



Australian Government
Clean Energy Regulator

NATIONAL
GREENHOUSE AND
ENERGY REPORTING

Supplementary guideline

Acquisitions, disposals and mergers:
treatment of change in controlling corporation



Calculating obligations under the NGER legislation

This document outlines how corporations' National Greenhouse and Energy Reporting (NGER) obligations are calculated when there has been a change in a corporate group's controlling corporation part way through a reporting year.

Under the National Greenhouse and Energy Reporting Act 2007 (NGER Act), a controlling corporation's obligations are based on whether it, or members of its corporate group, met one of the thresholds set out in section 13. There are two categories of section 13 thresholds: facility thresholds and corporate thresholds.

Facility thresholds

A controlling corporation will meet a facility threshold if the operations of a facility that is under the operational control of one of its group members:

- emits 25 kilotonnes (kt) or more of greenhouse gas emissions (in carbon dioxide equivalent (CO₂-e))
- consumes 100 terajoules (Tj) or more of energy, or
- produces 100 Tj or more of energy.

Corporate thresholds

The corporate thresholds were lowered gradually over the first three years of the operation of the NGER legislation.

For the 2010–11 reporting year onwards, a controlling corporation will meet a corporate threshold if in total, the operations of all the facilities under the operational control of all of its group members:

- emit 50 kt or more of greenhouse gas emissions (in CO₂-e)
- consume 200 Tj or more of energy, or
- produce 200 Tj or more of energy.

If any of the section 13 thresholds are met, the controlling corporation has an obligation to apply to the Clean Energy Regulator (CER) to be registered on the National Greenhouse and Energy Register.

Once registered, a controlling corporation is required to provide annual reports on the activities of the members of its corporate group.

Where a registered corporation meets a facility level threshold, and not a corporate threshold, the report only needs to cover the facilities which meet the threshold of 25 kt CO₂-e of greenhouse gas emissions or 100Tj of energy produced or consumed.

A registered corporation that meets a corporate threshold is required to report on all facilities under the operational control of members of its corporate group. This includes facilities that individually meet a facility threshold and those that do not.

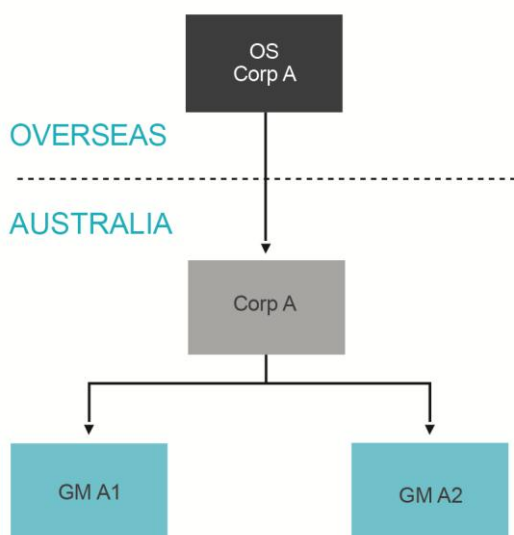
When does a corporate group have a new controlling corporation?

Section 7 of the NGER Act defines a controlling corporation as 'a constitutional corporation that does not have a holding company incorporated in Australia'. Section 7 also states that a holding company, 'in relation to a body corporate, is a body corporate of which the first body corporate is a subsidiary'.

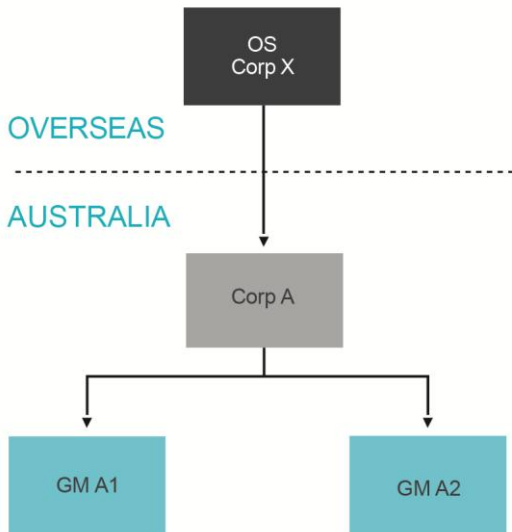
This means that the controlling corporation will be either:

- the Australian incorporated company at the top of a corporate group's structure, or
- a foreign corporation that has facilities in Australia, but no Australian incorporated subsidiaries.

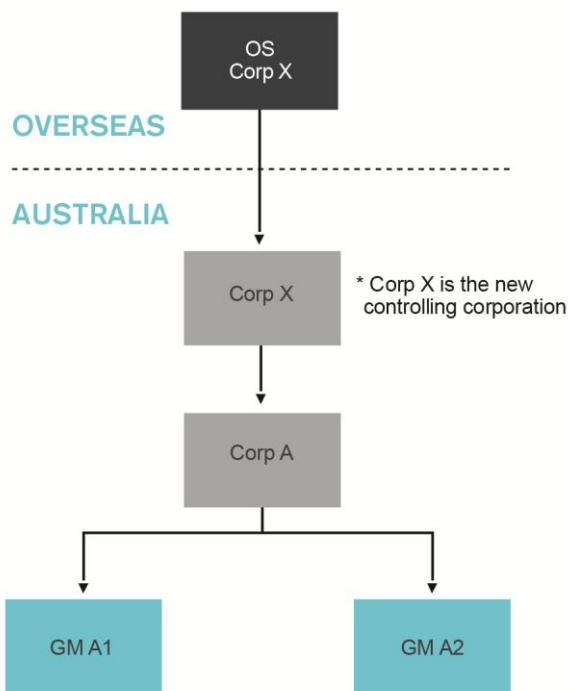
A change in control that occurs offshore may not result in a new controlling corporation for the purposes of the NGER Act. For example, in the diagram below, the ultimate holding company for the corporate group is OS Corp A, a foreign company that is not incorporated in Australia. Consequently, Corp A is the controlling corporation for the purposes of the NGER Act as it is an Australian incorporated company that does not have a holding company incorporated in Australia.



Should a change in control occur offshore, whereby all the shares held in Corp A, by OS Corp A are sold to OS Corp X, the new ultimate holding company will be OS Corp X. However, provided that the corporate structure in Australia remains the same, Corp A will continue to be the controlling corporation for the purposes of the NGER Act.



Should the change in control involve a change of the Australian corporate structure, whereby a new, Australian incorporated holding company is interposed between the Corp A and OS Corp X (the new ultimate holding company), the corporate group would have a new controlling corporation.



Similarly, any corporate restructure or takeover within Australia, resulting in a new Australian incorporated, ultimate holding company, will mean that the corporate group will have a new controlling corporation for the purposes of the NGER Act.

How are NGER obligations affected by a change in controlling corporation?

Registration obligations

The obligation to register arises at the point in time that a controlling corporation's group reaches a section 13 threshold, and does not fall away, even if the corporation subsequently ceases to be a controlling corporation.

Reporting obligations

A registered corporation must provide a report if it is still on the register as at 31 October following the financial year to which the report would relate.

A registered corporation's report must contain information in relation to the activities for the year, of the facilities under the operational control of it or its group members as at 30 June of the relevant reporting year (including group members that have been wound up or liquidated while part of the registered corporations group).

Deregistration

Deregistration of a controlling corporation (where no threshold will be met)

A registered controlling corporation needs to be able to demonstrate to the CER that it:

- will not reach a section 13 threshold for the reporting year in which the application for deregistration is made, and for the next two reporting years, and
- does not hold a reporting transfer certificate.

An application for deregistration submitted by a registered controlling corporation, is taken to relate to the reporting year in which the application is received. This means that in order to be deregistered before 31 October (and therefore avoid the requirement to submit a below threshold report), a registered controlling corporation must have submitted its application for deregistration before 30 June of the relevant reporting year.

Any application received from a registered controlling corporation, after 30 June, will be treated as an application for deregistration for the current reporting period.

For information on deregistration of a controlling corporation, where no threshold will be met due to the sale of its group members, please see Supplementary Guidelines: Treatment in Change of Ownership of a Group Member available on the NGER page of the CER website.

Deregistration of a registered corporation that has ceased to be a controlling corporation

Where a registered corporation has ceased to be a controlling corporation, the corporation will be deregistered provided that the CER is satisfied that the corporation;

- has ceased to be a controlling corporation, and
- does not hold a reporting transfer certificate.

In these circumstances, provided that the corporation is deregistered before 31 October, it would not have to provide a report for the reporting period that has just passed. An application for deregistration in these circumstances may be made after 30 June. However, corporations should ensure that the CER is given sufficient time to consider the application and deregister the corporation prior to 31 October.

The application for deregistration may be submitted by either the:

- corporation that has ceased to be a controlling corporation, or
- the acquiring corporation (the new controlling corporation), on behalf of the former controlling corporation.

Where the application is submitted by the former controlling corporation, it will be asked to acknowledge that it has made the data for the part of the year that it was the controlling corporation, available to the new controlling corporation in order to allow the new controlling corporation to meet its legislative obligations.

Where the application is submitted by the new controlling corporation, it will be asked to acknowledge that in assessing which thresholds it has met (and therefore what needs to be included in its report), it needs to include the data from the first part of the year, that it has acquired from the former controlling corporation.

For example, Controlling Corporation A (a registered corporation) is taken over by Controlling Corporation B on 1 January 2011. Controlling Corporation A is no longer a controlling corporation for the purposes of the NGER Act.

Controlling Corporation A could apply to the CER for deregistration, on the basis that it is no longer a controlling corporation (and must also demonstrate that it does not hold a reporting transfer certificate). It would need to acknowledge on the application form that it has made the data for the part of the year that it was the controlling corporation, available to Controlling Corporation B.

Alternatively, Controlling Corporation B could apply for deregistration on behalf of Controlling Corporation A. In this case, Controlling Corporation B will be asked to acknowledge that in assessing which thresholds it has met (and therefore what needs to be included in its report) it needs to include the data it has acquired from Controlling Corporation A.

If Controlling Corporation A applies for deregistration and is deregistered before 31 October 2011, it will not have to submit a below threshold report for the 2010–11 reporting year, and will have no further NGER obligations.

If Controlling Corporation A has not been deregistered prior to 31 October 2011, it will have to submit a below threshold report for the 2010-11 reporting year.

In summary the:

- Acquiring Controlling Corporation is required to provide a report in relation to the full year's activities of all members of its group as at 30 June (including group members that have been wound up or liquidated while part of the registered corporations group); and the
- Former Controlling Corporation can either:
 - » apply to deregister (provided it has been deregistered prior to the reporting deadline, it would not be required to submit a report)
 - » the new controlling corporation can apply to deregister on the former controlling corporation's behalf (provided it has been deregistered prior to the reporting deadline, it would not be required to submit a report), or

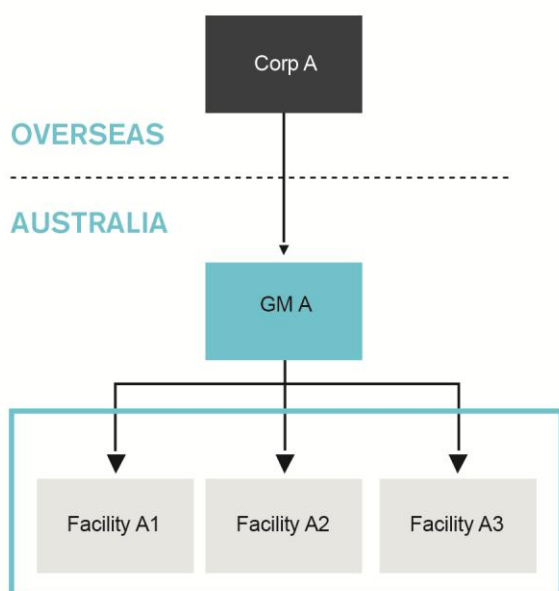
- » If the former controlling corporation has not been deregistered by the reporting deadline, it would submit a below threshold report (on the basis that at the end of the financial year, it had no group members to report on).

The following examples are to illustrate some of the different types of corporate restructures that could occur.

New controlling corporation has no pre-existing group members

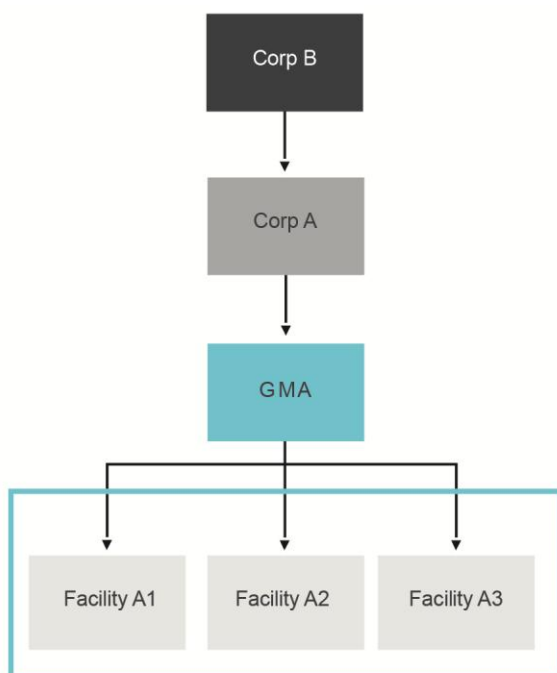
In some cases (e.g. an internal restructure of a corporate group where a new Australian incorporated holding company is created), the new controlling corporation may not have any pre-existing group members.

For example, during the 2010–11 reporting year, Corp A is the controlling corporation from 1 July 2010 to 31 December 2010.



On 1 January 2011, a new Australian incorporated holding company is created—Corp B. Corp B sits above Corp A (and the rest of Corp A's corporate group), and thus is the controlling corporation from 1 January 2011 to 30 June 2011.

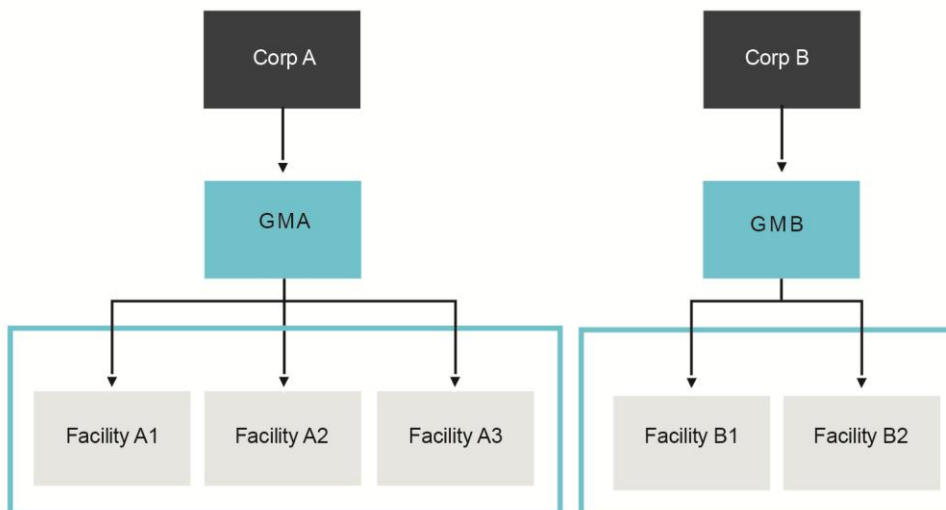
Corporate structure from 1 January 2011 to 30 June 2011



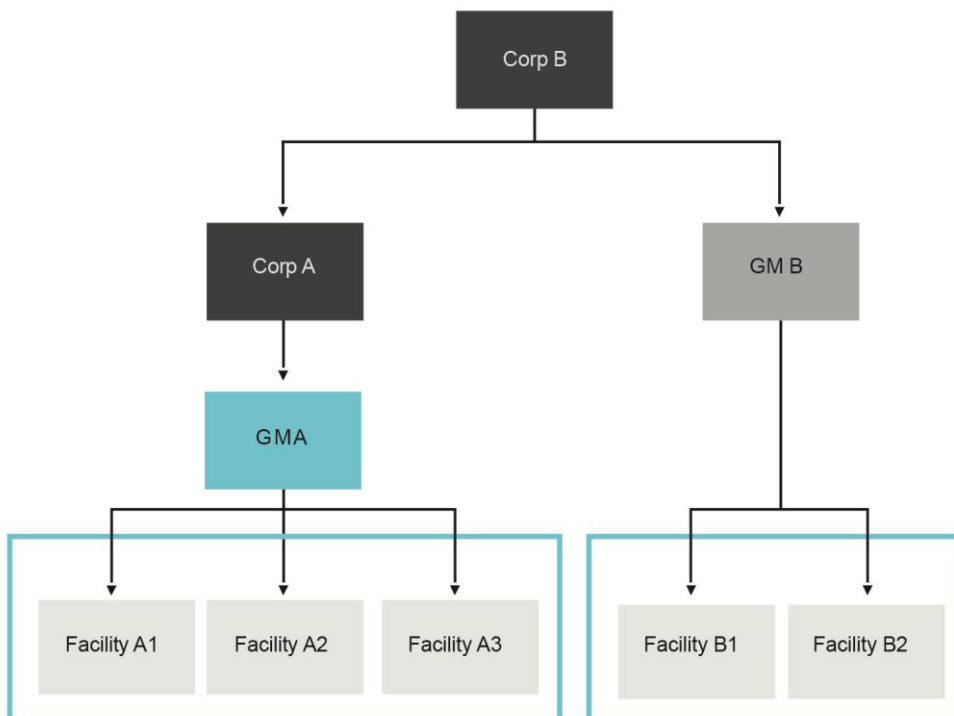
New controlling corporation has pre-existing group members

In many cases, such as a takeover, the new controlling corporation will already be an established corporation, with group members and facilities separate to those it acquires partway through a reporting year.

Corporate structures from 1 July 2010 to 31 December 2010



If Corp B acquires Corp A on 1 January 2011, Corp A, Group Member A and the facilities that Group Member A has operational control of, will be moved into Corp B's corporate group.



In both of these situations, NGER obligations are assessed in the following way:

Corp A's obligations

Corp A has an obligation to register if its group's activities reached a section 13 threshold from 1 July to 31 December 2010.

If no threshold was reached, and Corp A is not registered, it has no obligations under the NGER legislation.

If Corp A is registered, it is required to submit a below threshold report, or may apply to the CER to be deregistered.

Note: Corp A would need to ensure that it has been deregistered before 31 October 2011 in order to avoid reporting obligations for the 2010–11 reporting year. In order to be deregistered, Corp A would have to demonstrate to the CER that it is no longer a controlling corporation.

Corp B's obligations

Corp B assesses its obligations by looking at the activities for the year, of the facilities under the operational control of all members that are part of its corporate group as at 30 June 2011.

If Corp B's group (including the activities of Corp group A for the full year) reached any of the section 13 thresholds, Corp B would be required to register and report in relation to the full year's activities.

If, from 1 July 2010 to 30 June 2011, no threshold is met, and Corp B is not registered, it has no obligations under the NGER legislation.

If no threshold is reached and Corp B is registered, it is required to submit a below threshold report, or may apply to the CER to be deregistered.

NB: Corp B has not ceased to be a controlling corporation. Therefore, in order to avoid reporting obligations for the 2010–11 reporting year, Corp B must lodge its application by 30 June 2011, and the CER must have deregistered Corp B before 31 October 2011. Corp B must demonstrate to the CER that it has not met a threshold for the 2010–11 reporting year, and will not reach a threshold in the next two reporting years (i.e. 2011–12 and 2012–13).

Change in controlling corporation that occurs after 30 June

Where the change in controlling corporation occurs after 30 June, the former controlling corporation bears registration/reporting obligations for that reporting year.

Corporations are encouraged to consider who they wish to sign and submit the report in these situations. Should the acquiring corporation wish to submit the report for and on behalf of its newly acquired subsidiaries, the CEO of the former controlling corporation may authorise an agent (e.g. the CEO of the acquiring corporation) to sign the report.

Note: In these circumstances the agent does not act in his/her own capacity, but acts for and on behalf of the former controlling corporation's CEO. The civil penalty provisions in Part 5, Division 4 of the NGER Act could still apply to the former controlling corporation's CEO, regardless of who signs the report.

Where the acquiring corporation is authorised to sign on behalf of the former controlling corporation, the information in the report will still be attributed to the former controlling corporation. This means that if the corporate group meets a publication threshold, the data will be published under the name of the former controlling corporation.

For example, if Controlling Corporation B acquired Controlling Corporation A on 1 August 2011:

- Controlling Corporation A would bear NGER obligations in relation to the 2010–11 reporting year, and
- Controlling Corporation B would bear NGER obligations in relation to the 2011–12 reporting year.

However, the CEO of Controlling Corporation A, could authorise the CEO of Controlling Corporation B to sign Controlling Corporation A's 2010-11 report.

If, during the 2010–11 reporting year, Corporate Group A reached a publication threshold, the data would be published under Controlling Corporation A's name (even if the CEO of Controlling Corporation B was authorised to sign the report).

For more information on authorisations see the NGER Supplementary Guidelines—Chief Executive Officer available on the NGER page of the CER website.

When does part year reporting apply?

Operational control is the concept used to tie a facility to a group member, and therefore, ultimately to the controlling corporation of the group member with operational control over the facility. One of the reasons the notion of 'operational control' was chosen over 'financial control', is that the entity with operational control is generally in a better position to collect the required NGER data.

This is why part year reporting applies only where operational control of a facility changes from one group member to another. Part year reporting is appropriate in these circumstances as there are two (possibly more) group members that have operational control over a facility at different times throughout a reporting year. In these circumstances, the NGER Act only requires a controlling corporation to report on the activities of its group members' facilities, for the period of time those group members had operational control over the facilities, and therefore were in a position to collect and retain the required data.

Part year reporting does not apply where ownership of a group member changes. It also doesn't apply where there is a change in ownership of a corporate group. In these circumstances, the acquirer is acquiring the group member - the entity that has operational control over the facility.

It is expected that the required NGER data will pass with the group member, to the acquiring corporation.

What happens if the target has insufficient or poor data?

Where the target controlling corporation provides the acquiring corporation with insufficient or poor quality data, the acquiring controlling corporation is encouraged to contact the CER immediately to discuss its particular circumstances.

The CER's compliance approach is about encouraging corporations to voluntarily comply, and dealing with contraventions appropriately. In determining appropriate responses to non-compliance, the CER will use a risk-based approach that takes into account corporations' behaviours and motivations. Consideration will be given both to the statutory requirements, for example the requirements to register, report and keep records, as well as to corporations' progress on the underpinning systems and processes, such as the application of methodologies and collation of data.

It is expected that the target controlling corporation will cooperate with the acquiring corporation, and make the necessary data available. Corporations should be mindful that in the event the required data is not passed on, section 71 of the NGER Act provides for the relevant data to be provided to the CER. Failure to do so could result in civil penalties.

Change in ownership of a group member

For information on the treatment of a change in ownership of a group member (where the group member is not a controlling corporation), please see the NGER Supplementary Guidelines—Treatment of Change of Ownership of a Group Member available on the NGER page of the CER website.

Further information

Email: reporting@cleanenergyregulator.gov.au

Phone: 1300 553 542 within Australia

Web: www.cleanenergyregulator.gov.au

The information in this supplementary guideline is provided as guidance only. Controlling corporations are responsible for applying the NGER legislation to their particular circumstances and organisational structure. This guideline is not a substitute for independent professional advice.