

# Guideline

## *Environmental Protection Act 1994*

### **Issuing ‘chain of responsibility’ environmental protection orders under Chapter 7, Part 5, Division 2 of the *Environmental Protection Act 1994***

*This statutory guideline provides information on how the department will approach making a decision to issue an environmental protection order to related persons under Chapter 7, Part 5, Division 2 of the Environmental Protection Act 1994 associated with the Environmental Protection (Chain of Responsibility) Amendment Act 2016. It has been prescribed under the Environmental Protection Regulation 2008 and takes effect from 27 January 2017.*

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## 1.0 Introduction

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, enabling an EPO to be issued to a related person of a company,<sup>1</sup> also referred to as a CoRA EPO.

The intent of this guideline and the chain of responsibility provisions in the EP Act are to expand the powers of the Department of Environment and Heritage Protection (the **department**) 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.

These new powers do not restrict or change the existing ability of the department to issue an EPO to a **person** identified in section 358 of the EP Act. Rather, they expand the department's powers, allowing the department to issue an EPO to 'related persons,' being holding companies, certain landholders and persons with a 'relevant connection' to a company that is carrying out the relevant activity. This will include persons that have the capacity to influence the extent of the company's environmental compliance or persons capable of significantly benefitting financially from the relevant activities of the company.

The objectives of the CoRA amendments are to:<sup>2</sup>

- facilitate enhanced environmental protection for sites operated by companies in financial difficulty; and
- avoid the State bearing the costs for managing and rehabilitating sites in financial difficulty.

In addition to covering the statutory content requirements,<sup>3</sup> this guideline has been developed to:

- assist and guide the department's decisions regarding whether to issue CoRA EPOs; and
- achieve consistency and transparency in the administration of CoRA.

The department must have regard to this guideline in deciding who is a related person (because of a relevant connection with a company) and in deciding whether to issue a CoRA EPO to a related person of a company.<sup>4</sup>

Where appropriate, examples are used to provide contextual information concerning the operation of the CoRA. These examples may only relate to a single consideration, or a limited range of considerations, within the decision making process. Consequently, these examples should be considered in light of the whole decision-making process by the department. Importantly, the department will consider all relevant matters, including culpability, whether a party is a related person and whether the related person took all reasonable steps, having regard to the extent of the person's influence, to ensure the company complied with its environmental obligations and made adequate provision to fund rehabilitation and restoration of the environment prior to issuing a CoRA EPO. The decision to issue an EPO will always be made having regard to the individual circumstances of the matter. A flowchart explaining the process for issuing a CoRA EPO has been included in Appendix 3.

## 1.1 Relationship with Enforcement Guidelines

This guideline should at all times be read in conjunction with the department's Enforcement Guidelines. The Enforcement Guidelines assist decision making by authorised persons in addressing offences and breaches of environmental duties under the EP Act. The guidelines set out principles of a general nature, including

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<sup>1</sup> New heads of power are found in Chapter 7, Part 5, Division 2 of the EP Act.

<sup>2</sup> Extracted from the explanatory notes for the Environmental Protection (Chain of Responsibility) Amendment Bill 2016

<sup>3</sup> Statutory content requirements are outlined in section 548A of the EP Act.

<sup>4</sup> Section 363ABA(a) of the EP Act.

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culpability, to provide an understanding of how the department will approach enforcement. In summary, the purpose of the Enforcement Guidelines is to ensure consistency and transparency of enforcement actions by the department under the EP Act. The Enforcement Guidelines are publically available on the department's website at <http://www.ehp.qld.gov.au/management/pdf/enforcement-guidelines.pdf>.

### 1.1.1 Culpability

The department's Enforcement Guidelines include principles for determining culpability<sup>5</sup>. In determining who was responsible for an offence, the department will take the following considerations into account:

- 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;
- What was the role of each alleged offender (where there is more than one alleged offender).

These considerations will direct an investigation<sup>6</sup> into a non-compliance matter and the collection of evidence. The following example is provided to demonstrate how the department may consider culpability in relation to an incident. The establishment of culpability is fundamental in the issue of a CoRA EPO.<sup>7</sup>

#### For example:

A company has entered **external administration**. The company failed to undertake maintenance on key infrastructure as required under the environmental authority (EA) and as a result, there is potential for the infrastructure to fail and significant environmental harm to occur. In these circumstances, the department will ask the following questions in order to determine culpability:

#### 1. Who committed the act or omission?

In this example, the relevant act or omission is the failure to carry out maintenance on key infrastructure as required in the EA. The role of the relevant decision-makers in the company would be examined to determine who had responsibility for ensuring the maintenance was undertaken. Culpability may be as simple as the chief executive officer knowingly deciding not to undertake the maintenance or as complex as a course of conduct which incrementally resulted in insufficient funds being available for the required maintenance.

#### 2. Who created the material circumstances leading to the act or omission?

Why was the maintenance not undertaken? Were insufficient funds made available for this work? Who decided not to allocate sufficient funds to undertake this work? All of these circumstances would be investigated by the department.

#### 3. Who benefited from the offence?

Who was the recipient of any benefits from the failure to complete maintenance as required in the EA and was the person part of the decision-making process that gave rise to them receiving the benefit? Does the beneficiary have a relationship with the person who made the relevant decision and if so, to what

<sup>5</sup> Refer to section 2 of the Enforcement Guidelines.

<sup>6</sup> For the purposes of this guideline, investigation refers to the general process of investigating a matter. It may, but is not intended to only, refer to formal investigation process undertaken by the department.

<sup>7</sup> The strength of evidence necessary to establish a fact or truth may vary according to the seriousness of the issues involved. Administrative decisions, such as the decision to issue a CoRA EPO, are based on the standard of proof: *the balance of probabilities*. However if a prosecution for an alleged non-compliance is initiated, the court will apply the higher standard of proof: *beyond reasonable doubt*.

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extent was the recipient in a position, at the relevant time, to have influenced the decision?

The department has a range of investigative powers which allow for the collection of evidence. These include tools such as notices requiring information<sup>8</sup> and powers to compel answers to questions.<sup>9</sup> These techniques in combination with the guidance in this document will allow officers to gather information to assess the culpability of relevant persons.

### 1.1.2 Proportionate to the seriousness of the breach

Any enforcement action taken by the department will be proportionate to the seriousness of the breach.<sup>10</sup> As outlined in the department's Enforcement Guidelines, the department determines the seriousness of a breach of legislation by reference to three general considerations:<sup>11</sup>

- The objectives of the relevant legislation including the type of impact the offence provision is designed to deter or prevent.
- The actual or potential impact of the offence.
- The level of culpability of the alleged offender.

The seriousness of the breach of the legislation will inform the decision on the appropriate enforcement action taken in response to the offence. For further information in relation to how the department determines the seriousness of a breach, refer to the Enforcement Guidelines on the department's website at <http://www.ehp.qld.gov.au/management/pdf/enforcement-guidelines.pdf>.

## 2.0 Key principles

The following set of key principles, drawn from the EP Act and the Enforcement Guidelines, will be used to guide decision-making and enforcement by the department for CoRA EPOs:

1. EA holders have responsibility for compliance with the conditions of their EA and the EP Act, including the general environmental duty (GED).
2. Where an environmentally relevant activity (ERA) is conducted without the need of an EA, the operator of the ERA has responsibility for compliance with the EP Act, including the GED.
3. EA holders and operators conducting ERAs must take all reasonable and practicable measures to protect environmental values from unlawful harm.
4. EA holders and operators conducting ERAs will be required to pay the cost of restoration or rehabilitation of the environment.
5. Where enforcement against EA holders or operators conducting ERAs, will not achieve restoration or rehabilitation of the environment, or the protection of the environment from harm, the issue of a CoRA EPO will be explored subject to the further key principles below.
6. When deciding whether to take enforcement action, and who the recipient is of any enforcement action, the department will have regard to this guideline and its Enforcement Guidelines.
7. Being a related person does not of itself trigger the issue of a CoRA EPO. Culpability of the related person must be established prior to a related person receiving a CoRA EPO.

<sup>8</sup> Section 451 of the EP Act.

<sup>9</sup> Section 465 of the EP Act.

<sup>10</sup> Refer to section 1.4 of the Enforcement Guidelines.

<sup>11</sup> Refer to section 3.1 of the Enforcement Guidelines

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8. The department will only consider issuing a CoRA EPO to a related person where a company has avoided,<sup>12</sup> or attempted to avoid, its environmental obligations and the related person has participated in this conduct.
9. Any enforcement action taken by the department will be proportionate to the seriousness of the matter.
10. There is no pre-determined order in which the department will pursue related persons.
11. A security or bank guarantee will not be required under a CoRA EPO<sup>13</sup> where the EPO relates to the same matter for which financial assurance (FA) is already held and the FA is sufficient to cover the cost of complying with the requirements of the EPO. In that case, the amount of the security or bank guarantee would only be for the shortfall.

### 3.0 Environmental protection orders generally

The department will consider the most appropriate enforcement response before taking enforcement action. Although there may be statutory grounds to take a specific enforcement action, the department may decide that this is not the most appropriate enforcement action to take having regard of the circumstances of the matter. There is a range of enforcement actions available to the department. For further information on these enforcement actions, and the circumstances in which they may be appropriate, refer to the Environmentally Relevant Activities Compliance and Enforcement Guideline available on the department's website at <https://www.ehp.qld.gov.au/assets/documents/compliance/cm-gl-compliance-enforcement.pdf>.

An EPO is a statutory tool that may be issued by the department requiring the person to undertake specific actions within stated timeframes.<sup>14</sup> An EPO can only be issued on the basis of grounds listed in the EP Act<sup>15</sup> including:

- to secure compliance with the GED; or
- to secure compliance with a condition of an EA.

An EPO cannot be issued where none of the grounds in the EP Act exist.

#### For example:

A company has entered external administration. The company was in compliance with their EA conditions at the time of entering administration, there are currently no environmental risks on site that require ongoing management and no rehabilitation of land is required. At this time, there is no basis upon which to issue an EPO let alone an EPO under the CoRA provisions.

### 3.1 CoRA environmental protection orders

As a result of CoRA, and provided grounds exist<sup>16</sup>, the EP Act now allows for EPOs to be issued to related persons of companies in either of the following circumstances:

<sup>12</sup> The term 'avoid' is a broad concept that captures a range of behaviours, actions or omissions which may be engaged in by companies and related persons and which are intended to, and result in, the company *avoiding* their environmental obligations. This may include creating elaborate corporate structures or other legal entities to quarantine potential liability; one-off deliberate or negligent acts or omissions; or incremental acts or omissions which result in insufficient funds being available to the company to comply with its environmental obligations.

<sup>13</sup> EPOs issued under section 363AD of the EP Act may include a requirement to give the administering authority a bank guarantee or other security for the related person's compliance with the order.

<sup>14</sup> For more information on EPOs generally, refer to the Environmental Protection Order Guideline available on the department's website at <https://www.ehp.qld.gov.au/assets/documents/compliance/cm-gl-epo.pdf>.

<sup>15</sup> Section 358 of the EP Act lists the grounds for issuing an EPO. Note, the grounds listed in this guideline are not exhaustive. There are a number of additional grounds included in the EP Act.

<sup>16</sup> These grounds for CoRA EPOs are the same for EPOs issued under section 358 of the EP Act.

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Type	Section	When
1	363AC	Where an EPO is being, or has been, issued to the company under section 358 of the EP Act.
OR		
2	363AD	Where the company is a 'high risk company' as defined under the EP Act.

### 4.0 Who is a related person of a company?

There are four circumstances in which a person is a related person<sup>17</sup> of a company<sup>18</sup>:

1. parent companies – the person is a holding company of the company; or
2. landowners for non-resource activities – the person owns land on which the company carries out, or has carried out, a relevant non-resource activity; or
3. landowners for resource activities – the person owns land on which the company carries out, or has carried out, a relevant **resource activity** and is an **associated entity** of the company; or
4. relevant connection – the department decides under section 363AB of the EP Act that the person has a relevant connection with the company.

#### 4.0.1 Landowners

Landowners can have legal agreements in place allowing activities to occur on their land, without actually operating the activity themselves. Landowners can include individuals, companies, mortgagees<sup>19</sup> or local government agencies. The department will seek copies of these agreements where relevant. Such landowners are related persons, provided the activity is not a resource activity.

If the relevant activity is a resource activity, the landowner will not be a related person solely on the basis of land ownership. This is because the land on which resource activities are undertaken on is often owned by an unrelated person, subject to a compensation agreement.

Note that native title holders and trustees of Aboriginal land or Torres Strait Islander land are not landowners for the purposes of CoRA EPOs.<sup>20</sup>

### 4.1 When will a person have a relevant connection with the company?

There are two ways in which a person may have a relevant connection with a company:<sup>21</sup>

<sup>17</sup> Section 363AB(1) of the EP Act.

<sup>18</sup> Where a person is related person on the basis of being a holding company of the company, or through land ownership (circumstances 1 to 3), the department is not required to decide whether the person has a relevant connection under section 363AB of the EP Act (circumstance 4).

<sup>19</sup> Mortgagees can fall within the scope of the definition of 'owner' of land in certain circumstances where the mortgagee, or a person appointed by the mortgagee, is in possession of the land and has exclusive management and control of the land (Refer to the definition of 'owner' included in Schedule 4 of the EP Act). Note that where the mortgagee, or a person appointed by the mortgagee, is in possession of the land but does not have exclusive management and control of the land (i.e. does not fall within the scope of the definition of 'owner'), the department may consider whether the mortgagee is a related person on the basis of being in a position of influence (relevant connection).

<sup>20</sup> Section 363AB(8) of the EP Act

<sup>21</sup> Section 363AB(2)-(4) of the EP Act. Note that under section 363AB(6)(a) of the EP Act, in determining whether a person has a relevant connection, it is irrelevant if the person is:

- capable of, or has, significantly benefiting financially:
  - under an agreement or obligation relating to native title, Aboriginal cultural heritage or Torres Strait Islander cultural heritage; or
  - under a conduct and compensation agreement or from compensation paid or payable, under resource legislation or
  - under a make good agreement under the *Water Act 2000*; or
- is, or has been, in a position to influence the company's conduct because of an above agreement or obligation

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1. the person is capable of significantly benefiting financially, or has significantly benefited financially, from the carrying out of a relevant activity by the company; or
2. 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.

These are two separate considerations. A person may have a relevant connection if they satisfy only one of the above considerations.

The determination of whether a person has a relevant connection with a company will be made depending on the individual circumstances of each case. Departmental officers will investigate and collect a range of evidence to establish whether, in accordance with the law, a person has a relevant connection with a company. This investigation may include contact with the person in question to seek information directly from them. Authorised person powers or statutory notices may also be utilised during this process.

### 4.1.1 Significant financial benefit

The department may decide a person has a relevant connection with a company if it is satisfied that the person is capable of significantly benefiting financially, or has significantly benefited financially, from the carrying out of a relevant activity by the company. Financial benefit includes profit, income, revenue or dividends received, obtained, or enjoyed by the person.<sup>22</sup>

Determining a financial benefit will largely be a matter of fact (e.g. a shareholding exists), however the more complex issue for determination is whether this benefit is 'significant'. What amounts to a 'significant' financial benefit will vary depending on the circumstances. However, in a general sense, something is 'significant' when it is important, notable, or of consequence, having regard to its context.<sup>23</sup> As significance will be determined within the context of the specific circumstance, 'significant' may be considered in relation to:

- the proportion of the benefit relative to the total assets or benefit available from the activities carried out under the EA; or
- the proportion of the benefit, relative to the costs of restoring or rehabilitating the environment, or protecting the environment from harm; or
- The abnormality of benefit received, for example where a benefit received as a wage was above normal market value.

Only significant financial benefits from the period of time relevant to the causation (and, if relevant, mitigation) of the issue or incident being investigated will be considered. This is particularly relevant where there has been a course of conduct that gives rise to the issue or incident rather than a specific act or omission.

The following examples are provided to give context in relation to when the department may determine that a person has a relevant connection on the basis of significant financial benefit. The determination of significant financial benefit is just one consideration when deciding the potential recipients of any CoRA EPO and may not be relevant in all circumstances.

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<sup>22</sup> Section 363AB(8) of the EP Act.

<sup>23</sup> This definition of 'significant' considers the '[Significant Impact Guidelines](#)' for the *Environment Protection and Biodiversity Conservation Act 1999* and Federal case law.

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### **For example:**

#### **Uncommercial transactions**

A relative of the sole shareholder, and managing director of a company undertaking an environmentally relevant activity, has received a payment from the company. The payment is recorded in the company's accounts as being a salary for an employee. While the relative has worked for the company in carrying out the environmentally relevant activity, the payment is significantly more than the normal market value of the type of services provided by the relative. Shortly after the relative receives this payment, the company becomes insolvent and there are environmental risks on site that require ongoing management. As the payment received by the relative was significantly more than normal market value for the services provided, the relative may be considered to have a relevant connection on the basis of receiving a significant financial benefit.

#### **Third party suppliers**

A supplier has made normal market value profits from the sale of pipelines to a company through an arm's length transaction. A second supplier has made normal market value profits from the sale of a utility service to the company through an arm's length transaction. The company later becomes insolvent and has failed to carry out rehabilitation for the site as required in the company's EA. As the sale of the pipelines and the utility service were through arm's length commercial transactions, the suppliers would not be treated as having a relevant connection on the sole basis of having received a significant financial benefit from the sale of the pipelines or utility service.

#### **Vendors**

A vendor has made normal market value profits from the sale of an operation through an arm's length transaction. At the time of the sale, the operation was in compliance with its EA. After taking responsibility for the operation, the purchaser failed to carry out maintenance on key infrastructure as required in its EA and has become insolvent. There is a risk that as a result of the failure to carry out maintenance, the infrastructure will fail and cause significant environmental harm. As the sale of the operation was through an arm's length commercial transaction and the vendor received normal market value profits from the sale of the operation, the vendor would not be considered to have a relevant connection on the sole basis of significant financial benefit.

#### **Financial institutions – products and services for a fee**

A bank provides banking products and services to a company for a fee, such as deposit-taking and chequing facilities, payment or merchant facilities, transactional banking facilities, foreign exchange services, issuance of bank guarantees or the sale of standard risk-mitigation products. The fees received for undertaking these banking activities would not be considered significant financial benefits received by the bank and therefore the bank would not be regarded as having a relevant connection on the sole basis that it provided these services to a company.

#### **Financial institutions – equipment leases**

A financier enters into an equipment lease with a company for trucks, bulldozers and other construction equipment on normal commercial terms and at arms' length. In this instance the financier would not be regarded as having a relevant connection on the sole basis it received lease payments and retains a financier's ownership interest in the company's capital equipment.

#### **Financial institutions – lending agreements**

A bank enters into a lending agreement with a company on arm's length commercial terms and receives financial benefits (e.g. interest and the repayment of the loan) at commercial market rates in return for providing the credit. In this instance, the bank would not be regarded as having a relevant connection on the sole basis

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that it provided credit to the company and received financial benefits in return from the operation of the company.

### **Financial institutions – exercise of a security**

As part of a lending agreement a bank may take security over specific or all assets of the company. The company later finds itself in a state of financial difficulty. The bank and company try unsuccessfully to work through the company's issues. The bank subsequently exercises its rights under the loan agreement which includes appointing a receiver and manager, which results in the liquidation of all assets captured by its security to recover what the bank is owed. In this instance, the bank would not be regarded as having a relevant connection on the basis of significant financial benefit, as the actions taken by the bank were for related to the taking of a security.

### **Financial institutions – major investor**

A bank becomes a major investor in a company, whether by a lending agreement or otherwise, deriving significant dividends and capital gains such as equity from the company. In this instance, having regard to the significant financial benefits the bank receives as a major investor, the bank may be considered to have a relevant connection.

### **Shareholders – no dividends received**

A company has entered external administration. An environmental incident has occurred on site which requires action to be taken to minimise the risk of environmental harm.

Joan Smith purchased shares in the company just over a year ago. While other shareholders received actual benefits, through dividends, from the activities carried out by the company before it entered external administration, Joan never received dividends from the company due to its failure. While Joan Smith was capable of benefiting financially as a shareholder, in this instance, 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.

### **Shareholders – size of holding**

A company has entered external administration. The net profit for the company in the preceding financial year was \$70 million.

An environmental incident has occurred on site which requires action to be taken to minimise the risk of environmental harm. The approximate cost of taking action is \$1.5 million.

John Brown is a retiree who holds a small number of shares in the company. Annually, John Brown received dividends of \$6,000 which is a significant portion of his annual income.

Jane Bloggs holds a sizeable shareholding. Annually she received dividends of approximately \$3,550,000.

While John Brown's annual dividends from the company are significant to him, they would not be considered a significant financial benefit in light of the net profit of the company and the comparative shareholdings and financial benefits of Jane Bloggs. Consequently, John Brown would not be regarded as having a relevant connection on the sole basis of the financial benefits he received from his shareholdings, as the benefits are insignificant in light of the net profit of the company and in proportion to the relative costs to prevent environmental harm and protect the environment from the incident.

Conversely, Jane Bloggs's sizeable shareholding and dividends received from the company may be considered to be a significant financial benefit, having regard to the net profit of the company and the cost of taking action to minimise the risk of environmental harm from the incident. Consequently, Jane Bloggs may be considered to

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have a relevant connection on the sole basis of the financial benefits she received from her shareholdings as the benefits are significant in proportion to the relative costs to prevent environmental harm and protect the environment from the incident.

### **Non-executive director**

Peter Brown is a non-executive director of a company. He receives \$95,000 each year from the company for his services which is within normal market value for his position. This year, Peter also received a bonus of \$10,000 in consideration of his effective management of the company, which led to the realising of profits around \$1.5 million, up significantly on the previous financial year.

In this instance, Peter Brown would not be regarded as having a relevant connection on the sole basis of significant financial benefits as his director fees were within normal market value for his position and the bonus he received as director was small in proportion to the available \$1.5 million in profits.

### **4.1.2 Position to influence**

The department may decide a person has a relevant connection with a company if it is satisfied 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. 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).<sup>24</sup>

#### **4.1.2.1 Extent of a person's position to influence**

In addition to determining a relevant connection with the company, the determination that a person was in position to influence the company's environmental conduct will also be relevant to a determination of culpability, and again later when considering if the related person took all reasonable steps in relation to the company's environmental conduct. For this reason, the extent of a person's influence is considered in more detail in section 5.1.1 of this guideline.

The following examples are provided to give context in relation to when the department may determine that a person has a relevant connection on the basis of position to influence in the previous two years.

#### **For example:**

##### **Executive officers**

A company has entered external administration. A regulated dam on site has not been appropriately maintained resulting in dam failure and subsequent environmental harm. The managing director was aware that the dam had not been maintained, before the company went into administration. The director was responsible for the day-to-day allocation of funds and could have allocated funds to the maintenance of the dam. In this circumstance, the managing director may be considered to have a relevant connection on the basis the director was in a position to influence the actions of the company which resulted in the dam failure.

##### *Alternatively*

A company has entered external administration. A regulated dam has not been appropriately maintained

<sup>24</sup> Under section 363AB(3) of the EP Act, a reference to a person being in a position to influence a company's conduct includes a person being in that position –

- whether alone or jointly with an associated entity of the company; and
- whether by giving a direction or approval, by making fund available or in another way.

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resulting in dam failure and subsequent environmental harm. The company's human resources executive was not in a position to make decisions in relation to maintenance of the regulated dam. In this circumstance, the human resources executive would not be regarded as having a relevant connection on the basis of position to influence as they were not in a position to influence the environmental actions of the company which resulted in dam failure.

### **Financial institutions – financial services**

A financier has provided a company with information about its financial services and some possible options which may suit the company's objectives and requirements (for example loan or equipment lease arrangements) on arm's length commercial terms. As a result the company implements the advice. In this instance, the financier would not be regarded as having a relevant connection on the sole basis that this advice has been provided, as this advice would be considered professional advice and has been provided for commercial purposes.

### **Financial institutions – debt restructuring**

A bank has engaged in debt-restructuring discussions or negotiations with a company. As a result the company implements the advice. The bank would not be considered as having a relevant connection solely on the basis of these discussions, as the discussions are related and for the purpose of providing finance to the company.

### **Financial institutions – debt for equity swap**

A bank enters into a lending agreement with a company and later becomes a major investor in the company through a debt for equity swap. As part of the swap, the bank is given a seat on the board and has the ability to influence the company's environmental activities. In this instance, having regard to the influence the bank can exercise over the company, the bank may be considered to have a relevant connection on the basis of position to influence.

### **Contractor**

A contractor undertook work on behalf of a mining company for two years before ceasing work at the site 18 months ago. The contractor undertook work on both mining disturbance and rehabilitation and had some influence over the environmental decisions made during the period on site. The contractor was paid normal commercial fees for its work.

Since the contractor ceased working at the site, the EA holder decided to discontinue rehabilitation and subsequently went into administration. The EA holder's decision to discontinue rehabilitation is found to have led to erosion during a wet season, causing environmental harm.

Although the contractor may be considered as being in a position to influence how the company complied with its environmental obligations during the previous two years, the department determines that the contractor is not a related person as the contractor was not in a position to influence the decision to discontinue rehabilitation and is not culpable for the environmental harm.

### **Secured creditor**

A secured creditor decides to appoint a receiver to realise the assets of a company. The receiver consults with the secured creditor in relation to the receiver's realisation strategy for the assets and also informs the secured creditor about EA compliance and the risk and costs of compliance; however, the secured creditor does not exercise influence or control over the business of the company or direct the receiver. In this instance, the secured creditor would not be considered to have a relevant connection on the basis of position to influence as

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they were not in a position to influence the actions of the company.

### 4.2 Matters to consider in determining whether a person has a relevant connection with the company

In determining whether a person has a relevant connection, due to either a significant financial benefit or a position to influence, the EP Act lists a range of matters that may be considered.<sup>25</sup> The EP Act allows the department to consider these matters:<sup>26</sup>

- as they exist at the time of assessing whether the person is a related person; and
- as they have existed at any earlier time.<sup>27</sup>

#### For example:

A company has been wound up, however there are ongoing environmental issues on site which require action to be taken to minimise the risk of environmental harm. When deciding whether a person has a relevant connection with the company, the department may consider the connection that existed between the person and the company when the company was still operating and in the lead up to the environmental issues.

Table 1.1 outlines the matters that the department may consider in determining whether a person does or does not have a relevant connection to the company, in addition to clarifying whether the matter relates to significant financial benefit (SFB) or position to influence (PTI). Some of these matters at first glance suggest that a relevant connection exists. Other matters such as those relating to arm's length transactions or the provision of professional advice, suggest that prima facie, those persons do not have a relevant connection with the company. 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.

Appendix 4 provides information about the possible evidence the department may consider for each matter. The possible evidence included in Appendix 4 must read in conjunction with the other relevant factors described in the guideline.

**Table 1.1 Matters considered in determining whether a person does or does not have a relevant connection**

Matter that may be considered	Relates to SFB	Relates to PTI
The extent of the person's control of the company.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Whether the person is an executive officer <sup>28</sup> of the company.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Whether the person is an executive officer of a holding company or other company with a financial interest in the company.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
The extent of the person's financial interest in the company.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

<sup>25</sup> Section 363AB(4) of the EP Act.

<sup>26</sup> Section 363AB(5) of the EP Act.

<sup>27</sup> Note that this section should be read in conjunction with section 363AB(2)(b) of the EP Act which provides a timeframe of 2 years for considering whether a person was in a position to influence the company's environmental conduct.

<sup>28</sup> Refer to Schedule 4 of the EP Act. Note that under section 493 of the EP Act, executive officers of a corporation must ensure that the corporation complies with the EP Act.

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Matter that may be considered	Relates to SFB	Relates to PTI
The extent to which a legally recognisable structure or arrangement makes or has made it possible for the person to receive a financial benefit from the carrying out of a relevant activity by the company including (but not limited to) a structure or arrangement under which the person is not entitled to require a financial benefit, but it is possible for the person to receive a financial benefit because of a decision by someone else or the exercise of a discretion by someone else.	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Any agreements or other transactions the person enters into with the company.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Any agreements or other transactions the person enters into with a holding company or other company with a financial interest in the company.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
The extent to which dealings between the person and the company or a holding company or other company with a financial interest in the company, are at arm's length.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
The extent to which dealings between the person and the company or a holding company or other company with a financial interest in the company, are on an independent, commercial footing.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
The extent to which dealings between the person and the company or a holding company or other company with a financial interest in the company, are for the purpose of providing professional advice.	<input type="checkbox"/>	<input checked="" type="checkbox"/>
The extent to which dealings between the person and the company or a holding company or other company with a financial interest in the company, are for the purpose of providing finance, including the taking of a security.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
The extent of the person's compliance with a requirement under section 451 of the EP Act <sup>29</sup> for information relevant to the making of a decision under this section.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

In applying these matters:

- not all matters will be relevant to every determination of relevant connection;
- the department will consider the nature of the relationship and all the available evidence, including evidence that suggests a person does not have a relevant connection to the company;
- the department must give consideration to any evidence relevant to the decision including information produced by a potentially related person;
- the department will determine the weight of the evidence attributable to each matter depending on the individual circumstances of each case. However, evidence which demonstrates control over the company is likely to lend itself more strongly towards a determination of culpability and the existence of a relevant connection;

<sup>29</sup> Under section 451 of the EP Act, the department may give a notice to a person requiring the person to give the department information relevant to the administration or enforcement of the EP Act. The notice may only be given to a person the department suspects on reasonable grounds has knowledge of a matter, or has possession or control of a document dealing with a matter, for which the information is required.

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- the fact that there is evidence to support a connection based on a single matter, does not necessarily mean that the department will determine that a connection exists;
- generally, the more matters to support a connection, the more likely that the department will determine that a relevant connection exists.

### 5.0 When will a CoRA EPO be issued to a related person?

As outlined in the Key Principles, the department may consider issuing a CoRA EPO to related persons where:

- the company has avoided, or attempted to avoid, its environmental obligations and the related person has participated in this conduct, that is the person is culpable; and
- enforcement action against the EA holder or operator of the ERA is not available; or
- enforcement action against the EA holder or operator of the ERA will not achieve restoration of the environment or the protection of the environment from harm.

However, it will not always be appropriate to pursue all related persons. Rather, the department will consider the circumstances of each scenario to determine how many (if any) related persons should be issued a CoRA EPO. Where there are multiple related persons, the department will consider the relative culpability of each related person to determine the related person that is more culpable for the matter.

Assuming that one related person is more culpable than other related persons for a matter, the department would consider whether the related person has taken all reasonable steps, having regard to the extent to which the person was in a position to influence the company's conduct, to ensure that the company has complied with the EP Act and that there has been adequate provision to fund rehabilitation.

If it is determined that the related person was not culpable for a matter, or was culpable but took all reasonable steps in the circumstances, the department will not issue the person with a CoRA EPO.

### 5.1 Reasonable steps

There are no generic lists of all reasonable steps. What are reasonable steps will depend on the circumstances of the situation at hand and the extent to which the person was in a position to influence the company's conduct. What is reasonable for one related person will arise from the context of their specific role, powers, responsibilities or other relationship to the company and may differ greatly from the steps which would be reasonable for another related person.

The determination of what are reasonable steps in relation to a related person will occur through an investigation where relevant evidence is gathered, some examples of which are discussed in Appendix 5. The department will consider the relevant facts and circumstances in light of the nature of the relationship between the company and the related person. The department will also give consideration to:

- the state of knowledge at the time, and in the lead up to, the issue or incident; and
- the foreseeability and probability of the issue or incident occurring.

There are a number of factors the department may consider when determining whether a related person took all reasonable steps in the circumstances. These factors are discussed below. There may be other factors, not discussed below, which may be relevant when deciding if a related person took all reasonable steps.

Depending on how the connection between the company and related person has been established (e.g. through land ownership, a significant financial benefit or position to control) some factors may not be relevant to whether the person took all reasonable steps. However, the factors that relate to legal and practical ability to influence (section 5.1.1) and actual and expected knowledge (section 5.1.2) will be relevant to all

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determinations of whether a related person took all reasonable steps as they have significant implications on the expected reasonable steps required to be taken by that person.

Examples are provided to give context in relation to how the department may consider each factor when deciding whether all reasonable steps have been taken. These examples relate to a specific factor and should be considered in light of the whole decision making process.

### 5.1.1 Legal and practical ability to influence the company's conduct

The first key factor to be considered is the legal and practical ability of the related person to influence the company's conduct in relation to its environmental activities as this goes to the extent to which the person was in a position to influence the company's conduct. The department will consider the extent to which the person was in a position to influence the company's conduct as a matter of both fact and degree. 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.

Matters to be considered when determining the legal and practical ability of the related person to influence the company's conduct may include, but are not limited to:

- the nature and duration of the relationship between the related person and the company
- the potential for the related person to exercise decision making powers to direct the company's conduct
- the potential for the related person to provide advice or expertise to influence the company's conduct, and
- any implications of other legislation or law on the exercise of powers by the related person (e.g. *Corporations Act 2001* (Cth)).

#### For example:

##### Nature of the relationship

A local government agency may be connected to a company through land ownership (e.g. own land that is leased to a company to undertake non-resource activities) but may actually have a very limited legal or practical ability to influence the company's conduct, other than through lease conditions. As such, the reasonable steps expected of the local government agency in the event of an environmental incident would be less onerous than a related person connected to the company on the basis of their position to influence.

##### Alternatively

A related person may be the managing director of a company whose role includes overseeing and making decisions in relation to the company's compliance with its environmental obligations. In this instance, as the related person is in a greater position to influence the company's conduct than the landowner above, the reasonable steps expected of the managing director in the event of an environmental incident would be greater.

##### Actions regulated by other legislation or law

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. In this instance, the reasonable steps expected of the external administrator need to be considered in light of the external administrator's requirements and powers under the *Corporations Act 2001* (Cth), the terms of the external administrator's appointment, and the external administrator's powers and their obligations under the EP Act.

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The nature of an insolvency practitioner's relationship with a company in external administration will mean that the 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, and as a result, will not be issued with a CORA EPO for rehabilitation of pre-existing harm.

Under the *Corporations Act 2001* (Cth), an external administrator, such as a liquidator or administrator, is required to act in the interests of all creditors as a whole, not merely for the benefit of one creditor or stakeholder. The *Corporations Act 2001* (Cth) also gives such external administrators a number of powers to enable them to act in the best interest of all creditors. An external administrator such as a receiver (or receiver and manager) will be given powers by a security agreement or court order to enable the receiver (or receiver and manager) to act for the purposes of the appointment.

### **Incorporated joint ventures**

An incorporated joint venture (IJV) is made up of multiple parties, but operates as a separate legal entity and holds an EA as a single holder. The responsibilities of each the IJV partners will be outlined in the joint venture agreement. A minority IJV partner may be a related person on the basis of their significant financial benefit but may have a limited legal or practical ability to influence the IJV's conduct.

In the event that an environmental incident occurred on a site operated by an IJV and enforcement action against the IJV as the EA holder was not possible, the department would consider the influence that each of the IJV partners could exercise over the IJV's conduct. If a minority IJV partner is shown to have a limited ability to influence the IJV's conduct, the reasonable steps expected of the minority partner in the event of an environmental incident would be less onerous than an IJV partner that was in a greater position to influence the IJV's conduct.

### **5.1.2 Extent of actual and expected knowledge**

Another key factor to be considered is the extent of the actual and expected knowledge of the related person in relation to the environmental obligations of the company, including where the two differ. A person is not in a practical position to influence the relevant conduct of the company without knowledge of the relevant matters or the ability and responsibility to obtain that information. Consequently, the greater the actual or expected knowledge of a related person, the greater the expectation that the person would take reasonable steps in the event that an incident occurred.

However, a related person cannot avoid their obligation to take all reasonable steps by deliberately, negligently, intentionally or recklessly avoiding becoming aware of information that was within the person's role or responsibilities to become informed about. Similarly, if a person has been provided with relevant information and it is part of the person's role to read and address it, there is likely to be a reasonable inference that the person has read the information.

Matters to be considered when determining the actual and expected knowledge of the related person may include, but are not limited to:

- the nature and duration of the relationship between the related person and the company
- in the context of the nature and duration of that relationship:
  - whether the related person was informed, or ought to have kept themselves informed about the environmental obligations in the EP Act

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- whether the related person maintained, or was expected to maintain, an understanding of the nature of the company's operations
- whether the related person maintained, or was expected to maintain, an understanding of the environmental risks associated with the company's operations, and
- the steps the related person took to keep themselves informed about the environmental obligations in the EP Act, the nature of the company's operations and the environmental risks associated with the company's operations.

### **For example:**

#### **Executive officer**

A related person may be an executive officer of a company who is expected to have knowledge of the company's environmental conduct. To ensure that the executive officer kept themselves informed, the executive officer established channels to receive information about the company's environmental obligations including setting standing meeting agenda items and attending company presentations about environmental performance. In this instance, as the related person was expected to have knowledge and took steps to ensure they had actual knowledge, the expectation that the executive officer would take reasonable steps in the event of an environmental issue or incident would be greater than a related person that did not have actual or expected knowledge. The steps already taken by the executive to keep themselves informed may also be considered reasonable steps.

#### *Alternatively*

The executive officer has made appropriate enquiries of a more junior employee to seek information on issues about the company's environmental conduct. However the more junior employee has deliberately withheld information or provided false information to the executive officer about the company's environmental conduct when the executive made enquiries. In this instance, while the executive was expected to have knowledge and took steps to make reasonable enquiries to ensure they had actual knowledge, their actual knowledge was false so the expectation that the executive would take reasonable steps in the event of an environmental issue or incident would be less than if they had true actual knowledge.

#### **Financiers**

A financier becomes a major investor in a company and has significantly benefited financially from the activities carried out by the company. The financier is located overseas, and has no actual knowledge of the site operations, nor is the financier expected to have knowledge of the day to day operations. The financier reviews their investments yearly as well as the company's annual reports which do not specify day to day operations or report any environmental incidents and do not raise any reasonable concerns that the borrower is not making adequate provision to comply with its rehabilitation obligations. In the event of an environmental incident, the expectation that the financier would take reasonable steps would be less on the basis that the financier did not have actual or expected knowledge of the company's day to day operations or environmental conduct.

### **5.1.3 Exertion of position to influence**

A factor that may require consideration is whether the related person exerted their position to influence in a positive or negative way to ensure environmental harm was avoided and adequate provision was made for rehabilitation. This factor will be relevant where the related person was in a position to exert influence over the company's environmental conduct and had actual or expected knowledge of the issue or incident being investigated.

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Matters to be considered when determining whether the related person exerted their position to influence in a positive or negative way may include, but are not limited to:

- whether the related person took steps to oversee the design, resourcing and operation of the environmentally relevant activities undertaken by the company
- whether the related person took steps to oversee the design, resourcing, implementation, monitoring and review of an effective environmental risk management system which was aimed at ensuring compliance with the relevant environmental obligations
- whether the related person took steps to facilitate processes for company management to be informed of potential compliance issues
- whether the related person ensured that they responded in a timely way to information received about any potential compliance issues
- whether the related person complied with their duty to notify under the EP Act
- whether the related person is required to exercise their powers in the interests of a particular stakeholder or class of stakeholders, and
- whether the person is entitled to enforce their powers or rights under a commercial contract entered into between the person and the company (e.g. a bank exercising its right to enforce a security).

**For example:****Environmental risk management system**

In a medium sized company, an executive officer's role includes overseeing and making decisions in relation to the company's compliance with their environmental obligations. As part of their role, the executive officer oversaw the design and implementation of an environmental risk management system. However, the executive officer did not take steps to monitor or review the effectiveness of the environmental risk management system. An incident has subsequently occurred on site for which a significant contributing factor was the environmental risk management system not being effective for the environmental risks associated with the company's operations and the company has become insolvent. In this instance, as the executive officer failed to do what a reasonable person in his role could be expected to do to, monitor and review the environmental risk management system to ensure it was effective for the environmental risks associated with the company's operations, the executive officer may not have taken all reasonable steps to ensure that the company complied with its obligations.

**Timely response**

In a medium-sized company, an executive officer's role includes overseeing and making decisions in relation to the company's compliance with their environmental obligations. Five months ago, the executive officer received an expert report recommending an urgent upgrade of the company's environmental risk management system and advising that there was a high risk of the system failing and causing significant environmental harm in the next six months if key upgrades were not made to accommodate an increase in the intensity of the company's operations. The executive officer decides to delay the upgrades for a further six months. The executive officer does not inform the board of the advice or his decision. The company's environmental risk management system subsequently failed causing environmental harm. The company has since become insolvent. In this instance, as the executive officer did not respond in a timely manner to information received about any potential compliance issues and delayed upgrades to the company's environmental risk management system, it may be determined that the executive officer did not take all reasonable steps to ensure that the company complied with its obligations. In relation to the non-executive board members, the

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expectation that they would take reasonable steps is less as they had no actual knowledge of the expert report or the executive officer's decision.

### 5.1.3.1 Financial decision making

If a related person was in a position to make financial decisions for, or on behalf of the company at a time relevant to the particular matter, the department may consider any financial decisions made by the related person. This may include, but are not limited to:

- whether the related person exercised their financial decision making powers in such a way that adequate funds were available for the company to comply with its environmental obligations and ensure that environmental harm was/is avoided
- whether the related person made decisions to expend, or not, money to ensure that environmental harm was/is avoided
- whether the related person made/is making available funds to help prevent/remedy environmental harm or meet rehabilitation requirements
- whether the related person is required to exercise their financial decision making powers consistent with statutory or fiduciary duties, and
- whether the related person is required to exercise their financial decision making powers in the interests of a particular stakeholder/ or class or stakeholders.

### 5.1.4 Reliance on others

Another factor that may require consideration is the reliance that the related person placed on others to ensure that the company complied with its obligations and adequately provisioned funds whether this reliance was reasonable. This factor will be relevant where the related person delegated their environmental responsibility to another person or relied on the environmental advice or expertise of others. Where it can be shown that a related person reasonably relied on another person in relation to the company's environmental conduct, the reasonable steps expected of that person will be less onerous.

Matters to be considered when determining whether the related person reasonably relied on others may include, but are not limited to:

- whether the related person ensured that competent and qualified persons were engaged to undertake environmental activities on behalf of the company
- whether the related person provided clear and correct instructions to those persons engaged to undertake environmental activities on behalf of the company and took action to ensure those instructions were followed,
- ensuring the performance of those persons engaged is monitored; and
- whether the related person reasonably relied on the advice or expertise of others.

#### For example:

##### Delegation to competent and qualified persons

In a large company, an executive officer has delegated the day-to-day decision making about the company's environmental conduct, to another person. Prior to delegating this power, the executive officer checked company processes were in place to confirm that the person was competent and qualified including requiring evidence of the person's qualifications and referee checks to be undertaken. In this instance, in the event that

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an environmental incident were to occur, the reasonable steps expected of the executive officer may be less onerous on the basis that the executive officer could reasonably rely on the delegated person. This does not in of itself mean, that the executive officer will necessarily be found to have taken all reasonable steps. Depending on the particular matter, there may also have been other measures and processes that would reasonably have been appropriate to ensure that all reasonable steps' had been taken.

### *Alternatively*

The company had no processes in place to confirm the competency and qualifications of potential employees and the executive officer did not take any action to verify the qualifications of the person before delegating their authority. In this instance, in the event that an environmental incident were to occur, the reasonable steps expected of the executive officer may be greater on the basis that the executive officer could not reasonably rely on the delegated person.

### **Clear instructions**

A company officer has tasked a suitably qualified employee with implementing the maintenance schedule for key site infrastructure. The officer gave clear instructions to the employee outlining that the maintenance must be carried out in accordance with the company's EA and ensured that the employee had a copy of the EA. The employee did not carry out maintenance as required in the company's EA. When the officer made reasonable enquiries about the maintenance, the employee provided the officer with false information.

The infrastructure subsequently failed causing environmental harm and the company became insolvent. In this instance, as the officer provided clear instructions to the suitably qualified employee and followed up with the employee to ensure the instructions were followed, the reliance that the officer placed on the employee may be considered reasonable in spite of the employee's misconduct (which was unknown to the officer at the time). As such, the reasonable steps expected of the officer may be less onerous on the basis that the executive officer could reasonably rely on the employee until such time that the officer became aware of the falsity of the provided information or there were circumstances which would raise doubt in the mind of a reasonable officer as to the accuracy or conduct of the employee.

### **Third party advice and expertise**

The managing director of a company has engaged a third party to provide advice on a particular matter which the managing director knows to be outside of the expertise of the third party. The managing director knew of another party that had the appropriate expertise, however, there was a commercial advantage in engaging the third party. In this instance, if an environmental incident were to occur which related to the provided advice, the reasonable steps expected of the managing director may be greater on the basis that the managing director could not reasonably rely on advice provided by the third party.

## **6.0 Will a bank guarantee or security be required under an EPO if the department already holds financial assurance?**

### **6.1 What is financial assurance?**

Financial assurance (FA) is a type of financial security provided to the Queensland Government by the holder of an EA. FA can be imposed through either a condition of an EA or a condition of a transitional environmental program (TEP).

FA can be claimed by the department to cover any costs or expenses that it incurs, or may reasonably incur, where the EA holder or the recipient of a TEP has failed to meet its environmental obligations in taking action to:

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- prevent or minimise environmental harm or rehabilitate or restore the environment, in relation to the carrying out of an activity for which FA has been given; or
- secure compliance with an EA or small scale mining tenure<sup>30</sup> for which FA has been given.

A condition of the EA may require that FA is to be provided by the EA holder prior to commencing the activity authorised by the EA<sup>31</sup>.

For further information about FA, see the financial assurance under the *Environmental Protection Act 1994* Guideline available on the department's website at <https://www.ehp.qld.gov.au/assets/documents/regulation/era-gl-financial-assurance-ep-act.pdf>.

### 6.2 When will a bank guarantee or security be required?

A CoRA EPO issued under section 363AD(4)(c) of the EP Act (Type 2) can require the recipient to give the department a bank guarantee or other security for their compliance with the CoRA EPO. The intention is that by requiring a bank guarantee or other security under a CoRA EPO, should the recipient fail to comply with the requirements of the CoRA EPO, the bank guarantee or other security will cover the costs or expenses of the actions that have not been complied with. This prevents the environmental harm that has occurred from becoming a financial burden on the State.

The bank guarantee or security that can be required under a CoRA EPO has a broader scope than what can be required as FA. Unlike FA, a bank guarantee or security required under an EPO can relate to any actions or requirements imposed under the CoRA EPO. In comparison current departmental policy for FA is that it is calculated based on 'total rehabilitation liability'. FA may also be required to secure compliance with an EA or to prevent environmental harm, however, it is generally departmental policy not to do so.

A bank guarantee or security under a CoRA EPO may be required where the department has no other funds to claim or in the event that the recipient of the EPO fails to undertake the actions required by the CoRA EPO to prevent or minimise environmental harm, or to undertake remediation or rehabilitation. Any bank guarantee or security will, therefore, be proportionate to the harm that has occurred or the actions needed to prevent or minimise further harm. The decision to require a bank guarantee or security under a CoRA EPO, in part, depends on the circumstances that give rise to the CoRA EPO being issued. The nature of a CoRA EPO indicates that a contravention of the EP Act has occurred or is likely to occur. FA is calculated on the basis of compliant operation. This means that where operators are non-compliant, the FA held may not be adequate to cover the costs of restoration or remediation.

Where a contravention of the EP Act occurs or is likely to occur, and a CoRA EPO is issued, a security or bank guarantee may still be required under that CoRA EPO even if FA is already held by the department for that particular site. This is possible where:

- the extent of the environmental impact exceeds that for which FA was calculated; or
- the environmental impact is unrelated to the relevant activity for which the FA is held.

#### **For example:**

A company has entered into external administration. The company failed to complete rehabilitation of the site as per its EA conditions. Consequently, there are grounds for issuing a CoRA EPO to a related person to ensure that rehabilitation activities are undertaken on the site. As the company provided FA for the rehabilitation of the site, the proposed CoRA EPO would not include a requirement to provide a security or

<sup>30</sup> A small scale mining activity is defined in Schedule 4 of the EP Act.

<sup>31</sup> Refer to sections 292 and 293 of the EP Act.

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bank guarantee unless the FA is inadequate to undertake the required rehabilitation activities under the CoRA EPO. In that case, the amount of the security or bank guarantee would only be for the shortfall.

If a company is continuing to operate in contravention of the EP Act, the department will be unlikely to access FA to pay for the costs of either:

- remedying an offence;
- complying with an EA;
- preventing or minimising harm; or
- restoring the environment.

In such circumstances, enforcement tools, including EPOs, will be used to address the issue. Where a site is at the end of its life, and activities have ceased, the department will use whatever means possible to ensure that rehabilitation under the EA is completed. Where FA exists, this will be claimed, and if an EPO can be utilised, it may require a bank guarantee or security to cover any shortfall. However, the amount the department may claim from FA or security under an EPO will never exceed the total cost of rehabilitation of a site or complying with the requirements of the EPO.

A bank guarantee or security may also be required where no FA is held by the department.

It is important to note that although a bank guarantee or security may be required under an EPO, it will only be claimed should the recipient of the EPO fail to carry out the requirements stated in the EPO.

If a CoRA EPO is withdrawn, any security held by department under the CoRA EPO will be reimbursed to the person that submitted the security.

### 6.2.1 How will a bank guarantee or security required under a CoRA EPO be calculated?

When calculating the amount of the bank guarantee or security required under an EPO, the department will consider:

- the department's financial assurance calculator and calculation method, referred to in the department's guideline. Financial Assurance to calculate the amount required for any relevant expenses described in the in the calculator; and
- for any expenses not described in the calculator, the department will decide an amount that is reasonably reflects the likely cost to the department of taking action in place of the EPO recipient.

## 7.0 Joint and several liability

Where the department decides that there are two or more related persons that are culpable for an issue or incident and who failed to take all reasonable steps, the department may decide to hold them jointly and severally liable for compliance with a CoRA EPO, including costs.<sup>32</sup> This allows the department to enforce compliance against any of the related persons to ensure that the requirements of the CoRA EPO are carried out. That party may then seek to recover the costs of compliance from the other related person/s.

In deciding whether to hold the related persons jointly and severally liable for compliance with a CoRA EPO, the department may give consideration to the relationship between the related persons. However, any apportionment of the cost of compliance with a CoRA EPO is a matter to be determined between the parties by

<sup>32</sup> Section 363AE of the EP Act.

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private agreement. For this reason, the department is unlikely to be involved in the apportionment of liability between multiple related persons.

### 8.0 What happens if the related person is not the owner of the land on which action is required?

If a CoRA EPO is issued to a related person who is not the owner of the land on which the action is required, the recipient, or the person taking action for the recipient (i.e. a contractor), may enter the land:

- with the consent of the owner and occupier of the land; or
- if the recipient or contractor has given at least two business days written notice to the owner and occupier.<sup>33</sup>

The written notice must state:<sup>34</sup>

- the intention to enter the land; and
- the purpose of the entry; and
- the days and times when the entry is to be made.

Note that recipients or contractors are not permitted to enter a building that is being used for residential purposes.

In taking the action, the recipient or contractor must take all reasonable steps to ensure minimal inconvenience or damage as is practicable in the circumstances. A person that incurs loss or damage because of actions taken by the recipient or contractor is entitled to reasonable compensation from the recipient or contractor. The amount of any compensation is a matter for agreement between the recipient or contractor and the person. If the parties cannot agree, the amount of compensation is to be decided by the court.

### 9.0 Can action be taken in place of a related person if they fail to act?

An authorised person<sup>35</sup>, or person acting under the direction of an authorised person (e.g. a contractor), may take any of the actions stated in the CoRA EPO if:

- the recipient fails to comply with the CoRA EPO within the stated period: or
- the decision to issue the CoRA EPO is stayed under the EP Act.<sup>36</sup>

In taking the action, the authorised person or contractor must comply with the same requirements for entry as outlined above.

Note that this does not limit other provisions of the EP Act under which authorised persons may enter land.

If the department takes action in place of a related person who has failed to act, a cost recovery notice may be issued to the related person in certain circumstances.<sup>37</sup> For further information on cost recovery notices, see the Cost Recovery Guideline available on the department's website at

<https://www.ehp.qld.gov.au/management/compliance/pdf/cost-recovery-notice.pdf>.

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<sup>33</sup> Section 363AF(2) of the EP Act.

<sup>34</sup> Section 363AF(3) of the EP Act.

<sup>35</sup> Schedule 4 of the EP Act.

<sup>36</sup> Section 363AG of the EP Act.

<sup>37</sup> Section 363AI of the EP Act.

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### 10.0 Review of decisions and appeals

A person who is dissatisfied with certain decisions may be able to apply to have the department review that **original decision**.<sup>38</sup> The decision that someone is a related person and the decision to issue an EPO to a related person are both original decisions and can be reviewed. If an EPO is issued, a dissatisfied person is the recipient of the notice.

Generally, an application to have a decision reviewed must be:

- made within 10 business days of the decision being notified to the person<sup>39</sup>; and
- supported by enough information to enable the department to decide the application for review; and
- in the approved form, which can be found on the department's website.

Where an application has been made for a 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 by the department, a person who is dissatisfied with the review decision may be able to appeal against that decision to the relevant court<sup>40</sup> within 22 business days after receiving notice of the review decision.

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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<sup>38</sup> The provisions relating to reviews and appeals of decisions are outlined in sections 519 to 539 of the EP Act.

<sup>39</sup> Under section 521(2)(a)(ii), the department may allow a longer period of time for making a review application in special circumstances.

<sup>40</sup> If the CoRA EPO relates to a resource activity, the relevant court will be the Land Court. If the CoRA EPO relates to an activity other than a resource activity, the relevant court will be the Planning and Environment Court.

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### Appendix 1: Definitions

#### **Arm's length:**

- (1) A transaction in which the parties act severally and independently in forming the bargain and in which neither of the parties has the ability to exert personal influence or control over the other.
- (2) Dealing between persons or corporations in a commercial context, rather than on a social or more familiar basis. In an arm's length transaction, it is presumed that each party has made the best possible bargain in the circumstances.

**Associated entity:** as defined in section 50AAA of the *Corporations Act 2001* (Cth)

**Control:** as defined in the *Corporations Act 2001* (Cth)

- (1) For the purposes of this Act, an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.
- (2) In determining whether the first entity has this capacity:
  - (a) the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and
  - (b) any practice or pattern of behaviour affecting the second entity's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).
- (3) The first entity does not control the second entity merely because the first entity and a third entity jointly have the capacity to determine the outcome of decisions about the second entity's financial and operating policies.
- (4) If the first entity:
  - (a) has the capacity to influence decisions about the second entity's financial and operating policies; and
  - (b) is under a legal obligation to exercise that capacity for the benefit of someone other than the first entity's members;

the first entity is taken not to control the second entity.

**Department:** means the Department of Environment and Heritage Protection (or its successors).

**External administration:** refers to the situation where a body corporate has become an externally-administered body corporate as defined in section 9 of the *Corporations Act 2001* (Cth). Under section 9 of the *Corporations Act 2001* (Cth) an externally-administered body corporate means a body corporate:

- (a) that is being wound up; or
- (b) in respect of property of which a receiver, or a receiver and manager, has been appointed (whether or not by a court) and is acting; or
- (c) that is under administration; or
- (ca) that has executed a deed of company arrangement that has not yet terminated; or
- (d) that has entered into a compromise or arrangement with another person the administration of which has not been concluded.

**External administrator:** means:

- (a) a liquidator or a provisional liquidator;
- (b) a receiver, or a receiver and manager (whether or not appointed by a court);
- (c) an administrator of a company or a deed of company arrangement under the *Corporations Act 2001* (Cth), Part 5.3A; or

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- (d) a person appointed to administer a compromise or arrangement under the *Corporations Act 2001* (Cth).

**Executive officer, for a corporation:** as defined in Schedule 4 of the *Environmental Protection Act 1994*.

**Insolvent:** as defined in section 95A(2) of the *Corporations Act 2001* (Cth)

**Original decision:** as defined in section 519 of the *Environmental Protection Act 1994*.

**Person:** includes an individual and a corporation.

**Resource activity:** as defined in section 107 of the *Environmental Protection Act 1994* means an activity that involves—

- (a) a geothermal activity; or
- (b) a GHG storage activity; or
- (c) a mining activity; or
- (d) a petroleum activity.

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### Appendix 2: Detailed examples

#### Example 1: Jastribec Pty Ltd – Silver Mine

Jastribec Pty Ltd (the company) holds an EA and carries out resource activity 18 (mining silver) in central Queensland. The company's largest mine site is silver mine called the 'Fitz Mine' which they acquired seven years ago. The Fitz Mine has been in operation for 56 years and is yielding less tonnage of silver each year. For the previous financial year, 5.5 million tonnes of silver was extracted from the Fitz Mine. The mine is nearing the end of its life. The EA held by the company is largely made up of the model mining conditions, and has many conditions relating to rehabilitation. The Plan of Operations for the Fitz Mine details the timeframes for rehabilitation and includes provisions for the giving of FA. FA has been provided to the department to rehabilitate the mine site and conduct ongoing monitoring in accordance with the company's Plan of Operations.

John Davids owns 35 per cent of all shares in the company. Another 35 per cent of the company shares are held by various minor shareholders, who have a financial interest only. The remaining 30 per cent of shares are owned by BTJ Ltd, the holding company of Jastribec Pty Ltd.

John Davids is not officially a director of the company, but does have a certain amount of influence over the day-to-day operations of the Fitz Mine including giving instructions to the company 12 months ago to sell off infrastructure and monitoring equipment. This infrastructure and equipment was required:

- for the site to meet conditions of its EA and rehabilitation activities in the Plan of Operations; and
- to ensure that mine water dams were maintained

John Davids was aware of the purpose of infrastructure and equipment when he instructed that it be sold and he advised the company not to purchase replacement infrastructure and equipment.

John Davids is a director of BTJ Ltd. John Davids has on occasion, personally lent money to the company which was to be repaid with interest. Currently, the company owes him a total of \$16 million, which he recently lent to them.

BTJ Ltd has headquarters in Brisbane, but carries out very few operations in Australia. The only significant operation that BTJ Ltd undertakes in Australia is the operation of a port in Brisbane. BTJ Ltd holds an EA to carry out this activity (ERA 50 – bulk material handling). 30 per cent of all silver extracted at the Fitz Mine is exported through the port in Brisbane operated by BTJ Ltd. Many other mines make use of BTJ Ltd's port, and account for 90 per cent of all silver that goes through the port. Most of BTJ Ltd's operations are carried out in Papua New Guinea and Indonesia.

In addition to the loan by John Davids, the company also received a loan for \$40 million from ABC Banks. This is an ordinary loan, in the course of the bank providing financial intermediary type services and ABC Banks has no stake in the company or its operations. The outstanding balance of the loan is \$36.5 million. The loan from ABC Banks was used to purchase new equipment and hire a larger workforce to extract more of the remaining silver faster. The company has also leased a fleet of trucks from XYZ Lessor for \$15 million. The lease with XYZ Lessor was made on ordinary commercial terms and XYZ Lessors has no stake in the company or its operations. Prior to obtaining the loan from ABC Banks and entering into the lease with XYZ Lessor, the company sought professional advice from its accountant, to determine whether the company was in a position to acquire additional debt, given the likely correlative additional credit. The accountant advised that it is not in the best interests of the company to take on the additional loan and lease, as the additional debt burden may cripple the company and result in defaults on loan and lease repayments in the near future. ABC Banks and XYZ Lessor was unaware of the accountant's advice when it provided the \$40 million loan and \$15 lease agreement to the company.

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Initially, on the advice of their accountant, the company was reluctant to enter into the additional \$40 million loan and \$15 million lease arrangement. However, upon insistence from John Davids, the company took out the loan and entered into the lease. Less than six months later, the company has defaulted on all its debt obligations including the additional loan and lease, and has entered voluntary administration. The current total debt that the company owes ABC Banks is \$317.5 million and XYZ Lessor is \$14 million. In addition, there is \$16 million still owed to John Davids. The Fitz Mine has been shut down until further notice. There is an imminent risk of serious environmental harm due to the lack of maintenance on the mine water dams which are likely to overflow. This is evidenced by minor overtopping already occurring and heavy rainfall in the area predicted. At the time of voluntary administration, very few of the rehabilitation conditions in the EA have been met and only some of the rehabilitation activities in the Plan of Operations have been carried out.

### Issuing the EPO:

In light of the above information, the department is required to take immediate action to prevent or minimise serious environmental harm from the potential overtopping of the mine water dams and to ensure the rehabilitation of the site. The appropriate response in these circumstances is to issue a CoRA EPO under section 363AD of the EP Act because Jastribec Pty Ltd is in external administration. The CoRA EPO is issued to John Davids for the following reasons:

- John Davids is culpable for the lack of maintenance on the mine water dams and failure to undertake rehabilitation activities as he gave instructions to sell off infrastructure and monitoring equipment which was required for the maintenance and rehabilitation activities.
- John Davids is a related person to Jastribec Pty Ltd because he has a relevant connection to the company on the basis of the matters outlined below.
- The department is satisfied of the relevant connection between Jastribec Pty Ltd and John Davids because he significantly benefited financially from the silver mining carried out by the company and he was in a position to influence the company's conduct during the preceding two years.
- In deciding whether John Davids has a relevant connection to Jastribec Pty Ltd, the following matters were considered:
  - The extent of his influence and control over the company. John Davids demonstrated his significant influence over the company when he:
    - gave a directive to the company to acquire a new \$40 million loan through ABC Banks, contrary to professional advice sought by the company; and
    - instructed the company to sell off infrastructure and monitoring equipment.
  - His position as an executive officer of BTJ Ltd. John Davids is an executive officer of BTJ Ltd, who is the holding company of Jastribec Pty Ltd.
  - The extent of his financial interest in the Company. John Davids holds 35 per cent of all the shares in Jastribec Pty Ltd and BTJ Ltd (of which he is a director), holds an additional 30 per cent of the shares. Given the share structure of Jastribec Pty Ltd, the department has concluded that John Davids' 35 per cent ownership of shares in Jastribec Pty Ltd is a significant financial interest in the company.
  - The loan agreement with the company. John Davids has loaned Jastribec Pty Ltd various amounts of money. Most recently, he loaned the company \$16 million, which is still outstanding. This is a significant financial agreement that he has personally entered into with the company.

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- John Davids did not take all reasonable steps to ensure that Jastribec Pty Ltd complied with its environmental obligations. John Davids was aware of the purpose of infrastructure and equipment when he instructed that it be sold and not be replaced.

These factors have led the department to conclude that John Davids has a relevant connection to Jastribec Pty Ltd and is an appropriate person to receive a CoRA EPO.

### **Will the EPO include a requirement to provide a bank guarantee or security?**

A bank guarantee or security would not be required in relation to the rehabilitation of the site, unless the existing FA was found to be inadequate.

However, the EPO may include a requirement to provide a bank guarantee or security to ensure that the requirements in the EPO to prevent or minimise serious environmental harm from the potential overtopping of the mine water dams are complied with.

### **Will an EPO be issued to ABC Banks?**

An EPO will not be issued to ABC Banks as the department is satisfied that ABC Banks is not a related person on the basis that there is not a relevant connection between ABC Banks and Jastribec Pty Ltd. In deciding that ABC Banks did not have a relevant connection to Jastribec Pty Ltd, the department was satisfied that:

- The dealings with ABC Bank and Jastribec Pty Ltd were for the purpose of providing intermediary financial services only and were conducted on arm's length commercial terms.
- There are no other matters which indicate a relevant connection between the ABC Bank and Jastribec Pty Ltd.

### **Will an EPO be issued to XYZ Lessor?**

An EPO will not be issued to XYZ Lessor as the department is satisfied that XYZ Lessor is not a related person on the basis that there is not a relevant connection between XYZ Lessor and Jastribec Pty Ltd. In deciding that XYZ Lessor did not have a relevant connection to Jastribec Pty Ltd, the department was satisfied that:

- The dealings with XYZ Lessor and Jastribec Pty Ltd were for the purposes of providing secured finance only and were conducted on arms' length commercial terms.
- There are no other matters which indicate a relevant connection between the ABC Bank and Jastribec Pty Ltd.

### **Will an EPO be issued the company's accountant?**

An EPO will not be issued to the company's accountant as the department is satisfied that the company's accountant is not a related person on the basis that there is not a relevant connection between the accountant and Jastribec Pty Ltd. In deciding that the company's accountant did not have a relevant connection to Jastribec Pty Ltd, the department was satisfied that:

- The dealings between the accountant and Jastribec Pty Ltd were for the purpose of providing professional advice only.
- There are no other matters which indicate a relevant connection between the accountant and Jastribec Pty Ltd.

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### **Example 2: Cattle Corp – Abattoir**

Cattle Corp (CC) owned and operated a cattle station, abattoir, export meat business and leather goods manufacturing facilities in Queensland. CC hold an EA to conduct ERAs 25 (Meat processing) and 39 (Tannery). Waste from the abattoir and manufacturing facilities was stored on CC's property in central Queensland in large containers, many of which were decaying, rusting and uncovered. The containers were visibly leaking the waste, the ground near the containers was stained, and soil samples taken by the department revealed high concentrations of the contaminants stored in the containers, some of which were known carcinogens. The department is concerned that the discharge of these wastes has contaminated, or is likely to contaminate, groundwater. The risk to the environment is considered serious imminent environmental harm because groundwater in the region is known to flow towards a river which runs through CC's cattle station and adjacent properties and it is likely that the wastes have been stored at the site for a significant amount of time.

The department issues CC with an EPO requiring the immediate prevention of any further discharge of the waste and the rehabilitation of contaminated soil. After issuing the EPO, CC's largest customer entered into liquidation. Consequently, CC experiences serious cash flow difficulties because it is unable to collect the substantial debts owed to it by that customer. Due to concerns over insolvent trading, the board of CC puts the company into voluntary administration.

#### **Issuing the EPO:**

Faced with the possibility that the requirements of the EPO issued to CC may not be met, and with the wet season looming, the department considers whether to issue any related persons with a CoRA EPO. After carrying out an investigation, the department issues a CoRA EPO under section 363AC to one of CC's director, Rod Red. The department's reasons are as follow:

#### **Director Bob Black:**

Bob Black is an independent non-executive director of CC. The department did not issue Bob Black with a CoRA EPO as the department determined that Bob Black was not a related person of CC on the basis that Rob Black does not have a relevant connection with CC.

The department concluded that a relevant connection did not exist between Bob Black and the company for the following reasons:

- Bob Black did not receive, nor was he capable of receiving, a significant financial benefit from the company's activities. Bob Black was paid a fixed fee for his services on the board of CC which was within market value. He was not entitled to performance bonuses or other financial incentives; and
- Bob Black was not in a position to practically influence CC's conduct in relation to the way in which, or extent to which, the company stored and disposed of its chemical waste. While Bob Black was involved in shaping the company's strategic direction, CEO appointment decisions and overseeing the company's risk management framework, he did not exercise the financial or operational control over the company.

#### **Director Georgina Green:**

Georgina Green is the non-executive chairman of CC's board. The department considers that Georgina Green has a relevant connection to CC because, in addition to her role on the company's board, Georgina Green holds 10 per cent of CC's issued share capital and is the chief financial officer of CC's holding company. The department considered that together these factors constituted a relevant connection for the purposes of the Act. However, the department decided not to issue Georgina Green with a CoRA EPO because Georgina took all reasonable steps having regard to the extent of Georgina's position to influence to secure CC's compliance with

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its obligations under the EP Act and to ensure the company made adequate provision to fund projected remediation costs.

### **Director Rod Red:**

Rod Red is the managing director and chief executive officer of CC. In addition to his base salary, Rod Red's remuneration package includes financial performance incentives. In light of these factors, the department considers that Rod Red has a 'relevant connection' with the company and is therefore a 'related person' for the purposes of the EP Act. After investigating the circumstances leading to the discharge of waste by CC, the department finds that Rod Red failed to take all reasonable steps to ensure the company's compliance with its environmental obligations. The following matters were relevant to the department's finding that Rod Red had failed to take all reasonable steps:

- There was evidence that the site manager informed Rod Red about the discharge problem approximately eight months prior to the department's issuance of the EPO. When the site manager raised the issue again with Rod Red a week later, Rod Red instructed the site manager to obtain a quote to have the containers removed.
- When the site manager obtained the quote, he sent it to Rod Red for authorisation as was required by the company's internal policies. Despite following up with Rod Red on several occasions, more than four months passed before Rod Red told the site manager to obtain a second quote because the original quote of \$56,000 was too high. Rod Red admitted that he had made this decision without interrogating the quote or communicating with the prospective contractor.
- An alternative quote for \$28,000 was obtained. Several weeks later, Rod Red instructed the site manager to accept the quote. However, the contractor was unable to honour the agreement to remove the containers.
- There was no evidence that Rod Red took any steps to view the storage area and assess the problem personally even though he was regularly onsite during the relevant period. Rod Red explained to the department that during the relevant period he had been focused primarily on executing the company's plans to expand into new overseas markets.
- Rod Red did not inform the other board members of the discharge issue until the EPO was issued.

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**Appendix 3: Process for issuing a CoRA EPO**



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**Appendix 4: Possible evidence – relevant connection**

Matters that may be considered (as relevant)	Relevant to SFB or PTI <sup>41</sup>	Possible evidence and considerations
The extent of the person's control of the company	PTI	Details of: <ul style="list-style-type: none"> <li>• The person's role in relation to the company (e.g. an executive director of the company, a contractor for the company, or an external administrator with limited prior involvement with the company).</li> <li>• How long the person has been in their role.</li> <li>• The size and structure of the company.</li> <li>• The nature and complexity of the company's activities.</li> <li>• The person's responsibilities in relation to the company (e.g. company documents which assign responsibilities to directors or terms of a contract entered into between the company and related person).</li> <li>• The related person's ability to make decisions or provide advice or expertise.</li> <li>• Documents referring to any decisions the person has made in relation to the company's environmental obligations (e.g. board minutes, company resolutions, emails).</li> </ul>
Whether the person is an executive officer of the company	PTI	Details of: <ul style="list-style-type: none"> <li>• The person's role as an executive officer.<sup>42</sup></li> <li>• The person's responsibilities within the company (e.g. company documents which assign responsibilities to the person, interviews with company employees.)</li> <li>• The size, nature and complexity of the company board.</li> <li>• How long the person has been an executive officer.</li> </ul>

<sup>41</sup> Refers to Significant Financial Benefit (SFB) or Position to Influence (PTI)

<sup>42</sup> Under section 9 of the *Corporations Act 2001* (Cth), a person may be deemed to be a director if they act in the position of director or the directors of the company are accustomed to act in accordance with the person's instructions or wishes.

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<b>Matters that may be considered (as relevant)</b>	<b>Relevant to SFB or PTI<sup>41</sup></b>	<b>Possible evidence and considerations</b>
Whether the person is an executive officer of a holding company or other company with a financial interest in the company	PTI	<p>Details of:</p> <ul style="list-style-type: none"> <li>• The relationship between the company, the holding company, or other company with a financial interest in the company (e.g. the corporate group structure).</li> <li>• The nature and size of the financial interest. The person’s role as an executive officer of the other company.</li> <li>• The person’s responsibilities within the other company (e.g. company documents which assign responsibilities to the person, interviews with company employees).</li> <li>• How long the person has been an executive officer.</li> </ul>
The extent of the person’s financial interest in the company	SFB, PTI	<p>Details of:</p> <ul style="list-style-type: none"> <li>• The person’s remuneration and whether:               <ul style="list-style-type: none"> <li>○ it is higher than market value for the type of services the person provides</li> <li>○ it includes any financial bonuses or incentives (e.g. bonus for high stock performance).</li> </ul> </li> <li>• The person’s shareholdings in the company and whether it is a major shareholding or part of an ordinary investment strategy by the person.</li> <li>• The person’s interests in relevant property (e.g. machinery or equipment used by the company).</li> <li>• The person’s interests in relevant intellectual property (e.g. patents or trademarks used by the company).</li> <li>• Whether the person’s interest is a security interest (e.g. a bank that has an interest over property provided as security for a loan).</li> <li>• Any investments the person has made in the company (e.g. contribution of funds or assets).</li> <li>• Documents referring to the person’s financial interest in the company (e.g. company financial reports, invoices, investment records, deeds, contracts.).</li> </ul>
The extent to which a legally recognisable structure or arrangement makes or has	SFB	<p>Details of:</p> <ul style="list-style-type: none"> <li>• The legally recognisable structure or arrangement that makes it possible for the person to receive a financial benefit.</li> </ul>

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<b>Matters that may be considered (as relevant)</b>	<b>Relevant to SFB or PTI<sup>41</sup></b>	<b>Possible evidence and considerations</b>
made it possible for the person to receive a financial benefit from the carrying out of a relevant activity by the company including (but not limited to) a structure or arrangement under which the person is not entitled to require a financial benefit, but it is possible for the person to receive a financial benefit because of a decision by someone else or the exercise of a discretion by someone else		<ul style="list-style-type: none"> <li>• The terms of any documents for the structure or arrangement (e.g. trust deeds, constitutions, scheme or plan documents).</li> <li>• How the person may benefit from the structure or arrangement.</li> <li>• Whether the person or company used legally recognisable structures or arrangements to engage in avoidance behaviour.</li> </ul>
Any agreements or other transactions the person enters into with the company	SFB, PTI	Details of: <ul style="list-style-type: none"> <li>• Contracts or agreements that the person has entered into with the company.</li> <li>• Documents referring to the transactions or agreements between the company and person (e.g. company ledger, sales and purchases records, investment records, deeds, contracts).</li> </ul>
Any agreements or other transactions the person enters into with a holding company or other company with a financial interest in the company	SFB, PTI	Details of: <ul style="list-style-type: none"> <li>• The relationship between the company, the holding company, or other company with a financial interest in the company.</li> <li>• The nature and size of the financial interest.</li> <li>• Contracts or agreements that the person has entered into with the holding company, or other company with a financial interest in the company. Documents referring to the transactions or agreements between the</li> </ul>

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Matters that may be considered (as relevant)	Relevant to SFB or PTI <sup>41</sup>	Possible evidence and considerations
		<p>holding company, or other company with a financial interest in the company and person (e.g. company ledger, sales and purchases records, investment records, deeds, contracts).</p>
<p>The extent to which dealings between the person and the company or a holding company or other company with a financial interest in the company, are at arm’s length</p>	<p>SFB, PTI</p>	<p>Details of:</p> <ul style="list-style-type: none"> <li>• The products or services that the person provides (e.g. bank providing services as a financial intermediary).</li> <li>• The remuneration, fees or profit received by the person as a result of the dealings.</li> <li>• The nature of the relationship between the person and the company, holding company, or other company with a financial interest in the company. Whether the parties to the transaction are motivated by their own self-interest and were not subject to duress or pressure from the other party.</li> <li>• The dealings between the person and the company, holding company, or other company with a financial interest in the company.</li> <li>• Contracts or agreements that the person has entered into with the company holding company, or other company with a financial interest in the company.</li> <li>• Documents referring to transactions between the company and person (e.g. company ledger, sales and purchases records, contracts.)</li> </ul>
<p>The extent to which dealings between the person and the company or a holding company or other company with a financial interest in the company, are on an independent, commercial footing</p>	<p>SFB, PTI</p>	<p>Details of:</p> <ul style="list-style-type: none"> <li>• The commercial products or services that the person provides.</li> <li>• The remuneration, fees or profit received by the person as a result of the dealings.</li> <li>• The nature of the relationship between the person and the company, holding company, or other company with a financial interest in the company.</li> <li>• Whether the parties to the transaction are motivated by their own self-interest and were not subject to duress or pressure from the other party.</li> <li>• The dealings between the person and the company, holding company, or other company with a financial interest in the company.</li> <li>• Contracts or agreements that the person has entered into with the company holding company, or other</li> </ul>

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Matters that may be considered (as relevant)	Relevant to SFB or PTI <sup>41</sup>	Possible evidence and considerations
		<p>company with a financial interest in the company.</p> <ul style="list-style-type: none"> <li>• Payments received by the person from the company, holding company, or other company with a financial interest in the company and whether the payments are higher than market value for the type of products or services the person provides.</li> <li>• Documents referring to the transactions between the company and person (e.g. company ledger, sales and purchases records, contracts).</li> </ul>
<p>The extent to which dealings between the person and the company or a holding company or other company with a financial interest in the company, are for the purpose of providing professional advice</p>	<p>PTI</p>	<p>Details of:</p> <ul style="list-style-type: none"> <li>• The person’s profession or nature of advice (e.g. engineer, architect, lawyer, financial advisor, accountant, geological or scientific).</li> <li>• The services provided by the person to the company, holding company, or other company with a financial interest (e.g. financial advisory services provided by a bank for a fee at the request of the company for the efficacy of the company’s operations).</li> <li>• Contracts or agreements that the person has entered into with the company, holding company, or other company with a financial interest in the company to provide professional advice.</li> <li>• Payments received by the person from the company, holding company, or other company with a financial interest in the company and whether: <ul style="list-style-type: none"> <li>○ the payments are higher than market value for the type of advice provided</li> <li>○ it includes any financial bonuses or incentives.</li> </ul> </li> <li>• Documents referring to the transactions between the company and person (e.g. company ledger, sales and purchases records, contract of engagement).</li> </ul>
<p>The extent to which dealings between the person and the company or a holding company or other company with a financial interest in the</p>	<p>SFB, PTI</p>	<p>Details of:</p> <ul style="list-style-type: none"> <li>• The person’s business (e.g. bank, other lender).</li> <li>• The type of finance provided by the person to the company, holding company, or other company with a financial interest (e.g. bank guarantee for the purposes of FA or a loan to provide rehabilitation equipment).</li> <li>• Any securities taken over the assets or real property of the company, holding company, or other company</li> </ul>

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Matters that may be considered (as relevant)	Relevant to SFB or PTI <sup>41</sup>	Possible evidence and considerations
company, are for the purpose of providing finance, including the taking of a security		<p>with a financial interest.</p> <ul style="list-style-type: none"> <li>• Contracts or agreements that the person has entered into with the company, holding company, or other company with a financial interest in the company to provide finance.</li> <li>• Payments received by the person from the company, holding company, or other company with a financial interest in the company and whether:               <ul style="list-style-type: none"> <li>○ the payments are higher than market value for the type of advice provided</li> <li>○ it includes any financial bonuses or incentives.</li> </ul> </li> <li>• Documents referring to the transactions between the company and person (e.g. company ledger, sales and purchases records, contract of engagement).</li> </ul>
The extent of the person’s compliance with a requirement under section 451 for information relevant to the making of a decision under this section.	SFB, PTI	<p>Details of:</p> <ul style="list-style-type: none"> <li>• Notices issued to the person under section 451 of the EP Act.</li> <li>• The content required by the notice.</li> <li>• The timeframe for providing a response.</li> <li>• The response provided by the person to notices issued to the person under section 451 of the EP Act.</li> <li>• Whether the notice is currently the subject of a review or appeal.</li> </ul>

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**Appendix 5: Possible evidence – reasonable steps**

Factors that may be considered (as relevant)	Possible evidence and considerations
<p>The legal and practical ability of the related person to influence the company’s conduct</p>	<p>Details of:</p> <ul style="list-style-type: none"> <li>• The related person’s role in relation to the company (e.g. an executive director of the company or a landowner of the site where the company undertakes activities).</li> <li>• How long the person has been in their role.</li> <li>• The related person’s ability to make decisions or provide advice or expertise (e.g. company documents which assign responsibilities or delegate powers to directors, terms of a contract entered into between the company and related person, or the allocation of responsibilities under a joint venture agreement).</li> <li>• The size and structure of the company.</li> <li>• Any other statutory, fiduciary or legal requirements that the related person must comply with (e.g. <i>Corporations Act 2001</i> (Cth)).</li> </ul>
<p>The actual and expected knowledge of the related person in relation to the environmental obligations of the company, including where the two differ</p>	<p>Details of:</p> <ul style="list-style-type: none"> <li>• The related person’s role in relation to the company (e.g. an executive director of the company or an external administrator with limited prior knowledge of the company).</li> <li>• How long the person has been in the role (e.g. are they an external administrator who has only been recently appointed or had limited time to conduct a review of the company’s operations and obtain independent expert advice).</li> <li>• The responsibilities of the person and whether they ought to have kept themselves informed and aware of the environmental obligations of the company.</li> <li>• How the related person kept themselves, or ought to have kept themselves, informed and aware of the environmental obligations of the company.</li> <li>• The steps the related person took to keep themselves informed about the environmental obligations in the EP Act, the nature of the company’s operations and the environmental risks associated with the company’s operations.</li> <li>• If, and when, the person was provided information about the relevant matter.</li> <li>• Whether the person had a reasonable excuse for not being aware of information about the relevant matter (e.g. the</li> </ul>

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Factors that may be considered (as relevant)	Possible evidence and considerations
	<p>person was on extended leave at the relevant time).</p>
<p>Whether the related person exerted their position to influence in a positive or negative way to ensure environmental harm was avoided</p>	<p>Details of:</p> <ul style="list-style-type: none"> <li>• If the related person had decision making powers, decisions made, or not made by the person, in relation to the issue or incident of concern (e.g. board minutes, emails documents which detail the rejection of a contractor’s proposal to undertake works which are necessary to prevent environmental harm).</li> <li>• If the related person was in position to provide advice or expertise to the company, details of the advice or expertise provided, or not provided, by the person, in relation to the issue or incident of concern.</li> <li>• Any requirements placed on the related person to act in the interests of a particular stakeholder or class of stakeholders.</li> </ul>
<p>Any financial decisions made by the related person</p>	<p>Details of:</p> <ul style="list-style-type: none"> <li>• Financial decisions made, or not made by the person (e.g. documents which details a rejection of finance for maintenance).</li> <li>• Any other statutory, fiduciary or legal requirements that the related person must comply with when exercising their financial decision making powers (e.g. <i>Corporations Act 2001</i> (Cth)).</li> <li>• Any requirements placed on the related person to act in the interests of a particular stakeholder or class of stakeholders.</li> </ul>
<p>Reliance that the related person placed on others to ensure that the environmental harm was avoided and whether this reliance was reasonable</p>	<p>Details of:</p> <ul style="list-style-type: none"> <li>• How the related person kept themselves, or ought to have kept themselves, informed and aware of the competency and qualifications of those person engaged undertake activities on behalf of the company (e.g. documents that detail recruitment and tender process for the persons/activities).</li> <li>• Any instructions the related person provided to those persons engaged to undertake environmental activities on behalf of the company.</li> <li>• Any actions the related person took to ensure to their instructions were followed.</li> </ul>

**Guideline**

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<b>Factors that may be considered (as relevant)</b>	<b>Possible evidence and considerations</b>
	<ul style="list-style-type: none"><li>• Any advice or expertise that the related person received in relation to the company's environmental obligations.</li><li>• Any actions that the related person took to confirm that the provider of the advice or expertise was qualified to do so.</li></ul>

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**Approved By**

Jim Reeves

Signature

22 December 2016

Date

Director-General  
Department of Environment and Heritage  
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