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## Private and confidential

Ian Church  
Chief Executive Officer  
Lockyer Valley Regional Council

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*Subject to legal professional privilege*

Dear Ian

## Laidley Saleyards work health and safety and environmental issues

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You have sought our advice regarding how Lockyer Valley Regional Council (**Council**) can minimise its liability exposure in relation to its current ownership and operation of saleyards and an associated cattle plunge dip located in Laidley, Queensland (**Saleyards**).

In accordance with your instructions, our advice is limited to minimising Council's exposure under the *Work Health and Safety Act 2011* (Qld) (**WHS Act**), *Environmental Protection Act 1994* (Qld) (**EP Act**) and associated subordinate legislation by way of Council selling or leasing the Saleyards.

We have considered the following reports in providing our advice (together, the **Consultant Reports**):

- (a) *Engineering Investigation Report* dated 27 November 2023;
- (b) *Review of Effluent and Stormwater Management* report dated 5 May 2023 (**ESM Report**); and
- (c) *Site Audit – Design and Safety* report dated 22 June 2022.

## Work Health and Safety

### Council's duties

- 2 As a person conducting a business or undertaking (**PCBU**), Council has a primary duty of care to ensure, so far as is reasonably practicable, the health and safety of Council's workers, contractors engaged to conduct work on behalf of Council, and other persons (e.g. members of the public) at a workplace.<sup>1</sup>
- 3 Council's duties extend to ensuring the workplace itself, and any fixtures, fittings or plant at the workplace are without risks to the health and safety of any person.<sup>2</sup>

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<sup>1</sup> Sections 19 of the WHS Act.

<sup>2</sup> Sections 20-21 of the WHS Act.

- 4 The Saleyards are a workplace for WHS Act purposes.<sup>3</sup>
- 5 The extent to which Council has management or control of a given workplace (and the associated activities at the workplace) will be proportionate to the duties Council retains under the WHS Act in relation to the workplace.
- 6 Council is currently the owner and operator of the Saleyards. We note on page 180 of the *Ordinary Meeting of Council Minutes* dated 21 August 2024 that '*sales are managed by one provider with a user agreement in place*'. We have not been provided with a copy of this agreement and therefore we are not aware of the terms which govern the agreement.
- 7 For the purposes of this advice, we have proceeded on the basis that, under the current arrangement, Council has management or control of the Saleyards for WHS Act purposes. The following discusses the two options which you have asked us to consider.

## 1. Council sells the Saleyards

- 8 Council may remove its WHS Act exposure liability by selling the Saleyards.
- 9 Despite the existing WHS issues (particularly related to the condition of structures) at the Saleyards, Council may absolve itself of ongoing WHS Act duties associated with the Saleyards. This is simply because, following sale, Council will no longer have management or control of, or any involvement with the operation of the Saleyards.
- 10 In practical terms, Council's duties under the WHS Act in relation to the Saleyards will cease on the earliest of the:
- (a) date which the parties to the executed contract of sale have expressly agreed; or
  - (b) date where the buyer obtains management or control of the Saleyards; or
  - (c) settlement date of the property transaction.
- 11 As part of any sale process of the Saleyards, we recommend Council seeks advice regarding the extent of Council's obligations to disclose the WHS issues (of which it is aware) at the Saleyards. For example, this may include the disclosure by Council to any prospective buyer of:
- (a) assessments and associated reports conducted or commissioned by Council (such as the Consultant Reports) in relation to the Saleyards; and
  - (b) operation and maintenance manuals and maintenance records for any relevant structures or fixed or mobile plant and equipment included in the sale.

## 2. Council retains ownership and leases the Saleyards

- 12 Council can significantly reduce — though not remove — its WHS Act exposure liability by retaining ownership of the Saleyards and leasing it to another party (**Lessee**).
- 13 A Lessee of the Saleyards will also be a PCBU for WHS Act purposes and therefore will hold the same primary duty of care as Council.

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<sup>3</sup> Under section 8(1) of the WHS Act, a workplace is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.

- 14 Council can hold duties under the WHS Act concurrently with another PCBU (e.g. a Lessee). The WHS Act makes clear that, where there are concurrent duty holders, each person:<sup>4</sup>
- (a) retains responsibility for the person's duty in relation to the matter; and
  - (b) must discharge the person's duty to the extent to which the person has the capacity to influence and control the matter.
- 15 This means that where Council is the owner of the Saleyards and has a lease agreement with another party, Council retains duties under the WHS Act. The extent to which Council owes these duties is made up of a combination of:
- (a) the express duties of a PCBU under the WHS Act;
  - (b) relevant WHS related provisions (if any) of the lease agreement between Council and the Lessee; and
  - (c) the level of practical control Council exercises throughout the term of the lease agreement.
- 16 There are two key factors relevant to determining what is reasonably practicable for Council as a concurrent duty holder (in this case, with a Lessee of a Council-owned asset) — control and the inherent risk. That is:
- (a) the more **control** Council has over the activities at the Saleyards, the more it must do to discharge its WHS duties, so far as is reasonably practicable; and
  - (b) the more **inherent risk** to the health and safety of persons at the Saleyards (e.g. the condition of structures, fixtures or fittings), the more that Council must do to discharge its WHS duties, so far as is reasonably practicable.
- 17 Regarding control, where Council executes a lease agreement with another party — and makes clear in that agreement that the Lessee has management or control of the Saleyards for the term of the lease — what Council must do to discharge its duties under the WHS Act regarding the activities at the Saleyards will be substantially reduced. Conversely, where the Lessee conducts activities at the Saleyards under the direction and supervision of Council, the circumstances will be markedly different. That is, the greater control being exercised increases what Council must do to discharge its duties, so far as is reasonably practicable.
- 18 Regarding inherent risk, Council has a duty to consult, cooperate and coordinate activities with other duty holders.<sup>5</sup> Accordingly, Council must communicate to the prospective Lessee any matters of which Council is aware with respect to the Saleyards that may adversely affect the health and safety of persons (such as identified WHS risks in the Consultant Reports).
- 19 We recommend that prior to entering a lease agreement with another party, Council takes steps to address the WHS issues addressed in the Consultant Reports, particularly those listed in Tables 3 and 5 of the *Site Audit – Design and Safety* report. This will assist in reducing the risk of Council being held liable for any future incidents associated with fixed structures at the Saleyards (e.g. the collapse of raised structures such as walkways and bench seating; or the inadequate spacing of horizontal fence bars to separate animals and persons).

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<sup>4</sup> Section 16 of the WHS Act.

<sup>5</sup> Section 46 of the WHS Act.

## WHS Act liability mitigation

- 20 To minimise liability under the WHS Act, the most effective course of action is for Council to sell the Saleyards. This approach is strictly from the view of liability under the WHS Act and is of course subject to other financial, community and other priorities of Council.

## Environmental liabilities

### Basis of advice

- 21 The following sections of this advice discuss potential liability under the EP Act. The advice is relatively broad in this respect, as we do not have a full understanding of the communications passing between Council and the Department of Environment, Science and Innovation (**DESI**) over the past year or so.
- 22 After we commenced preparing this advice, on 30 September 2024 we were provided with a copy of a notice from DESI to Council dated 28 September 2023 confirming that:
- (a) Council gave a duty to notify form to DESI on 5 June 2023;
  - (b) DESI officers subsequently attended a site inspection on 11 July 2023; and
  - (c) DESI was considering taking enforcement action for a potential breach of the EP Act and invited Council to provide further information by 27 October 2023.
- 23 We are not aware of whether any enforcement action was subsequently taken by DESI against Council in respect of the Saleyards, or if the compliance investigation remains open from DESI's perspective.
- 24 Accordingly, the advice we provide below is largely general in nature, and may need to be revisited in light of any particular further factual background in terms of the history of communications with DESI around the Saleyards.
- 25 We have also prepared this advice on the assumption that Council has never held any environmental authority for activities carried out at the Saleyards, given none are revealed from searching DESI's online public registers. We do not suggest that Council necessarily was ever required to hold an EA but note this for completeness, as we have not considered any potential liability for EA-related offences in our analysis.
- 26 Our advice is not intended to cover any potential civil disputes that may arise between a future owner or operator of the Saleyards and Council outside of the statutory regime discussed below.

### Summary of advice

- 27 There are a range of potential liabilities under the EP Act which may arise from the factual situation as we presently understand it, including:
- (a) duties to notify, as described in more detail below;
  - (b) duties to restore or remediate harm or contamination, whether arising as a standalone "duty" or in response to a notice, direction, or other compliance tool issued by the regulator; and
  - (c) for offences against the EP Act, including causing harm or failing to comply with a duty.

- 28 Presently, Council assumes a number of different roles in relation to the Saleyards and relevant to considering these potentially liabilities, including as operator, owner of the activity, owner of the land, and local government authority for the land.
- 29 Council can somewhat limit potential liabilities under the EP Act by selling or leasing the Saleyards. The extent to which liability can be limited through selling or leasing the Saleyards is described in detail below.
- 30 Some residual potential liability will remain regardless of any transaction in respect of:
- (a) any potential alleged offences or contamination associated with previous acts or omissions of Council in its role as operator of the Saleyards activity; and
  - (b) Council's statutory role as local government for the area more broadly.

## Council's duties

### Overview

- 31 A number of duties are imposed on both individuals at large and specified roles or capacities under the EP Act. In each case, the failure to comply with an applicable duty is an offence against the EP Act.
- 32 In addition, a number of offences exist generally under the EP Act for causing environmental harm or contamination, and DESI as the administering authority has a range of compliance tools and enforcement mechanisms at its disposal for suspected or alleged contraventions.
- 33 Broadly, the EP Act and policies under it adopt a concept known as the "polluter pays" principle, meaning that the person or body who caused or contributed to any particular circumstance requiring environmental restoration or remediation will be the first person the regulator pursues to conduct or pay for the restoration or remediation works.
- 34 However, the regime also provides for a number of cascading fall backs for situation where the primary polluter cannot be found, no longer exists, or is otherwise unable to be compelled to restore or remediate the land.

### General Environmental Duty

- 35 Council, like everyone else in Queensland, has a general duty under the EP Act not to carry out any activity that causes, or is likely to cause, environmental harm unless Council takes all reasonably practicable measures to prevent or minimise that harm.<sup>6</sup>
- 36 Environmental harm is defined and further categorised in the EP Act, including as:
- (a) irreversible or widespread harm to an area of high conservation or harm which causes property damage or rehabilitation costs of greater than \$100,000 (**serious environmental harm**)<sup>7</sup>; or
  - (b) harm which is not trivial or negligible and causes actual or potential damage or rehabilitation costs of between \$10,000 and \$100,000 (**material environmental harm**).<sup>8</sup>

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<sup>6</sup> Section 319 of the EP Act.

<sup>7</sup> Section 17 of the EP Act.

<sup>8</sup> Section 16 of the EP Act.

37 There are also a range of offences under the EP Act for causing environmental harm.

### **Duties to notify**

38 There is also a duty under the EP Act to notify DESI in writing no later than 24 hours after a person becomes aware, or ought reasonably to have become aware, that an event has happened that causes or threatens serious or material environmental harm.<sup>9</sup>

39 The duty to notify can apply to:

- (a) a person carrying out an activity in which an event happens that causes or threatens serious or material environmental harm;<sup>10</sup>
- (b) if the person is carrying out an activity during the person's employment or engagement by someone else, an employer;<sup>11</sup>
- (c) the owner or occupier of land;<sup>12</sup> or
- (d) a local government.<sup>13</sup>

40 The duty of an owner or occupier of land arises at the time of becoming aware, or having ought reasonably to become aware of:<sup>14</sup>

- (a) the presence of, or the happening of an event involving a hazardous contaminant on the land that is causing, or is reasonably likely to cause, serious or material environmental harm;
- (b) a change in the condition of the land that is causing or is reasonably likely to cause, serious or material environmental harm; or
- (c) a notifiable activity having been carried out, or being carried out, on the land (notice for a notifiable activity must be given within 20 business days).<sup>15</sup>

41 Council also has a duty to notify of any of the limbs listed under paragraph 40 above in its capacity as a local government where the activity, event or change occurs within its local government area.<sup>16</sup>

### **Duty to restore**

42 Council has a duty to restore the environment if Council causes or permits, or has caused or permitted, an incident involving contamination of the environment to happen that results in unlawful environmental harm.<sup>17</sup> The duty to restore (which was only introduced into the EP Act this year) requires that a person, as soon as reasonably practicable after the contamination incident happens, take measures, as far as reasonably practicable, to rehabilitate or restore the environment to its prior condition.

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<sup>9</sup> Section 320A of the EP Act.

<sup>10</sup> Section 320A (1)(a) of the EP Act.

<sup>11</sup> Section 320D (2) of the EP Act.

<sup>12</sup> Section 320A (2)(a)(i) of the EP Act.

<sup>13</sup> Section 320BD of the EP Act.

<sup>14</sup> Section 320A (2)(b) of the EP Act.

<sup>15</sup> Section 320DA (3) of the EP Act.

<sup>16</sup> Section 320A (3) of the EP Act.

<sup>17</sup> Section 319C of the EP Act.

### Other DESI powers for contaminated land

- 43 Council will be the "person responsible" for the land for the purposes of Chapter 7 of the EP Act, potentially under multiple limbs of the relevant definition, being:
- (a) the person who released a hazardous contaminant contaminating the land
  - (b) the relevant local government
  - (c) if the above do not apply, the owner of the land in relation to whom either of the following applies:
    - (i) when the owner acquired the land particulars of the land were recorded in the environmental management register or the contaminated land register;
    - (ii) the land became contaminated after the owner acquired the land.
- 44 An environmental investigation may be required for any parcels of land attached to the Saleyards that are recorded on the EMR if DESI is satisfied, or suspects on reasonable grounds, the hazardous contaminant contaminating the land has the potential to cause serious or material environmental harm, and is satisfied that a person, animal or another part of the environment may be exposed to the hazardous contaminant.<sup>18</sup>
- 45 If the land is determined to be contaminated following an environmental investigation and DESI believes the contamination may be managed by applying conditions to the use or development of, or activities carried out on, the land, the person responsible may be required to prepare or commission a site management plan for the land.<sup>19</sup>

### Compliance and enforcement mechanisms more broadly

- 46 DESI also has a range of powers and tools more broadly at its disposal in responding to suspected offences under the EP Act, similar to those Council has in its role as assessment manager and enforcement agency under much of the *Planning Act 2016* (Qld) and related legislation.
- 47 This includes investigation and enforcement powers and, in the event of a suspect breach, options to take measures such as:
- (a) issuing one or more Penalty Infringement Notices
  - (b) imposing fines;
  - (c) issuing an Environmental Enforcement Order (**EEO**) requiring the recipient to take stated steps, on the basis of one or more enforcement grounds, including:
    - (i) to secure compliance with the general environmental duty or the duty to restore; or
    - (ii) in response to a contamination incident; and
  - (d) commencing Court proceedings, including prosecutions under the *Justices Act 1886* (Qld) or enforcement proceedings in the Planning and Environment Court.

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<sup>18</sup> Section 326BA of the EP Act.

<sup>19</sup> Sections 370 and 391 of the EP Act.

- 48 The severity of such responses is, of course, varied and DESI will generally be guided by its Enforcement Guidelines, particularly the criteria around seriousness of and culpability for an alleged offence, and broader governance and model litigant principles.
- 49 Under section 11 of the *Local Government Act 2009* (Qld), a local government is a body corporate. Council is therefore arguably a company for the purposes of certain provisions of the EP Act designed to allow individuals to be targeted 'behind the corporate veil'.
- 50 Under this chain of responsibility regime in the EP Act, an EEO may be issued to a related person of a company in certain circumstances, and the EEO may impose any requirement on the related person that is being, or has been, imposed on the company, as if the related person were the company.<sup>20</sup>
- 51 A related person can include a person who owns the land on which the company carries out, or has carried out, an activity that has caused, is causing or is likely to cause serious or material environmental harm.<sup>21</sup>

### **Executive officer liability**

- 52 The EP Act also imposes a deemed liability regime in respect of an offence committed by a corporation, which includes executive officers of a local government, relevantly defined as the CEO together with any 'person who is concerned with, or takes part in, the local government's management, whatever the person's position is called'.
- 53 The regime provides that where a corporation commits an offence against the EP Act, each of its executive officers will be deemed to have committed the offence of failing to ensure the corporation complied, unless an individual officer can establish a statutory due diligence offence.
- 54 The executive officer liability regime is mostly relevant in a prosecution context, however, anyone who may be an executive officer may also personally be required to assist in any investigation including potentially being compelled to attend an interview and answer questions about a suspected corporate offence.

### **Review of Effluent and Stormwater Management report and DESI response**

- 55 The ESM Report identified the following environmental risks exist at the Laidley Saleyards:
- (a) the release of contaminants across the site;
  - (b) evidence of effluent migration from the selling and holding pens; and
  - (c) leakage from the cattle drip.
- 56 The ESM Report confirms the writer's professional opinion that the environmental risks on site trigger the following duties under the EP Act:
- (a) a duty to notify that the effluent contaminated runoff from the site is causing, or is likely to cause, serious or material environmental harm; and

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<sup>20</sup> Section 369P of the EP Act.

<sup>21</sup> Section 369N(1)(b) and 369M of the EP Act,



- (b) a duty to notify of a 'notifiable activity', being the presence of the cattle dip on lots 803 and 804 on L171 and Lot 1 on SP288143.<sup>22</sup>

- 57 The ESM Report confirms that lot 186 on L1731 is already listed on the Environmental Management Register (**EMR**).
- 58 We have been provided with a letter from DESI to Council which appears to form part of a broader chain of communication, and also provides confirmation that Council provided DESI with a Duty to Notify form under section 320D of the Act.
- 59 In response, DESI undertook a site inspection on 11 July 2023 of the Laidley Saleyards. In the observations made during the site inspection, DESI expressed concern that contamination issues were long standing and had not been actioned. DESI noted that they would be monitoring the facility into the future to ensure infrastructure is installed and maintained to prevent a release of contaminants from the cattle yards and cattle dip to waters.
- 60 In DESI's response letter to Council on 28 September 2023, the Department set out requirements for Council to:
- (a) take all reasonable and practicable measures immediately to prevent the released of prescribed contaminants to waters from the site; and
  - (b) provide a letter of response detailing the actions and measures that Council intended to take to prevent release of contaminants from the facility to waters and a timeline by which these would be completed.
- 61 We are not able to confirm from the material provided to us whether Council has fully discharged its duties associated with the receipt of and conclusions in the ESM Report, or whether DESI has given any clear indications of its position on the existing circumstances at the Saleyards since September 2023.

## **Soil contamination testing results**

- 62 Council has provided soil contamination testing results undertaken at the Laidley cattle yards and livestock plunge dip. The results demonstrated that for all samples analysed, the reported concentrations of targeted contaminants were below the applied human health and ecological investigation levels for a low-density residential land use.

### **1. Council sells the Saleyards**

- 63 Council is responsible for the triggered duties listed at paragraph 56. If there was a failure to notify DESI within the prescribed timeframes, Council will remain liable if the Saleyards are sold. Council will also potentially remain subject to any enforcement or compliance action DESI is minded to take in respect of alleged contraventions of the EP Act occurring prior to the sale.
- 64 Selling the Saleyards will mitigate the Council's liability moving forward under the EP Act as Council will no longer be responsible for the general duty to prevent and minimise harm. Upon the transfer of the land, Council will also no longer be responsible for any duty to notify in the capacity of a landowner, occupier, or employer.
- 65 If Council sells the Saleyards, a duty to notify still applies to Council in its capacity as local government.

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<sup>22</sup> *Notifiable Activity 22 Livestock dip or spray race operations – operating a livestock dip or spray race activity* – Schedule 3 of the EP Act.

- 66 Council will continue to be liable if a duty to restore the land arises in relation to matters that occurred prior to the sale. If future soil testing indicates that contamination has occurred on the land which constitutes unlawful environmental harm, Council could be considered the person who caused or permitted the contamination, and the initial person pursued by DESI for any remediation or restoration works.
- 67 If future contamination on the land arises from acts or omissions by a subsequent landowner, Council may still be a responsible person for requirement under the EP Act in its capacity as the local government. However, ordinarily in the first instance the person who released the contaminant will be the responsible person for obligations arising under the EP Act under the 'polluter pays' principle which is incorporated into the regime despite not being directly referenced.

## **2. Council retains ownership and leases the Saleyards**

- 68 As above at paragraph 63, if Council failed to provide notification for a triggered duty within the prescribed time frame, liability for the breach of the duty to notify will not transfer to a future operator if the Council leases the Saleyards.
- 69 Leasing the saleyards will mitigate Council's statutory duty to prevent and minimise harm occurring on the land in the future as Council will no longer be the party operating the Saleyards.
- 70 If the Saleyards are leased, Council will still be liable for any future duty to notify under the EP Act in its dual capacities as landowner and as a local government. A duty to notify under the EP Act will also apply to a future lessee as an 'occupier' of the land.<sup>23</sup> Where a duty to notify arises for a number of different people concerning the same event, a number of persons can comply with their individual duty to notify by jointly issuing one notice advising the event, if this can be achieved within the time frames.<sup>24</sup>
- 71 As above at paragraph 66, Council will continue to liable if a duty to restore the land is enlivened due to any incidents that were caused or permitted by the Council during its period of operating the Saleyards.
- 72 If a future lessee causes or permits an incident involving contamination that causes unlawful environmental harm, the lessee will be primarily responsible for a duty to restore the land under the EP Act.
- 73 If the Saleyards are leased and ownership of the Saleyards are retained, Council will remain the person responsible for any environmental investigation or site management plan required on the land for contamination that occurred in the period where Council was the operator of the Saleyards.
- 74 If a future lessee of the Saleyards contaminates the land, Council may be still a responsible person for an obligation under the EP Act in its capacity as the local government and as the landowner. However, in the first instance the person who released the contaminant will be the responsible person for obligations arising under the EP Act, although a lessee may seek a level of contribution from Council on the basis Council caused the original contamination.

## **Other matters relevant to potential transactions**

- 75 If the Council decides to proceed with a sale of the land, written notice must be given to the buyer that the land is recorded on the EMR. If at the time of the sale of land a site management plan is in place, details of this must also be provided to the buyer.<sup>25</sup>

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<sup>23</sup> Section 320A (2)(a)(i) of the EP Act.

<sup>24</sup> The *Duty to Notify of Environmental Harm Guideline* from the Department of Environment, Science and Innovation.

<sup>25</sup> Section 408 of the EP Act.

- 76 Failure to give notice is an offence under section 408 and would give the buyer a right to rescind the agreement. If any payment has transferred from the buyer and the agreement is rescinded, the payment must be refunded.<sup>26</sup>
- 77 No equivalent provision exists for a lease of land listed on the EMR.

### **Conclusions on EP Act liability mitigation**

- 78 Council is not able to fully mitigate its potential liability for any potential offences under the EP Act DESI considers may have occurred during the period Council was the owner and operator of the Saleyards by selling or leasing the land.
- 79 Council can somewhat limit its potential liability under the EP Act for dealing with any future environmental harm on the land by selling the Saleyards. Council will still be subject to a duty to notify in its capacity as the local government and may be the prescribed responsible person for obligations under the EP Act in relation to contaminated land where no alternative "polluter" can be identified and compelled to restore or remediate the land.
- 80 Council can limit liability under the EP Act for dealing with any future environmental harm on the land by leasing the Saleyards, although to a lesser extent. In this instance, the Council will still have a duty to notify and may be the prescribed responsible person for obligations under the EP Act in dual capacities as both landowner and as the local government. Accordingly, there will be fewer alternatives for DESI to consider in responding to any future contamination or harm event if the incoming lessee cannot be compelled to restore or remediate the land.

If you have any questions regarding this advice, we are pleased to discuss.

Yours sincerely

**Cameron Dean**  
Partner

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<sup>26</sup> Section 408(3)(4) of the EP Act.