

EPPRD CONFIDENTIALITY DEED POLL GUIDELINE

Revision history

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Disclaimer: This document is based on Plant Health Australia’s understanding of the Government and Plant Industry Cost Sharing Deed in respect of Emergency Plant Pest Responses (**EPPRD**) and the Deed Poll. It does not constitute, and should not be relied upon as being legal advice on the interpretation of the EPPRD or the Deed Poll. It does not, and is not intended to, replace, amend or otherwise alter the terms of the EPPRD or the Deed Poll in any way. Readers should seek their own independent advice on the interpretation of the provisions of the EPPRD and the Deed Poll, and the application of those provisions to their own circumstances.

Purpose

The purpose of this document is to assist individuals in understanding the Confidentiality Deed Poll and the personal legal confidentiality obligations which result from signing it.

Scope

The scope of this document is limited to the confidentiality obligations arising from the signing the Confidentiality Deed Poll under the *Government and Plant Industry Cost Sharing Deed in respect of Emergency Plant Pest Responses (EPPRD)*.

Definitions

Unless otherwise specified, capitalised words/terms (excluding names) in this document are defined in the EPPRD or the Deed Poll. Refer to the current version available at www.planthealthaustralia.com.au/epprd.

Introduction

Schedule 9 of the EPPRD contains the Confidentiality Deed Poll which individuals may be required to sign prior to participation in any activities pursuant, or related, to the EPPRD. As a Deed Poll, it will be legally enforceable against any individual who signs it, by any Party to the EPPRD, or other person, that has disclosed, or has an interest in, the Confidential Information.

The Confidentiality Deed Poll outlines the confidentiality obligations of the individual signing it, including what information should reasonably be regarded as Confidential Information and the requirements for managing this information, including its storage and disclosure.

1. Why do I need to sign the Confidentiality Deed Poll?

During activities carried out under the EPPRD, information of a confidential nature will necessarily be made available to or shared amongst Parties to the EPPRD and their Representatives. This Confidential Information may also be disclosed to staff and advisers of Parties, observers at meetings of the National Management Group (**NMG**), Consultative Committee on Emergency Plant Pests (**CCEPP**) and the Categorisation Group, as well as, in appropriate circumstances, to officers, staff and members of Industry Parties or working and advisory groups established under CCEPP, NMG or the Categorisation Group. Unauthorised release of Confidential Information could have significant impacts, such as damaging the commercial position of a Party or its members, or Australia's trade position with its international partners, or government planning and budgeting processes.

The Confidentiality Deed Poll provides a mechanism by which recipients of Confidential Information acknowledge that they may be provided with, or have access to, information that is confidential in nature, and undertake to maintain the confidentiality of the information in accordance with the terms set out in the Confidentiality Deed Poll. This gives confidence to a Party or other person disclosing Confidential Information that the information will not be disclosed in an unauthorised manner or released to the public, thereby supporting open communication amongst Parties to the EPPRD, and members of Industry Parties.

If an individual breaches their obligations under the Confidentiality Deed Poll, both the individual and the organisation with which they are affiliated may be exposed to legal proceedings brought by a Party to the EPPRD, or another person, if that Party or other person has suffered harm as a consequence of the disclosure.

The confidentiality undertakings made under the Confidentiality Deed Poll are in addition to the confidentiality undertakings made by Parties under the EPPRD. It is important that confidentiality is maintained at an individual (Deed Poll) and organisational level by having policies and procedures in place to ensure each Party is abiding by the confidentiality provisions set out in clause 29 of the EPPRD.

Industry Party Representatives

If you are a Representative of an Industry Party, you must sign the Confidentiality Deed Poll:

- before attending NMG, CCEPP or Categorisation Group meetings¹;
- if you are invited to contribute to the operations and decision making process within Emergency Plant Pest (EPP) control centres; or
- you have signed an earlier version of the EPPRD Confidentiality Deed Poll or have signed the Confidentiality Deed Poll as a Representative of a different Party.

The Confidentiality Deed Poll should be completed and returned to PHA. If you are a Representative, please submit the Confidentiality Deed Poll at the same time that you submit your EPPRD Representative form authorising you to act as a Representative for your Party. PHA must receive your completed Confidentiality Deed Poll before you participate in EPPRD related activities.

Government Party Representatives

Representatives of Government Parties **must** sign an appropriate form of Confidentiality Deed Poll (which may be in the form of Schedule 9) prior to participation in any activities pursuant to EPPRD. This may be incorporated into Departmental confidentiality agreements or terms of employment if appropriate.

Non-Representatives and other personnel

You **may be** required to sign the Confidentiality Deed Poll if you:

- are employed by, or sit on the Board of, an Industry Party and are involved in the development or implementation of the EPPRD;
- are engaged or consulted by a Party on EPPRD related activities. For example, you may be engaged to give advice on financial or technical matters relevant to an EPP or Incident;
- are a CCEPP or NMG observer or advisor;
- attend EPPRD related meetings or Incident debriefs;
- are nominated to be a member of a Categorisation Group or are an advisor to a Categorisation Group member;
- attend biannual meetings of the EPPRD signatories; or
- attend annual debriefing forums.

The Confidentiality Deed Poll should be completed and returned to PHA prior to participating in any activity pursuant to the EPPRD.

2. How do I sign the Confidentiality Deed Poll?

The Confidentiality Deed Poll must be signed in the presence of a witness. After signing the Confidentiality Deed Poll, your organisation should keep a copy of the signed Confidentiality Deed Poll and a scanned copy must be sent to PHA at PHACC@phau.com.au. PHA will maintain a repository of signed Confidentiality Deed Polls.

Whether you can electronically execute the Confidentiality Deed Poll depends on the State or Territory you reside in. The below table sets out the jurisdictions that permit electronic execution and electronic witnessing:

Electronic Execution and Electronic Witnessing (Accurate as of 30 October 2023)								
	NSW	VIC	QLD	WA	SA	TAS	NT	ACT
Electronic execution permitted?	Yes	Yes	Yes	No	No	No	No	No
Electronic witnessing permitted?	Yes	Yes	No	No	No	No	No	No

¹ Clause 11.4.2

Electronic witnessing means that the person witnessing you signing the Confidentiality Deed Poll is doing so by AV link, rather than in person.

If you are electronically executing the Confidentiality Deed Poll, you may do so using either a Digital Signature or a Non-Digital Esignature. Examples of both these methods are set out below (these examples are not exhaustive):

a. Digital Signature:

- DocuSign
- AdobeSign.

b. Non-Digital Esignature:

- an electronic image of a signature which is 'pasted' on an electronic document like an editable PDF
- signing an electronic document on a screen with a stylus or finger.

If you use a Non-Digital Esignature, please include the following text when you return your signed Confidentiality Deed Poll to PHA:

I [insert name] of [insert address] confirm that I have personally affixed my electronic signature to the Confidentiality Deed Poll and I did so intending that my signature would bind me in the manner contemplated by the Confidentiality Deed Poll.

If your jurisdiction does not permit electronic execution, you **must** execute the Confidentiality Deed Poll using a wet ink signature.

If your jurisdiction does permit electronic execution, you may still choose to use a wet ink signature.

3. What is Confidential Information?

Confidential Information is defined in clause 1.1 of the EPPRD as:

"all know-how and commercially valuable or sensitive information (in whatever form) disclosed by a Party to one or more other Parties for the purposes of this Deed, but does not include information that:

- (a) is already in the public domain or, after the date of this Deed, becomes part of the public domain otherwise than as a result of an authorised disclosure by the receiving Parties or its representatives;*
- (b) is or becomes available to the receiving Party from a third party lawfully in possession of the information and which has the lawful power to disclose such information to the receiving Party on a non-confidential basis; or*
- (c) was in the lawful possession of the receiving Party without restrictions as to its use or was developed independently by the receiving Party (as shown by its written records or other evidence) prior to the date of disclosure to it under this Deed."*

This has been broadened by Background paragraph C of the Confidentiality Deed Poll, which notes that Confidential Information may include:

- a. information relating to industry members or others affected by an Incident, or their properties or businesses;
- b. information relating to response activities or plans;
- c. commercial in confidence information relating to a Party, a member of an Industry Party or a third party;
- d. sensitive information relating to government policies, financial interests or activities;
- e. information which attracts to legal professional privilege;
- f. internal working documents relating to Incidents, Response Plans and Categorisation of EPPs;
- g. information relating to national security or international relations; and
- h. personal information.

Below are examples of information that will be Confidential Information:

- a. Commercial in-confidence information relating to a third party such as a grower's financial records,

including Owner Reimbursement Cost claims, or a grower's commercial records provided for tracing purposes.

- b. Sensitive government information relating to government policies or financial interests including budget information and cost claims.
- c. Legal advice.
- d. Internal working documents of the CCEPP or NMG, including Response Plans, Preliminary Information Data Sheet, Incident Situation Reports, CCEPP and NMG meeting papers.
- e. Information relating to national security or international relations information or information that could influence international trade and so should be managed appropriately to mitigate risk. This may include information relating to a suspect detection of an EPP.

Information that is already in the public domain or becomes part of the public domain through authorised disclosure is not, or is no longer, Confidential Information.

In addition to Confidential Information, Parties have an obligation to protect Personal Information as set out in clause 27 of the EPPRD (and it is treated as Confidential Information by the Deed Poll). These obligations are beyond the scope of this guideline. However, it is important that all Parties involved in an Incident ensure that the identity and location of growers or companies directly affected by an EPP incursion are not made public and are only disclosed to employees and Representatives of Parties when absolutely necessary for the proper function of the EPPRD (and, when applicable, with the consent of the individual concerned). The following are types of information that should never be disclosed to third parties:

- a. details about the location of Infected Premises or Suspect Premises;
- b. details of the grower or company whose Crops have been affected by an EPP, or information including photos, locations, varieties grown or other commercial information that could be used to identify affected growers or companies; or
- c. an image of a person or other identifying information inserted in a document setting out an opinion that the person is responsible for introducing the EPP into Australia.

4. What am I committing to by signing the Confidentiality Deed Poll?

In signing the Confidentiality Deed Poll, you make a legal commitment to each Party of the EPPRD, and other parties that provide Confidential Information, that you will:

- a. only use or disclose Confidential Information for the purposes that it was provided to you and abide by any conditions or limitations, both written and verbal, placed on the use or disclosure of the information;
- b. ensure that Confidential Information made available to you is stored with an appropriate level of security to prevent unauthorised access;
- c. only make Confidential Information available to those persons who have a "need to know" for the proper performance of the EPPRD or associated activities; and
- d. gain prior written approval from the disclosing Party or Parties prior to disclosing it to a third party or the public (except as required by law).

This means you must keep Confidential Information secure, and not disclose it to anyone else without written approval to do so.

5. Scope of the Confidentiality Deed Poll

The Confidentiality Deed Poll applies to all Confidential Information disclosed by a Party or another person, including in the course of activities, correspondence and undertakings carried out under or in relation to the EPPRD, both within and outside of an Incident.

Industry Party Delegates and Industry Liaison Officers that participate in the Lead Agency's emergency response control centre(s) are required to sign the Confidentiality Deed Poll. However the scope of the Confidentiality Deed Poll does not apply to information provided by the Lead Agency during activities

undertaken in a control centre or during operational activities conducted by the Lead Agency. The Lead Agency may have policies and legal requirements surrounding Confidential Information disclosed in these activities. If information is acquired in a control centre and also via the CCEPP and NMG, it is to be treated as Confidential Information unless the Lead Agency advises all CCEPP or NMG members otherwise.

6. What happens if I don't sign?

Please discuss any concerns you may have about signing the Confidentiality Deed Poll with your Party, affiliated EPPRD Party or PHA. If you do not wish to sign the Confidentiality Deed Poll, you will be limited in the activities in which you will be able to participate under the EPPRD, and will not be permitted to attend meetings of the NMG, CCEPP or Categorisation Group or receive confidential briefings.