

Draft Issuing Chain of Responsibility Environmental Protection Orders Guideline

Consultation Report

Prepared by: Strategic Compliance, Department of Environment and Heritage Protection

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Purpose

The purpose of this report is to summarise the results of public consultation on the draft 'Issuing chain of responsibility environmental protection orders under Chapter 7, Part 5, Division 2 of the *Environmental Protection Act 1994* Guideline' (the guideline) undertaken by the Department of Environment and Heritage Protection (the department). This report outlines the key issues raised during consultation and the actions or responses to those issues.

Regulatory Background

The *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (CoRA) came into effect on 27 April 2016. The CoRA amends the environmental protection order (EPO) provisions in the *Environmental Protection Act 1994* (the EP Act) by inserting new heads of power, allowing an EPO to be issued to a related person of a company.

These new powers do not prohibit or change the ability of the department to issue an EPO to a person identified in section 358 of the EP Act. Rather, they allow the department to issue an EPO to a related person, including a person with a relevant connection to a company that is carrying out the relevant activity.

Under section 548A of the EP Act, the department may make guidelines about how the department decides:

- whether a person has a relevant connection with a company;
- whether to issue any EPO to related persons of the company; and
- which of the related persons of the company to issue an EPO.

The guideline will take effect when it is approved by regulation. Under section 363ABA of the EP Act, the department must have regard to any relevant guidelines in force under section 548A when deciding to issue an EPO to a related person.

Public consultation

Public consultation on the draft guideline was held from 14 November 2016 to 25 November 2016.

Notices inviting written submissions on the draft guideline were provided through:

- the department's 'Be involved' webpage;
- the Queensland Government's Get Involved website;
- emails to stakeholders that had previously contacted the department to express an interest in reviewing the guideline; and
- emails to members of the CoRA Working Group.¹

Submissions were received from 14 stakeholders.

All submissions were reviewed and their contents summarised and collated by issue. Note that submissions requesting amendments to legislation were not within the scope of this guideline and have not been addressed in the consultation report.

¹ The CoRA Working Group was established by the Minister of Environment to engage key stakeholders (including banking and investments groups, environmental and legal organisations, resources and mining representatives, and State government agencies) in the development of the guideline.

Result of consultation and response

Table 2 provides a summary of the key issues identified in the submissions for the draft guideline and the department's responses to each issue. Most issues that were within the scope of the draft guideline were addressed through amendments to the guideline.

The submission numbers listed in Table 1 below correspond to Table 2, column 2 'Issues raised by' and the persons and organisations that made a submission on the draft guideline during the public consultation period.

Table 1: List of submitters

Submission number	Person or organisation
1	Australian Bankers' Association
2	Environmental Defenders Office of Northern Queensland
3	Energex Limited
4	Ipswich City Council
5	Australian Restructuring Insolvency and Turnaround Association
6	Property Council of Australia
7	Australian Petroleum Production and Exploration Association
8	Environmental Defenders Office (Qld) Inc.
9	Queensland Resources Council
10	Lock the Gate Alliance
11	Individual
12	Australian Institute of Company Directors
13	Queensland Law Society
14	Australian Finance Conference

Table 2 – Summary of key issues and responses

Issue	Issue raised by	Issue description	Response
1. General examples	13, 9	<p>The key examples used in the draft guideline are repeated throughout to provide a holistic understanding and provide an ultimate conclusion.</p> <p>Suggested including examples for the following categories, to demonstrate culpability and guidance to determine reasonable steps:</p> <ul style="list-style-type: none"> • Financier or other investor • Shareholder • Executive officer or other employee • Landholder, leaseholder and tenant • Mortgagee in possession • External administrators • Contractors 	<p>Two detailed examples will be included in Appendix 2 of the guideline to provide a holistic view of how the department will decide to issue a CoRA EPO. In addition, the following category of related person are addressed in examples in the following sections of guideline:</p> <ul style="list-style-type: none"> • Financier or other investor – refer to examples in sections 4.1.1 and 5.1.2 • Shareholder – refer to section 4.1.1 • Executive officer or other employee – refer to detailed example in Appendix 2 • Landowner, leaseholder and tenant – refer to section 4.1.1 • Mortgagee in possession / Exercising of security – refer to Section 4.1.1 • External administrators – refer to section 5.1.1 • Contractors – refer to section 4.1.2
2. Section 1.1. Relationship with Enforcement Guidelines	1, 4, 6, 9, 13,	<p>The guideline should clarify the category/s of the culpability that may receive a CoRA EPO. For example, only serious culpability but not for low culpability. In addition the categories of culpability should consider the seriousness of the matter or impact of the breach.</p> <p>Examples should be included to demonstrate how culpability may be established for specific persons such as landowners, financial institutions and local government agencies.</p> <p>Section 1.1 should also include information about proportionality with the seriousness of the breach consistent with the Enforcement Guidelines.</p>	<p>Culpability refers to the blame and responsibility of the alleged offender in relation to the alleged offence and therefore the criteria to be considered in determining culpability applies to all alleged offenders e.g. an individual, a large corporations or a local government agency.</p> <p>As outlined in the department's Enforcement Guidelines there are three categories of culpability:</p> <ul style="list-style-type: none"> • Low capability • Moderate culpability • Serious culpability <p>The three categories outlined in the Enforcement Guidelines assist departmental officers to determine the seriousness of the offence. Other considerations include the objectives of the relevant legislation</p>

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			<p>and the actual or potential impact of the offence. Each of these considerations are taken into account by the department when determining the most appropriate enforcement response.</p> <p>As the culpability is just one matter that needs to be considered in balance of the other matters, it is not appropriate to include statements to the effect that if a related person meets a certain category of culpability then they will, or will not, be issued with a CoRA EPO.</p> <p>However, as outlined in the Enforcement Guidelines, as a general rule, administrative notices and orders (which would include CoRA EPOs) are generally reserved for moderate to serious breaches of legislation.</p> <p>As outlined in the guideline, the department's Enforcement Guidelines must be read in conjunction with the CoRA guideline. On this basis the guideline will not be changed to further describe culpability as this information can be sourced from the Enforcement Guidelines.</p> <p>In relation to the example included in section 1.1.1., the intent of this example was to provide a simple example of culpability and how the considerations from the Enforcement Guidelines may be considered. On this basis, detailed culpability examples in relation to specific persons such as landowners, financial institutions and local government agencies have not been included.</p> <p>However, in relation to landowners and local government agencies, section 5.1.1 of the guideline includes an amended example, 'Nature of the relationship' which discusses the expectations for reasonable steps where a local government agency is a landowner that has entered into a lease agreement with a company.</p> <p>The guideline has been amended to include an additional section, section 1.1.2: Proportionate to the seriousness of the breach which information adapted from the Department's enforcement guidelines.</p>
3. Section 2.0 Key principles	8, 9	<p>The guideline should clarify the intent of the key principles.</p> <p>The guideline should clarify key principle 11, particularly to:</p> <ul style="list-style-type: none"> Clarify that 'If the financial assurance is not sufficient, 	<p>The guideline describes that the Key Principles are drawn from the EP Act and the Enforcement Guidelines, and will be used to guide decision-making and enforcement by the department for CoRA EPOs.</p>

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		<p>the first recourse would still be to call in the financial assurance, so that it is only the gap that is under consideration in relation to a CoRA EPO; and</p> <ul style="list-style-type: none"> • Clarify responsibility and insert: 'Any financial assurance required to be utilised by the department under an EPO must be fully reimbursed or replaced by the company upon withdrawal by the department.' 	<p>Key principle 11 has been amended to confirm the information included in section 6.0 of the guideline. That is, where FA is already held in relation to the same matter as a CoRA EPO, any security or bank guarantee under any CoRA EPO would only be for a shortfall in the FA.</p> <p>Section 6.0 has also been amended to clarify that "If an EPO is withdrawn, any security held by department under the EPO will be reimbursed to the person that submitted the security."</p>
4. Section 3.0 Environmental protection Orders generally	9	A review of the enforcement guidelines is requested. In particular, specific mention of CoRA EPOs should be made, and information should be included about how the department will assess which compliance tool to use e.g. prosecution, clean-up notices.	<p>The Enforcement Guidelines include information in relation to Administrative actions (section 6), the class of enforcement tool to which CoRA EPOs belong.</p> <p>Any potential amendments to the Enforcement Guidelines are beyond the scope of development of the CoRA Guideline and are a separate matter for consideration at a later date.</p>
5. Section 3.0 Environmental Protection Orders Generally - Example	1, 9	Questioned, in relation to the statement "this does not mean that at a later point circumstances may not arise which could provide grounds for the issue of an EPO," whether the administrator would be issued the EPO?	<p>The intent of this example was to demonstrate that an EPO cannot be issued if there are no grounds under the Act to do so.</p> <p>There is insufficient detail included in the example to identify who the recipient of any future EPO may be. In reality, all of the matters outlined in the guideline would be considered when determining the potential recipient of any enforcement action.</p> <p>The statement in question was included as a caveat to the example, that although there are currently no grounds to issue an EPO, this does not prevent an EPO from being issued in future if grounds exist. This statement has been removed from the guideline to simplify the example.</p>
6. Section 4.0 Who is a related person of a company	2, 4, 5, 6, 7, 9, 11	<p>The guideline may be inadequate in dealing with tributers in the mining industry.</p> <p>The guideline does not consider how local government may be considered a related person. For example:</p> <ul style="list-style-type: none"> • as a land owner; • as a person who has a relevant connection, on the basis of significant financial benefit or • as person who has a relevant connection, on the basis 	<p>A tributer operates a mine for a percentage of the ore won. The department may determine that the financial benefits gained, or potentially gained, by a tributer equate to a significant financial benefit from the carrying out of a relevant activity by the company. This is because the company has made an operational decision to enter into an arrangement with the tributer and will be obtaining financial benefits as a result of the arrangement. As such, the department considers that the activities of the tributer are related to the carrying out of a relevant activity by the company.</p> <p>On this basis no changes has been made to the guideline in relation</p>

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		<p>of position to influence.</p> <p>Questioned if 'related persons' extends to the department.</p> <p>Seeking clarity around the timeframes for determining if someone is a related person.</p>	<p>to this issue as the department considers that the guideline would be able to address a scenario that involved a tributer in the mining industry.</p> <p>The 'Nature of the relationship' example included in section 5.1.1 of the guideline has been amended to refer to a situation where a local government agency is a landowner that has entered into a lease agreement with a company.</p> <p>The first three categories of related person – parent companies, landowners for non-resource activities and landowners for resource-activities do not have time limits. It is only within the category of relevant connection that the two year time limit applies.</p> <p>Section 4.1 of the guideline describes that a person may have a relevant connection with a company if the person is, or has been at any time during the previous two years, in a position to influence the company's conduct in relation to the way in which, or extent to which, the company complies with its obligations under the EP Act. This limitation is included in section 363B(2)(b) of the EP Act.</p> <p>In relation to whether 'related persons' extends to the department, the intent of the guideline and the CoRA provisions are to expand the department's powers, to ensure that companies and their related parties bear the cost of managing and rehabilitating sites and prevent leaving the Queensland taxpayers with costly environmental clean-up bills. Therefore it is not intended that the department would be a related person. Furthermore, the guideline is not intended to capture government agencies (including local government agencies) undertaking compliance and enforcement action under the EP Act as related persons.</p>
<p>7. Section 4.0.1 Landowners</p>	<p>1, 6, 7, 9, 13</p>	<p>It was noted that landowners under existing leases cannot be expected to undertake steps which they are not legally authorised to do under existing leases. The guideline should address the following in relation to landowners:</p> <ul style="list-style-type: none"> • The extent of due diligence required to be undertaken on tenants by landowners; • Confirmation that landlords are not required to attempt to renegotiate existing leases; 	<p>Section 5.1.1 of the guideline outlines the factors that the department may consider when determining whether a related persons took all reasonable steps, including the legal and practical ability to influence the company's conduct. This section clarifies that any implications of other legislation or law on the exercise of powers by the related person will be considered when determining reasonable steps. The 'Nature of relationships' example (section 5.1.1) outlines that the reasonable steps expected of a landowner in the event of an environmental incident would be less onerous than a</p>

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		<ul style="list-style-type: none"> Confirmation that landlords are not expected to interfere in or carry on a tenant's business for them, or take action to enforce tenant's to comply with their environmental compliance. <p>The guideline should provide greater guidance in relation to landowners including the circumstances under which a mortgagee in possession may be a landowner.</p>	<p>related person connected to the company on the basis of their position to influence. Furthermore, as outlined in the guideline, if the related person, such as a landowner, was not culpable for the matter, the department will not issue the person with a CoRA EPO.</p> <p>Section 4.0.1 of the guideline describes that a landowner may include a person who has a legal agreement in place allowing activities to occur on their land, without actually operating the activity themselves. It is not necessary to specifically mention all the potential landowners and legal agreements as the EP Act defines an 'owner' for the purpose of a CoRA EPO. However, the guideline has been amended to include information about when a mortgagee may be defined as an owner. This information is adapted from and consistent with Schedule 4 of the EP Act.</p>
<p>8. Section 4.1 When will a person have a relevant connection with a company?</p>	<p>12</p>	<p>The guideline should clarify how the 'relevant connection' test would be applied to non-executive directors, particularly providing parameters for when directors would and would not be considered to have a relevant connection, and provide examples explicitly acknowledging the:</p> <ul style="list-style-type: none"> The different roles of the board and management, particularly that holding a board position, or receiving financial benefits from a company, does not necessarily mean that a non-executive director is able to exert real or practical influence over a company's specific environmental activities; and The differences between executive officers who are involved in the day-to-day operations of the company, and executive directors who must necessarily rely on information provided by management in carrying out their responsibilities. 	<p>The guideline cannot specifically describe all the various intricate roles and responsibilities that non-executive directors, boards and management may have. A determination of relevant connection can only be made with consideration of the individual circumstances of each case.</p> <p>Section 4.1.2 describes how a person's position, including their role and the degree to which their role has the ability to influence the decisions and actions of the company in relation to compliance with the EP Act is considered in relation to the relevant connection test (position to influence). Furthermore, a non-executive officer example is included in section 4.1.1 (significant financial benefit).</p> <p>An additional detailed example in relation to company directors has also been included in Appendix 2 – Detailed examples (Cattle Corp).</p> <p>There is no difference legally under the <i>Corporations Act 2001</i> and by extension under the EP Act between executive officers with day-to-day involvement and those who rely on the reports of lower tiers of management. As per section 493 of the EP Act, the extension of executive officer liability is such that executive officers are wholly responsible for the compliance of their corporation with the EP Act. How an individual executive officer decides to exercise this responsibility is a matter for them and their legal representatives to determine.</p>

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<p>9. Section 4.1.1 Significant financial benefits</p>	<p>4, 7, 8, 9</p>	<p>Recommends that salaries to employees and directors fees at market rate should not be considered to be a significant financial benefit.</p> <p>Suggest inserting a third bullet point: 'abnormality of benefit received, for example where a benefit received as a wage was far outside of normal market value, as the first example relates to this instance.'</p> <p>Clarity is requested around the circumstances where the total assets or benefit from the activity are very small (second dot point).</p>	<p>The examples in section 4.1.1 demonstrate that where financial benefits, such as wages or salaries are within normal market value, they are not considered a significant financial benefit. Conversely, as indicated in the 'Uncommercial transactions' example, if a received wage or salary is significantly more than normal market value for the services provided, this may be considered to a significant financial benefit. On this basis, a third bullet point has been included in this section to in relation to the abnormality of benefit received.</p> <p>The example in section 4.1.1, 'Shareholders – size of holding' demonstrates how the proportion of the benefit, relative to the costs of taking action to protect the environment may be considered. On this basis, the guideline will not be amended to provide further clarity regarding dot point 2.</p>
<p>10. Section 4.1.1 Significant financial benefits examples</p>	<p>1, 3, 6, 7, 8, 9, 12, 13, 14</p>	<p>Uncommercial transactions</p> <p>Questioned, in relation to the uncommercial transactions example, what is the relationship of this payment with the activities of the company?</p> <p>Third party suppliers</p> <p>Seeking the inclusion of an example or statement to address the scenario of the arm's length supply by a utility service.</p> <p>Vendors</p> <p>The guideline should explain why the vendor example is not a significant financial benefit and not a relevant connection.</p> <p>Financial institutions</p> <p>Questions regarding the relevance and intent of the financial institution examples. Suggested additional / amended information to include as part of the financial institution examples.</p> <p>The guideline should clarify the difference in the proposed approach between a bank which provides financial services and the case where a bank, or other institution, becomes a major investor.</p> <p>It was also noted that an agreement under which a bank</p>	<p>Uncommercial transactions</p> <p>The uncommercial transactions example has been amended to clarify the link between the payment to the relative and the company's environmental activities.</p> <p>Third party suppliers</p> <p>The third party supplier example has been expanded to also consider the scenario of a service provider who has sold a utility service to a company through an arm's-length transaction.</p> <p>Vendors</p> <p>The example has been amended to clarify that the vendor would not be considered to have a relevant connection on the sole basis of significant financial benefit because:</p> <ul style="list-style-type: none"> • the sale was through and arm's length transaction; and • the vendor received normal market value profits from the sale of the operation. <p>Financial institutions</p> <p>Various amendments have been made to financial institution examples:</p> <ul style="list-style-type: none"> • Additional examples regarding the exercise of a security by a financial institution and a financier entering into an

Issue	Issue raised by	Issue description	Response
		<p>acquires a significant equity position would not, always be referred to as a 'lending agreement'.</p> <p>Seeking further clarity around the examples to provide reassurance to banks that they can enforce their securities without running the risk of either becoming a related person themselves, or having to indemnify receivers against this risk.</p> <p>An example should be included for a financier that enters into an equipment lease with a company.</p> <p>Shareholders</p> <p>The guideline should clarify if shareholder in the 'No dividends received example' was not a related person because 2% is a small percentage or because the shareholder didn't get any actual dividends.</p> <p>The guideline should explain what the decisive factor is, in the 'Size of holding example,' and whether the size of the holding is relevant to significant financial benefit test.</p> <p>It was noted that the relative size of the dividend amount to the cost of environmental mitigation is irrelevant. The amount of the dividend is also irrelevant to the question of being a major shareholder. The relevant enquiry is the ability of such a person to influence the activities of the company in all of the circumstances.</p> <p>Non-executive officers</p> <p>The guideline should explain what the decisive factor is, in this example.</p> <p>The guideline should also demonstrate when Peter Brown's total remuneration package, including a bonus was not considered a significant financial benefit.</p>	<p>equipment lease with a company have been included.</p> <ul style="list-style-type: none"> The major investor example has been clarified to outline that capital gain can include equity, and may be considered a significant financial benefit. A 'debt for equity swap' scenario has also been included as an example for position to influence (section 4.1.2). Additional information in relation to debt restructuring / working through a company's financial issues have not been included as a similar example is already included in the guideline in relation to position to influence (section 4.1.2). <p>Shareholders</p> <p>The 'No dividends received example' has been amended to clarify that Joan Smith would not be regarded as having a relevant connection on the sole basis of significant financial benefits as she did not receive any financial benefits from her shareholdings, despite her being capable of benefiting as a shareholder.</p> <p>The 'Size of holding example' has been amended to explain that the size of John Brown's shareholding and his received dividends is considered insignificant, proportionate to the relative costs to prevent environmental harm and protect the environment from the incident. Conversely, Jane Bloggs's shareholding is sizable and her received dividends are significant in proportion to the cost to prevent environmental harm and protect the environment from the incident. Therefore, her benefits may be considered a significant financial benefit.</p> <p>As outlined in the guideline, what amounts to a 'significant' financial benefit will vary depending on the circumstances. It is not intended that persons who have obtained, or are entitled to obtain, only a small financial benefit would be considered to have, or be capable of receiving, a significant financial benefit. In this case the proportion of benefit relevant to the environmental mitigation is important to ensure the department pursues related persons who have benefited from the activity. These considerations are relevant and will not be removed from the guideline.</p>

Issue	Issue raised by	Issue description	Response
			<p>Non-executive officers</p> <p>The example will be amended to clarify that Peter Brown would not be regarded as having a relevant connection on the sole basis of the fees he received as director of the company as the fees were within the normal market value for his position.</p> <p>In addition, the example has been amended to include the payment of a bonus which did not result in a finding of significant financial benefit.</p>
<p>11. Section 4.1.2 Position to Influence</p>	<p>5, 7, 9, 13</p>	<p>The 'Position to Influence' and 'Extent of the Position to Influence' sections should be restructured to move the text from section 5.1. to section 4.1.2</p> <p>The guideline should include a nexus between a person's position to influence and the particular conduct of the company that has caused (or let to failure to mitigate) the subject matter of the EPO under consideration.</p> <p>The guideline needs to note that the 'extent' of a person's position to influence is a matter of both fact and degree and should be qualified as significant.</p> <p>Questioned why the guideline only considers the factors contained in section 363AB(4) under this section. The list contained in section 363AB(4) is a non-exhaustive list. section 4.1.2 should contain existing case law on the meaning of the term position to influence.</p> <p>Noted that the position to influence consideration should not oblige a bank under debt-restructuring arrangements to actively monitor compliance with environmental requirements.</p>	<p>The department acknowledges that the 'Position to Influence' and 'Extent of the Position to Influence' sections contain related information. However, sections 4.1.2 and 5.1.1 has not been restructured. To do so, would result in extensive changes to the guideline which would not be reviewed or considered by stakeholders prior to finalisation. To more clearly link the two sections, section 4.1.2 has been amended to include an additional section (section 4.1.2.1 - Extent of a person's position to influence). This additional section explains that the extent of a person's influence is considered in more detail in section 5.1.1, 'Reasonable steps'. section 5.1.1 states that the greater the influence that a related person can exercise in relation to the company's conduct, the greater the expectation in terms of reasonable steps. This goes to the extent of the person's influence and on this basis the guideline will not be amended to refer to significant.</p> <p>Sections 4.1.2 and 5.1.1 provide examples to explain, that a position to influence is a matter for both fact and degree including the Nature of relationship example which explains that a landowner's position to influence may be less influential than a Managing Director, because the landowner's influence is limited by implications of other legislation.</p> <p>There has been no judicial consideration of the term position to influence by a Queensland court in the context of its appearance in the EP Act. While interstate precedents may be persuasive, specific cases have not been referenced. In the event that a CoRA EPO is considered by Queensland Courts, it will be the place of the judiciary to determine the relevance of any specific case law precedents.</p>

Issue	Issue raised by	Issue description	Response
			The example 'Financial institutions – debt restructuring' in section 4.1.2 outlines that a bank providing debt-restructuring advice is not considered as having a relevant connection because they are not in a position influence. Therefore this issue is not relevant and has not been addressed in the guideline.
12. Section 4.1.2 Position to influence - examples	1, 7, 8, 9, 12, 13, 14	<p>Executive officer</p> <p>The guideline should demonstrate how timing of activities and awareness of activities are applied.</p> <p>The guideline should include an example to demonstrate that the ability of a non-executive director to influence day to day activities of the company should be viewed through the context of such a director's legal duties as has been established through case law interpreting duties under sections 180 and 181 of the <i>Corporations Act 2001</i>.</p> <p>Financial institutions</p> <p>Suggestion to include an example relating to a financier entering into an equipment lease arrangement.</p> <p>Amendments suggested in relation to the 'Debt restructuring' example. Also questions regarding what would happen if the company implemented the debt restructuring advice.</p> <p>Contractor</p> <p>Recommend removing the mention of position to influence as it is not consistent with the case law on the meaning of that term or in the context of the CoRA provisions.</p> <p>Receivership</p> <p>Amendments suggested to example. Also suggestion that that example should be retitled 'Secured creditor' as the example relates to the secured creditor rather than the receiver.</p>	<p>Executive officer</p> <p>Section 5.1 describes that the department will give consideration to the related persons state of knowledge at the time, and in the lead up to, the issue or incident when considering reasonable steps. In addition, the example in section 4.1.2 'Executive officer' has been amended to clarify that the managing director was aware that the dam had not been maintained, before the company went into administration.</p> <p>Section 5.1.1 of the outlines the factors that the department may consider when determining whether a related persons took all reasonable steps, including the legal and practical ability to influence the company's conduct. This section clarifies that any implications of other legislation or law on the exercise of powers by the related person will be considered. On this basis the guideline has not been amended to include an additional example in section 4.1.2. However, an additional detailed example in relation to company directors has also been included in Appendix 2, 'Detailed examples' (Cattle Corp).</p> <p>Financial institutions</p> <p>The 'Financial services' example was amended to also consider a financier entering into an equipment lease arrangement with a company.</p> <p>The 'Debt restructuring' example was also amended to include that the company implemented the bank's debt restructuring advice.</p> <p>The 'Debt for equity swap' example previously included in section 4.1.1 (Significant financial benefit) has been reworked and included in section 4.1.2.</p> <p>Contractor</p> <p>The use of position to influence in this example is referring to the</p>

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			<p>influence that the contractor had over compliance with the environmental obligations of the EA holder. 'Position to influence', as it appears in section 363AB of the EP Act, is only in relation to the companies conduct or the way in which the company has or has not complied with the EP Act. The use of the term 'position to influence' in this example is a correct use of the term. As outlined above in the response to Issue 11, it will be the place of the judiciary to determine the relevance of any specific case law precedents.</p> <p>Receivership</p> <p>The 'Receivership' example has been amended and retitled 'Secured creditor.' A suggestion to include a statement to the effect that the secured creditor has not received a significant financial benefit was not included on the basis that this example relates to position to influence rather than significant financial benefits. An additional example, 'Exercise of a security,' has been included in section 4.1.1 which deals with similar issues.</p>
<p>13. Section 4.2 Matters to be considered when determining whether a person has a relevant connection with a company</p>	<p>9, 12</p>	<p>Request inserting the legislative definition of 'executive officer', instead of the ordinary meaning of that term, as it's significantly broader.</p> <p>Recommend that the matters in Table 1.1 be amended to show that they are a non-exhaustive list of factors to be considered consistent with the case law on the subject.</p>	<p>The footnote attached to executive officer on Table 1, references section 493 of the EP Act. This footnote has been amended to also refer to Schedule 4 of the EP Act which includes a definition of executive officer.</p> <p>The guideline will provide further clarity by inserting a definition of executive officer in Appendix 1.</p> <p>Section 4.2 of the guideline states that 'there may also be other matters, not listed in Table 1.1 which may be relevant to determining that a relevant connection exists or does not exist.' This statement has not been amended to refer to case law on the basis that, it will be the place of the judiciary to determine the relevance of any specific case law precedents.</p>
<p>14. Section 5.0 When will a CoRA EPO be issued to a related person?</p>	<p>7, 9, 12, 13</p>	<p>Noted that some sections of the guideline which raise reasonable steps indicate that a culpable related person who took reasonable steps will not be issued with a CoRA EPO. 'Reasonable steps' is not a defence. If it is intended as a defence, it would require a legislative amendment. Instead, it is a description of when the department will not exercise its discretion to issue a CoRA EPO.</p>	<p>The 'reasonable steps' section is not intended as a defence. It is a discretionary matter for consideration by the department when deciding whether to issue a CoRA EPO. Saying that, the position that the department has taken in the guideline is that, if a person has taken all reasonable steps, the person will not be issued with a CoRA EPO.</p> <p>A detailed example in Appendix 2: Cattle Corp has been included to</p>

Issue	Issue raised by	Issue description	Response
		<p>The guideline should provide clarity to reassure non-executive directors that act in good faith and with diligence that they will not be held liable for environmental issues over which they had no real or practical influence. Suggest inserting a provide case study to provide further clarity that the roles and responsibilities of non-executive directors will be considered in determining reasonable steps.</p> <p>The guideline should clarify that the following persons should not be held personally responsible for environmental harm, unless this harm was caused, after their appointment, as a result of their direction, act or omission:</p> <ol style="list-style-type: none"> 1. An administrator, liquidator, receiver and/or receiver and manager, as defined by section 9 of the <i>Corporations Act 2001</i>; and/or 2. An administrator, Official Receiver, Official Trustee, registered trustee or “the trustee” as defined by section 5 of the <i>Bankruptcy Act 1966</i> (collectively to be referred to as “insolvency practitioner”). 	<p>show that the department would not issue a CoRA EPO to a non-executive that has taken all reasonable steps to secure the company’s compliance with its obligations under the EP Act and to ensure the company made adequate provision to fund projected remediation costs. However, the suggested reasonable steps detailed in the suggested example have been removed on the basis that reasonable steps will always depend on the facts and circumstances of an individual matter. To include specific reasonable steps as part of the example may suggest that this is a definitive list of reasonable steps which may apply in other more complex scenarios.</p> <p>In relation to the personal responsibility of insolvency practitioners, the department refers to the example included in section 5.1.1: Actions regulated by other legislation or law. In this example an external administrator has assumed responsibility for a site. After assuming responsibility for the site, the external administrator becomes aware of an incident that is causing, or at risk of causing, environmental harm. The example goes on to discuss when the insolvency practitioner may or may not be culpable.</p> <p>Reference to administrators, liquidators, receivers and insolvency are defined in Appendix 1 and reference the <i>Corporations Act 2001</i>. Official Receiver, Official Trustee, registered trustee or “the trustee” as defined by section 5 of the <i>Bankruptcy Act 1966</i> are not used in the guideline and will not be required to be defined in Appendix 1.</p>
<p>15. Section 5.1 what are considered reasonable steps?</p>	<p>6, 9, 13</p>	<p>Suggested that the factors relevant to determining position to influence have been confused with those for all reasonable steps.</p> <p>The guideline should include examples to demonstrate when major investors such as financiers or shareholders, would be regarded to have taken all reasonable steps.</p>	<p>The guideline describes in section 4.1.2 that a position to influence will be any position in which a person is capable of influencing, the decisions or actions of the company in relation to its compliance with the EP Act whether in an official (e.g. appointed company director) or unofficial capacity (e.g. someone acting as a shadow director). However, the extent of a person’s influence, is considered in detail in section 5.1: Reasonable steps. This section also provides examples to explain, that a position to influence is a matter for both fact and degree. An additional heading, ‘Extent of a person’s positions to influence’ has been included in the guideline to provide a link between sections 4.1.2 (Positon to Influence) and section 5.1.1 (Legal and practical ability to influence the company’s conduct).</p> <p>An additional example has been included in section 5.1.2 in relation</p>

Issue	Issue raised by	Issue description	Response
			to an overseas financier.
16. Section 5.1.1 Legal and practical ability to influence the company's conduct	1, 5, 9	<p>A related person's legal and practical ability to influence the company's conduct should only be considered in relation to the company's environmental obligations.</p> <p>This section should be amended to state that external administrators, who exercise their power in a manner which is permitted or required by the <i>Corporations Act 2001</i> (Cth), the terms of their appointment or general law, will not be considered to have failed to take all reasonable steps. Therefore there should be no circumstance in which insolvency practitioners should be issued with a CoRA EPO for pre-existing environmental issues.</p> <p>Suggested that this section should come before section 5.0: Reasonable steps.</p> <p>The guideline does not sufficiently communicate the need for the extent of the influence to be qualified as a matter of degree or 'a matter of fact and degree'.</p>	<p>The omission of a link between a related person's legal and practical ability to influence the company's conduct and the company's environmental obligations was an oversight and this has been rectified in the guideline.</p> <p>Section 5.1.1: Actions regulated by other legislation or law has been amended to clarify when insolvency practitioner may or may not be culpable for environmental harm. As outlined in this example, an insolvency practitioner may be found to be culpable for harm resulting from acts or omissions during their involvement with the company (including acts or omissions which result in harm due to the pre-existing conditions of the land). However, given the nature of their relationship with the company an insolvency practitioner will not be considered culpable for pre-existing harm.</p> <p>As outlined in the response to Issue 11, sections 4.1.2 and 5.1.1 has not been restructured.</p> <p>Any decision to issue a CoRA EPO will be decided on the individual facts and circumstances of the matter at hand. As this is consistent with the idea that the extent of the influence be qualified as 'a matter of fact and degree,' a statement to this effect has been included in section 5.1.1.</p>
17. Section 5.1.2 Extent of actual and expected knowledge	1, 9	<p>Amendments were suggested to clarify that the extent of the actual and expected knowledge of the related person relates to both the person's role and responsibilities.</p> <p>It was also noted that there were grammatical errors included in the third dot pot.</p>	<p>Amendments were included as appropriate to clarify that the extent of the actual and expected knowledge of the related person relates to both the person's role and responsibilities.</p> <p>The grammatical errors in the third dot point have also been corrected.</p> <p>Furthermore, as referred to in response to Issue 15, an additional example has been included in section 5.1.2 in relation to an overseas financier.</p>
18. Section 5.1.3 Exertion of power of	1, 9, 12	<p>Questioned if the concepts of culpability and all reasonable steps had been confused in this section. The steps outlined appear to cover off on matters which relate to prima facie culpability. As culpability is a positive factor towards the</p>	<p>The additional section 4.1.2.1 - Extent of a person's position to influence provides a link between culpability and exertion of position to influence.</p> <p>The list of matters in Section 5.1.3 'Exertion of position or influence'</p>

Issue	Issue raised by	Issue description	Response
influence		<p>issue of a CoRA EPO whilst all reasonable steps is a defensive factor, this section should be amended.</p> <p>Requested that the list under section 5.1.3 be removed consistent with the suggestion that there can be no generic list of all reasonable steps.</p> <p>The environmental management risk system (EMS) example serves only to demonstrate the lack of experience within the department with day-to-day decision making about specific environmental risks. The guideline is placing too much importance on an environmental management system considering an EMS is more likely a demonstration of a mind focussed on the risks and not an example of 'all reasonable steps'.</p>	<p>provides further clarity and guidance around factors that many indicate whether the related person exerted their position of influence in a positive or negative way to ensure environmental harm was avoided and adequate provision was made for rehabilitation. The absence of this list would add ambiguity and uncertainty for related persons in understanding what the department may consider in determining that a related person took all reasonable steps. The list is not exhaustive and is necessary to provide guidance. On this basis the list will not be removed from the guideline.</p> <p>The environmental risk management system example demonstrates the extent to which a related person may exert their position of influence to ensure environmental harm was avoided. In this case their position of influence was exerted in a negative way because they failed to review the effectiveness of the system. This example reflects the department's risk based approach to preventing environmental harm, as the department will consider the way a person manages risk in assessing, conditioning and enforcing environmental obligations under the EP Act. The department considers managing environmental risk as a minimum acceptable standard in preventing environmental harm, if a person fails to do this, their risk increases. This minimum standard is also considered a part of general environmental duty in section 319 of the EP Act.</p> <p>Note that the title of this section has been updated to 'Exertion of position of influence' to ensure consistency with the EP Act.</p>
19. Section 5.1.3.1 Financial decision making	1	<p>Suggestion that the words 'in relation to' are deleted from the first sentence of the section on that basis that the scope is too great.</p> <p>Request to include statement to the effect that a bank makes no decisions for, or on behalf, of its customers.</p>	<p>Words 'in relation to' have been replaced with 'for' in the first sentence of the section as the intent of the statement is to capture those persons exercising financial decision making powers for, or on behalf of, the company rather than those persons exercising financial decision making powers in relation to the company (e.g. persons deciding to purchase or sell products to the company).</p> <p>Statement regarding a bank not making decisions on behalf of its customers has not been included as this is generally well known and no other similar statements are included for other stakeholders.</p>
20. Section 6.2 when will a bank	7, 9, 13	The guideline should clarify that a CoRA EPO should not be issued if FA is held for the same purpose as the subject matter of the EPO, and security for a CoRA EPO should not	A decision to claim FA may form part of the department's compliance strategy for a site. However, the department does not support the position that a CoRA EPO should not be issued if FA is

Issue	Issue raised by	Issue description	Response
guarantee or security be required?		<p>be required where FA is held for the same issue.</p> <p>Noted that unlike financial assurance, a bank guarantee is open ended, and suggests that guidance is provided, including a formula or explanation of the required quantum, so that a recipient might understand the basis of the potential liability.</p>	<p>held for the same purpose as the subject matter of the EPO.</p> <p>The intent of section 6.0 of the guideline is to provide guidance about when the department may require a bank guarantee or security under a CoRA EPO.</p> <p>The guideline has been amended to include a new section, section 6.2.1, to clarify how the department will consider the amount of any bank guarantee or security required under a CoRA EPO.</p>
21. Section 7.0 Joint and several liability	7, 12	<p>The guideline should clearly set out a regime for apportioning 'responsibility' for a company's failings among multiple related persons according to degree or culpability, and legislate this regime.</p>	<p>Section 363AE of the EP Act outlines that a CoRA EPO may provide for joint and several liability. Consistent with this provision, section 7.0 of the guideline acknowledges that department may decide to hold two or more related persons jointly and severally liable for compliance with a CoRA EPO, including costs. The draft guideline goes on to state that 'any apportionment of the cost of compliance with a CoRA EPO is a matter to be determined between the parties by private agreement'. For this reason, the department is unlikely to be involved in the apportionment of liability between multiple related persons. Therefore, a regime for apportioning responsibility will not be included in the guideline.</p> <p>As noted in this consultation report, issues requesting amendments to legislation are outside the scope of this consultation process and will not be addressed.</p>
22. Appendix 2 Comprehensive example	1, 9, 14	<p>Commented that it is left to assume that ABC Banks was not aware of the accountant's advice. If this assumption is correct, a statement should be included.</p> <p>Requested that the basis for establishing that John Davids has a relevant connection to the company is included.</p> <p>Suggested that the example includes information about ABC Banks taking action to enforce its loan.</p> <p>More information is required about John Davids' position. As a minority shareholder, he would not normally be able to give directions to the board and management. His relationship to the parent company or general management need to be clarified.</p> <p>Suggest reversing the loan from John Davids to a loan to</p>	<p>An additional statement has included as part of the detailed example to outline that ABC Banks was unaware of the accountant's advice.</p> <p>No further information was included to establish the basis for John Davids' relevant connection to the company as it was considered that sufficient information is included for the purposes of the example. However, a better link was provided between the statement that John Davids has a relevant connection and the basis for establishing this.</p> <p>Furthermore, no additional information was included in relation to the bank enforcing its loan as an additional example to address this was included as part of the significant financial benefit discussion (section 4.1.1).</p> <p>The loan which John Davids provided to the company and his sizable shareholdings are considered sufficient to demonstrate a</p>

Issue	Issue raised by	Issue description	Response
		<p>John Davids, in order to increase his financial benefit.</p> <p>The example should explain why the FA which is apparently held has not been claimed by the department.</p> <p>Suggestion to include an equipment lease arrangement as part of the example.</p>	<p>significant financial benefit. As such, no changes have been made to the loan arrangement.</p> <p>Additional information has not been included in the example in relation to the claiming of FA as this matter would be considered as part of the department's wider enforcement strategy and is outside of the scope of the example. However, consistent with section 6.0 of the guideline, information is included about whether the CoRA EPO would require a bank guarantee or security.</p> <p>The example was amended to also include a person XYZ Lessor that has entered in equipment lease arrangement with the company.</p> <p>Note that other minor amendments have been made to the example.</p>
23. Appendix 3 – Process for issuing a CoRA EPO	9	<p>Suggested that the key principles be added into the flowchart as a few have been missed. The wording 'Decide that a culpable party is a related person' should be changed to 'Consider evidence of potential culpability' otherwise it is suggesting that the next decisions in the chart are being pre-empted.</p>	<p>The intent of the flowchart is describe the general process by which the department will decide to issue a CoRA EPO. However, minor amendments have been made to the flowchart to better reflect the Key Principles and decision-making provision.</p>
24. Appendix 4 Matters that may be considered in determining a relevant connection	1, 12, 9, 13	<p>Questioned whether the department looks at both significant financial benefit or position to influence when determining whether someone has a relevant connection?</p> <p>The table should indicate if the matter is evidence in favour of establishing a relevant connection or not, in addition the third column should be structured to lead to further considerations or definitely prove a 'relevant connection' with an affirmative answer. It should also provide some guidance rather than a list.</p> <p>It is noted that some categories of evidence listed may be subject to privilege and it will not be possible for the department to obtain them and some of evidentiary factors are not physical evidence or documentary evidence but are instead factors or considerations.</p> <p>The guideline should not state or imply that the provision of independent advice (legal or otherwise), in the absence of any other relevant factors for the 'relevant connection' decision, is an indicator of the potential related person being</p>	<p>The 'Relevant to SFB or PTI' column of Appendix 4 is indicative of whether the matter will generally be relevant to significant financial benefit (SFB) or position to influence (PTI). This column is not intended to restrict the department to only consider matters which are designated as SFB or PTI. Conversely, under the legislation, it is open to the department to decide a person has a relevant connection on the basis of significant financial benefit, position to influence, or both, if there is evidence to support a connection on both grounds.</p> <p>The 'Possible evidence' column has been retitled 'Possible considerations or evidence' to make it clear that some information listed is physical evidence and some may be considerations.</p> <p>Section 4.2 'Matters to consider in determining whether a person has a relevant connection with the company' has also been amended to include a clarifying statement to the effect that Appendix 4 provides information about the possible evidence the department may consider for each matter and that the evidence in Appendix 4 must read in conjunction with the other relevant factors described in</p>

Issue	Issue raised by	Issue description	Response
		<p>in a position to influence the EA holder. Professional advisors were to be included as having a 'relevant connection' merely on the basis of offering independent legal or other advice, it may deter those advisors from accepting an engagement when approached by an EA holder for their advice.</p> <p>Questioned whether providing finance was relevant to position to influence or only significant financial benefit.</p> <p>The guideline should clarify the meaning of arm's length transaction and summary of case law.</p> <p>Questioned whether a notice under section 451 of the EP Act is stayed while the review or appeal is ongoing.</p>	<p>the guideline.</p> <p>Appendix 4 lists the type of information and evidence that may be considered to decide each matter relating to relevant connection. The intent of this table is not to describe the degree to which each piece of evidence should prove or disprove a significant financial benefit or position to influence. The degree to which these pieces of evidence should be considered are described in the relevant sections of the guideline and demonstrated through the examples. On this basis, Appendix 4 will not be amended to address this issue.</p> <p>It is considered that providing finance may be relevant to position to influence on the basis that the finance provider may acquire, depending on the terms of the loan agreement, some level of control over the company's conduct.</p> <p>The meaning of 'arm's length' is used in a variety of Australian legislation and variations exist for its interpretation. However, a general definition has been included in the guideline.</p> <p>Under section 521 of the EP Act, making an application for an internal review of an original decision (including the decision to issue a section 451 notice) does not automatically stay the original decision. However, in accordance with section 522 of the EP Act, the applicant may immediately apply for a stay of the original decision.</p>
<p>25. Appendix 5 Possible evidence Table – Reasonable Steps</p>	<p>9, 13</p>	<p>The table should indicate if the matter is evidence in favour of establishing a relevant connection or not, in addition the third column should be structured to lead to further considerations or definitely prove a 'relevant connection' with an affirmative answer. It should also provide some guidance rather than a list.</p> <p>The Table should assist a related person to self-assess what steps they have taken, and if this steps are reasonable. The factor should indicate if the evidence is in favour of establishing a relevant connection or not.</p> <p>The table in Appendix 5 confuses the legal principles which apply with the separate issues of extent of position to influence and all reasonable steps.</p>	<p>Consistent with the amendments to Appendix 4, the 'Possible evidence' column has been retitled 'Possible considerations or evidence' to make it clear that some information listed is physical evidence and some may be considerations.</p> <p>Appendix 5 lists the type of information and evidence that may be considered in relation to each factor for reasonable steps. The intent of this table is not to describe the degree to which each piece of evidence should prove or disprove if a related person took all reasonable steps. The degree to which these pieces of evidence should be considered are described in the relevant sections of the guideline and demonstrated through the examples. On this basis, Appendix 5 will not be amended to address this issue.</p> <p>The table in Appendix 5 lists out the factors which may be</p>

Issue	Issue raised by	Issue description	Response
			<p>considered when determining a whether a person has taken all reasonable steps and the possible evidence and considerations in relation to each factor. The department acknowledges that there is some overlap between the considerations for relevant connection under section 363AB and reasonable steps under 363ABA of the EP Act. As a result, the language may be similar but the guideline makes it clear that relevant connection and reasonable steps are two separate matters on which the decision to issue a CoRA EPO will be based. For these reasons, it is not necessary to amend Appendix 5 in accordance with this suggestion.</p>