

Indirect change of control guideline

A guideline about the procedure to assess an entity's financial and technical ability to comply with conditions of a resource authority, when there is an indirect change of control

July 2023

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Purpose

This guideline outlines the procedure to assess an entity's financial and technical ability to comply with the conditions of a resource authority when the ownership of a resource authority itself does not change but who is in control of the company changes. This is referred to as an 'indirect' change of control.

The Minister has a discretionary power to assess whether the holder of a resource authority has the financial and technical resources to comply with the conditions of the resource authority if the Minister reasonably believes, or is notified, that there has been an indirect change in control of the resource authority.

The indirect change in control process only applies to corporations, not individuals. It applies if a change of control has been identified and the new controlling entity poses an increased risk to the State because the entity does not have the requisite financial and technical resources to comply with the conditions of the resource authority.

These measures are designed to strengthen the State's oversight over resource authorities that have a change of control of the ownership to mitigate the risk of the changed holder failing to meet their resource authority obligations, potentially leading to the site being disclaimed.

The [Financial and technical capability guideline](#) provides further information to assist applicants to understand the legislative obligations required to meet permit conditions and to ensure that activities are funded and resourced.

The department is committed to respecting, protecting and promoting human rights. Under the *Human Rights Act 2019*, the department has an obligation to act and make decisions in a way that is compatible with human rights and, when making a decision, to give proper consideration to human rights. To the extent an act or decision under this document may engage human rights under the *Human Rights Act 2019*, regard will be had to that Act in undertaking the act or making the decision.

Indirect change of control

An indirect change of control is a change that happens under section 46 (What is a subsidiary) or section 50AA (Control) of the *Corporations Act 2001* (Cth) (Corporations Act).

Pursuant to section 46 of the Corporations Act, a holder that is a body corporate will be a subsidiary of a body corporate if:

- the other body corporate controls the composition of the holder's board;
- the other body corporate can cast or control the casting of more than 50% of the maximum number of votes that may be cast at a general meeting of the holder;
- the other body corporate holds more than 50% of the issued share capital of the holder (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
- the holder is a subsidiary of a subsidiary of the other body corporate.

Pursuant to section 50AA of the Corporations Act, an entity controls a second entity (in this case the holder), if it has the capacity to determine the outcome of decisions about the second entity's financial and operating policies. In determining whether the first entity has this capacity:

- the practical influence that the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and

- 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).

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. If the first entity:

- has the capacity to influence decisions about the second entity's financial and operating policies; and
- 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.

Power to impose new conditions or amend existing conditions

If the holder of a resource authority starts or stops being a subsidiary of a corporation under section 46 of the Corporations Act, or after an entity starts or stops controlling the holder of a resource authority under section 50AA of the Corporations Act, the Minister *may* consider whether, after the change, the holder has the financial and technical resources to comply with the conditions of the resource authority.

The Minister *may* impose or vary a condition but only in the following circumstances:

- there has been a change in the holder (for example, under section 141BA(2) of the MRA); and
- the Minister considers that, after the change, the holder *may* not have the financial and technical resources (for example, under section 141BA(3) of the MRA).¹

Types of conditions that may be imposed

The types of conditions that may be imposed will vary depending on the circumstances but will need to mitigate the risk arising from the indirect change and be consistent with the purposes of the relevant Resource Act.

These conditions may include, but are not limited to, requiring the holder to:

- produce reports (in addition to those required as a condition of the resource authority) which would generally be of a financial nature, such as returns, financial statements and any other materials at stated times and in a stated manner,
- carry out or not carry out specific work program activities, or
- pay additional security for the resource authority.

The condition would apply for a period that is reasonable dependent on the risk associated with the entities financial and technical resources to comply with the conditions of the resource authority.

¹ *Mineral Resources Act 1989*, ss 141BA, 194ABA, 276C; *Petroleum and Gas (Production and Safety) Act 2004*, ss 80A, 160A, 424A, 455A; *Petroleum Act 1923*, s 208; *Geothermal Energy Act 2010*, s 133A; *Greenhouse Gas Storage Act 2009*, s 92A, 173A.

Procedure

Under section 42(1) of the *Mineral and Energy Resources (Financial Provisioning) Act 2018* (MERFP) a resource authority holder is required to notify the Scheme Manager (the manager of the financial provisioning scheme established under MERFP) of a 'changed holder event'. A 'changed holder event' is defined in section 31A of MERFP to include changes of control under sections 46 and 50AA of the Corporations Act. Failure to comply with this requirement is an offence under MERFP.

The Scheme Manager is required to give a copy of the notice to the chief executive (resources).

If a notice of a changed holder event is not received under MERFP, but the Minister reasonably believes that a change has happened, the Minister has the power to require the holder to give the Minister information or a document about whether or not the change has happened.

The Minister also has the power to require the holder to give the Minister any information or documentation required by the Minister to make a decision about whether to impose another condition on or amend a condition of the resource authority.

The Minister must give the holder a written notice about the information or documents required and give the holder at least 10 business days to comply. This period may be extended by the Minister.

Before deciding to impose another condition on, or amend a condition of a resource authority, the Minister must give the holder a notice stating:

- the proposed decision,
- the reasons for the proposed decision, and
- that the holder may, within 10 business days after the notice is given, make submissions to the Minister about the proposed decision.

The Minister may extend the period by notice to the holder of the resource authority.

In deciding whether to impose another condition on, or amend a condition of a resource authority, the Minister must consider any information or document that was given by the holder in response to a requirement to give that material, as well as any submission about the proposed decision made by the holder.

The Minister's discretionary power to impose another condition on or amend a condition of a resource authority applies to resource authorities granted at any time but only if the indirect change of control happens after 7 September 2020.²

The Minister's decision to impose another condition on or amend a condition of a resource authority cannot be appealed, however as an administrative decision, may be reviewed under the *Judicial Review Act 1991*.

² *Mineral Resources Act 1989* s 873; *Petroleum and Gas (Production and Safety) Act 2004* s 1013; *Petroleum Act 1923* s 208; *Geothermal Energy Act 2010* s 414; *Greenhouse Gas Storage Act 2009* s 450.

Document information

Availability and location: External - Business and Industry Website
Owner and approver: Deputy Director-General, Georesources Division
Review date: September 2023
Related documents: [Financial and technical capability guideline](#)

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