

Information Sheet 2

Realising surety provided by multiple holders

Financial Provisioning Scheme



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1 Introduction

The *Mineral and Energy Resources (Financial Provisioning) Act 2018 (MERFP Act)* establishes a Financial Provisioning Scheme (scheme) to manage the financial risk to the State if environmental authority holders for resource activities do not comply with their environmental management and rehabilitation obligations.

Under the scheme, the scheme manager may require holders to provide financial provisioning by way of a contribution to the scheme fund, or by providing surety. Surety may be provided by way of a bank guarantee, insurance bond or cash – see *Scheme Manager Guideline 4 Forms of Surety* for the approved templates required for bank guarantees, insurance bonds and cash surety deeds (**surety instruments**).

The administering authority of the *Environmental Protection Act 1994 (EP Act)* may ask the scheme manager for payment of costs and expenses by making a claim on all or part of the surety. The scheme manager must comply with the request – see Part 3 Division Subdivision 2 – Realising Surety of the MERFP Act.

This information sheet should be read in conjunction with the MERFP Act and, where relevant, other guidelines and information sheets made under the MERFP Act. Guidelines and information sheets are available on the scheme manager's website together with additional information about the scheme.

More generally, the administering authority for the EP Act makes decisions about appropriate enforcement actions which are informed by a set of enforcement guidelines, available here:

<https://environment.des.qld.gov.au/management/pdf/enforcement-guidelines.pdf>

2 Purpose

Where there is more than one holder for an authority, the scheme manager will assign the authority to a 'relevant holder' – see *Scheme Manager Guideline 2 Assigning an authority to a relevant holder*. For ease of administration, the scheme manager will invoice the relevant holder for the total surety payable to the scheme. The total surety may be paid by separate surety instruments from each holder. However, it is the responsibility of the relevant holder to ensure the invoice is paid in full.

However, assigning an authority to a relevant holder does not affect the joint and several obligations of each holder to provide surety to the scheme manager – see *Information Sheet 1 Risk category allocation* section 4.3.

This information sheet sets out the practice the scheme manager will follow when realising surety provided by multiple holders (e.g. unincorporated joint ventures) under surety instruments.

3 Liability of multiple holders under the EP Act and the MERFP Act

Where there are multiple holders of an authority, the holders are likely to have entered into a contractual arrangement which sets out the proportionate liability of each holder in relation to the activities carried out under the authority.

Despite this contractual arrangement, liability of multiple holders of an authority under both the EP Act and the MERFP Act is joint and several. This means that:

- the administering authority of the EP Act may take enforcement action against one or all of the holders of an authority; and
- the scheme manager can recover the total financial provisioning amount from one or all of the holders.

4 Claiming surety provided by multiple holders

Where there are multiple holders, the total surety may be provided to the scheme manager by each holder providing the scheme manager with a separate surety instrument in the amount of their proportionate liability.

Where the administering authority of the EP Act makes a claim to the scheme manager for surety in relation to an authority with multiple holders, the claim is made in respect of the authority generally, not in relation to a specific holder of the authority (i.e. it is irrelevant which holder may have been non-compliant).

As outlined above, liability of multiple holders under the both the MERFP Act and the EP Act is joint and several. Accordingly, the scheme manager may claim against any or all of the surety instruments in whatever proportions the scheme manager deems appropriate.

However, the scheme manager's practice when claiming surety provided by multiple holders under separate surety instruments in respect of the same authority will be as follows:

1. Claim surety from each surety instrument in accordance with the proportion to which the surety instrument relates to the total surety liability for the authority.
2. If surety is unable to be claimed from one of the surety instruments, that surety instrument's share will be claimed from the remaining surety instruments (but only up to the maximum amount of the surety instrument). Note that as surety instruments are required to be unconditional and irrevocable, it would be rare for the scheme manager to be unable to claim on a surety.
 - a) If there is only one remaining surety instrument, the outstanding surety will be claimed from that surety instrument (subject to the maximum claimable under that surety instrument).

Example 1

A Pty Ltd and B Pty Ltd have formed an unincorporated joint venture and are the holders in respect of a single environmental authority. The parties have provided surety for \$1,000,000 in the following proportions:

A Pty Ltd - \$500,000 (50%)

B Pty Ltd - \$500,000 (50%)

The administering authority of the EP Act makes a claim with the scheme manager for \$600,000 under the environmental authority. Accordingly, the proportionate liability of each holder is:

A Pty Ltd - \$300,000 (50%)

B Pty Ltd - \$300,000 (50%)

The scheme manager tries but is unable to claim under B Pty Ltd's surety instrument. As liability under the MERFP Act is joint and several, the scheme manager may then seek to recover the

outstanding \$300,000 from A Pty Ltd's surety. However, as A Pty Ltd's surety instrument is capped at \$500,000, the scheme manager can only recover a further \$200,000.

- b) If there is more than one remaining surety instrument, the scheme manager will apportion the outstanding surety between the remaining surety instruments in accordance with their relative proportions to each other.

Example 2

A Pty Ltd, B Pty Ltd and C Pty Ltd have formed an unincorporated joint venture and are the holders in respect of a single environmental authority. The parties have provided surety for \$1,000,000 in the following proportions:

*A Pty Ltd - \$500,000 (50%)
B Pty Ltd - \$300,000 (30%)
C Pty Ltd - \$200,000 (20%)*

The administering authority of the EP Act makes a claim with the scheme manager for \$500,000 under the environmental authority. Accordingly, the proportionate liability of each holder is:

*A Pty Ltd - \$250,000 (50%)
B Pty Ltd - \$150,000 (30%)
C Pty Ltd - \$100,000 (20%)*

The scheme manager is unable to claim under C Pty Ltd's surety instrument. As liability under the MERFP Act is joint and several, the scheme manager may seek to recover the outstanding \$100,000 surety from A Pty Ltd and B Pty Ltd as follows:

$$\text{A Pty Ltd: } \frac{50}{50+30} = \frac{50}{80} = 62.5\% \text{ (i.e. } 62.5\% \times \$100,000)$$

$$\text{B Pty Ltd: } \frac{30}{50+30} = \frac{30}{80} = 37.5\% \text{ (i.e. } 37.5\% \times \$100,000)$$

A Pty Ltd's total liability = \$312,500 (i.e. \$250,000 + \$62,500)

B Pty Ltd's total liability = \$187,500 (i.e. \$150,000 + \$37,500)

5 Maximum surety reached

The fact that the maximum amount claimable under each surety instrument is reached (or cannot be claimed) does not prevent the administering authority of the EP Act pursuing alternative forms of action to secure the holders' compliance with their environmental authority.

The scheme manager may also direct the holders to replenish their surety under section 69 of the MERFP Act.