

Overview: management and enforcement of Coordinator-General conditions for coordinated projects

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The Department of State Development, Infrastructure, Local Government and Planning improves productivity and quality of life in Queensland by leading economic strategy, industry development, infrastructure and planning, for the benefit of all.

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1. Purpose

Under the *State Development and Public Works Organisation Act 1971* (the Act), the Coordinator-General may condition coordinated projects to ensure that their impacts are properly managed.

This document outlines the activities of the Office of the Coordinator-General (OCG), Department of State Development, Infrastructure, Local Government and Planning to monitor and evaluate whether projects declared 'coordinated projects' under the Act are being developed in accordance with Coordinator-General conditions and/or recommendations.

Proponents of coordinated projects (and any contractors or subsequent operators of the development) may be subject to particular obligations under the Act due to conditions and/or recommendations of the Coordinator-General. Accordingly, proponents are encouraged to familiarise themselves with the Act and this document.

2. Strategic overview

Under Part 4 of the Act, the Coordinator-General shall ensure that in any development, proper account is taken of the environmental effects. In doing so, when evaluating a coordinated project's environmental impact statement (EIS) or impact assessment report (IAR), the Coordinator-General may state conditions, make recommendations and/or impose conditions of approval in a Coordinator-General's evaluation report. Under the Act, these conditions and recommendations constitute 'enforceable conditions'. For proponents of coordinated projects and their agents, contractors, subcontractors or licensees, compliance with enforceable conditions may be enforced.

The statutory enforcement tools provided for in the Act can be used in response to an alleged contravention of an enforceable condition (see section 4 for further information).

It is important to note that assessment of a coordinated project under the Act does not exempt the proponent and subsequent operators of the development from the need to obtain all necessary development approvals and/or operational licences under other relevant Queensland legislation, such as development approval under the *Planning Act 2016* (Planning Act). Entities with monitoring and enforcement roles under other legislation continue to hold these responsibilities.

3. OCG's compliance team and third-party auditing

A compliance team exists within OCG to focus on compliance and enforcement matters.

The primary role of the compliance team is to evaluate proponents' compliance with enforceable conditions on coordinated projects. Any non-compliance will be addressed appropriately through education, remediation and/or enforcement action.

The Coordinator-General is responsible for ensuring that enforceable conditions are effective and enforceable. The use of third-party auditing is a fundamental aspect of OCG's management of compliance with conditions.

As an imposed condition of approval in a Coordinator-General's evaluation report, the Coordinator-General may require a proponent to have its activities audited by an independent and suitably qualified person¹.

Where required, an independent audit is carried out to determine whether a project's activities are being undertaken in accordance with enforceable conditions. A verified report on the audit findings is prepared and submitted to the Coordinator-General for review. Project audit periods and requirements may vary, depending on the nature of the development and project activities.

OCG's compliance team reviews submitted audit reports for coordinated projects and may recommend further actions to the Coordinator-General, if considered necessary. OCG's compliance team may also monitor or audit a project's activities as a result of the findings of an audit report, or as part of a random or targeted audit program. Such audits may include a review of the level of compliance with enforceable conditions and/or an assessment of the accuracy of the audit report submitted to the Coordinator-General.

4. Enforceable conditions management and enforcement measures

To achieve its compliance and enforcement objectives, OCG uses a range of enforcement measures.

Within the scope of its conditions management role, OCG's compliance team investigates and assesses all non-compliance notifications. Based on these investigations and assessments, an appropriate enforcement response measure will be recommended. The Coordinator-General will decide the most appropriate enforcement measure, depending on the situation and the seriousness of the non-compliance or offence.

In some cases, the Coordinator-General's decision may be to respond by providing advice, guidance, and/or assistance to help a proponent comply with enforceable conditions. However, in some instances statutory tools may be used to ensure compliance with enforceable conditions.

In more serious instances or matters where other statutory tools have failed to achieve the desired outcome, the Coordinator-General may decide to prosecute.

When considering whether to prosecute, there are two elements that must be considered:

- (1) whether there is the evidence to establish a *prima facie*² case
- (2) whether it is in the public interest.

The Director's Guidelines of the Queensland Office of the Director of Public Prosecutions³ will be used as a guide for deciding whether to prosecute an alleged contravention of the Act. The enforcement measures available to the Coordinator-General to respond to non-compliance with an enforceable condition are set out below.

¹ Suitably qualified person: means a person/s or entity who has professional qualifications, training or skill or experience relevant to the nominated subject matters and can give authoritative assessment, advice and analysis about performance relevant to the subject matters using relevant protocols, standards, methods or literature.

² Evidence adequate to establish a fact or raise a presumption of fact unless refuted.

³ <https://www.justice.qld.gov.au/about-us/services/public-prosecutions>

4.1 Written notices (information and warning letters)

A written notice may be provided to a person (a legal person, which includes a company), outlining concerns or providing a warning in relation to non-compliance. A written notice may request a response be provided to the Coordinator-General. Requests for a response may require the undertaking of certain action(s) or provision of information to ensure compliance with enforceable conditions.

4.2 Enforcement notices

Under section 157B of the Act, if the Coordinator-General reasonably believes a person has contravened, or is contravening, an enforceable condition, the Coordinator-General may give a written enforcement notice. An enforcement notice requires a person to:

- comply with the condition or
- take stated steps the Coordinator-General considers are reasonably necessary to ensure compliance with the condition.

Without limiting these requirements, an enforcement notice may require the recipient to:

- not start or stop a stated activity indefinitely for a stated period or until further notice from the Coordinator-General or
- require the recipient to carry out a stated activity only during stated times or subject to stated conditions or
- require the recipient to take a stated action within a stated period.

An enforcement notice may also require the recipient to notify the Coordinator-General when the recipient has complied with the notice.

The recipient of an enforcement notice must comply with the notice. The maximum penalty for not complying is 1665 penalty units⁴ (\$229,520 for an individual or \$11,147,600 for a corporation⁵). The maximum penalty for contravening an enforcement notice issued under the Planning Act is 4500 penalty units (\$620,325 for an individual and \$3,101,625 for a corporation).

4.3 Enforcement orders

The Coordinator-General can seek an enforcement order from the Planning and Environment Court (P&E Court) under section 157I of the Act. Enforcement orders may be sought to remedy or restrain a contravention of an enforceable condition. The P&E Court may make an enforcement order if it is satisfied that the relevant contravention is happening, has happened or will happen unless the enforcement order is made.

The P&E Court also has the power to make an interim enforcement order pending a decision of a proceeding for an enforcement order if the court is satisfied it would be appropriate to make an interim order.

When issuing an enforcement order, the P&E Court has very broad powers and may direct a party to the proceeding for the order:

⁴ The penalty unit value in Queensland is **\$137.85** (current 1 July 2021) – section 5A of the *Penalties and Sentences Act 1992*.

⁵ The value of a penalty unit for a corporation is calculated at five times the amount imposed on an individual (*Penalties and Sentences Act 1992*).

- to stop an activity that constitutes, or will constitute, a contravention of an enforceable condition, or
- not to start an activity that will constitute a contravention of an enforceable condition, or
- to do anything required to stop a contravention of an enforceable condition, or
- to return anything to a condition as close as practicable to the condition it was in immediately before a contravention of an enforceable condition, or
- to do anything about the land or activity which is the subject of the order to comply with an enforceable condition.

When making an enforcement order, the P&E Court will specify the time the order is to be complied with.

It is an offence for a person to contravene an enforcement order. The maximum penalty for not complying with an enforcement order is 3000 penalty units (\$413,550 for an individual or \$2,067,750 for a corporation), or two years imprisonment. The penalty reflects the seriousness of the offence and must be higher than the penalty for the breach of an enforcement notice. The maximum penalty for contravening an enforcement order issued under the Planning Act is 4500 penalty units, or two years imprisonment.

4.4 Non-compliance with imposed conditions

Where the Coordinator-General imposes conditions under section 54B of the Act, a contravention is an offence under section 176(5) of the Planning Act. Under section 157N of the Act, the maximum penalty is 3000 penalty units (\$413,550 for an individual or \$2,067,750 for a corporation) or two years imprisonment. The maximum penalty is 4500 penalty units (\$620,325 for an individual or \$33,101,625 for a corporation) or two years imprisonment under the Planning Act. It should also be noted that such conditions apply to anyone undertaking the project, including for example, the proponent and an agent, contractor or subcontractor or licensee of the proponent (see section 54D of the Act).

4.5 Offence of giving Coordinator-General a false or misleading document

The Coordinator-General relies upon information supplied by proponents and other persons to make decisions and take actions under the Act. The foundation of an effective independent compliance auditing system is the receipt of accurate and complete audit reporting documentation. For these reasons, it is critical that the information supplied to the Coordinator-General is not false or misleading.

Section 157O of the Act makes it an offence, in relation to the performance of the Coordinator-General's functions, to give the Coordinator-General a document containing information that the person knows is false or misleading in a material particular. The maximum penalty for not complying is 1665 penalty units (\$229,520 for an individual or \$1,147,601 for a corporation), which is consistent with contemporary regulatory legislation.

4.6 Liability of directors and executive officers

A company is able to be held liable for committing an offence and can be found guilty of a criminal offence. A company's status is considered as a separate legal person. Liability for a criminal offence will be its own. However, many statutory provisions exist in Queensland legislation that lift the 'corporate veil' to expose those involved in the running of the corporation and/or those involved in performing the corporation's activities to have concurrent criminal liability with the corporation.

The Act requires that executive officers of a corporation must ensure that their corporation complies with particular sections of the Act. If they fail to ensure this, then they are deemed to have committed the offence of failing to ensure the corporation complies with the Act. It is a defence for an executive officer to prove that:

- if the officer was in a position to influence the conduct of the corporation in relation to the offence - the officer exercised reasonable diligence to ensure the corporation complied with the Act, or
- the officer was not in a position to influence the conduct of the corporation in relation to the offence.

This provision ensures that those individuals who were actually responsible for an offence can be punished in their personal capacity for the offence and ensures executive officers cannot hide behind the corporate veil. Consistent with similar contemporary regulatory legislation, the penalty for the executive officer is the same as the penalty for the contravention of the section by an individual.

Under Schedule 2 (Dictionary), Section 2 of the Act, an executive officer of a corporation is defined in the Act as a person who is concerned with, or takes part in, its management whether or not the person is a director or the person's position is given the name of executive officer.

5. Relationship with other entities

Under the terms of the Bilateral Agreement between the Commonwealth and the State of Queensland, projects that are assessed under Part 4 of the Act and the State Development and Public Works Organisation Regulation 2010, should also meet the Commonwealth's requirements for assessment of the impacts of a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999*.

Clause 22.2 of the agreement requires the Commonwealth and the state to cooperate when monitoring conditions attached to approvals. This aims to ensure that reporting and compliance activities, including site inspections are, to the extent practicable consistent and effective.

In order to achieve this, OCG's Compliance Team will set in place complementary arrangements for monitoring compliance with conditions on any project which is approved by both the state and the Commonwealth, subject to the existing systems and legal requirement of both parties.

Similarly, where state agencies or other entities have jurisdiction or a compliance role in relation to a project, the OCG Compliance Team will ensure that reporting and compliance activities, including site inspections, are coordinated.