



Australian Government  
Clean Energy Regulator

NATIONAL  
GREENHOUSE AND  
ENERGY REPORTING

# Supplementary guideline

Operational control

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## Introduction

The purpose of this guidance is to assist corporations in identifying the corporation with operational control over a facility or facilities under the *National Greenhouse and Energy Reporting Act 2007* (NGER Act).

This guidance document should be read in conjunction with the NGER Act, and the supporting regulations, in their current form at the time of reading. Changes to the legislation may affect the information in this document. It is intended that this document will be updated in light of any legislative changes or if further clarity on a particular issue is required. The information contained in this document is provided as guidance only.

This document is general in nature, and does not cover every situation that may arise in relation to determining operational control.

Corporations are responsible for determining their obligations under the law and for applying the law to their individual circumstances, and should seek professional advice if they have any concern. This document is not intended to provide legal advice.

## What is operational control?

The concept of operational control is central to determining a corporation's obligations under the NGER Act.

Under the NGER Act, a controlling corporation assesses its registration and reporting obligations by reference to the facilities that are under its operational control, and under the operational control of members of its corporate group.

The meaning of operational control can be found in sections 11 – 11B of the NGER Act. A corporation will have operational control over a facility if:

- The corporation has the authority to introduce and implement any or all of the following for the facility:
  - » operating policies
  - » health and safety policies
  - » environmental policies

OR

- Where more than one corporation has the authority to introduce and implement any or all of the policies mentioned above, the corporation that has the **greatest** authority to introduce and implement the operating and environmental policies has operational control over the facility.

OR

- The corporation has been nominated as having operational control over the facility. Note that nominations of operational control are permitted where more than one corporation has the authority to introduce and implement any or all of the policies mentioned above, and no one corporation has the greatest authority to introduce and implement operating and environmental policies.

OR

- The Clean Energy Regulator declares that the corporation has operational control over the facility under section 55 of the NGER Act.

## What are operating, health and safety and environmental policies?

Operating, health and safety and environmental policies are not defined in the NGER Act. As such, they should be given their plain and ordinary meaning in the context of the NGER Act.

### Meaning of policy

The Macquarie Online Dictionary defines policy as:

- a definite course of action adopted as expedient or from other considerations: *a business policy*.

### Meaning of operate

The Macquarie Online Dictionary defines operate as:

- to work or use a machine, apparatus, or the like
- to perform some process of work or treatment
- to manage or use (a machine etc) at work, or
- to keep (a machine, apparatus, factory, industrial system, etc) working or in operation.

Having regard to the ordinary meaning of these terms, the phrase 'operating policy' should be interpreted broadly, to include any articulated course of action concerning the running of a facility (including directions for the operation of the facility or machinery at the facility or plans for the facility such as budgets and operational plans).

#### Box 1: Examples of operating policies

- Hours of operation and output levels
- Production processes / operating procedures
- Staff numbers and shift lengths
- Procurement policies
- Inter-facility and intra-facility transport procedures
- Storage policies
- Capital stock procurement and maintenance procedures
- Operational staff training policies
- Operational record keeping procedures
- Product branding
- Asset management plans

### Meaning of health and safety policies

Health and safety policies encompass any policies aimed at ensuring the health and safety of workers, minimisation of risks to workers' health and safety as well as policies designed to ensure that the facility operates in a safe manner. Like operating policies, health and safety policies should be given its plain and ordinary meaning in the context of the NGER Act.

### **Box 2: Examples of health and safety policies**

- Evacuation procedures
- Protective clothing requirements
- Safe handling of materials
- Safe operation of capital stock
- Alcohol and drug testing procedures
- Occupational health and safety training requirements
- Mandatory rest period policies
- Incident record keeping procedures

### **Meaning of environmental policies**

The Macquarie Online Dictionary defines environmental as:

- relating to the natural environment, its protection and conservation: environmental issues, or
- relating to issues affecting the environment.

Environmental policies should be given its plain and ordinary meaning. In the context of the NGER Act any policy relating to the protection and conservation of the natural environment can be considered an environmental policy.

### **Box 3: Examples of environmental policies**

- Environmental management plans
- Waste disposal procedures
- Waste-related capital stock procurement and maintenance procedures
- Environmental incident response policies
- Environmental incident complaint handling procedures
- Management of energy use and greenhouse gas emissions

### **Where do operating, health and safety and environmental policies come from?**

Operating, health and safety, and environmental policies may come from a variety of sources. Some policies may derive from legislative requirements, for example, compliance with health and safety requirements under State or Commonwealth health and safety legislation. Note that corporations who are required to comply with obligations under legislation, for example workplace health and safety obligations under the *Work Health and Safety Act 2011* (Cth), would generally have the authority to introduce and implement any corresponding policies.

Policies may also be specified in contracts for the operation of facilities or may be instigated by the owner or operator themselves. All sources of policies should be considered when assessing operational control.

## What does ‘introduce and implement’ mean?

As noted above, a corporation will have operational control over a facility if they have the authority to introduce and implement the relevant policies. Again, introduce and implement are not defined in the NGER Act and the ordinary meaning of these words in the context of the Act should be used.

The Macquarie Online Dictionary defines introduce as:

- to lead, bring, or put into place, position, surrounding, relations etc.

The Macquarie Online Dictionary defines implement as:

- to put (a plan, proposal, etc) into effect.

Having regard to the ordinary meaning of these words, introduce and implement would include writing, developing and approving such policies as well as putting such policies into effect (including by directing staff to comply with the policies and enforcing compliance with these policies, if necessary).

There is no distinction between the authority to implement and the authority to introduce any of the policies. That is, the authority to introduce relevant policies and the authority to implement relevant policies for a facility should be given equal consideration when determining who has operational control of that facility.

However, both the authority to implement and the authority to introduce the relevant policies must be present in the same corporation. A corporation that lacks the authority to both implement and introduce the relevant policies for a facility will preclude that corporation from having operational control over the facility.

## Registration under the NGER Act

A controlling corporation must apply to be registered if it, or member(s) of its corporate group, have operational control over a facility/facilities, the operation of which, individually or together, reaches one or more of the thresholds set out in section 13 of the NGER Act.

A controlling corporation need not include a facility that is under its operational control, or under the operational control of a member of its corporate group, in its NGER Act section 13 threshold assessment where reporting obligations for that facility have been transferred to the person with financial control over the facility via a reporting transfer certificate (RTC).

A corporation which is the holder of an RTC will be registered by the Clean Energy Regulator under the NGER Act if that corporation was not already registered. Further information on RTCs can be found on the [NGER forms and resources](#)<sup>1</sup> page on the Clean Energy Regulator website.

Further information on registering under the NGER Act can also be found on the [Register and deregister](#)<sup>2</sup> page on the Clean Energy Regulator website.

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<sup>1</sup> <http://www.cleanenergyregulator.gov.au/NGER/Forms-and-resources/Guides-and-factsheets#n7>

<sup>2</sup> <http://www.cleanenergyregulator.gov.au/NGER/Reporting-cycle/Register-and-deregister>

## Reporting under the NGER Act

Once registered, a controlling corporation must report on the greenhouse gas emissions, energy consumption and energy production from the facility/facilities over which it, or members of its corporate group, has operational control (unless the facility is the subject of an RTC).

## Identifying the corporation with operational control

### Step 1: Has the overall control test been applied?

Prior to determining operational control over a facility, corporations need to identify the facility that they may have operational control over by applying the provisions of section 9 of the NGER Act and Division 2.4 of the *National Greenhouse and Energy Reporting Regulations 2008* (NGER Regulations).

It is important to note that the concept of *overall control* is used when identifying the activity or series of activities that comprise a facility. For further information on overall control and defining facility boundaries, refer to the [NGER supplementary guideline: Defining facilities](#)<sup>3</sup>.

Once a facility has been identified corporations need to assess operational control for the facility against the requirements set out in the NGER legislation. As noted above the test for overall control that applies when identifying the activity or series of activities that comprise a facility is the same as the test for operational control, the test that applies when attributing a facility to a particular corporation. Therefore, if a corporation has already considered overall control when identifying a facility, the same reasoning will apply when determining operational control in relation to the facility.

This means that where a facility:

- has been defined under sub-regulation 2.16(2) of the NGER Regulations—a single site with two or more series of activities grouped together
- has had listed activities attributed to it under regulations 2.17 or 2.18 of the NGER Regulations,
- is a transport sector facility under regulation 2.19 of the NGER Regulations, or
- is a network/pipeline facility under regulation 2.20 of the NGER Regulations,

the corporation that was determined to have overall control of the activities that make up the facility will be the same corporation that will have operational control over the facility. In these circumstances, a corporation would only need to note this fact, rather than apply the test for a second time.

The operational control test will only be applied without first considering overall control where a facility has been defined under sub-regulation 2.16(1) (NGER Regulations) (a single site facility, where the activities together produce one or more products or services). Overall control is not considered when defining facilities under this sub-regulation.

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<sup>3</sup> <http://www.cleanenergyregulator.gov.au/NGER/Forms-and-resources/Guides-and-factsheets#n2>

#### **Box 4: Example—facility occurring at a single site under subregulation 2.16(1) (NGER Regulations)**

An abattoir’s manufacturing process occurring at a single site consists of:

- a primary production activity, meat processing, and
- other activities, such as transport, waste water treatment and administrative activities.

Together these activities make up the primary production process.

In the case of meat production, the meat is also sold as a secondary product in the form of smallgoods (ham, salami etc.) to the market.

There is no other production process attributed to the primary production process.

As all of these activities form part of the primary production process (meat production) and occur at a single site, under sub-regulation 2.16(1) (NGER Regulations) they will form part of a single undertaking or enterprise regardless of who has overall control of the activities. That is, as the overall control test is not applied in defining this facility, the operational control test will need to be considered.

This abattoir manufacturing facility is called Facility A.

## **Step 2: Determine if your corporation has the authority to introduce and implement policies for the facility**

Step 2 only needs to be considered where the overall control test has not been applied, as in the example above.

A corporation may have operational control over a facility if it has the authority to introduce and implement any or all of the following for the facility:

- operating policies
- health and safety policies, or
- environmental policies.

It is up to corporations to consider all the policies that apply to a particular facility and assess whether they have the authority to introduce and implement any or all of them.

When applying the test for operational control, corporations should consider who has the authority to introduce and implement the relevant policies in relation to the facility as a whole. The test does not apply specifically to a corporation’s ability to affect a facility’s greenhouse gas emissions, energy production and/or energy consumption.

### Box 5: Example—determining which corporation has operational control over a facility

For the abattoir manufacturing facility (Facility A) described in Box 1, Corporation A has the authority to introduce and implement some operating and environmental policies. Policies that Corporation A has the authority to introduce and implement include:

- product branding (operational policy)
- operational health and safety policies
- ability to influence asset purchase (operational policy)
- ability to establish minimum emissions standards for fuels used in the production, and
- environmental policies, water and air quality

No other corporation has the authority to introduce and implement any relevant policies in relation to the facility.

Therefore, it is determined that Corporation A has operational control of the facility.

## Step 3: Is there another corporation that could also introduce and implement any or all of these policies?

Generally, only one corporation can have operational control over a facility at any one time. The exception to this is where section 11B of the NGER Act applies and a nomination of operational control has **not** been made (more information is provided below).

Section 11A of the NGER Act provides that, in cases where two or more corporations could introduce and implement any or all of the operating, health and safety and environmental policies for the facility, if there is one corporation with *greatest* authority to introduce and implement **both** operating and environmental policies, then that corporation will be taken to have operational control over the facility.

Note that the authority to introduce and implement *health and safety policies* is not considered here.

The Clean Energy Regulator has developed two operational control scorecards to assist corporations in determining who has operational control over a facility and in recording these decisions. There is a scorecard for both single and multi-party situations. The scorecards are provided in Appendix 1 of this guideline.

The scorecards are provided as guidance and are not mandatory. Applying the scorecards may assist corporations in determining operational control and the completed documents can form part of a corporation's reporting methodology and records for audit and compliance purposes. However, it is ultimately the responsibility of corporations to comply with the requirements of the NGER legislation and make their own decisions regarding operational control.



### **Box 6: Example—more than one corporation with the authority to introduce and implement policies for a facility**

Corporation A has the authority to introduce and implement environmental and operating policies for Facility A. Corporation B has the authority to introduce and implement health and safety and operating policies for Facility A. No other corporation has the authority to introduce or implement any or all of the policies listed in section 11 of the NGER Act.

As there is more than one corporation that could possibly have operational control over Facility A, Corporation A and Corporation B must consider which of them has the greatest authority to introduce and implement operating and environmental policies in line with section 11A of the NGER Act. The corporation with the greatest authority to introduce and implement operating and environmental policies for a facility is taken to have operational control over the facility for the purposes of the NGER Act. Although Corporation B may have the authority to introduce and implement health and safety policies for the facility, as this is a multi-party situation, health and safety policies are not considered.

Therefore, using the Operational Control Scorecard—multi-party situations, it is determined that Corporation A has the greatest authority to introduce and implement operating and environmental policies for Facility A. Corporation A, therefore, has operational control of Facility A under section 11A of the NGER Act.

## **Third party contract operators**

In some circumstances a third party may be contracted to operate or manage a facility on behalf of the facility owner.

Examples arise in the mining sector in cases of contract mining, and in the commercial property sector where property managers manage buildings on behalf of an owner or an occupant.

Section 11A of the NGER Act specifies that in circumstances where more than one corporation could satisfy the requirements of section 11(1)(a) for a facility, then the corporation with the **greatest** authority to introduce and implement **both** operating and environmental policies is taken to have operational control over the facility.

In circumstances where a third party is responsible for managing or operating a facility, the greatest authority to *introduce* operating and environmental policies may not be clear and may ultimately be determined by the conditions of the contract between the facility owner and operator.

Both the facility owner and the operator may reasonably be considered to have authority to introduce policies relating to the facility's operations, health and safety and the environment.

In some circumstances contract conditions may be prescriptive and require an operator to introduce policies determined by the owner. In other circumstances contract conditions may be non-prescriptive and allow the operator to introduce policies as considered necessary. However, even where contract conditions are prescriptive, operators may be able to introduce some policies while the owner would be responsible for others.

The greatest authority to implement policies will, in the majority of circumstances, be with the facility operator.

On balance, in circumstances where more than one corporation could be considered to have some ability to satisfy the requirements of paragraph 11(1)(a), a facility operator will generally be taken to have operational control over that facility in preference to the facility owner. Facility owners and operators should nevertheless have regard to their specific circumstances and contractual and factual relationship in making this determination.

**Box 7: Example—more than one corporation with the authority to introduce and implement policies for a facility**

An operating and maintenance contract exists between Corporation A (owner) and Corporation B (contractor) for the operation over a facility giving Corporation B authority to introduce and implement operating and environmental policies.

Corporation B also has the authority to introduce and implement operating and environmental policies.

However, the contract requires that Corporation B's introduction of these policies must be approved by Corporation A before they are implemented. Corporation A is also granted powers to monitor Corporation B's implementation of the policies and to request changes as required. Corporation B must comply with any directions given by Corporation A.

In this scenario both corporations have some authority for the introduction and implementation of operating and environmental policies. However, as the introduction and implementation of these policies is subject to Corporation A's approval and oversight, Corporation A has the greatest authority to introduce and implement these policies and, therefore, will be taken to have operational control of the facility under section 11A of the NGER Act.

## Nominations of operational control

Section 11B accommodates situations where:

- two or more corporations (the relevant corporations) have the authority to introduce and implement any or all of the operating, health and safety and environmental policies in relation to a facility, and
- of those corporations, no one corporation has the *greatest* authority to introduce and implement both operating and environmental policies.

In these cases, one of the relevant corporations may be nominated as having operational control over the facility, provided that the facility passes the **eligible nomination test**.

A facility will pass the eligible nomination test at a particular time if:

- two or more corporations are able to introduce and implement any or all of the operating, health and safety and environmental policies in relation to the facility
- no corporation had the *greatest* authority to introduce and implement operating and environmental policies
- no declaration under section 55 applies in relation to the facility, and
- the time occurs in a designated financial year.

**Note:** A designated financial year means the financial year beginning on 1 July 2012 or a later financial year.

Where a facility passes the eligible nomination test, a corporation may be nominated as having operational control over the facility. The corporation nominated as having operational control must be one of the corporations that has the authority to introduce and implement any or all of the operating, health and safety and environmental policies in relation to the facility.

A nomination of operational control must be made jointly with the consent of all relevant corporations (i.e. each corporation with the authority to introduce and implement any or all of the operating, health and safety and environmental policies in relation to the facility must jointly nominate one of the relevant corporations as having operational control over the facility(s) (the nominee).

## The effect of the nomination

Where a nomination of operational control is in place, the controlling corporation (if any) of the corporation nominated as having operational control will be required to submit a report under section 19 of the NGER Act relating to the greenhouse gas emissions, energy production and energy consumption from the operation of the facility.

## The effect of not nominating

If the facility passes the eligible nomination test at all times during the period and corporations do not nominate one of them to have operational control over the facility, each of the corporations who could introduce and implement the operating and/or health and safety and/or environmental policies (the relevant corporations) will be taken to have operational control under the NGER Act.

In this situation, the controlling corporation of each corporation that has operational control over the facility or facilities, will be required to submit a report under section 19 of the NGER Act relating to the greenhouse gas emissions, energy production and energy consumption from the operation of the facility.

## Who can be nominated?

Any relevant corporation who meets the definition of a 'group entity' under section 7 of the NGER Act may be nominated under section 11B of the NGER Act, to have operational control over the facility.

However, a restriction on nominations applies in relation to foreign corporations. A foreign corporation is defined in the NGER Act as a corporation that:

- is incorporated outside Australia, or
- is an authority of a foreign country.

Where any of the other corporation/s who have the authority to introduce and implement any or all of the operating, health and safety and environmental policies (the *relevant corporations*) are not foreign corporations and the nominee is a foreign corporation, the foreign corporation cannot be nominated.

A foreign corporation can only be nominated if all the other relevant corporations are also foreign corporations.

## Nomination start and end dates

Relevant corporations must specify a start and end date for the nomination.

The start date may be earlier than the day on which the nomination is made so long as the nomination is made before the 31 August the following year.

### **Box 8: Example nomination before 31 August**

Corporation A and Corporation B both have the authority to introduce and implement operating, health and safety, and environmental policies in relation to Facility A. Neither Corporation A nor Corporation B have the greatest authority to introduce and implement operating and environmental policies for the facility.

No declaration under section 55 applies in relation to the facility.

Corporation A and Corporation B decide to nominate Corporation A as having operational control of the facility. Corporation A and Corporation B consent to the nomination.

A nomination start date of 1 July 2014 is agreed. For the nomination start date to be valid it must be made before 31 August 2015.

The start date may be later than the date the nomination is made provided that:

- the start date occurs in the same financial year as the day on which the nomination is made, or
- the start date occurs in the financial year next following the financial year in which the nomination is made.

### Box 9: Example nomination later date

Corporation A and Corporation B both have the authority to introduce and implement operating, health and safety, and environmental policies in relation to Facility A. Neither Corporation A nor Corporation B have the greatest authority to introduce and implement operating and environmental policies for the facility.

No declaration under section 55 applies in relation to the facility.

Corporation A and Corporation B decide to nominate Corporation A as having operational control of the facility. Corporation A and Corporation B consent to the nomination.

A nomination start date of 1 April 2015 is agreed. For the nomination start date to be valid, the nomination must be made in the 2014-15 financial year.

Alternatively, a start date of 1 April 2016 is agreed. For the nomination start date to be valid, it must be made in the 2015-16 financial year.

## Can I make a new nomination if I already have a nomination in place?

Yes. A new nomination will replace an existing nomination provided that the new nomination expressly indicates that it is intended to replace the existing nomination.

The existing nomination will cease to operate at the beginning of the start date of the new nomination.

## Cancellation of nominations

The Clean Energy Regulator may cancel a nomination relating to a facility if satisfied that:

- the facility passes the eligible nomination test, but the nominated corporation is not a relevant corporation, i.e. does not have the authority to introduce and implement any or all of the operating, health and safety and environmental policies for the facility, or
- the facility does not pass the eligible nomination test, or
- the nominated corporation has become an externally-administered body corporate, or
- the nominated corporation has become an insolvent under administration, or
- the nominated corporation has an unsatisfactory compliance record.

**Note:** The terms externally-administered body corporate and insolvent under administration have the same meaning under the NGER Act as they do under the *Corporations Act 2001*.

**Note:** Section 11D of the NGER Act sets out the actions/inactions of a corporation which will result in the corporation having an unsatisfactory compliance record under the NGER Act.

## What happens if the facility stops being able to pass the eligible nomination test?

In cases where a nomination is in force in relation to a facility, but the facility ceases to pass the eligible nomination test, each nominator must, within 30 days of the cessation, inform the Clean Energy Regulator that the facility no longer passes the eligible nomination test. A failure to make such notification may result in a civil penalty of 400 units being imposed.

Corporations do not need to inform the Clean Energy Regulator that the facility no longer passes the eligible nomination test if the question of which corporation has operational control is not relevant (directly, or indirectly) under the NGER Act or if a declaration has been made under section 55 of the NGER Act.

## What if I am still unsure about who has operational control?

Where there is still uncertainty or disagreement about who has operational control over a facility, and/or parties are unable to come to an agreement to nominate one corporation as having operational control, corporations are encouraged to seek legal advice. All decisions relating to who has operational control over a facility, and the reasoning behind these decisions, should be recorded.

Where parties are still unable to resolve the issue of operational control, the Clean Energy Regulator may declare a controlling corporation or another member of the corporation's group to have operational control over a facility under section 55 of the NGER Act. This declaration can be made on the initiative of the Clean Energy Regulator. Alternatively, it can be made by the Clean Energy Regulator in response to an application by a controlling corporation or a member of the corporation's group.

However, the Clean Energy Regulator cannot declare that a member of a controlling corporation's group (other than the controlling corporation) as having operational control over a facility in response to an application made by the member unless the controlling corporation has consented in writing to the making of the declaration.

A corporation or group member of a controlling corporation is not able to apply for a declaration that a member of a different controlling corporation's corporate group has operational control over a facility.

An application by a controlling corporation, a member of the controlling corporation's group must be made in accordance with the requirements set out in section 55 of the NGER Act and regulation 6.03 of the NGER Regulations. As part of these legislative requirements, corporations will need to provide details of any contracts or arrangements that will assist the Clean Energy Regulator in identifying the party with the authority to introduce and implement any or all of the operating, health and safety and environmental policies and be satisfied that the party has substantial authority to introduce and implement operating and/or environmental policies.

A section 55 application must specify the time period which the declaration is intended to cover.

Corporations should note that in applying section 55, the Clean Energy Regulator may also have discretion to consider factors other than who has the authority to introduce and implement any or all of the operating, health and safety and environmental policies in relation to the facility. For example, consideration may also be given to the objects of the NGER Act.

The Clean Energy Regulator is unable to declare a controlling corporation or a member of the controlling corporation's group to have operational control unless they have substantial authority to introduce and implement either or both operating and environmental policies for the facility.

**All reasonable efforts to apply the NGER legislation to a corporations circumstances should be made prior to any application for a declaration of operational control.**

A form for applying for a declaration of operational control can be found on the [NGER guides and factsheets](#)<sup>4</sup> page on the Clean Energy Regulator website.

## What if I only have operational control of the facility for part of a financial year?

Under subsection 19(3) of the NGER Act, if a corporation or a member of its corporate group has operational control over a facility for only part of a financial year, then the report, in relation to that facility need only be for the portion of the year that operational control was held.

Subsection 13(2) of the NGER Act provides for the facility level threshold to be adjusted on a pro rata basis, if a group member has operational control over a facility for part of the year.

### **Box 10: Example—Part year reporting**

Reporting under section 19 of the NGER Act where operational control over a facility changes part way through a reporting year.

Corporation A has operational control over Facility A. On 14 April 2013, Corporation A sells Facility A to Corporation B. Upon the sale of Facility A, operational control passes to Corporation B. As operational control of the facility has changed with the sale, then part year reporting applies and the following reporting obligations apply:

- Corporation A must provide a section 19 report for Facility A for the period 1 July 2012 to 13 April 2013
- Corporation B must provide a section 19 report for the period 14 April 2013 until 30 June 2013, and
- Corporation B must continue to report under section 19 on Facility A until it no longer has operational control of the facility.

As Corporation A and Corporation B trigger a corporate threshold under section 13, Facility A must be reported regardless of the results of applying the pro rata thresholds under section 13(2).

## Change of corporation with operational control

It is possible that changes in circumstances will mean the corporation with operational control over a facility will change from one year to the next, or within a reporting year. Corporations that trigger reporting requirements under the NGER Act are required to report annually to the Clean Energy Regulator.

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<sup>4</sup> <http://www.cleanenergyregulator.gov.au/NGER/Forms-and-resources/Guides-and-factsheets#n3>

A controlling corporation is required, under section 19 of the NGER Act, to provide a list of the facilities under the operational control of members of its corporate group, and to identify which member has operational control over which facility. The report is the way to notify the Clean Energy Regulator that operational control over a facility has changed. You do not need to seek the Clean Energy Regulator's approval to do this, prior to submitting the report. However, you may wish to discuss or seek independent advice on any changes, particularly where you are unsure of the interpretation and application of the legislation. **You should also ensure you keep records relating to any decisions made about who has operational control.**

The following information outlines general principles to consider when determining whether the corporation with operational control over a facility has changed.

There can be various reasons why a change in the corporation with operational control would occur. However, the six most common categories are:

### **1. A change in ownership of the facility, as a result of which, operational control has moved to the new owner or another corporation**

Where a facility has been sold, and as a result of the sale, a new corporation has taken over the running of the facility, it would generally be expected that the corporation with operational control will change. This may be the new owner, however, after the change in ownership there may be some other third party that has operational control over the facility.

### **2. Change in contracts has made it necessary to reassess operational control**

When determining whether a change in a contract/operating agreement is sufficient to trigger a change in operational control, parties must consider whether the amendments have a material effect on:

- who has the authority to introduce and implement any or all of the operating, health and safety and environmental policies in relation to the facility, or
- where more than one corporation can introduce and implement any or all of those policies, who has the greatest authority to introduce and implement the operating and environmental policies in relation to the facility.

Please note that it is not sufficient for corporations to rely on amendments to a contract such as the insertion of a clause that purports to specify who has operational control. For example, a clause that states 'for the purposes of the NGER Act, Party X is taken to have operational control' is not sufficient to trigger a change in operational control.

### **3. Nominating a corporation to have operational control where there is uncertainty**

From 1 July 2012, two or more corporations are able to nominate one of the corporations to have operational control over a facility where all corporations have the authority to introduce and implement operating, health and safety and environmental policies, but no particular corporation has the greatest authority to introduce and implement the operating and environmental policies in relation to the facility.

Corporations that previously made a decision in relation to operational control prior to 1 July 2012 may wish to consider if it more appropriate to make a nomination of operational control instead.



Forms for nominations of operational control are available on the [Forms](#)<sup>5</sup> page on the Clean Energy Regulator website.

#### **4. Reassessments by parties of how they have previously applied the definition of operational control**

Where a corporation is unsure whether its interpretation and application of the operational control provisions is correct, it is recommended that they reassess which corporation has operational control according to the rules of the NGER Act. Care must be taken to ensure reassessments are made with reference to sections 11-11B of the NGER Act, as applicable, and must be capable of being substantiated with reference to these provisions.

#### **5. Reassessment with reference to a wholly owned subsidiary**

When determining whether a holding company has operational control over a facility (as opposed to its subsidiary), the holding company will only have operational control if it has the authority or the greatest authority to introduce and implement the relevant policies in relation to the facility. The holding company does not automatically have operational control over the facility just because its wholly owned subsidiary has the authority to introduce and implement the relevant policies for a facility.

For example, a controlling corporation that acquires a number of companies and their facilities may keep the facilities in the names of the acquired companies, while setting all policies for the facilities itself.

Alternatively, the controlling corporation and its subsidiary may share the authority to introduce and implement the relevant policies, but the controlling corporation retains the greatest authority to introduce the operating and environmental policies.

In either of these cases, the controlling corporation needs to be able to demonstrate that it introduces and implements the relevant policies or has the greatest authority to do so.

#### **6. Reassessment with reference to an agency agreement**

When applying the definition of operational control, the existence of an agency agreement does not, by itself, establish that the principal has operational control. While an agent's activities are undertaken on behalf of the principal, it may be the case that the agent has:

- the authority to introduce and implement any or all of the operating, health and safety, and environmental policies in relation to the facility, or
- the greatest authority to introduce and implement the operating and environmental policies in relation to the facility.

Parties should examine their particular agency agreement to weigh up the extent to which the agent and the principal have the authority to introduce and implement the relevant policies in relation to the facility.

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<sup>5</sup> <http://www.cleanenergyregulator.gov.au/NGER/Forms-and-resources/Forms#n1>

# What should I do if I have determined there has been a change of corporation with operational control?

## Record keeping provisions

The NGER Act contains record keeping provisions which require a corporation to keep records that will enable the Clean Energy Regulator to ascertain whether the corporation has complied with their obligations under the NGER Act. Failure to keep records may incur a civil penalty. Regardless of the reason, any decision that results in a change in the corporation with operational control should be well documented.

## Audit provisions

The Clean Energy Regulator may appoint an audit team leader, or require a corporation to appoint an audit team leader, to carry out an audit on one or more aspects of a corporation's compliance with the NGER Act. This may include an audit of the way a corporation has applied the definition of operational control.

## Reporting transfer certificates (RTCs)

The NGER Act enables the voluntary transfer of a controlling corporation's section 19 reporting obligations, for a facility, from a controlling corporation where one member of its group has operational control of the facility, to another member of a different corporate group with financial control of the facility.

Reporting obligations can only be transferred when the Clean Energy Regulator issues an RTC under section 22L of the NGER Act. All reporting, recordkeeping obligations and compliance measures under the NGER Act, in relation to an RTC facility are transferred to the holder of the certificate.

For Further information on RTCs refer to the [NGER Guides and factsheets](#)<sup>6</sup> page on the Clean Energy Regulator website.

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<sup>6</sup> <http://www.cleanenergyregulator.gov.au/NGER/Forms-and-resources/Guides-and-factsheets#n7>

## Appendix 1: The operational control scorecard

The Clean Energy Regulator has developed two operational control scorecards to assist corporations in determining operational control of a facility and recording these decisions. The single party scorecard is for situations where only one corporation has the authority to introduce and implement policies for the facility. The multi-party scorecard is for situations where more than one party could potentially have operational control of the facility.

These scorecards are provided for guidance only, and are not mandatory. Applying the scorecards may assist corporations in determining operational control and the completed documents can form part of a corporation's reporting methodology and records for audit and compliance purposes. However, it is ultimately the responsibility of corporations to comply with the requirements of the NGER legislation.

### Operational Control Scorecard—single party situations

The Operational Control Scorecard—single party situations can be used where there is only one corporation with the authority to introduce and implement policies for a facility. The single party scorecard can form part of a corporation's reporting methodology and records for audit and compliance purposes in relation to operational control decisions.

The single party scorecard provides space for corporations to record the policies that they have the authority to introduce and implement for the facility. It does not provide columns for multiple corporations to compare their authority to introduce and implement policies for a facility with another corporation.

### Operational Control Scorecard—multi-party situations

The Operational Control Scorecard—multi-party situations can be used where more than one party has the authority to introduce and implement policies for a facility. The multi-party scorecard can be used as a guide to assist in determining the party with operational control of the facility.

Corporations should note that, where there is more than one party with the authority to introduce and implement policies, the party with the greatest authority to introduce and implement operating and environmental policies will be taken to be the corporation with operational control over the facility (section 11A NGER Act). The authority to introduce and implement health and safety policies is not considered in multi-party situations.

The multi-party scorecard can be applied on a case-by-case basis where operational control is uncertain and could lie with two or more corporations. Application of the multi-party scorecard will require subjective assessment and consultation between interested parties.

### How to use the scorecard—single party situations

1. Identify the facility by applying the appropriate legislation (refer to section 9 of the NGER Act, Division 2.4 of the NGER Regulations and the [NGER supplementary guideline: Defining facilities](#)<sup>7</sup>).
2. Identify any corporation with the authority to introduce and implement operating, health and safety and/or environmental policies for the facility (refer to section 11(1)(a) of the NGER Act).
3. If only one corporation has the authority to implement and introduce policies for the facility, fill in the facility and location details in Part 1 of the Scorecard—single party situations. **Note: if more than one**

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<sup>7</sup> <http://www.cleanenergyregulator.gov.au/NGER/Forms-and-resources/Guides-and-factsheets#n2>

corporation has the authority to introduce and implement the policies for the facility, then the multi-party situation scorecard should be used.

4. In the appropriate column of Part 2 of the Scorecard, list the operating, health and safety and environmental policies that apply to activities within the facility.
5. The completed scorecard can be used to assist corporations in recording decisions relating to the operational control over a facility.

### Part 1: NGER operational control tool—single party situations

Note: this scorecard is to be used where only one corporation has the authority to introduce and implement the policies listed in section 11(1)(a) of the NGER Act for a facility.

<b>Facility name / description</b>	
<b>Facility address / latitude and longitude (where applicable)</b>	
<b>Corporation name</b>	
<b>Address (head office)</b>	
<b>ABN</b>	

### Part 2: NGER operational control tool—single party situations

#### Operating policies


## Environmental policies


## Health and safety policies


## How to use the scorecard—multi-party situations

1. Identify the facility by applying the appropriate legislation (refer to section 9 of the NGER Act, Division 2.4 of the NGER Regulations and the [NGER supplementary guideline: Defining facilities](#)<sup>8</sup>).
2. Identify any corporation with the authority to introduce and implement operating, health and safety or environmental policies for the facility (refer to section 11(1)(a) of the NGER Act).
3. If more than one corporation has the authority to introduce and implement the policies for the facility, fill in the corporate, facility and location details in Part 1 of the Scorecard—multi-party situations. Note: if only one corporation has the authority to introduce and implement the policies for the facility, then the single party situation scorecard should be used.
4. In the appropriate column of Part 2 of the Scorecard, list the operating and environmental policies that apply to activities within the facility. Only operating and environmental policies are considered where more than one corporation has the authority to introduce or implement any of the policies in section 11(1)(a) of the NGER Act.
5. Assign a score between 0 and 30 to each policy (in ascending order of importance) for both the introduction and implementation of policies where applicable. This is the policy score. This score will require industry expertise and will involve subjectivity.
6. For each corporation involved in the activity, assign scores to reflect their respective authority to introduce and implement the policy. This is the corporate score. The combined sum of corporate scores for a policy should equal the policy score.

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<sup>8</sup> <http://www.cleanenergyregulator.gov.au/NGER/Forms-and-resources/Guides-and-factsheets#n2>

7. For example, a very important policy might be assigned a policy score of 25. Corporation A might have a high degree of authority to introduce policies; B moderately; and C none. The scores might read: A – 20, B – 5, C – 0.
8. After scores for each corporation are entered against each policy, the corporate scores for each corporation must be tallied. The corporation with the highest overall score could be considered to have operational control of the facility.

### Part 1: NGER operational control scorecard—multi-party situations

Note: this scorecard is to be used where more than one corporation has the authority to introduce and implement the policies listed in section 11(1) of the NGER Act for a facility.

<b>Facility name / description</b>	
<b>Facility address / latitude and longitude (where applicable)</b>	

Corporation	Corporation name	Address (head office)	ABN
Corp A			
Corp B			
Corp C			

## Part 2: NGER operational control tool—multi-party situations

	Policy	Policy Score (0-30)	Corp. Score A	Corp. Score B	Corp. Score C
Operating policies					
	<b>TOTAL</b>				
Environmental policies					
	<b>TOTAL</b>				
<b>Operational control total</b>					
<b>Corporation with operational control</b>					

## Further information

Email: [reporting@cleanenergyregulator.gov.au](mailto:reporting@cleanenergyregulator.gov.au)

Phone: 1300 553 542 within Australia

Website: [www.cleanenergyregulator.gov.au](http://www.cleanenergyregulator.gov.au)