

Information sheet

Environment Protection Act 1994

Enforcement action and multiple EA holders

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

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1 Background

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

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

For simplicity, throughout this guideline an *authorised person* will be referred to as an *authorised officer* (AO), as the department recognises this is a commonly used term within the community.

Schedule 4 of the Act provides the following definition of holder and includes the holder of an EA:

holder—

1. The *holder* of a transitional environmental program is—
 - the person or public authority to whom the transitional environmental program was issued; or
 - if the transitional environmental program relates to an environmental authority—the holder of the environmental authority.
2. The *holder* of an environmental authority for a prescribed ERA is—
 - the person who made an application for the authority; or
 - if a transfer application for the authority has been approved under chapter 5, part 9—the person to whom the transferred environmental authority has been issued.
3. The *holder* of an environmental authority or PRC plan for a resource activity is the holder of the relevant tenure.
4. The *holder* of a resource tenure is the holder of the tenure under resource legislation.
4A. However, if a resource tenure for which a holder has an environmental authority or PRCP schedule ends, the person who was the holder of the tenure under resource legislation immediately before it ended continues to be the holder of the environmental authority or PRCP schedule.
5. The *holder* of a temporary emissions licence is the holder of the environmental authority to which the temporary emissions licence relates.
6. However, if a holder of an environmental authority under paragraph 1 or 2 dies, that person's personal representative becomes the holder.

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

2 Legal entities generally

Statutory notices, like those provided for under the Act for enforcement purposes such as environmental protection orders (EPOs), can only be issued to legal entities, irrespective of the type of entity that has applied for an EA. A legal entity is an entity on which a legal system may confer rights and impose responsibilities. This means that when taking enforcement action against holders of EAs, the enforcement action can only be taken against legal entities that 'make up' the holders of the EA. For example, a business may operate under the

name of their joint venture, however the EA is held by the two people who make up the joint venture. This means that enforcement action can be taken against the two people (the legal entities) who make up the joint venture and not the joint venture itself. Note this is, as opposed to a corporation which can sue, and be sued in its own right, just like a natural person

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

Type of entity	Is it a legal entity?
Sole trader (i.e., individual)	YES
Partnership	NO
Unincorporated Joint Venture	NO
Incorporated Joint Venture	YES
Joint Venture under a Unit Trust	NO
Trust	NO
Co-operative	YES
Company (with an ACN)	YES
Incorporated Association	YES
Unincorporated Association	NO
Body Corporate	YES
Registrable Australian Body	YES
Managed Investment Scheme	YES
Business	NO
Government Owned Corporation	YES
Local Council	YES
University	YES

2.1 Joint ventures

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

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

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

2.1.1 Unincorporated Joint Ventures (UJVs)

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

3 Environmental Responsibility (culpability) of EA holders

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

Conversely, culpability is not automatically established on behalf of all joint holders where there has been an alleged non-compliance. The department will seek to determine the culpability of each EA holder for a particular offence on an individual basis before proceeding to enforcement action.

3.1 Steps the department will take to determine culpability

3.1.1 Determining non-compliance and parties

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

3.1.2 Determining specific facts and circumstances

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

For example, consistent with the Department's Enforcement Guidelines (ESR/2021/5549¹) when determining who is responsible for an offence, a number of considerations must be taken into account, including (but not limited to):

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

¹ This is the publication number. The publication number can be used as a search term to find the latest version of a publication at www.des.qld.gov.au

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

3.1.3 Providing for natural justice

Natural justice is provided to all likely parties to an offence prior to any enforcement decision making. Natural justice informs the alleged offender of the specific alleged offence(s) including any relevant information and allows for the response to any allegations made by the department to show why enforcement action should not be taken against them. It is in the interests of a holder of a TEP, including EA holders, to ensure that they respond in a timely manner (or within a given timeframe) to any communication received in relation to an alleged offence. The response given by an alleged offence is taken into consideration by the decision maker before an enforcement recommendation is finalised. For example, where there are multiple EA holders and one is more responsible for the alleged offence than others because that EA holder carries out day-to-day operations and makes decisions on site, EA holders should advise the department accordingly and include any information that supports the reasons or representations (such as contractual arrangements). The natural justice should be provided by the most efficient means possible, and this may be through verbal communication or in writing via an email or letter.

3.1.4 Asking specific questions

If the department does not receive adequate responses from EA holders in relation to any information sought through the natural justice step, the department may ask specific questions of the EA holder(s), employees on site or other involved persons in an attempt to determine who has primary control of a particular site or any other fact or circumstance that the officer needs to determine.

4 Other tools to determine culpability

The department and authorised officers under the Act can also utilise other tools to obtain information that is required to make an enforcement decision.

4.1.1 Section 451 Requiring relevant information

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

Section 451 notices can only be used where the department suspects on reasonable grounds that a person:

- has knowledge of a relevant matter; or
- is in possession or control of a document that is relevant to the matter.

4.1.2 Section 465 Requirement to provide answers to questions

Under section 465 of the Act, an authorised officer can require a personⁱ to answer questions if the authorised officer suspects on reasonable grounds that:

- an offence against the Act has happened; and
- a person may be able to give information about the offence.

When exercising this power, an authorised officer can:

- require a person to answer a question about the suspected offence (this can include requiring a verbal response on the spot, for example during a field interview); or
- issue a written notice that requires the person to attend a particular place, at a particular time, to answer questions about the suspected offence (a formal interview); or

- issue a written notice to a corporation and require them to nominate a representative (the corporation's representative) who is authorised to provide answers about the suspected offence; and
- subsequently issue a written notice requiring the corporation's representative to attend a formal interview to answer questions about the suspected offence*.

*Note – the Act states that an answer given by a corporation's representative binds the corporation.

4.1.3 Section 466 Requirement to produce documents

Under section 466 of the Act, an authorised person can require a person to produce a document for inspection that is required to be held or kept under:

- the Act; or
- a development condition of a development approval;
- an agricultural ERA standard that applies to an agricultural ERA or
- a recognised accreditation program for an agricultural ERA.

This may assist in determining culpability or control of a particular site if required.

An authorised officer can keep a produced document for the purpose of taking an extract from it or making a copy of the document. An authorised officer must return the document to the person as soon as practicable after taking the extract or making the copy.

5 Options for EA holders after receiving a statutory notice

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

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

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

- provided to the department within 10 business days after the day on which the person receives notice of the original decision;
- supported by enough information to enable the department to decide the application for review; and
- made using the application form, Application for review of original decision ([ESR/2015/1573²](#)).

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

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

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

² This is the publication number. The publication number can be used as a search term to find the latest version of a publication at www.des.qld.gov.au

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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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