]."

[79] The primary judge then considered the operation of s 5G of the CA. He first discussed the necessary preconditions for the application of that provision, according to the conditions which were set out in Item 1 of s 5G(3). As already discussed, there is no issue in this appeal about the satisfaction of those conditions. And there was and is no issue about the inconsistency of the disclaimer provisions of the CA and the relevant provisions of the EPO, if that inconsistency could not be avoided by s 5G.[51]

[80] The primary judge then considered the application of s 5G(11) and the argument for the liquidators that it did not apply, which relied upon the judgment of Barrett J in *HIH Casualty and General Insurance Ltd (in liq) v Building Insurers' Guarantee Corporation* ("*HIH*").[52]

[81] In *HIH*, Barrett J had to consider the interaction between, on the one hand, certain State and Territory statutes which sought to enable statutory authorities to obtain the benefit of reinsurance held by HIH, and on the other, ss 555, 556 and 562A of the CA by which the benefit of those reinsurance contracts would be applied for the benefit of the body of creditors generally. Barrett J held that s 5G applied, so that those so called "cut-through provisions" were not affected by those provisions of the CA.[53] But that was through the application of ss 5G(4) and 5G(8). Barrett J considered that s 5G(11) could not be applied because of the interpretation which he placed upon the expression in that provision, which is not found in s 5G(4) or (8), namely that the Commonwealth provision would not operate "in a State or Territory".[54] For the same reason, Barrett J held that s 5F, which similarly provided for a disapplication of

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51 Ibid at [131].
52 (2003) 202 ALR 610; [2003] NSWSC 1083.
53 Ibid at 655 [124]-[125].
54 Ibid at 646-647 [94].

a Commonwealth law "in the State or Territory", could not be employed in the disapplication of ss 555, 556 and 562A.[55] In essence, this was because those provisions of the CA were incapable of having, at the same time, an operation in one State or Territory but not in another. The core of the reasoning in *HIH* was in this passage:[56]

> "[88] The concept is thus a dual concept of restriction of territorial application and restriction of application to subject matter. The effect of both s 5F(2) and s 5F(4) is to single out a particular "matter", being the "matter" identified by the state or territory enactment, and to cause the territorial operation of the Corporations Act to be modified and restricted so that such application as it would otherwise have had "in" the relevant state or territory "to" (or "in relation to") the particular "matter" is negated. As a corollary, such application as the Corporations Act has to or in relation to the particular matter that cannot be classified as application "in" the state or territory is not negated.
>
> [89] Such a concept is no doubt meaningful in relation to Corporations Act provisions dealing with matters having clear territorial attributes. Section 911A, for example, says that a person who carries on a financial services business "in this jurisdiction" must hold a licence. Section 5F would undoubtedly accommodate a provision of, say, New South Wales law enabling a particular resident of New South Wales to carry on a financial services business in New South Wales even though unlicensed.
>
> [90] But the circumstances currently under discussion involve no such activity having or capable of having a territorial quality linked to a state or territory. The question at issue concerns the operation of Corporations Act provisions directing the manner of application of the property of a company in the course of insolvent winding up and the order in which debts and claims are to be paid in such a winding up. By virtue of s 1378, the registration of the particular company under Pt 2A.2 of the Corporations Law of a state or territory existing immediately before commencement of the Corporations Act on 15 July 2001 became, on that day, the equivalent of registration under Pt 2A.2 of the Corporations Act, with the result that the company was, at that point, taken to be "incorporated in this jurisdiction" (see s 119A(1)), although "registered", in the s 119A(2) sense, in the state or territory under whose Corporations Law it was registered immediately before 15 July 2001 (see s 1378(4)). The concept of incorporation in "this jurisdiction" (being, according to the s 9 definition, the geographical area consisting of all the states, the Australian Capital Territory and the Northern Territory) can only mean that the company came to have on and after 15 July 2001, by force of the Commonwealth Act (which has the territorial coverage specified in its s 5 and is binding, by cl V of the covering clauses of the Constitution, on the courts, judges and people of every part of the Commonwealth), one

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55 Ibid at 646 [92].

56 Ibid at 645-646.

> indivisible existence as a body corporate throughout "this jurisdiction" without reference to any political or geographical subdivision of it. The concept is similar to the concept of intangible property created by Commonwealth law which is seen as locally situated in Australia at large and cannot be recognised as locally situated in any particular state or territory: *Re Usines de Melle and Firmin Boinot's Patent* (1954) 91 CLR 42 at 49. The subsidiary notion of "registration" in s 119A(2) of the Corporations Act does not detract from this. Its purpose seems to be to supply a secondary territorial attribute by reference to which particular state or territory legislation may operate by specific reference: see Note 3 to s 119A."

[91] 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."

[82] In the present case, the appellants argued that the disclaimer provisions of the CA were relevantly indistinguishable from those provisions of the CA in question in *HIH*, in that they could not have a non-application in one State but not another. Without considering whether the disclaimer provisions could have that differential operation between the States, the primary judge rejected the appellants' argument by refusing to follow the reasoning in *HIH*.[57] I will discuss the judge's reasons for doing so later in this judgment.

[83] The primary judge concluded as follows:

> "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.

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57 Primary Reasons at [153].

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."

The appellants' arguments in this court

[84] The appellants' argument emphasises that each of the respondents conceded, before the primary judge, that the appellants had validly disclaimed property constituted by the land, the plant and equipment and the MDL. They say that the respondent should not now be permitted to depart from that position.

[85] The appellants argue that the requirements of the EPO, and any liability for not complying with those requirements, is a liability in respect of disclaimed property, the termination of which was the automatic effect of the disclaimer according to s 568D of the CA. It is submitted that the operation of s 568D cannot be divorced from the operation of s 568, such that there could be a disclaimer of property with a termination of the company's rights and interests in, but not all of its liabilities in respect of, the disclaimer property. They argue there is no occasion to consider the operation of s 5G of the CA, because the legal consequence of the disclaimer, the validity of which was unchallenged, is that s 568D operates according to its terms.

[86] Should it be necessary to consider s 5G, then the appellants argue, in reliance upon the reasoning in *HIH*, that the disclaimer provisions of the CA cannot be disapplied in Queensland without those provisions still operating outside Queensland upon this winding up inconsistently with the EPA and thereby invalidating the EPA to the extent of the inconsistency under s 109 of the *Constitution*.

[87] In reply to the respondents' argument for the application of s 5G(8) (which was not argued before the primary judge), the appellants say that in this case, in the terms of s 5G(8), "the … winding up is [not being] carried out in accordance with a provision of a law of a State …". The relevant State law is the EPA, which, it is argued, is not a law itself providing for the winding up of Linc and therefore is not a law under which the winding up is being carried out.

The respondents' arguments in this court

[88] Save in one respect there is no material difference between the respective arguments for the respondents.

[89] The respondents argue that the EPA imposed no liability "in respect of" any disclaimed property, because the liabilities created by the EPO, and any consequential liability from its contravention, do not have the requisite connection with any disclaimed property. An EPO may be issued to a person who is not the owner of property, from which it is argued that an EPO is a stand alone statutory obligation which persists beyond any disclaimer in the present case.

[90] They argue that if the EPO did create liabilities in respect of the disclaimed property, then by the operation of either s 5G(8) or, as the primary judge held, the operation of s 5G(11), any potential inconsistency between the disclaimer provisions and those of the EPA is avoided.

[91] It is submitted that in the application of s 5G(11), the reasoning of Barrett J in *HIH* should be rejected. It is said that the disclaimer provisions are capable of having a differential operation in Queensland, and that their operation should be rolled back to allow the EPA provisions to operate according to their terms.

[92] The one respect in which the argument for the Chief Executive tended to differ from that for the Attorney-General was that in this Court, there was an attempt by the former to depart from the admission made before the primary judge that the appellants had validly disclaimed the land, the plant and equipment and the MDL.

Was there a disclaimer of property?

[93] I have set out earlier extracts from the written submissions for the Chief Executive and the Attorney-General, in which there were unambiguous admissions that the Chinchilla land and the MDL had been disclaimed under s 568.[58] Their arguments were about the effect of that disclaimer. In their reliance upon s 5G of the CA, they did not go as far as saying that the inconsistency between the disclaimer provisions and the EPA provisions required the disapplication of ss 568 and 568D in their entirety. Rather, they limited that disapplication to an effect of the disclaimer which would be otherwise inconsistent with the obligations imposed or which might arise under the EPA.

[94] Those admissions were consistent with the State's conduct outside of the litigation. I have set out already the letter from Mr Goldsworthy, who was the Project Director, Petroleum Gas and Compliance within the Department of Environment and Heritage Protection, dated 1 July 2016.[59] In his affidavit, Mr Goldsworthy said that since that date, the State of Queensland, through his Department, "has been in control of the Chinchilla Site". He added that he was unaware of any request by the appellants for access to that site.

[95] Given the content of Mr Goldsworthy's letter and affidavit, the conduct of the State since 1 July 2016 and the terms of the contentions and submissions before the primary judge, the stance on behalf of the Chief Executive in this Court is remarkable. It was sought to be justified by arguments that what had been said in the statement of contentions for the Chief Executive was "no more than a statement of historical fact that on 30 June 2016 the Liquidators disclaimed the Chinchilla Land, MDL309 and PFL5" and that "[a]t the point at which the Statement of Contention was filed, the Liquidators had not put in issue the disclaimer of [that property], nor was the potential

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58 See above at [68]-[70].

59 See above at [56].

validity of the disclaimer in issue."[60] However it was for the respondents to the proceeding to put in issue the disclaimer, which it is clear, they did not do. It is further submitted that the Chief Executive's written submissions went no further than accepting that the Chinchilla Land and MDL309 were each "property" for the purposes of s 568". That characterisation of the submissions cannot be accepted.

[96] The Chief Executive ought not to be permitted to depart from that position, by seeking to mis-describe the way in which it had conducted its case. There is no argument that the admission that this property had been disclaimed was made in error and that, in the interests of justice, the Chief Executive should be permitted to resist this appeal upon a different basis, particularly when the submissions for the Attorney-General have not departed from the same admissions. Nor is it explained how the present position of the Chief Executive on this question might be reconciled with the State's conduct since the purported disclaimer.

[97] The admission that this property had been disclaimed was an admission of a proposition that involved a mixture of fact and law. But as the appellants argue, it was an admission of a formal kind, made in a proceeding without pleadings but in a document (the Statement of Contentions) which, like a pleading, was to define the issues for the court's determination.

[98] The primary judge made no specific finding about whether the land and the MDL had been disclaimed. That is criticised in the appellants' argument, but it is said for the Chief Executive that the primary judge was not asked to make such a finding. That suggestion is incorrect: in the appellants' submissions to the primary judge, there were arguments to the effect that the EPO was a liability in respect of the land, or alternatively a liability in respect of the MDL, arguments which required the primary judge to accept the premise that the land or the MDL had been disclaimed. In fairness to the primary judge, it should be said that the absence of an express finding was probably because the disclaimer of that property was admitted.

[99] In addition, there is the finding by the primary judge that relevant plant and equipment was disclaimed property.[61] The judge inferred that some of the items of plant and equipment, or as he described it, the "site infrastructure", consisted of fixtures to the Chinchilla land.[62] Again, it appears that the judge proceeded upon the premise that the land had been disclaimed, without making an express finding to that effect.

[100] The judge found it unnecessary to decide whether, as the appellants had argued, the environmental authority associated with the MDL was property which had been disclaimed. The appellants' argument had emphasised the transferability of an environmental authority and the fact that it was subject to a substantial annual fee, which demonstrated that it had a substantial value. It also had a value because it affected the value of the associated MDL. The Chief Executive's argument was that the environmental authority was not "property" because it conferred no "property rights", but instead "a freedom from liability (for carrying out otherwise prohibited activity)". It was said to be akin to a mere personal licence.[63] Its argument distinguished the environmental authorities from the MDL and the PFL, which were said to be authorisations to carry out the specified mining or petroleum activity, whereas the environmental authorities gave no right to Linc to do anything.[64]

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60 First respondent's outline of argument at [10].
61 Primary Reasons at [80].
62 Ibid at [73].
63 Ibid at [45].
64 Chief Executive's outline of submissions to the primary judge at [11].

[101] Like the primary judge, I find it unnecessary to determine whether the environmental authority was property capable of being disclaimed. As I am about to discuss, the liabilities under the EPO were liabilities in respect of disclaimed property, irrespective of whether that included the environmental authority.

Liabilities in respect of disclaimed property

[102] The respondents argue that the EPO imposed liabilities, the existence of which was independent of any property which was held by Linc. An EPO must specify the person to whom it is issued, but there is no requirement for an EPO to specify any relevant property.[65] In turn, as the submissions for the Attorney-General point out, it is an offence for the "recipient" of an EPO to contravene it, irrespective of whether that person or entity owns or occupies any land. As I have discussed, the EPO did not affect Linc's right to deal with the land,[66] a proposition endorsed in the submissions for the Attorney-General and which is said to show the independence of the EPO from any interest in property. An EPO does not run with land and it is not recorded on a register of title.

[103] It must be accepted that, according to the relevant provisions of the EPA, the requirements of an EPO will not have the requisite connection with property, such that its requirements would be liabilities in respect of property under s 568D, *in every case*. The present question, however, is whether the requirements of this EPO imposed liabilities in respect of disclaimed property.

[104] This EPO imposed requirements for the stated purpose of securing compliance with Linc's general environmental duty under s 319. The EPO was expressly issued with respect to the activities of Linc on this site under its MDL (and PFL). By the disclaimer of the land and the MDL, Linc's authority and capacity to engage in those activities was terminated. Section 181 of the MRA required Linc, whilst it was the holder of the MDL, to carry out or cause to be carried out such activities as were specified in that licence. By s 181(4)(a)(iii), as the holder of the MDL, Linc was able to carry out (or cause to be carried out) activity in the nature of remediating the site. Quite apart from its ownership of the land, Linc as the holder of the MDL was authorised to enter the area of the MDL for any purpose permitted or required under its licence.[67] Therefore a disclaimer of the land and the MDL not only put paid to Linc's rights to enter the land, but also to its rights and obligations to carry out the activity on the land which would have required the discharge of the general environmental duty.

[105] These were the consequences of the disclaimer of the land and the MDL, quite apart from any consideration of the disclaimer of property constituted by the environmental authority. It could not be suggested that Linc could carry on the relevant activity, absent the land and the MDL, but under the environmental authority alone. As already noted, the argument for the Chief Executive is that an environmental authority is something of a misdescription, because it confers no authority or "right" upon its holder, but only an exemption from a statutory prohibition against carrying out an environmentally relevant activity without it. That submission acknowledges that if the environmental authority was not disclaimed, of itself it could not have provided the authority for Linc to carry on the relevant activity.

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65 EPA s 360(1).
66 EPA s 362.
67 MRA s 181(4)(b).

[106] Once the land and MDL had been disclaimed, there was no activity which could be carried out by Linc to which the general environmental duty could attach, and for which this EPO could have operated in the pursuit of its stated purpose. The connection between the disclaimed property and the liabilities under the EPO is thereby clear and immediate: the liabilities under the EPO were premised upon Linc's carrying out activity which it could not and would not carry out, once the land and the MDL had been disclaimed.

[107] For the Attorney-General, it was suggested that the disclaimer of the land and the MDL need not have been an insurmountable difficulty for compliance with the EPO. It is conceded by the Attorney-General that "as the land, MDL309 and PFL5 have been disclaimed, the applicants would need some right to enter the land in order to comply with the EPO".[68] But it is suggested that s 575 of the EPA could be invoked, which allows a person to apply to the Magistrates Court for an order to enter land to conduct work under an "environmental requirement", a term which includes an environmental authority.[69] The submission adds that: "however, in this case, where the land has been disclaimed and has reverted to the State as a result of the disclaimer, this is unlikely to be necessary" and that "some other mechanism, such as a permit to occupy under the *Land Act* 1994 (Qld), could be utilised to authorise access to the land for rehabilitation purposes."[70] Several things must be said about those submissions. As for s 575, what was required here was work under an EPO, which is not an "environmental requirement" as defined, for which a Magistrates Court might make an order permitting the entry of land. Next, the availability of access to the site would not, of itself, authorise or oblige Linc to carry out the activity to which the duty attached and the EPO related. As I have discussed,[71] an EPO does not require its recipient to continue to carry out, or to resume the carrying out of an activity to which it relates. Subject to the conditions of s 362 the recipient of an EPO may dispose of the place or business to which the order relates or, as s 363 illustrates, cease to carry out the activity to which the EPO relates.

[108] It is unnecessary for the appellants to demonstrate that the requirements of the EPO were liabilities which would have encumbered the land, so that they would have passed to any transferee of the land. The MDL permitted and required activity on this site and, as the respondents agree, constituted property of the company in the relevant sense.

[109] Linc's continued enjoyment of the disclaimed property depended upon meeting the ongoing obligations[72] under the EPO. Once the effect of the loss of the land and the MDL upon Linc's activity on the site is considered, then having regard to the purpose and terms of this EPO, there is a connection by which they are liabilities in respect of the disclaimed property in the terms of s 568D. That connection is starkly illustrated by the requirements of the EPO that Linc retain and maintain infrastructure (some of which, the judge inferred, were fixtures). Performance of that requirement is now impossible if, as the State has admitted and alleged in correspondence, the property has already passed to the State.

[110] There is a qualification to be added to that conclusion. As I have discussed, the EPO required some things to be done by Linc within a period or periods which must have

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68 Second respondent's outline of argument at n56.
69 EPA Schedule 4.
70 Second respondent's outline of argument at n56.
71 See above at [29].
72 To adopt the words of Keane J in *Willmott Growers* at 627 [125].

expired before the disclaimer on 30 June 2016. Because the disclaimer could operate only prospectively, it may not have affected the responsibility of Linc for non-compliance of those particular requirements. If the appellants are to be directed that they need not cause, or attempt to cause, Linc to comply with the EPO, that advice could be confined to such things as the EPO would have required of Linc after 30 June 2016.[73]

Section 5G

[111] If, as I have concluded, the requirements of the EPO were liabilities in respect of property which was disclaimed, the appellants say that there is no further question to be determined, because the disclaimer of the property necessarily involved the termination of those liabilities. It is said, in effect, that there cannot be disclaimers of varying effects: once there is a disclaimer, that is a step which has the effects prescribed by s 568D, and the effect on Linc's rights and interests in the property cannot be divorced from the effect on liabilities in respect of the property.

[112] That submission has force. The disclaimer provisions do not recognise some more limited type of disclaimer, in which some, but not all of those consequences prescribed by s 568D would result from the exercise of the power. The purpose of the power is to facilitate the orderly winding up of a company by enabling a liquidator to rid the company of burdensome financial obligations which might otherwise continue to the detriment of those interested in the administration.[74] But in the submissions for the Attorney-General (and for both respondents before the primary judge), it is contended that s 5G of the CA effects a disapplication of s 568D to an extent, namely the extent necessary to preserve a company's liabilities in respect of disclaimer property which are imposed under a law of the State of a kind to which s 5G applies. Under this argument, Linc would have no right or interest in the disclaimer property, but would remain liable to meet in some way the requirements of the EPO. In my view, that argument cannot be accepted.

[113] Section 5G operates where there would be a direct inconsistency, according to s 109 of the *Constitution*, between a provision of the Corporations legislation and a provision of a State law of a kind to which s 5G is expressed to apply. In such cases, and where the interaction between the provision of the CA and the State provision is not governed by earlier sub-sections of s 5G, s 5G(11) rolls back the operation of the CA in order to avoid that inconsistency. However s 5G(11) should not be construed and applied to produce an operation of the CA which the Commonwealth Parliament could not have intended. It could not have been intended that by a disclaimer of property, a liquidator could cause a company to lose all of its rights and interests in or in respect of the property, but remain burdened by a liability in respect of it. That would be an absurd operation of a law which has a long recognised purpose of enabling the company to rid itself of burdensome obligations. To put the matter another way, as a matter of construction, s 5G cannot displace the effect of s 568D on some or all of a company's liabilities but not upon the other effects of a disclaimer. Consequently, the appellants are correct in submitting that s 5G(11) could be applied in this case only by impugning the disclaimer itself.[75]

[114] In my view, the primary judge erred in not recognising the effect of the respondents' admissions and in reasoning from the premise of that which was admitted. Had that

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73 Being the effective date of the disclaimer according to s 568C(3)(b) of the CA.

74 *Re Middle Harbour Investments Ltd (in liq)* [1977] 2 NSWLR 652 at 657.

75 cf *Bell Group NV (in liq) v Western Australia* [2016] HCA 21 per French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ at [52] and [70] and per Gageler J at [77], each citing *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 122 per Dixon J; [1948] HCA 13.

been done, the only real question would have been whether the requirements of the EPO imposed liabilities in respect of the disclaimer property. As that question should have been answered in the appellants' favour, the primary judge ought to have concluded that those liabilities had been terminated.

[115] It follows that I would accept the appellants' primary argument for the disposition of this appeal. Under that argument there is no cause to consider the operation of s 5G, because the acceptance by the respondents of the disclaimer of the land and the MDL is effectively an acceptance that the disclaimer terminated the liabilities under the EPO. But in case it is incorrect to hold the respondents to their admissions of a valid disclaimer, the potential operation of s 5G should be considered.

[116] In this Court, the appellants accept that the relevant provisions of the EPA were each a "pre-commencement" (commenced) provision as defined in s 5G(12). They also concede that the conditions relevant to Item 1 in the table in s 5G(3) are met.

[117] The respondents now rely upon both ss 5G(8) and 5G(11). I have earlier set out the text of each provision. Where the circumstances engage it, each provision results in a disapplication of a provision or provisions of a Commonwealth law, in order to avoid an inconsistency in which the Commonwealth law would have prevailed under s 109 of the *Constitution*. But there are important differences between these provisions.

[118] The first is that s 5G(11) limits the disapplication of the Commonwealth law to the State or Territory whose law is in question, whereas there is no such limitation on the disapplication of the Commonwealth provision under s 5G(8). Under s 5G(8), the Commonwealth provision is disapplied across the jurisdiction to which Corporations legislation extends.[76] The second difference is that s 5G(8) deals with a specific subject matter, namely schemes of arrangement, receiverships, windings up or other external administrations, which, subject to the operation of s 5G(8), are the subject of Chapter 5 of the CA. On the other hand, s 5G(11) refers generally to "a provision of the Corporations legislation".

[119] The judgment of Barrett J in *HIH* well explains the difficulties in the proposition that the provisions of Chapter 5 dealing with the winding up of a corporation could be disapplied but only within one State.[77] I have set out earlier the passages from that judgment which explain the difficulty in the application of ss 555 and 556 of the CA in one part of "this jurisdiction", but not in others. As Barrett J there said, the operation of those provisions are incapable of having some territorial quality linked to a State or Territory.[78] Barrett J was there considering ss 5F(2) and 5F(4), under which there can be a similar disapplication of provisions of the Corporations legislation "in the State or Territory". But this analysis was also applied by him to the interpretation of s 5G(11).[79]

[120] If relevant provisions of the CA are disapplied in a State, but continue to have operation in the balance of "this jurisdiction", there would remain at least a potential for the inconsistent operation of laws in which the Commonwealth law would prevail by the State law being rendered invalid under s 109 of the *Constitution*. As is submitted for the appellants, s 5G(11) says that the relevant Commonwealth provision is not to operate "in a State", which is a different thing to "in or out of a State". Thus in *HIH*, because

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76 Described as "this jurisdiction" and defined by s 5(2) and s 9 of the CA to include each State, the Australian Capital Territory and the Northern Territory.

77 *HIH* at 645-646 [88]-[91]. See above at [81].

78 *HIH* at 645 [90].

79 Ibid at 647 [94].

the provisions of ss 555 and 556[80] were to be applied outside a relevant State, they would still have an operation on that winding up.

[121] After quoting relevant passages from *HIH*, the primary judge in this case rejected that reasoning by saying only this:

> "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.
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> 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.
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> 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.
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> 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."

[122] The primary judge said that there was not textual support for this limitation upon the operation of s 5G(11). But, with respect, there is a textual basis in the expression "in a State or Territory". That expression is susceptible to several meanings, but on any view, it is a deliberate limitation upon the disapplication of the relevant Commonwealth provision. In my respectful opinion, the reasoning of the primary judge does not appear to attribute any effect to those words.

[123] I am also unable to agree with what the primary judge said at [153]. In my respectful view, that reasoning does not address the fundamental problem which was identified in *HIH*, namely the difficulty in disapplying the effect of the priorities provisions of the CA by having them disapplied in only one State or Territory.

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80 And, in that case, s 562A of the CA.

[124] For the Attorney-General, it is argued that the words "in a State ..." do not refer to a geographical area, but rather to the ambit of a State's law making power. As I have said, these words have more than one possible meaning, and in my view, there is much to be said for reading them as identifying the body of laws which are to apply in a State. In other words, where s 5G(11) applies, it results in the Commonwealth provision not operating as part of the law of (say) Queensland. Nevertheless, there remains the difficulty which is revealed by the reasoning in *HIH*. As Barrett J explained, where the Commonwealth provision cannot have a differential operation in a certain State or Territory, the only effective way to avoid invalidity under s 109 would be to roll back the operation of the Commonwealth provision across the whole of the jurisdiction to which the CA applies. That is the means which is employed by s 5G(8).

[125] For these reasons, the essence of Barrett J's analysis is, in my respectful view, correct. The next question is whether the particular Commonwealth and State laws in question here might allow for the operation of s 5G(11). For the respondents, it is submitted that s 5G(11) could still be applied, because ss 568 and 568D are capable of having a limited application which is confined to Queensland. It is argued that what is in question in the present case is the operation of the disclaimer provisions upon certain property within Queensland, namely real property in Queensland and a MDL issued over that land. It is said that s 5G(11) could disapply ss 568 and 568D in Queensland, by disapplying those provisions to property which is in Queensland.

[126] That argument cannot be accepted. If the liabilities constituted by the requirements of the EPO are not terminated, they would have to be discharged if an offence against s 361(2) of the EPA is to be avoided. And the liquidators would be bound by s 493(1) to ensure that Linc complied with the EPO. Section 493(4)(a) provides that there is a defence for an executive officer to prove that the officer took all reasonable steps to ensure the corporation complied with the provision. But it is far from clear that this defence would avail a liquidator who was unable to have the company comply with the EPA because he had applied what would have been the necessary funds instead to the payment of debts and claims according to the priorities prescribed by ss 556(1) and 559 of the CA. In any case, so far as *Linc's* obligation is concerned, there is no arguable qualification to the operation of s 361(2) of the EPA in the event that there are insufficient funds to comply with the requirements of the EPO.[81] For the Chief Executive, it is said that the expenditure to ensure compliance with the EPO would be in the nature of "expenses ... properly incurred" by the liquidators within s 556(1)(dd) of the CA and thereby would rank ahead of expenses of a category lower in the hierarchy prescribed by s 556(1) as well as unsecured debts and claims.[82] That submission does not address the potential for the available funds to be insufficient to pay both the costs of complying with the EPA and all other debts and claims either having priority over those in s 556(1)(dd) or ranking equally with the EPO costs.[83] Therefore, there would be a real potential for s 556 of the CA and the EPA provisions to operate inconsistently because, outside of Queensland, s 556 would not be disapplied by s 5G(11). In essence, there would be the same predicament for the liquidators as Barrett J identified in *HIH*.

[127] It can be seen then that confining the operation of ss 568 and 568D to property which is located in Queensland would not *ensure* that no inconsistency would arise between

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81 The likely cost of which is unknown, because it would depend upon the outcome of Audit Reports 1 and 2, according to the affidavit of HA Broadfoot at [33].

82 First respondent's outline of argument at [47(a)].

83 See CA s 559.

provisions of the CA, specifically ss 556(1) and 559, and the relevant provisions of the EPA. As the disapplication of a provision of the Corporations legislation can result from s 5G(11) only if it ensures that no such inconsistency would arise, s 5G(11) could not be employed in the way for which the respondents contend.

[128] Those difficulties in the application of s 5G(11) to the provisions of the CA dealing with winding up, provide strong support for construing s 5G(8) as providing *the* basis for the disapplication of any of the provisions of Chapter 5. As already noted, s 5G(8) results in the disapplication which is not confined to any part of the jurisdiction governed by the CA. It is of course a provision dealing specifically with the disapplication of provisions of Chapter 5. As *HIH* illustrates, s 5G(8) can operate to disapply particular provisions of Chapter 5 in order to accommodate a law of a State under which a winding up is carried out.

[129] The respondents now argue, in the alternative, that s 5G(8) disapplies any relevant provision of the CA, resulting in the same outcome, namely that Linc (and indirectly the appellants) would remain bound by the EPO. The correctness of that argument depends upon whether the winding up of Linc could be described as being "carried out in accordance with a provision of [the EPA]". For the respondents, it is argued that if s 358 and s 361 of the EPA could be characterised as laws affecting the course of the winding up of Linc, it follows that the winding up would be carried out in accordance with the EPA.

[130] In my view, that argument should not be accepted. The engagement of s 5G(8) requires more than the existence of a provision of a law of a State or Territory which is a law to be observed in the carrying out of the external administration. It requires that State or Territory provision to be a law whose subject matter is the external administration of a corporation or corporations, or more specifically here, to be a law about how companies are to be wound up. In *HIH*, Barrett J said that the "winding up" with which s 5G(8) is concerned, is the process "collecting the assets, realising and reducing them to money, dealing with proofs of creditors by admitting or rejecting them, and distributing the net proceeds, after providing for costs and expenses, to the persons entitled", as McPherson SPJ described it in *Re Crust "N" Crumb Bakers (Wholesale) Pty Ltd*.[84] As *HIH* illustrates, the provision of the law of a State need not regulate the entirety of the winding up in order for it to be a provision which would engage s 5G(8). However it must be a provision which can be characterised as providing for how a company is to be wound up at least in some respect during that process. Each of the so called "cut-through" provisions which were considered in *HIH* can be seen to be a provision of that kind. The EPA is not of that kind and s 5G(8) is not engaged.

[131] For these reasons, if it is necessary to consider the operation of s 5G, in my conclusion neither s 5G(8) nor s 5G(11) disapplies relevant provisions of the CA. Consequently, any inconsistency must be resolved in favour of the CA, and the validity and effect of the disclaimer of Linc's property is unaffected.

Appeal against the costs order of the primary judge

[132] The primary judge ordered that the costs of the present appellants and those of the Chief Executive, each calculated on an indemnity basis, be costs in the liquidation of Linc. The appellants were granted leave to appeal against the order in favour of the

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84 [1992] 2 Qd R 76 at 78, cited in *HIH* at 647-648 [97].

Chief Executive. This Court has received written submissions on that appeal, which is pressed only in the event that the principal appeal is to be allowed.

[133] In *Farrow Finance Company Ltd (in liq) v ANZ Executors & Trustee Co Ltd*,[85] Hansen J said:

> "In my opinion, the general principles which apply to the question of costs upon an application by a liquidator for direction include these: Where the application is necessitated only by the stand taken by one particular creditor, or a certain group of creditors acting only in their own interest, and the question involved is not a complex one, then costs should generally follow the event. In other words, if the position which the liquidator always intended to adopt is vindicated, and the submission of the opposing creditors is rejected, then those creditors should be liable for the liquidator's costs of the application. An example of the application of that principle is *Re Masureik & Allan Pty Ltd* (1981) 6 ACLR 39 (SC (NSW), Needham J). In that case, both the liquidator and the company's largest creditor (a bank) agreed that the liquidator should treat the recovery of a preferential payment as ensuing to the benefit of the general body of creditors on the well known authority of *Re Yagerphone Ltd* [1935] 1 Ch 392, and *N A Kratzman Pty Ltd (in liq) v Tucker (No 2)* (1968) 123 CLR 295; [1968] ALR 616. A director of the company, however, contended otherwise, for his interest as a guarantor of the company's debt to the bank lay in the sum recovered going in reduction of that debt. He insisted that the liquidator was obliged to seek directions on the issue, despite the liquidator informing him that an application would be made for costs if a directions hearing was necessary. The liquidator's submissions were upheld, and the director was ordered to pay the liquidator's costs.
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> On the other hand, where the issue involved is a complex one, or one involving a relatively novel proposition in law, then the starting point is that the costs of all necessary parties are to be paid by the liquidator and counted as costs in the liquidation: see, for example, *Re GPI Leisure Corp Ltd (in liq)* (1994) 130 ALR 256; 15 ACSR 282 (Fed C of A, Whitlam J). That was the starting point I adopted upon the issue of costs in *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* (19 July 1996, SC (Vic), Hansen J, unreported). That case also serves as a good example of the factors which might lead a court to depart from the starting point. The liquidator's application in *UTSA* ran over three days, and involved detailed evidence (including cross examination of witnesses) and submissions. The defendant to the liquidators' summons for directions raised a very large number of points in opposition, the bulk of which were rejected outright. Principally for that reason the defendant was required to pay two-thirds of the costs of the liquidators."

[134] Citing that passage, counsel for the appellants accept that there were issues, in particular those concerning s 5G(11), which were complex. However they submit that the preferable approach, is for the Court to consider whether the proceeding was, in substance, adversarial, for which they cite the judgment of Campbell JA with

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85 (1997) 23 ACSR 521 at 526-527.

whom McColl JA agreed, in *BE Australia WD Pty Ltd (subject to a deed of company arrangement) & Ors v Sutton.*[86]

[135] The submissions for the Chief Executive agree that it is the judgment of Campbell JA which should be applied. But it said that closer attention should be paid to the reasoning in that case.

[136] *BE Australia WD Pty Ltd v Sutton* was an appeal against the rejection of a proof of debt, or alternatively an application for an order under s 447A of the CA. There was a substantial question of whether the applicant was a creditor. The proceedings were not, in form, inter partes litigation, but Campbell JA said that this was not decisive of how the costs of the litigation should be dealt with.[87] Campbell JA there said:[88]

> "Courts exercising equity jurisdiction encounter a variety of situations where a fund is being administered subject to the control of the court, and a question arises about the proper manner in which that fund should be administered. Such a situation can arise concerning administration of deceased estates, concerning administration of trusts, concerning company liquidations, concerning administration of the estates of incapable people, and concerning DOCAs. In those situations, whether the costs of the court deciding the question that has arisen should be treated as costs of administration of the fund is significantly influenced by whether the proceedings are in substance adversarial ones. While where the costs should fall in litigation is always a matter of discretion, very commonly costs are paid from the fund for non-adversarial proceedings, and by the loser for adversarial proceedings …"

[137] For the Chief Executive it is argued that the proceedings were not adversarial, but were analogous to a case where a trustee of a will or settlement asks the court to construe the trust instrument for the guidance of the trustee, and in order to ascertain the interest of the beneficiaries, they are represented.

[138] However, the present proceeding was undoubtedly adversarial. The originating application sought not only directions to the liquidators, but the making of such declarations as might be appropriate, and the Chief Executive also submitted to the primary judge that it would be appropriate to give effect to the court's conclusion by making a declaration in respect of each of the issues which had been argued.

[139] Although a declaration was originally sought by the present appellants, and declarations were also suggested by the Chief Executive, the declaratory relief was not pursued by the appellants and the nature of the proceedings was that the liquidators sought advice. The Chief Executive was a proper contradictor to that application. The conduct of the case by the Chief Executive, before the primary judge, was proper notwithstanding that I have concluded that his submissions ought not to have been accepted. It must be kept in mind that the Chief Executive's response to the proceeding was for a public and not a commercial purpose. Nevertheless, he incurred substantial costs which, in my view, ought not to fall upon the creditors of Linc whose interests would have been disadvantaged had his arguments ultimately prevailed.

[140] The appellants do not seek an order that the Chief Executive pay their costs. They seek only an outcome whereby the Chief Executive bears his own costs. In my

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86 (2011) 82 NSWLR 336, especially at [214]; [2011] NSWCA 414.
87 Ibid at [213].
88 Ibid.

conclusion, the interests of justice favour that outcome, rather than the order which was made by the primary judge. The judge's discretionary decision on costs, of course, must have been affected by the outcome of his judgment.

Orders

[141] In appeal 4657 of 2017, I would order as follows:

1. Allow the appeal.
2. Set aside the order made on 13 April 2017.
3. The appellants be directed that they are justified in not causing Linc Energy Limited (in liquidation) to comply with the Environmental Protection Order issued by the respondent Chief Executive on 13 May 2016, insofar as that order required anything to be done or not done at a time after 30 June 2016.
4. The parties are to file and serve any written submission as to the costs of the appeal within 10 days of the date of this judgment.[89]

[142] As I have discussed, the disclaimer could not have affected liabilities under the EPO which had already accrued. Whether the Chief Executive would see any point in insisting upon compliance with those requirements is a matter for his consideration.

[143] In appeal 6449 of 2017, I would order as follows:

1. Allow the appeal.
2. Set aside the order made on 31 May 2017, whereby the respondent Chief Executive was to have his costs as costs in the liquidation of Linc Energy Limited (in liquidation).
3. Order that the respondent Chief Executive bear his own costs of the proceeding before the primary judge.

[144] **BOND J:**

The questions which arise

[145] I have had the advantage of reading in draft the reasons for judgment of McMurdo JA. His Honour's exposition of the facts and of the arguments which were advanced in this appeal permits me to express my reasons in a relatively summary fashion.

[146] Immediately prior to 30 June 2016, Linc Energy Limited (in liquidation) held environmental authorities issued pursuant to the *Environmental Protection Act* 1994 (Qld) (**EPA**), which permitted it to carry out certain mining and petroleum related activities on land which it owned and in respect of which it had a mineral development licence and a petroleum facility licence. The environmental authorities subjected Linc to onerous decommissioning and rehabilitation requirements. Further, Linc had been issued an environmental protection order (**EPO**) by the Chief Executive of the Department of Environment and Heritage Protection pursuant to s 358 of the EPA. The EPO had imposed obligations on Linc in connection with that land, including the obligations to maintain certain infrastructure and to carry out site monitoring, testing and reporting.

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89 The costs of the appeal should be left open at this point, having regard to the outcome for the costs before the primary judge.

[147] Linc's liquidators sought to take advantage of the provisions of the *Corporations Act* 2001 (Cth) which permit disclaimer of property which may give rise to onerous obligations. To that end, Linc's liquidators issued a notice dated 30 June 2016 (the **disclaimer notice**). The disclaimer notice stated that the liquidators "hereby disclaim (with immediate effect) the property listed in the attached Schedule pursuant to subsection 568(1)(a), (c), (d), (e) and (f) of the *Corporations Act 2001* (Cth)". Amongst other things, the schedule listed the relevant land owned by Linc, the relevant mineral development licence, a petroleum facility licence and environmental authorities issued under the EPA.

[148] Pursuant to s 568C(3) of the *Corporations Act*, the disclaimer took effect on the day after the day the liquidators lodged notice of the disclaimer. Lodgment occurred on 30 June 2016, so, if it took effect at all, the disclaimer took effect on 1 July 2016. The liquidators contended, by virtue of s 568D of the *Corporations Act*, that as and from the date it took effect the disclaimer must be taken to have terminated Linc's liability to comply with the EPO.

[149] The question whether the liquidators were correct in so contending was significant for two reasons. First, as McMurdo JA has explained, s 361 provides that the recipient of an EPO who contravenes the EPO commits an offence, and, further, the liquidators themselves may have been exposed to prosecution for an offence under s 493 of the EPA if they did not take all reasonable steps to have Linc comply with the EPO. Second, the Chief Executive had contended that the expenses which the liquidators would have to incur to comply with the EPO would be expenses which fell under s 556(1)(dd) of the *Corporations Act*, therefore taking priority over and, in any distribution, ranking ahead of claims of unsecured creditors, employees entitlements and the liquidators' own remuneration. On the other hand, if the liability had been terminated, not only would the liquidators not have to incur the expenses, but any person aggrieved by the termination would be taken to be a creditor of Linc to the extent of any loss they suffered and could prove such a loss as a debt in Linc's winding up: s 568D(2).

[150] Pursuant to s 511 of the *Corporations Act*, the liquidators applied to the Court for directions that they would be justified in not causing Linc to comply with the EPO. The learned primary judge resolved that application by directing the liquidators that they would not be so justified. The liquidators' appeal from the decision of the learned primary judge seeks to reverse that direction.

[151] To my mind, the issues in this appeal require the following questions to be answered, and in this order.

[152] **First**, should Linc's liability to comply with the EPO be characterized as a liability in respect of property which the liquidators had disclaimed by the disclaimer notice?

[153] **Second**, did the provisions of Part 1.1A of the *Corporations Act* operate so that the disclaimer notice could not be taken to have terminated Linc's liability to comply with the EPO as and from the date the notice took effect?

[154] **Third**, what direction should be made to the liquidators consequent upon the answers to the first two questions, in particular having regard to the admissions subsequently made by the Chief Executive that the relevant land and the mineral development licence had been validly disclaimed?

Should Linc's liability to comply with the EPO be characterized as liability in respect of disclaimed property?

[155] I agree generally with McMurdo JA's reasons for concluding that liabilities imposed on Linc by the operation of the EPO must be characterized as liabilities in respect of property which the liquidators had disclaimed.

[156] Accordingly, the first question should be answered in the affirmative.

Did the provisions of Part 1.1A of the *Corporations Act* prevent the disclaimer notice operating to terminate Linc's liability to comply with the EPO as and from the date the notice took effect?

[157] Section 5(3) of the *Corporations Act* provides "[e]ach provision of this Act applies in this jurisdiction". The phrase "this jurisdiction" is defined by operation of ss 5 and 9 as, relevantly, the geographical area of the States and Territories who participate in the national scheme. Thus is established the hardly surprising proposition that s 568D "applies in" that geographical area.

[158] Section 568D of the *Corporations Act* provides that, once a disclaimer takes effect, it is "taken to have terminated ... the company's rights, interests, liabilities and property in or in respect of the disclaimer property". The result would be that the proposition that the disclaimer notice is "taken to have terminated" particular rights and liabilities applies nationally and for all purposes of the national scheme.

[159] It follows that, prima facie, once the first question is answered in the affirmative –

(a) by force of s 568D there is a deemed termination of Linc's liability to comply with the EPO;

(b) a direct inconsistency would arise between the operation of the sections of the Commonwealth legislation creating that outcome (i.e. ss 568 and 568D of the *Corporations Act*) and the operation of the state legislation imposing the liability (i.e. ss 319 and 361 of the EPA); and

(c) the inconsistency would be resolved in favour of the application of ss 568 and 568D by s 109 of the *Constitution*.

[160] However, as Barrett J noted in *HIH Casualty and General Insurance Ltd (in liq) v Building Insurers' Guarantee Corporation* (2003) 202 ALR 610 at [72], Part 1.1A of the *Corporations Act* shows a general intention of forestalling or minimizing conflict of this kind.

[161] McMurdo JA has explained that the EPA provisions meet the conditions set out in item 1 of the table contained in s 5G(3) of the *Corporations Act* and why the critical question is whether s 5G(11) can operate to bring about an outcome that no inconsistency arises. I agree with his Honour's reasoning for the conclusion that s 5G(11) cannot so operate. In my view there is no extent of denial of the operation of ss 568 and 568D in the State of Queensland which is capable of ensuring that there is no inconsistency between ss 568 and 568D and the relevant provisions of the EPA, because ss 568 and 568D will continue to apply in all other states and territories participating in the national scheme.

[162] I also agree with the reasons of McMurdo JA for rejecting the alternative argument regarding the possible application of s 5G(8).

[163] It follows that the second question must be answered in the negative.

What direction should be made to the liquidators?

[164] McMurdo JA has explained that upon receipt of the disclaimer notice the Department acknowledged that the notice had taken effect and that machinery, equipment and removable improvements would now vest in the State. And his Honour has explained that in the course of the conduct of the present proceeding, it had been admitted that land owned by Linc and the mineral development licence and certain plant had been effectively disclaimed.

[165] I agree with McMurdo JA that s 5G(11) could be applied in this case only by impugning the entire effectiveness of the disclaimer notice. However McMurdo JA concluded that, having conceded the effectiveness of the disclaimer of the land and the mineral development lease, the Chief Executive could not be heard to argue that there was no effective disclaimer of the liability.

[166] In my view, and as a matter of law, the disclaimer either did or did not take effect to terminate rights and liabilities as and from 1 July 2016, a date which was months before the relevant admissions were made. My answer to the second question is that it did take effect to terminate rights and liabilities. Had I reached a different view, there would have been much to be said in favour of not permitting the parties' willingness to conduct the proceeding on a false basis to stand in the way of the Court's disposition of the proceeding by recognizing the true position. However, because of my answer to the second question, it is unnecessary to consider this possibility any further.

[167] In light of the answers to the first and second questions, the direction given by the learned primary judge should be reversed.

Conclusion

[168] I agree with the orders proposed by McMurdo JA in appeal 4657 of 2017. I also agree with the orders which his Honour proposed in appeal 6449 of 2017 and with his Honour's reasons for those orders.