LAND COURT OF QUEENSLAND

CITATION:	*MRV Metals Pty Ltd v Chief Executive, Department of Environment and Science* [2020] QLC 9
PARTIES:	**MRV Metals Pty Ltd** ACN 610 100 402 (appellant) v **Chief Executive, Department of Environment and Science** (respondent)
FILE NO:	EPA414-18 (EPML04238116)
DIVISION:	General Division
PROCEEDING:	Appeal against internal review decision under the *Environmental Protection Act 1994*
DELIVERED ON:	4 March 2020
DELIVERED AT:	Brisbane
HEARD ON:	12 November 2019 Submissions closed 20 December 2019
HEARD AT:	Brisbane
PRESIDENT:	FY Kingham
ORDERS:	**1. The answer to Q1 is yes.** **2. It is not necessary to answer Q9.** **3. The answer to Q3A, as I read it without the definition of remediation costs, is (a) no and (b) yes.** **4. I decline to answer Q3B.** **5. The answer to Q4 is yes.** **6. I will hear from the parties about directions to progress the appeal and any consequential orders.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – whether the pre-Amended

Environmental Protection Act 1994 applies – whether, if the pre-Amended Act does not apply, the Land Court has jurisdiction to hear the appeal – where the Land Court does have jurisdiction

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SEPARATE DECISION OR DETERMINATION OF QUESTIONS – where the Court was asked to determine preliminary questions for the appeal – where the parties could not agree on the formulation of some preliminary questions – whether there was utility in answering some questions – whether there was an adequate factual foundation to answer some questions – where the Court answered some questions and declined to answer one

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – where the pre-Amended *Environmental Protection Act 1994* provides for financial assurances for the cost of taking action because of environmental harm caused by mining activities and imposes a statutory cap on the amount of the financial assurance – where the parties did not agree on the interpretation and application of the cap where there is pre-existing environmental harm – whether the definition of environmental harm in s 14(2) *Environmental Protection Act 1994* sets the scope of the financial assurance – where the Court found the cap limited the financial assurance to the cost of taking action to rehabilitate or restore and protect the environment because of any further environmental harm caused by the activity – where the Court found that action may, as a matter of practical necessity, also address pre-existing environmental harm, a matter that could only be determined after hearing evidence

Acts Interpretation Act 1954 s 4, s 20(2)(b), s 20(2)(c), s 20(3)
Environmental Protection Act 1994 (as in force 29 March 2019) s 9, s 14, s 18, s 107, s 110, s 287, s 288, s 290, s 292, s 295(4), s 298, s 426, s 519, s 521, s 524, sch 2, sch 4
Environmental Protection Act 1994 s 112, s 126D, s 296, s 297, s 300, s 753(2), s 757, s 760, s 761, Ch 5, pt 14
Land Court Act 2000 s 5, s 7(b), s 33(1)(b)
Land Court Rules 2000 r 19(2)(a)
Mineral and Energy Resources (Financial Provisioning) Act 2018 s 24

Bass v Permanent Trustee Co Ltd (1998) CLR 334; [1999] HCA 9, applied
CGU v Blakeley [2016] HCA 2, applied
O'Grady v Northern Queensland Co Ltd (1990) 169 CLR

356; [1990] HCA 16, applied
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, applied
Re Multiplex Constructions Pty Ltd [1999] 1 Qd R 287; [1997] QCA 447, applied
Re Ross-Jones and Mainovich; Ex parte Green (1984) 156 CLR 185; [1984] HCA 82, applied
Reading Australia Pty Ltd v Australian Mutual Provident Society & Anor (1999) 217 ALR 495; [1999] FCA 718, applied

APPEARANCES: AJ Morris QC, with JM O'Connor (instructed by Irish Bentley Lawyers) for the appellant
RN Traves QC, with R Laidely (instructed by Litigation Unit, Department of Environment and Science) for the respondent

[1] Miners have won silver, copper, zinc and lead near Texas, Queensland, since the 1890s. More recently, the Texas Silver mine has tested the regulation of rehabilitation of mined land. The environmental legacy of that mine is central to the dispute between the parties to this appeal.

[2] Between 2015 and 2017, Texas Silver Mines Pty Ltd went into liquidation, the liquidators disclaimed the company's environmental liabilities, and the Queensland Government assumed ownership of the land, managed the abandoned mine, and spent more than $2 million in rehabilitating the site.

[3] Then MRV Metals Pty Ltd became involved. It purchased the land from the Government. It holds the necessary mining lease (ML 100106) and environmental authority (EPML04238116) for a mine called the "Granite Belt project," which includes areas disturbed by the Texas Silver mine.

[4] As a condition of the environmental authority for the project, the Department of Environment and Science can require MRV Metals to pay a financial assurance as a condition of its environmental authority. When DES made the financial assurance decision, s 295(4) of the *Environmental Protection Act 1994*[1] imposed a statutory limit or cap on the amount that can be required as financial assurance.

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[1] The *Environmental Protection Act 1994* was amended on 1 April 2019, and (inter alia) introduced a new regime with respect to financial assurance, now Chapter 5, Part 14, Division 1 of the current EPA.

[5] MRV Metals appeals against the financial assurance decision made by an officer acting as a delegate of DES. The issue is how to calculate the amount of the financial assurance, given the statutory cap and the environmental legacy of the Texas Silver mine.

[6] Recent amendments to the EPA cause an additional complication. The amendments significantly reformed the system for securing rehabilitation obligations and protecting the community from bearing the cost of work left undone.

[7] The parties jointly proposed that, prior to the appeal hearing, the Court should answer questions about whether the pre-amended EPA applies to the appeal, and how to interpret and apply the statutory cap where there is pre-existing environmental harm.

[8] There is no issue about the Court's power to answer the questions. The Court may make declarations about "the construction of any legislation for the purposes of proceedings in which the court has exclusive jurisdiction."[2] Further, at the request of a party, or on its own initiative, the Court may make "an order about a preliminary point that may wholly or substantially decide a significant issue in the proceeding."[3]

[9] The parties persuaded me answering questions in a preliminary hearing could save them substantial effort and cost in preparing for the appeal. My confidence about that decision was shaken when the parties presented me with nine questions, only some of which were agreed. Some questions fell away before or during the hearing, and MRV Metals reformulated one of its questions in an attempt to arrive at a formulation that captured the parties' differing views on a topic.

[10] The Court cannot answer purely hypothetical questions or provide an advisory opinion.[4] I am satisfied they are not purely hypothetical. They are productive of a real and pressing dispute about the financial assurance decision already made by DES for MRV Metals' mining project.[5]

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2 *Land Court Act 2000* s 33(1)(b).
3 *Land Court Rules 2000* r 19(2)(a).
4 *Bass v Permanent Trustee Co ltd* (1998) CLR 334, [1999] HCA 9 [47].
5 *CGU v Blakeley* [2016] HCA 2 [102].

[11] It is not necessary for the decision on a point to settle the litigation between the parties.[6] Deciding a point separately may save time and cost for the parties. It is "desirable that, whenever possible, judges should decide summarily questions which can be conveniently so decided."[7] That has particular force in this Court, which "must act according to equity, good conscience and the substantial merits of the case, without regard to legal technicalities and forms or the practice of other courts."[8]

[12] Nevertheless, there must be some utility in answering a question. Where a question is one of mixed fact and law, there must be sufficient agreed facts to allow the Court to answer the question.[9]

[13] I have applied those principles in addressing the remaining five questions posed by the parties on the following topics:

1. Whether the pre-amended Act applies to the appeal
   Q1 & Q9 - jointly proposed

2. How to interpret and apply the statutory cap where there is pre-existing environmental harm.

   Q3 proposed by MRV Metals (now Q3A and 3B)[10]
   Q4 - proposed by DES

Does the pre-amended Act apply to the appeal?

[14] DES decided the amount of the financial assurance before 1 April 2019, the commencement date for amendments made by the *Mineral and Energy Resources (Financial Provisioning) Act 2018*. That Act substantially amended the EPA provisions about financial assurances.

[15] The parties framed two questions:

> Q1: In deciding the appeal, is the Court to decide the amount and form of financial assurance by reference to the pre-amended Act?
>
> Q9: If in deciding the appeal, the Court is not to decide the amount and form of financial assurance by reference to the pre-amended Act, is the

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6 *Reading Australia Pty Ltd v Australian Mutual Provident Society & Anor* (1999) 217 ALR 495; [1999] FCA 718 [14].
7 *Re Multiplex Constructions Pty Ltd* [1999] 1 Qd R 287; [1997] QCA 447, 2.
8 LCA s 7(b).
9 *Bass v Permanent Trustee Co Ltd* (1998) CLR 334, [1999] HCA 9 [56].
10 MRV Metals reformulated this as two questions that it described as Q1 & Q2. To avoid confusion with the original Q1, I have referred to these two new questions as Q3A & Q3B.

> appeal validly made and does the Land Court of Queensland have jurisdiction to hear it?

[16] The parties agree the answer to Q1 is yes and, on that basis, Q9 does not arise.

[17] This is a court of limited statutory jurisdiction.[11] If the pre-amended Act applies, the Court has jurisdiction to hear the appeal. If not, the parties do not agree about the Court's jurisdiction to hear it. For that reason, despite the parties' agreement, I must be satisfied that the pre-Amended Act does apply.

[18] Under the pre-amended Act, DES had the power to require the miner to provide a financial assurance to secure compliance with the environmental authority.[12] The miner could request an internal review[13] of the original financial assurance decision,[14] and, if dissatisfied, appeal the review decision to this Court.[15]

[19] The Financial Provisioning Act established a different process for resource authorities. There is now a scheme fund[16] and a resource authority holder must contribute to the scheme fund or give a surety.[17] The relevant decision is now an ERC decision, not a financial assurance decision. It is not necessary to descend further into the detail of the new scheme. Transitional provisions manage the change from the old to the new system.

[20] Generally, the amendment of an Act does not affect anything begun under the Act[18] or a right acquired under the Act.[19] The remedy (in this case, the appeal) can be started, continued, or completed, as if the amendment had not happened.[20]

[21] An amending Act can displace that rule of construction, if it expresses a contrary intention.[21]

[22] I am not satisfied the Financial Provisioning Act does that.

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11 LCA s 5.
12 EPA s 292(1)(b), as in force at 29 March 2019.
13 Ibid s 521.
14 Ibid s 519; sch 2.
15 Ibid s 524.
16 *Mineral and Energy Resources (Financial Provisioning) Act 2018* s 24.
17 EPA s 297, as in force at 9 December 2019.
18 *Acts Interpretation Act 1954* s 20(2)(b).
19 Ibid s 20(2)(c).
20 Ibid s 20(3).
21 Ibid s 4.

[23] The transitional provisions seek to preserve what has gone before, until either DES or the miner takes some action to bring an environmental authority within the new regime for financial assurances.

[24] Where there is an existing application to amend or discharge a financial assurance commenced under the pre-amended Act, the process continues as if the amendments had not been made.[22]

[25] An existing plan of operations continues until the earliest of: its expiration date, the date DES approves a PRCP schedule for the mine or, if the miner applies for an ERC decision under the amended Act, the day the ERC decision is made.[23]

[26] Although, the financial assurance decision operates as a deemed ERC decision until then,[24] it is a deemed ERC decision for the limited purpose of applying one part of the amended Act.[25] That part does not address appeals from financial assurance decisions under the pre-amended Act.

[27] I consider the transitional provisions introduced by the Financial Provisioning Act are consistent with, and do not express a contrary intention that would displace the general rule.

[28] MRV Metal's plan of operations has not expired. DES has not approved a PRCP schedule for the mine. MRV Metals has not applied for an ERC decision. MRV Metals commenced the appeal before the amendments commenced. The pre-amended Act governs the appeal.

[29] The answer to Q1 is yes. It is not necessary, therefore, to answer Q9.

[30] Unless otherwise specified, all future references in these reasons to the EPA are references to the pre-amended Act.

How to interpret and apply the statutory cap where there is pre-existing environmental harm

22 EPA ss 757, 760, as in force at 9 December 2019.
23 Ibid s 753(2).
24 Ibid s 761.
25 Ibid Chapter 5, part 14.

[31] The remaining questions address the topic of calculating the financial assurance. The issue is how to interpret and apply the statutory cap where there is pre-existing environmental harm.

[32] The parties disagree on the questions for this topic. MRV Metals posed two questions, DES one. MRV Metals argues that its questions encapsulate the issue, and that DES' question does not advance matters. DES argues I should not answer MRV Metals' questions, because they misinterpret the relevant provisions and will not resolve the dispute in a practical sense.

MRV Metals' questions

Q3A: Where an area is the subject of pre-existing environmental harm, is the administering authority authorised or permitted, for the purpose of determining the amount the cap, to require financial assurance in an amount that, in the opinion of the administering authority;

(a) represents the remediation costs of the total environmental harm; or

(b) represents only the remediation costs of the further environmental harm? [26]

Q3B: If the answer to Question 3A(b) is in the affirmative, how are the remediation costs of the further environmental harm to be determined in the following circumstances:

(a) where the further environmental harm is practically capable of remediation without **any** remediation of the pre-existing environmental harm?

(b) where the further environmental harm is practically capable of remediation without **complete** remediation of the pre-existing environmental harm, but as a necessary consequence of remediation of the further environmental harm there will be a partial remediation of the pre-existing environmental harm?

(c) Where the further environmental harm is **not** practically capable of remediation without **complete** remediation of the pre-existing environmental harm?

DES's question

Q4. Where the administering authority is of the opinion:

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[26] Appellant's Further Submissions, As Directed, Following Oral Addresses, filed by the Appellant on 25 November 2019, Q1.

(a) that environmental harm may be caused by the activity; and
(b) that the environmental harm may occur in respect of areas to which environmental harm has already been caused by a previous and unrelated activity,

may the administering authority require financial assurance in respect of action to rehabilitate or restore and protect the environment from the environmental harm that may be caused by the activity where that action may also have the effect of rehabilitating or restoring and protecting the environment from the earlier environmental harm?

[33] The statutory cap is imposed by s 295(4):

> **295 Deciding amount and form of financial assurance**
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> …
>
> (4) Despite subsections (1) and (3), the administering authority can not require financial assurance of an amount more than the amount that, in the authority's opinion, represents **the total of likely costs and expenses that may be incurred taking action to rehabilitate or restore and protect the environment because of environmental harm that may be caused by the activity**. (emphasis added)

[34] The highlighted portion of that provision contains a number of terms and concepts, some of which are in dispute. I will turn to that shortly.

[35] In their questions, and in their submissions, the parties have used various terms that are not defined in the EPA and are not used in s 295(4).

[36] Both parties agree there are areas of existing disturbance (or harm) on the land from the Texas Silver mine. They have called it different things at different times. In their statement of agreed facts, they called it "historical environmental disturbance that existed prior to the grant" of the MRV EA.[27] MRV Metals called it "pre-existing environmental harm" in Q3A & Q3B. DES called it "earlier environmental harm" in Q4. I cannot discern any difference in meaning between those various terms. MRV Metals also used and defined the terms "further environmental harm" and "total environmental harm" for its questions.

[37] DES objected these are not statutory definitions. That is true, but the definitions provide a useful vocabulary and will give clarity to the reasons. It is not possible to address the parties' arguments without using such terms where, as here, there is an

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[27] Statement of Agreed Facts, filed by the Appellant (on behalf of the Respondent) on 12 June 2019, [24]-[25].

existing environmental legacy from a previous mining operation, disconnected to MRV Metals' mine.

[38] Appendix A contains definitions that MRV Metals used for its questions 3A & 3B. I will use some of them in my reasons. When I use the following terms, they have the following meanings, derived from MRV Metals' questions:

- references to "**pre-existing environmental harm**" are references to environmental harm which existed on or in respect of an area at the time when the relevant environmental authority was granted;
- references to "**future environmental harm**" are references to environmental harm, caused to or in respect of an area by a specified activity, including environmental harm which is either:
    - additional to the pre-existing environmental harm to or in respect of an area; or
    - in the nature of an exacerbation of the pre-existing environmental harm.
- references to "**the total environmental harm**" are references to the whole of the environmental harm to or in respect of an area constituted by:
    - the pre-existing environmental harm to or in respect of the area; and
    - the further environmental harm to or in respect of the area.

[39] Returning to s 295(4), it contains a number of terms or concepts agreed, but the overall interpretation is in dispute. The focus of the parties' dispute is how to interpret this passage:

> "…the total of likely costs and expenses that may be incurred taking action to rehabilitate or restore and protect the environment **because of environmental harm** that **may be caused by** the **activity**." (emphasis added)

[40] I have highlighted three terms I will examine in preparing to address the parties' questions. They must be considered in context. I must apply an interpretation that is consistent with the language and purpose of the EPA, as a whole. I must assume that provisions of an Act are intended to give effect to harmonious goals. I must adjust the meaning of apparently competing provisions to best give effect to the

purpose and language of these provisions, while maintaining the unity of all the provisions. [28]

"activity"

[41] The EPA does not define the term "activity." It contains a series of cascading definitions that provide guidance to its meaning.

[42] DES has the power to require the holder of an environmental authority to give a financial assurance "before the relevant activity is carried out under the environmental authority."[29]

[43] The "relevant activity" is "the environmentally relevant activity the subject of the authority."[30] "Environmentally relevant activity" includes a "resource activity."[31] "Resource activity" includes a "mining activity."[32] A "mining activity" includes an activity that is an authorised activity for a mining lease.[33]

[44] For a resource activity, there are two relevant authorisations under the EPA. The first is the grant of an environmental authority, the second is the submission of a compliant plan of operations.

[45] A miner is not authorised to conduct the resource activity unless acting under an environmental authority.[34] Further, they cannot undertake any activity under the mining lease unless they have submitted to DES a plan of operations that complies with the statutory requirements.[35] In undertaking the activity, the miner must comply with the plan of operations.[36]

[46] The plan of operations must show where the activities will occur and include an action program for complying with the environmental authority, and a rehabilitation program for the mining lease.[37] The rehabilitation program must state a proposed

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28 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 [70].
29 EPA s 292(1)(a), as in force 29 March 2019.
30 Ibid sch 4.
31 Ibid s 18.
32 Ibid s 107.
33 Ibid s 110.
34 Ibid s 426.
35 Ibid s 287.
36 Ibid s 290.
37 Ibid ss 287, 288(1)(c).

amount of financial assurance for the plan period,[38] which must not exceed five years.[39]

[47] Given those provisions and linked definitions, it follows the "activity" referred to in s 295(4) is the activity described in the plan of operations for the period of the plan. As I understood the submissions, the parties agreed about that.

"may be caused by"

[48] Another important agreement emerged during oral submissions. The parties agree that the phrase "may be caused by," when used in s 295(4), should be interpreted consistently with s 14(2) which defines a test of causation for environmental harm:

> **14 Environmental harm**
>
> ...
>
> (2) *Environmental harm* may be caused by an activity—
> (a) whether the harm is a direct or indirect result of the activity; or
> (b) whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors.

[49] The parties agree that, in deciding the amount of financial assurance, DES cannot consider costs of taking action because of environmental harm unless MRV Metals has directly or indirectly caused it, whether alone or in combination with other activities or factors.

[50] DES has already given effect to that interpretation in its financial assurance decision. The environmental authority contains a table of already disturbed land that will not be disturbed further by MRV Metals. As I understand the parties' submissions, DES has not made any allowance in its financial assurance decision for the costs of taking action because of the environmental harm already caused to those areas.

[51] The parties appear to accept there is no causal nexus between that environmental harm and MRV Metals' activity in that circumstance.

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38 Ibid s 288(2).
39 Ibid s 288(5).

[52] Where the dispute lies is how to interpret and apply the cap where there *is* a necessary causal nexus between MRV Metals' activities and environmental harm in an already disturbed area, that is, where there is **pre-existing environmental harm**.

[53] MRV Metals says the financial assurance is limited to the cost of taking action because of the **further environmental harm**. DES says s 295(4), properly interpreted, does not draw that distinction. Once the causal nexus between activity and harm is established, the financial assurance is calculated on the costs of taking action because of the environmental harm, without trying to distinguish between pre-existing and further environmental harm.

[54] Using MRV Metals' definitions, MRV Metals argues environmental harm means **further environmental harm** and DES says it means **total environmental harm.** Depending on the nature of the harm, and the action that would be taken because of it, the difference could be quite significant.

[55] Although the parties took great care in exploring the term "environmental harm," the financial assurance is calculated on the action that would be taken "**because of** environmental harm." In my view, this holds the key in interpreting the statutory cap. I turn to that phrase now.

"because of environmental harm"

[56] Some features of the scheme as a whole, and differences in language used in relevant provisions, leads me to conclude that, where there is **pre-existing environmental harm,** the environmental harm referred to in s 295(4) is **the further environmental harm** caused by the activity not the **total environmental harm.**

[57] Section 292 provides DES with the power to require a financial assurance and identifies the purposes of doing so:

> **292 Requirement to give financial assurance for environmental authority**
>
> (1) The administering authority may, by condition of an environmental authority, require the holder of the environmental authority to give the administering authority financial assurance-
>
> (a) before the relevant activity is carried out under the environmental authority; and
>
> (b) as security for-
> (i) compliance with the environmental authority; and

(ii) costs or expenses, or likely costs or expenses mentioned in section 298.

[58] By reference in s 292(1)(b), s 298 identifies the type of costs or expenses that DES may consider in calculating the financial assurance:

> **298 Application of sdiv 3**
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> This subdivision applies if the administering authority incurs or might reasonably incur, costs or expenses in taking action to-
>
> (a) prevent or minimise environmental harm or rehabilitate or restore the environment, in relation to the carrying out of an activity for which financial assurance has been given; or
>
> (b) secure compliance with an environmental authority or small scale mining tenure for which financial assurance has been given.

[59] The distinction in s 298 between the remediation costs and the costs of securing compliance with an environmental authority reflects the dual purposes of requiring a financial assurance stated in s 292(1)(b).

[60] In contrast, s 295(4) refers *only* to "costs and expenses that may be incurred in taking action to rehabilitate or restore and protect the environment" and not the costs of securing compliance with the environmental authority.

[61] That difference is not surprising. The two sections do different work in the scheme. Section 292 establishes the power and the rationale for requiring a financial assurance. Section 295 sets the parameters of that power.

[62] There is another difference between the language used in s 298 and s 295(4) that is illuminating.

[63] Section 298(a) refers to "taking action to prevent or minimise environmental harm or rehabilitate or restore the environment, **in relation to** the carrying out of an activity." Section 295(4) refers to DES "taking action to rehabilitate or restore and protect the environment **because of** environmental harm that may be caused by the activity."

[64] That difference in wording in such closely related provisions must have some meaning. In interpreting the difference between them, I have had regard to the ordinary meaning of the relevant words.

[65] The phrase "in relation to," in s 298(a), requires an *association* between DES taking action and "the carrying out of an activity." "In relation to" means there must be a direct, not merely an incidental, connection, between the two.[40]

[66] Section 295(4) uses "because of"; different, and in my view, stronger language. The ordinary meaning of *because* is "on account of the fact."[41] The use of that word connotes a stronger link is required, a causal nexus rather than an association or connection.

[67] My reference to a causal nexus should not be confused with the test of causation in the definition of environmental harm in s 14(2). Section 14(2) assists in establishing a link between MRV Metals' activity and environmental harm, but its function is not to define the scope of the financial assurance. That is done by s 295(4).

[68] The causal nexus inherent in the phrase "because of" is the nexus between the *action* and the harm. Environmental harm may be caused indirectly, or in combination with other activities or factors, that does not mean the financial assurance is calculated by reference to environmental harm caused by other activities or factors. DES is forecasting the need to take action, because MRV Metals' has caused harm.

[69] As I interpret s 295(4), I do not see any conflict between s 14(2) and s 295(4). However, if there is, s 295(4) is the leading provision. It is the later provision and applies specifically to calculating the financial assurance. Section 14(2) is an earlier provision that applies generally in the EPA. As such, it must give way to s 295(4).[42]

[70] The use of the phrase "because of" confines the scope of the financial assurance to the action that would be taken to rehabilitate or restore and protect the environment because of the **further environmental harm** caused by MRV Metals' activities.

[71] That interpretation is consistent with the prospective assessment required in calculating a financial assurance. The financial assurance is to secure prospective costs; it is an estimate of the likely costs that may be incurred in taking action.

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40 *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356, [1999] HCA 16 [19]; *Re Ross-Jones and Mainovich; Ex parte Green* (1984) 156 CLR 185; [1984] HCA 82 [16].

41 *Collins Australian Dictionary* (7th ed, 2005) 'because' (def 2).

42 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 [70].

Further, the financial assurance is directed to prospective harm; the environmental harm that may be caused by the activity.

[72] Another indication of the future focus of the assessment is the link between the financial assurance and the plan of operations. As discussed above, the "activity" referred to in s 295(4) is the activity described in the plan of operations for the period of the plan. As well as defining the activity, this introduces a temporal qualification. The calculation relates to activity that will occur during the plan period, not some other time.

[73] Finally, a future focus is inherent in the relevant definitions.

[74] Environmental harm is any adverse effect on an environmental value.[43] An environmental value is a quality or physical characteristic of the environment.[44] An "effect" is something produced by a cause or agent; a result.[45] So, there must be a change to a quality or physical characteristic of the environment for there to be an adverse effect on that value.

[75] To recap, those matters persuade me that, where there is **pre-existing environmental harm**, the environmental harm referred to in s 295(4) means the **further environmental harm** caused by the activity.

[76] Depending on the nature of the **further environmental harm**, and the action that might be taken to address it, it may be possible to take action only in respect of the **further environmental harm**; or the action may, as a matter of practical necessity, also address the **pre-existing environmental harm**, in whole or part.

[77] In either case, DES must calculate the financial assurance by reference to the *action* taken because of the **further environmental harm**. If, necessarily, the action also addresses the **existing environmental harm,** that has no consequence for the calculation.

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43 EPA s 14(1), as in force 29 March 2019.
44 Ibid s 9.
45 *Collins Australian Dictionary* (7th ed, 2005) 'effect' (def 1).

[78] There may be a substantial dispute about what action would have to be taken to remediate any **further environmental harm.** This is illustrated by the example given in DES's written submissions.[46]

[79] MRV Metals proposes to rework existing heap leach pads, left from the Texas Silver mine, which may produce minerals if further treated. This will involve further use of contaminants. There appears to be a dispute about whether the financial assurance should include the costs of capping existing heap leach pads.

[80] That is a dispute about what action would need to be taken to rehabilitate or restore and protect the environment because of any **further environmental harm** that may be caused by MRV Metals' activity. A dispute of that nature cannot be resolved without hearing evidence about the harm, pre-existing and further, and the possible action to address the further harm.

Answers to the questions

[81] I now return to the questions posed by the parties on this topic.

[82] Senior counsel for the parties tried to reach agreement on questions that would clarify the meaning of s 295(4) and its application where there is **pre-existing environmental harm.** They failed, not because of any lack of will or effort on their part.

[83] I will provide my answer, or my reasons for not answering, each question in turn.

MRV Metals' questions

Q3A: Where an area is the subject of pre-existing environmental harm, is the administering authority authorised or permitted, for the purpose of determining the amount the cap, to require financial assurance in an amount that, in the opinion of the administering authority;

(a) represents the remediation costs of the total environmental harm; or

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46 Respondent's Submissions in Respect to the Statement of Legal Issues for Determination, filed by the Respondent on 28 June 2019, [38] – [40].

(b) represents only the remediation costs of the further environmental harm?[47]

[84] Before answering that question, I note that MRV Metals has defined two further terms it has used in this question. Remediation means *action* to rehabilitate or restore and protect the environment because of environmental harm. Remediation costs means the likely costs and expenses that may be incurred undertaking remediation.

[85] Those definitions are important. Without reading them into the question, the formulation deflects attention from the critical question. As I discussed at [76] – [80], the critical question is, *what action would be taken* because of the further environmental harm. The financial assurance is calculated by reference to that action.

[86] Reading Q3A, with the benefit of those definitions, I understand it to mean:

Q3A: Where an area is the subject of pre-existing environmental harm, is the administering authority authorised or permitted, for the purpose of determining the amount the cap, to require financial assurance in an amount that, in the opinion of the administering authority;

(a) represents the likely costs of taking action to rehabilitate or restore and protect the environment because of the total environmental harm; or

(b) represents only the likely costs of taking action to rehabilitate or restore and protect the environment because of the further environmental harm?

[87] On that basis, the answer to (a) is no and the answer to (b) is yes.

[88] MRV Metals' second question is:

Q3B: If the answer to Question 3A(b) is in the affirmative, how are the remediation costs of the further environmental harm to be determined in the following circumstances:

(a) where the further environmental harm is practically capable of remediation without **any** remediation of the pre-existing environmental harm?

(b) where the further environmental harm is practically capable of remediation without **complete** remediation of the pre-existing

[47] Appellant's Further Submissions, As Directed, Following Oral Addresses, filed by the Appellant on 25 November 2019, Q1.

environmental harm, but as a necessary consequence of remediation of the further environmental harm there will be a partial remediation of the pre-existing environmental harm?

(c) Where the further environmental harm is **not** practically capable of remediation without **complete** remediation of the pre-existing environmental harm? [48]

[89] As currently formulated, the question is misconceived. The financial assurance calculation must be the same under all three scenarios, because the action that would be taken is the same.

[90] As discussed at [56]-[76], where there is **pre-existing environmental harm**, the environmental harm is the **further environmental harm.** Further, as discussed at [76]-[80], the critical question is what *action* would be taken because of the further environmental harm.

[91] What action would be taken because of the further environmental harm may be in dispute. Such a dispute cannot be resolved without a factual foundation, which the Statement of Facts does not provide.

[92] There is no utility in answering Q3B and I decline to do so.

DES's question

Q4. Where the administering authority is of the opinion:
(a) that environmental harm may be caused by the activity; and
(b) that the environmental harm may occur in respect of areas to which environmental harm has already been caused by a previous and unrelated activity,
may the administering authority require financial assurance in respect of action to rehabilitate or restore and protect the environment from the environmental harm that may be caused by the activity where that action may also have the effect of rehabilitating or restoring and protecting the environment from the earlier environmental harm?

[93] By the end of the hearing, there was apparent agreement that the answer to this question must be yes. Regardless, DES requested I answer it.

[94] Given my reasoning at [76] – [77], the answer to Q4 is yes.

Conclusion and orders

[95] With respect to the questions:

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48 Ibid Q2.

1. **The answer to Q1 is yes.**
2. **It is not necessary to answer Q9.**
3. **The answer to Q3A, as I read it without the definition of remediation costs, is (a) no and (b) yes.**
4. **I decline to answer Q3B.**
5. **The answer to Q4 is yes.**
6. **I will hear from the parties about directions to progress the appeal and any consequential orders.**

APPENDIX A

Definitions used by MRV Metals for Q3A & 3B

In the following questions:

(1) references to "**the pre-amended Act**" are references to the *Environmental Protection Act 1994* (Q.) as in force prior to 1 April 2019;

(2) references to "**the cap**" are references to the limitation, under subsection 295(4) of the pre-amended Act, upon the amount of a financial assurance which may be required;

(3) references to something being "**caused**" by a specified activity (and other grammatical forms of the same verb) are references to causation within the meaning of subsection 295(4) of the pre-amended Act, which includes (as the parties agree) causation of the nature adumbrated in subsection 14(2) of the pre-amended Act, being:
- causation constituted by the direct or indirect result of a specified activity; or
- causation constituted by the result of a specified activity, whether alone or in combination with another or other activities or factors;

(4) references to "**remediation**" are references to action to rehabilitate or restore and protect the environment because of environmental harm, within the meaning of subsection 295(4) of the pre-amended Act;

(5) references to "**remediation costs**" are references to the likely costs and expenses that may be incurred undertaking remediation;

(6) references to an "**area**" are references to the area which is subject of a relevant environmental authority;

(7) references to "**pre-existing environmental harm**" are references to environmental harm which existed on or in respect of an area at the time when the relevant environmental authority was granted;

(8) references to "**future environmental harm**" are references to environmental harm, caused to or in respect of an area by a specified activity, including environmental harm which is either:
- additional to the pre-existing environmental harm to or in respect of an area; or
- in the nature of an exacerbation of the pre-existing environmental harm.

(9) references to "**the total environmental harm**" are references to the whole of the environmental harm to or in respect of an area constituted by:
- the pre-existing environmental harm to or in respect of the area; and
- the further environmental harm to or in respect of the area.