

Information sheet

Environmental Protection Act 1994

Enforcement action and multiple EA holders

The purpose of this information sheet is to assist external customers of the Department of Environment and Heritage Protection (the department) in understanding how the department responds to alleged non-compliances where an environmental authority (EA) under the Environmental Protection Act 1994 (the Act) is held by multiple entities.

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Background

Under the *Environmental Protection Act 1994* (the Act), an Environmental Authority (EA) may be held by more than one legal entity.

Prior to 31 March 2013, a principal holder was able to be nominated on behalf of all holders of an EA to communicate on their behalf for compliance related matters. This allowed the Department of Environment and Heritage Protection ('the department') as the administering authority for the Act to give a notice, or make a requirement under Chapter 5A of the Act, to all holders of an EA by giving/making it to the principal holder. These provisions were removed from the Act as part of the *Greentape* reforms in order to address issues which arose where an EA was suspended but the administering authority had provided natural justice only to the principal holder. The effect of removing these provisions is that 'principal holders' of an EA no longer exist under the Act and all entities are considered 'joint holders' of EAs. Principal applicant provisions still apply to application processes under the Act, but cannot be relied upon as a 'principal holder' for compliance matters.

All entities listed as holders of an EA are responsible for the activities carried out under the EA, and are considered to be 'joint holders'. All 'joint holders' have statutory liability for compliance with the conditions of the EA and any other regulatory requirements under the Act. Consequently, where alleged non-compliances under the Act arise, all holders of the EA have strict statutory liability under the Act.

Compliance action involving joint holders can be complex and involves extra consideration by the administering authority. This information sheet is intended to assist customers of the department to understand the decision making process where there are suspected non compliances involving an EA with joint holders.

1 Legal entities generally

Statutory notices like those provided for under the Act for enforcement purposes such as environmental protection orders (EPOs) can only be issued to legal entities, irrespective of the type of entity that has applied for an EA. A legal entity is an entity on which a legal system may confer rights and impose responsibilities. This means that when taking enforcement action against holders of EAs, the enforcement action can only be taken against legal entities that 'make up' the holders of the EA. For example, a business may operate under the name of their joint venture, however the EA is held by the two people who make up the joint venture. This means that enforcement action can be taken against the two people (the legal entities) who make up the joint venture and not the joint venture itself. Note this is, as opposed to a corporation which can sue, and be sued in its own right, just like a natural person

The following table helps distinguish legal entities from other types of entities:

Type of entity	Is it a legal entity?
Sole trader (i.e. individual)	YES
Partnership	NO
Unincorporated Joint Venture	NO
Incorporated Joint Venture	YES
Joint Venture under a Unit Trust	NO
Trust	NO
Co-operative	YES
Company (with an ACN)	YES
Incorporated Association	YES

Type of entity	Is it a legal entity?
Unincorporated Association	NO
Body Corporate	YES
Registrable Australian Body	YES
Managed Investment Scheme	YES
Business	NO
Government Owned Corporation	YES
Local Council	YES
University	YES

1.1 Joint Ventures

Joint ventures are predominantly a business arrangement involving an association of persons for the purposes of a particular activity or endeavour for profit with each party contributing finance, property or some particular skill. There are primarily two types of joint ventures:

1. Incorporated joint ventures;
2. Unincorporated joint ventures.

Incorporated joint ventures operate as a separate legal entity with a separate ACN and are able to hold an EA as a single holder; therefore there are no issues with determining which holder(s) of an EA should be subject to compliance action.

1.1.1 Unincorporated Joint Ventures (UJVs)

An unincorporated joint venture is a contractual relationship that is used frequently in the resource sector. It can involve a large number of parties, some of which may hold the tenure or have a proprietary interest in the site on which the activity is carried out, but others may have only a minority financial interest in the operations or even be located overseas. Each member of a UJV is likely to be a legal entity in its own right, but the UJV is not a legal entity itself. As a result, all parties of the UJV are held responsible for ensuring compliance with the EA, and enforcement action can be taken against each party of the UJV where non-compliances occur, until such time that culpability is determined. There is no established legislative framework for UJVs; they are not defined or mentioned in the *Corporations Act 2001* or any other legislation. UJVs are a contractual relationship established through case law. This creates a disparity between business practice in the resource industry and the legislative actuality under the Act.

2 Environmental Responsibility (culpability) of EA holders

Each holder of an EA has statutory liability for compliance with the EA and the Act. This remains so, irrespective of any underlying agreements of interest that the holders may have. For example, the holders of an EA may have internal agreements that minority parties (e.g. those who have only provided small amounts of capital for the project) are not responsible for any alleged non-compliances because they do not have a controlling interest. However, under the Act, internal agreements do not automatically relieve minority parties from their statutory liability for compliance.

Conversely, culpability is not automatically established on behalf of all joint holders where there has been an alleged non-compliance. The administering authority, will seek to determine the culpability of each EA holder for

a particular offence on an individual basis before proceeding to enforcement action. Departmental officers ('Officers'), will ensure that a sufficient attempt is made to assess the culpability of each joint EA holder for a particular offence as a part of the investigation process.

2.1 Steps the department will take to determine culpability

2.1.1 Determining non-compliance and parties

Non-compliance can be identified through a number of different means such as desktop inspections, on-site inspections, notifications or complaints. Officers will then seek to determine the legal entity names and addresses for each party to an alleged offence. Officers will utilise departmental databases and systems, written files and notes, local knowledge, ASIC searches and publicly available information to establish this information.

2.1.2 Determining specific facts and circumstances

Officers will consider the facts and circumstances of the matter including when the alleged non-compliance took place and who was in charge of the site/tenure at the time of the non-compliance.

For example, consistent with the Department's [Enforcement Guidelines](#), when determining who is responsible for an offence, a number of considerations must be taken into account, including (but not limited to):

- Who was primarily responsible for the offence, that is:
 - who committed the act;
 - who formed the intention (if relevant);
 - who created the material circumstances leading to the alleged offence; and
 - who benefited from the offence; and
- What the role of each alleged offender was (where there is more than one alleged offender).

Where culpability can be established, multiple holders of an EA may be issued with statutory notices, but all holders will not automatically be considered to be jointly responsible for a particular non-compliance.

Officers must refer to the Department's [Enforcement Guidelines](#) for a full range of relevant considerations.

2.1.3 Providing for natural justice in a pre-enforcement letter

Departmental policy is to issue pre-enforcement letters to all likely parties to an offence prior to any enforcement decision making. A pre-enforcement letter advises of a specific alleged offence(s) including any relevant information and allows for the alleged offenders to respond to any allegations and show why enforcement action should not be taken against them. It is in the interests of an EA holder/s to ensure that they respond in a timely manner (or within a given timeframe) to any letters received in relation to alleged non-compliance. This is because any response given by an alleged offence before an enforcement recommendation is finalised must be taken into consideration by the decision maker. For example, where there are multiple EA holders and one is more responsible for the alleged offence than others because that EA holder carries out day-to-day operations and makes decisions on site, EA holders should advise the department accordingly and include any information that supports the reasons or representations (such as contractual arrangements).

2.1.4 Asking specific questions

If no response is received by the department, Officers may ask specific and pointed questions of the EA holder(s), employees on site or other involved persons in an attempt to determine who has primary control of a particular site or any other fact or circumstance that the officer needs to determine.

3 Other tools to determine culpability

Departmental officers who are also authorised persons under the Act can also utilise other tools to obtain information that is required to make an enforcement decision.

3.1.1 Section 451 Requiring relevant information

Officers can issue a notice under section 451 of the Act, requiring relevant information from a person, which can assist officers in obtaining information or documents.

Section 451 notices can only be used where the administering authority suspects on reasonable grounds that a person has knowledge of a matter or is in possession or control of a document dealing with a matter for which the information is required.

3.1.2 Section 465 Requirement to provide answers to questions

Officers can require or issue a notice under section 465 of the Act in order to compel individuals to answer questions to assist them to determine culpability.

Under section 456, the authorised person must suspect that an offence against the act has occurred and that a person(s) may be able to give information about the offence.

3.1.3 Section 466 Requirement to produce documents

Authorised persons can issue a notice under section 466 to require a person to produce documents to be held or kept under the Act. This may assist in determining culpability or control of a particular site if required.

An authorised person may keep a produced document to take an extract from, or make a copy of, the document. An authorised person must return the document to the person as soon as practicable after taking the extract or making the copy.

4 Options for EA holders after receiving a statutory notice

Some decisions of the department are considered to be 'original decisions', in particular many enforcement actions. Original decisions can be found in Schedule 2 of the Act. The provisions regarding reviews of original decisions and appeals are found in sections 519–539 of the Act.

A person who is dissatisfied with an original decision of the department may be able to apply to have the department review that original decision.

Generally, an application for review of an original decision must be:

- provided to the department within 10 business days after the day on which the person receives notice of the original decision;
- supported by enough information to enable the department to decide the application for review; and
- made using the application for [review of an original decision form](#) .

Where an application has been made for an original decision to be reviewed, the applicant may also apply to the relevant court for a stay of the decision to secure the effectiveness of the review.

Once the original decision has been reviewed, a person who is dissatisfied with the review decision may be able to appeal against that decision to the relevant court within 22 business days after receiving notice of the review decision.

The court may grant a stay of the review decision until such time as the appeal is decided. An appeal against a review decision does not affect the operation or the carrying out of a review decision unless that decision is stayed by the court.

A person whose interests are or would be adversely affected by a decision of the department may also be able to request a statement of reasons for a decision or a statutory order review under the *Judicial Review Act 1991*.

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For further information about reviews and appeals see the information sheet—[Internal review and appeal to the Planning and Environment Court](#) .

Disclaimer While this document has been prepared with care it contains general information and does not profess to offer legal, professional or commercial advice. The Queensland Government accepts no liability for any external decisions or actions taken on the basis of this document. Persons external to the Department of Environment and Heritage Protection should satisfy themselves independently and by consulting their own professional advisors before embarking on any proposed course of action. This document will be reviewed on an ongoing basis and is subject to change without notice.

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