Department of the Environment, Tourism, Science and Innovation

Enforcement Guidelines

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DELIVERING FOR QUEENSLAND
Queensland Government

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1 Introduction

Queensland's economic, social and ecological welfare relies upon the sustainable management of its environment and conservation of its heritage.

The Queensland Government is committed to ecologically sustainable development—protecting the ecological processes on which life depends while allowing for development that improves the total quality of life, both now and in the future.

The Department of the Environment, Tourism, Science and Innovation (the department) is the government's lead agency for the administration of legislation that protects, conserves and manages Queensland's environment and heritage. The department has produced a solid policy platform on which it has built partnerships with the community and industry to encourage greater understanding of sustainable conservation, environmental and heritage practices and support for innovation.

To build a culture of compliance—where individuals, business and industry take responsibility for ensuring that their activities do not cause unlawful impacts—the department will sometimes need to take enforcement action. Enforcement action provides a strong deterrent to non-compliance.

The effective protection of the environment, as well as good regulatory practice, calls for the department to have clear guidelines governing the taking of enforcement action. These Enforcement Guidelines complement the department's Strategic Plan, and other documents which set out the department's approach to its enforcement activities (available on the department's website).

To the extent possible in the circumstances, it is the goal of the department's enforcement responses to:

- reinforce legal obligations under legislation
- achieve outcomes consistent with legislation
- deter non-compliant behaviour
- assertively apply consistent and proportionate enforcement action.

1.1 Scope

The department administers a number of pieces of legislation, including:

- *Coastal Protection and Management Act 1995*
- *Environmental Protection Act 1994*
- *Environmental Offsets Act 2014*
- *Forestry Act 1959*
- *Marine Parks Act 2004*
- *Nature Conservation Act 1992*
- *Queensland Heritage Act 1992*[1]
- *Recreation Areas Management Act 2006*
- *Waste Reduction and Recycling Act 2011*
- *Water Act 2000 (Chapter 3)*
- *Wet Tropics World Heritage Protection and Management Act 1993.*

Under these pieces of legislation there are also a number of different government authorities that may also have delegated or devolved powers, such as the police or local governments. To ensure consistency and transparency of enforcement actions, these Enforcement Guidelines apply to decisions about enforcement actions made by the department in administering its legislation. It is also intended to guide decisions made under this legislation by other authorities, however it does not bind these authorities.

[1] The department may also take compliance action under the *Planning Act 2016* with respect to development offences, including in relation to Queensland heritage places.

1.2 Purpose

These Enforcement Guidelines assist the department and other relevant authorities in making decisions about taking enforcement action under legislation administered by the department. The guidelines set out principles of a general nature to provide an understanding of how the department will approach enforcement.

The department publishes its Enforcement Guidelines as part of its commitment to transparency in its compliance activities, and to educate the public about the department's expectations and compliance approach. People and businesses who have specific obligations under legislation administered by the department are encouraged to familiarise themselves with these guidelines.

It is important to note that these are guidelines and not directions. They are designed to assist the making of enforcement decisions to achieve consistency, efficiency, effectiveness and transparency in the administration of legislation by the department.

1.3 Procedure

The department will assess all notifications it receives of possible contraventions of its legislation, and based on these assessments and any associated investigations, will make decisions as to the appropriate response. In some cases, the decision may be to take no action, for example, if an investigation reveals that no contravention of the legislation has occurred. In some cases, the department may provide advice, guidance, or assistance to help a person comply with the legislation. In other cases, it may be necessary for the department to take enforcement action in response to a contravention of the legislation.

In these guidelines, enforcement action includes any action taken to punish a contravention of legislation administered by the department, to deter or prevent a person or persons from committing future contraventions of the legislation, or to require someone to remedy or stop committing a contravention of the legislation. Enforcement actions do not include measures intended only to inform or educate a person, and do not include investigations into alleged contraventions of legislation although such investigations may be required to inform various enforcement actions.

The range of enforcement actions available to the department includes:

- warning letters
- penalty infringement notices
- administrative notices and orders made under legislation
- proceedings for court orders provided for under legislation
- prosecution
- suspension or cancellation of permit, licence or authority.

Sometimes a number of enforcement actions may be taken in combination.

From time to time, the department becomes aware of matters that are offences against legislation it administers, and which are also offences against legislation administered by another government agency. In these circumstances, the following principles will apply:

- The department may consult the other agency to determine which agency should lead any investigation, and which agency would be the appropriate agency to take any enforcement action. There may be circumstances in which it is appropriate for a joint investigation to take place, and for each agency to take its own enforcement action
- The department may be the appropriate agency to lead an investigation or take enforcement action where one or more of the following applies:
    - the subject matter is more closely aligned with the department's portfolio of responsibilities than that of the other agency
    - enforcement action by the department would more effectively prevent or remedy the contravention and its impacts
    - the penalties that apply for the offence under the department's legislation reflect the seriousness of the offence more accurately than the penalties under the other agency's legislation
- The department will refer a matter to a local government for investigation or enforcement action where the matter is within the devolved responsibility of the local government

- Where dishonesty or other criminal offences are involved, the department may refer the matter to the Queensland Police Service, the Australian Federal Police or other authorities as appropriate.

1.4 Principles

The following principles guide the department in making decisions about taking enforcement action:

- enforcement action will be proportionate to the seriousness of the contravention
- decisions about enforcement action will be impartial, based on available evidence, and on the strategic objectives of the department
- where enforcement action involves litigation, the department is bound by the Queensland Government's Model Litigant Principles, which can be found on the Department of Justice and Attorney General website at <www.justice.qld.gov.au>. The principles ensure that, when conducting litigation, the department meets the community's and the courts' expectations that the State will conduct itself in a manner which exemplifies the principles of justice, and that the State's power will be used in the public interest.

The department is guided by the overriding principle that enforcement action must not be taken for improper purposes. A decision on whether or not to take enforcement action will not be influenced by factors such as:

- the alleged offender’s gender, ethnicity, nationality, political associations, religion or beliefs
- a departmental employee’s personal feelings towards the alleged offender or the victim
- possible political advantage or disadvantage to a government or any political group or party
- the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

All decisions made by the department will be made in accordance with the *Human Rights Act 2019*.

2 Who enforcement action will be taken against

One of the main aims of Parliament in making a contravention of the law a criminal offence is to deter the offenders and others from similar behaviour. By extending criminal liability to many people (for example, landowners and directors and managers of corporations), the law generates increased awareness and responsibility for legal obligations within corporate structures and throughout the community.

Situations can arise where a number of people may be responsible for the commission of an offence and may therefore be liable for enforcement action. The department recognises that it may not always be appropriate to take enforcement action against every person who may be liable for an offence. The following sections set out what the department will consider when determining who enforcement action may be taken against.

2.1 Identification of offender(s)

In determining who was responsible for an offence, the department will take the following considerations into account:

- who was primarily responsible for the offence, that is:
  - who committed the act
  - who formed the intention (if relevant)
  - who created the material circumstances leading to the alleged offence
  - who benefited from the offence
- what was the role of each alleged offender (where there is more than one alleged offender).

2.2 Notification

The department will also take into account any notification it receives of a contravention by an alleged offender. It will specifically consider whether:

- the alleged offender notified the department of the contravention promptly
- the information assisted in the control or mitigation of any impacts

- the information substantially aided the department's investigation of the incident
- the information was available from other sources
- there was a failure to comply with an obligation to notify the department of the contravention
- the notification occurred prior to the department or any other regulatory body obtaining knowledge of the contravention.

2.3 Corporate liability

Corporations as well as individuals can be liable for offences against legislation. Where an offence is committed by employees, agents or officers of a corporation in the course of their employment, proceedings will usually be commenced against the corporation. Where, however, the offence has occurred because the employee, agent or officer has committed an offence of their own volition, outside the scope of their employment or authority, proceedings may be instituted against the employee, agent or officer and not against the corporation. Another factor which will be considered is the existence and effective implementation of any training and compliance programs of the corporation.

2.4 Liability of employees and contractors

Employees' obligations under the department's legislation cannot be overridden by an instruction from their employer—it is not a defence for an employee to assert that he or she was acting under direction from a supervisor, although this may be a consideration and a mitigating factor in sentencing or choice of appropriate enforcement action. This principle equally applies to contractors. Therefore the guiding principle in deciding whether to pursue an employee or a contractor is their degree of culpability or responsibility.

In addition to the issues set out in section 3.1.3, factors to be considered in assessing the degree of culpability include:

- whether the employee or contractor knew or should have known that the activity was likely to be illegal or inappropriate
- the seniority of the employee and the scope of their duties
- whether, having regard to the employee's seniority and employment duties or the contractor's contract, the employee or contractor had taken reasonable steps to draw to the attention of the employer or any other relevant person the impropriety of the practice
- whether the employee or contractor has taken reasonable steps to mitigate or prevent any impacts (if it was in the employee's or contractor's power to do so).

2.5 Liability of directors and executive officers

Most of the legislation administered by the department contains provisions extending liability for offences committed by a corporation to its executive officers.

When determining whether to take enforcement action against an executive officer in accordance with such a provision, the key consideration will be whether the person had actual control or influence over the conduct of the corporation in a relevant respect. As a general policy, the department will take enforcement action under the executive officer liability provisions only where evidence links the person with the corporation's illegal activity. That evidence may show, for example, that the executive officer:

- intended to engage in the action or omission
- was negligent or reckless with respect to the action or omission
- intended to deceive the department
- failed to monitor or periodically assess and manage risks associated with the corporation's relevant activities or review supporting systems and programs.

The general legislative exceptions to executive officer liability are that:

- the executive officer was not in a position to influence the corporation's conduct; or
- the officer took all reasonable steps to ensure that the corporation complied with the law.

The department may take the view that reasonable steps were taken to ensure that the corporation complied with the law where it can be demonstrated the executive officer ensured that:

- the corporation had an effective risk management system in place which was aimed at ensuring compliance with relevant legislative requirements
- all staff were aware of the system
- the system had been effectively implemented throughout the corporation
- the system was regularly reviewed and was amended when necessary.

2.6 Unlicensed operators

When determining the appropriate enforcement action against people conducting regulated activities without necessary permits ('unlicensed operators'), the following principles will be considered:

- the department's first priority is to ensure that any risk of harm or impacts from an unlicensed operation is appropriately managed
- the department will work cooperatively with other regulators who may also have responsibility for regulating the unlicensed activity (for example, an unlicensed industrial site may have failed to obtain a development permit from local government as well as an environmental authority from the department)
- in deciding the appropriate response, the department will take account of the level of competitive advantage enjoyed by the unlicensed operator as one factor for consideration, however in most cases, some type of enforcement action will be taken in response to an unlicensed operator
- in rare cases, the department may defer enforcement action until an unlicensed operator has had the opportunity to obtain a licence and operate lawfully. In such cases the operator will be expected to meet contemporary standards for the management of its environmental risk.

2.7 Liability of external administrators

In terms of ensuring compliance with legislation administered by the department, external administrators (including liquidators, receivers and managers and administrators) who are responsible for the management of a corporation, will be subject to the same considerations as other executive officers. External administrators who assume control of a corporation and become aware of activities or conduct that contravenes legislation administered by the department should ensure that the activity or conduct ceases and that the department is informed of the activity or conduct. External administrators should also ensure that the company complies with any notices or orders given to the company by the department as far as is possible given the provisions of the *Corporations Act 2001*.

2.8 Liability of government agencies

The legislation administered by the department binds all persons, including government agencies. The decision to take enforcement action or alternative regulatory intervention against a government agency will depend on whether to do so is in the public interest. The department acknowledges that:

- legislation administered by the department applies equally to both the private and public sectors, and the public should hold equal expectations that both sectors will comply with legal obligations
- that for local governments, it is the community that is served by that local government who bears both the costs of a prosecution and ultimately any penalty imposed upon that public authority
- where regulatory intervention is required, consideration will be given to ensuring ratepayer monies remain in local communities while holding local governments accountable and requiring compliance with the law.

A decision about taking enforcement action against a government agency will consider these factors, together with the other matters set out in these guidelines.

When considering the appropriate enforcement response to any non-compliance by a government agency, the department will consider how the public interest will be best served.

3 Choice of enforcement action

3.1 Determining seriousness of a contravention of legislation

The department determines the seriousness of a contravention of legislation by reference to four general considerations:

- the objectives of the relevant legislation including the nature of the offence and type of impact the offence provision is designed to deter or prevent
- the actual or potential impact of the offence
- the level of culpability of the alleged offender
- the financial or other benefit received from the contravention.

The seriousness of the contravention of the legislation will inform the decision on the appropriate enforcement action taken in response to the offence. This guideline sets out five levels of seriousness for contraventions of legislation: low, minor, moderate, major, and serious. Outlined below are some criteria which can be used to assist the department in assessing the level of seriousness of a contravention. The tables below regarding the impacts of the offence and the level of culpability of the alleged offender indicate the seriousness of the offence.

3.1.1 Objectives of legislation

The objectives or purpose of any legislation are generally outlined at the beginning of the legislation, and provide context to the following legislative provisions. To determine the purpose of the particular offence provision, often it is useful to refer to both the objectives of the legislation and to other documents such as the explanatory notes or Parliamentary speeches.

The seriousness with which the Legislature views an offence may often be apparent by maximum penalty or class of offence assigned to it in the legislation. Where legislation designates levels or classes of offence, this will be considered in deciding the appropriate enforcement response.

3.1.2 Impact

The impact of an offence can be characterised by reference to the effects or consequences of the offence and also by reference to the act or omission the offence provision has been designed to prevent or deter (see the objectives of the legislation discussed above).

To determine the level of impact, for example for the offence of contravention of an environmental authority condition, reference may be made to the level and extent of impact on the environment resulting from the contravention. Similarly, the level of impact of an offence involving unauthorised works on a heritage place may be measured by the level and extent of impact to the building, structure or place. For conservation offences, the level of impact may be measured both by the impact on the specific wildlife or protected area involved, and by reference to impacts or potential impacts on the species or protected area. For public safety or licensing related offences, the level of impact may be measured by the impact or potential impact on the safety of the public or the desire to maintain good order in public spaces.

An offence not involving environmental, heritage, conservation, public safety or licensing impacts, for example for the offence of providing false or misleading information to the department, may be characterised as an administrative offence. This does not mean that the offence is not serious. For example, the provision of false or misleading annual returns to the department seriously undermines its ability to effectively administer its legislation. Examples of other administrative offences include:

- failure to comply with the duty to notify
- a contravention that undermines a legislative scheme (e.g. failure to pay estimated rehabilitation costs, registration or other fees etc.)
- the provision of false or misleading statements in applications or other material submitted to the department
- failures in respect of permit conditions that relate to reporting or the keeping of documents.

There may be some overlap between administrative and other types of offences.

Five levels of impacts have been developed to assist the department in classifying the seriousness of an alleged offence and inform a decision on the appropriate enforcement response (refer to Table 1 – Criteria to be considered in determining impact of contravention). These levels also include the risk or potential impact of an alleged offence.

If an offence satisfies criteria across a range of the impact levels, generally, it will be assigned the highest applicable level. For example, if there is an incident which has caused permanent impacts on the environment (which falls into the serious level), however the level of public concern is low (which falls into the minor level); the matter will be regarded as serious.

3.1.3 Culpability

Culpability refers to the blame and responsibility of the alleged offender for the alleged offence. Three levels of culpability have been developed which, along with the levels of impact, will assist the department in classifying the seriousness of an alleged offence and therefore determine the appropriate enforcement response (refer to Table 2 – Criteria to be considered in determining the culpability of alleged offender). Again, if an alleged offender has satisfied criteria across a range of the levels, the most serious category will be assigned.

Table 1. Criteria to be considered in determining impact of the contravention

IMPACT	5 Serious impact or risk of impact	4 Major impact or risk of impact	3 Moderate impact or risk of impact	2 Minor impact or risk of impact	1 Low impact or risk of impact
	• permanent, or potential for permanent, long-term impact • impact is on or potentially on a wide-scale, or of great intensity • widespread or high level of public concern or impact to public safety about the incident • where offence is of an administrative nature, it severely undermines the legislative scheme or the offender provides false or misleading information.	• medium to long-term impact, or potential impact • impact is on or potentially on a medium to wide-scale, or of medium to great intensity • high level of public concern or impact to public safety • where the offence is of an administrative nature, it undermines the legislative scheme or the offender conceals information or avoids liability for fees or taking necessary actions to prevent offence.	• temporary to medium-term impact, or potential impact • impact is on or potentially on a localised to medium scale, or is of a low to medium intensity • moderate level of public concern or impact to public safety • where the offence is of an administrative nature, it has a moderate impact on the legislative scheme, or the offender carelessly fails to comply with administrative requirement.	• transient impact, or potential impact • impact is on or potentially on a localised scale, or is of a low intensity • low level of public concern or impact to public safety • where the offence is of an administrative nature, it has no impact on the legislative scheme or is of an inadvertent nature.	• no impact, or potential impact • no public concern or impact to public safety • where the offence is of an administrative nature, it could not have been prevented.

Table 2. Criteria to be considered in determining culpability of alleged offender

CULPABILITY	3 Serious culpability	2 Moderate culpability	1 Low culpability
	• intentional or wilful acts • past non-compliances or convictions involving the same or similar legislative provisions • non-compliances of an ongoing or long duration • no attempt at clean-up or remedial action undertaken • motivated by profit or obtained a material benefit from the non-compliance • involves serious misleading conduct • failure to notify the department effectively or notification outside of reasonable timeframes • wilful ignorance of clear directions, warnings or administrative actions (from either employees, consultants, the department, or other government officers) which may have prevented or mitigated the impact • the impact or risk of impact was obvious and/or preventable by implementing or following accepted industry standards.	• careless acts • isolated prior non-compliances with legislation or similar legislation • non-compliance of an medium duration • genuine attempt at remediation or remediation partially effective • attempt at notification of department of incident within reasonable timeframe • may have benefitted from the non-compliance • was aware of the risk of impact or the impact was foreseeable • the impact or risk of impact may have been prevented by following accepted industry standards.	• inadvertent acts • no prior non-compliances with legislation or similar legislation • non-compliance of short-term duration • remediation effective • notification to department of incident within reasonable timeframe • did not benefit from the non-compliance • the impact or risk of impact was not foreseeable • the impact or risk of impact was not prevented by high standards of operation (greater than accepted industry standards).

3.2 Application of objectives of legislation, impact, and culpability

The department will exercise its discretion to take any enforcement action it considers appropriate in the circumstances, taking into account the seriousness of the contravention of the legislation. The objective of some enforcement actions may be considered punitive, whilst others may be aimed at preventing, deterring or rectifying impacts of offences. Some enforcement actions do both; for example a prosecution may result in a fine (being punitive or a deterrent) and orders to remediate an affected area (rectifying the impacts of the offence).

There are seven general categories of enforcement actions available to the department:

- warning letters
- infringement notices
- administrative notices and orders made under legislation
- proceedings for court orders provided for under legislation
- enforceable undertakings
- prosecution
- suspension or cancellation of permit, licence or authority.

The choice of the enforcement action will be determined by reference to the seriousness of the contravention of legislation and the desired outcome having regard to the facts and circumstances of each matter.

As a guide, warning letters are generally reserved for low or minor contraventions; infringement notices for minor contraventions, administrative notices and orders (with the exception of cancellation of licences or permits) for moderate to serious contraventions; enforceable undertakings are considered to be an alternative enforcement action for moderate contraventions; and court orders, prosecutions and cancellation of permits or licences are generally reserved for major or serious contraventions of legislation.

4 Warning letters

Warning letters or verbal warnings are generally not provided for in legislation, but are an enforcement response that the department may take in relation to minor contraventions of legislation. It may be where the imposition of a financial penalty is not considered appropriate, and where a warning that the offender's conduct is a contravention of the legislation is considered a sufficient compliance response based on the circumstances of the matter, for example, a first contravention or one that is easily remedied.

Warning letters should be used for minor contraventions of the department's legislation, involving little or no impact and where the offender has a low level of culpability. They are not appropriate for ongoing or repeated minor contraventions.

5 Infringement notices

Infringement notices are a means of dealing with minor contraventions of legislation administered by the department which warrant some form of sanction, but which are generally not serious enough to warrant a prosecution. Such contraventions might include a minor contravention of a licence or permit condition, littering of rubbish or cigarette butts, or illegal dumping of waste. Infringement notices have the advantage of allowing an offence to be dealt with quickly and without the time and cost involved in a prosecution.

The issuing of infringement notices is governed by the *State Penalties Enforcement Act 1999*. The offences for which infringement notices can be issued, and the associated penalties, are set out in the *State Penalties Enforcement Regulation 2014*.

While an infringement notice is issued because a person has committed an offence, payment of the fine is not an admission of guilt (although the department will record the infringement notice against the person's compliance history). If a person fails to pay an infringement notice, it is referred to the State Penalties Enforcement Registry and is recoverable as a debt.

If a person elects to contest the infringement notice, the department will review the matter, and investigate whether the evidence establishes that an offence has been committed, and if so, commence a prosecution in the Magistrates Court. If a person who contests an infringement notice is found guilty, the Court may impose a penalty higher than the amount of the infringement notice, and may order the payment of costs and the recording of a conviction.

In making decisions about issuing an infringement notice, the department will be guided by the following principles:

- Infringement notices should be issued where the contravention is minor and the scale of the impact is known and small
- An infringement notice will generally not be appropriate where the contravention is ongoing
- Infringement notices should not be issued for multiple offences arising out of the same course of conduct, unless the offences go to separate and distinct aspects of that conduct
- Infringement notices should be issued only where the facts of the offence are clear
- Infringement notices should be issued only where the infringement notice is likely to act as a deterrent. If an infringement notice is not likely to deter the offender from committing a similar offence in the future, consideration should be given to whether prosecution is a more appropriate response. For example, an infringement notice should not be issued where the benefit gained by the commission of the offence is greater than the fine issued
- Infringement notices should be issued as soon as reasonably possible after the offence comes to the attention of the department.

6 Administrative actions

Administrative actions are enforcement actions that include the range of notices and orders that the department may issue under legislation it administers in order to secure compliance with obligations under that legislation. They are generally used to remedy contraventions of the legislation. Administrative actions differ from prosecutions and infringement notices as they are usually aimed at preventing or rectifying a contravention, while prosecutions and infringement notices are usually aimed at punishing and/or deterring unlawful conduct.

The department may take an administrative action where:

- it is the most effective means of preventing or rectifying impacts on the environment
- it is reasonable and proportionate in light of all of the relevant circumstances.

The taking of a particular administrative action by the department does not preclude it from taking other enforcement action (including other administrative actions). In order to properly and effectively address contraventions of the legislation, a number of enforcement actions may need to be taken either simultaneously or overtime as part of a strategy for addressing the offending conduct and achieving the desired regulatory outcome.

For example, it may be appropriate to issue a notice to conduct an environmental evaluation to a corporation to determine the cause of a particular equipment failure which led to an unlawful emission. However, this administrative action does not prevent the department from prosecuting the company for the unlawful emission associated with the equipment failure. In this example, the environmental evaluation informs the necessary steps to rectify and prevent the equipment failure in the future, whilst a prosecution will punish and deter the conduct that resulted in the unlawful emission.

In some situations it may not be appropriate to take more than one enforcement action in response to a situation. For example, it may not be appropriate to issue an environmental enforcement order to require certain actions by the recipient where a transitional environmental program is in force (and is being complied with) to rectify the same issue.

When deciding whether to take or not take administrative action, the department will comply with the requirements of the legislation that authorises the action, the principles of natural justice and any other requirements of a lawful administrative decision.

7 Civil proceedings for court orders

Most of the legislation administered by the department enables it to apply for civil court orders requiring a person to stop committing an offence, or to remedy or rectify an offence. Applications for court orders are generally appropriate in circumstances where there has been a major or serious contravention of the legislation.

These applications are civil proceedings (governed by civil procedures and burden of proof) as opposed to criminal proceedings as is the case with prosecutions. In commencing and conducting proceedings for court orders, the department will adhere to the Model Litigant Principles (refer to section 1.4 of these guidelines).

The department may commence proceedings for such orders where:

- sufficient evidence exists to satisfy the requirements of the legislation under which the proceedings are to be

brought

- the department has reasonable prospects of success
- the orders sought by the department will likely address the offending behaviour or the consequences of the offence.

Should a court order be contravened, the department will consider commencing further proceedings in accordance with these guidelines to address the non-compliance.

In certain cases, the department may also apply for civil orders against persistent offenders and subject to the court finding it necessary, the court may make various orders, including an order prohibiting the person from carrying out a particular activity.

8 Enforceable undertakings

An enforceable undertaking is a published agreement between the department and a person which can require the person to carry out a wide range of actions to achieve compliance with the *Environmental Protection Act 1994* and further improve the protection of the environment. An enforceable undertaking can be suggested by the department or initiated by a person where there has been a contravention or contraventions of the *Environmental Protection Act 1994*, provided the contravention or contraventions are not indictable offences.

An enforceable undertaking is essentially an alternative to prosecution and whilst it does not require an admission to be made in relation to a contravention(s), it does require the inclusion of a statement of regret and must detail the circumstances that led to the contravention(s). For further information on enforceable undertakings, refer to the Guideline – Enforceable undertakings under the *Environmental Protection Act 1994* available on the department's website.

9 Prosecution

Prosecution is part of the department's strategy for achieving its legislative and policy objectives, however as outlined in these guidelines it is usually not the only enforcement action available and will be used after careful consideration. If an alternative to prosecution may be more effective in achieving the objects of the legislation, then that alternative will be considered. Prosecutions may be an appropriate enforcement action in response to major or serious contraventions of the legislation.

9.1 The decision to prosecute

The decision to prosecute is generally made by the Deputy Director-General of the Environmental Services and Regulation division on behalf of the department. The decision is based on:

- whether the available evidence provides reasonable prospects of successfully obtaining a conviction; and
- if so, whether it is in the public interest to exercise the discretion to commence a prosecution.

9.1.1 Prospects of success

The determination of prospects of success of a proposed prosecution will consider whether:

- the available evidence is capable of proving each element of the offence beyond reasonable doubt
- the admissibility of evidence
- the credibility of available witnesses
- the availability or strength of any expert evidence required to prove the offence
- any defences that are plainly open to the alleged offender.

9.1.2 Public interest considerations

The commencement of a prosecution is discretionary, and the dominant factor in the exercise of that discretion is the public interest. When deciding whether to commence a prosecution the department may take into account the following public interest considerations:

- the seriousness of the offence including the impacts or potential impacts caused by the alleged offence

- the degree of culpability of the alleged offender including any mitigating or aggravating circumstances (including notification, cooperation or a display of contrition)
- the availability and effectiveness of any alternatives to prosecution
- the alleged offender's compliance history
- whether the alleged contravention is a continuing or subsequent offence
- the prevalence of the alleged offence and the need for general deterrence
- the length of time since the alleged offence occurred
- the age and physical or mental health of the alleged offenders
- whether there are counter-productive features of the prosecution
- in cases involving Aboriginal and Torres Strait Islander use or management of natural resources, the views of the traditional owners of the area
- the length and expense of any court hearing
- the likely outcome in the event of a conviction having regard to the sentencing options available to the court
- any precedent which may be set by not instituting proceedings
- whether the consequences of a prosecution would be unduly harsh or oppressive
- whether proceedings are to be instituted against others arising out of the same incident
- the sentencing principles set out in the *Penalties and Sentences Act 1992*
- the extent to which the alleged offender cooperates in the investigation or prosecution of other offenders.[2]

In addition to the public interest factors, the decision to commence a prosecution will also take account of the principles in section 1.4 of these guidelines.

Once a decision has been made to prosecute, the department must present the evidence fairly and impartially to the court. The department's only interest in procuring a conviction is to ensure that the right person is convicted, that the truth is known and that justice is done.

9.2 Choice of charges

The charges against an alleged offender must reflect the nature and extent of the conduct disclosed by the evidence, with the aim of providing a basis for the court to impose an appropriate penalty and make appropriate orders. There will be occasions where the same conduct is prohibited under separate statutes and involves an offence under each. In circumstances where it would be inappropriate to lay both charges, the department will consider the legislation and exercise its discretion to commence proceedings for the appropriate offence provisions taking into account the circumstances of the conduct and the penalties available for each offence provision. Where another prosecuting agency is involved, the department will liaise with the other agency to ensure the most appropriate charge(s) is commenced (refer to section 1.3 of these guidelines).

9.3 Mode of trial – summary or indictable proceedings

Most offences under legislation administered by the department are summary offences which are heard and dealt with by a magistrate. However, some offences are indictable and may be heard in the District Court at the election of the prosecution, the defendant or the magistrate.

Proceeding summarily on an indictable offence may have the effect of limiting the custodial or financial penalty that may be sought by the prosecution and imposed by the Magistrates Court. For prosecutions commenced by the department, the decision as to whether to proceed on indictment rests with the Office of the Director of Public

[2] The department does not have the power to grant indemnity from prosecution to accomplices; this power resides with the Attorney General. The Office of the Director of Public Prosecutions (ODPP) Guidelines set out how an application for an indemnity from prosecution can be made. The ODPP Guidelines are available online at http://www.justice.qld.gov.au. An accomplice who pleads guilty and agrees to testify against an alleged co-offender may receive a sentencing discount for that co-operation.

Prosecutions (ODPP). Before referring the matter to the ODPP, the department will consider the ODPP's guidelines which sets out the test to be applied to determine whether a prosecution should proceed on indictment.

9.4 Charge negotiations

Once a prosecution has commenced, the department may enter into discussions with a defendant about which charges should proceed to a hearing. No agreement can be reached with a defendant who is not prepared to take responsibility for the impacts of their unlawful conduct. When taking part in discussions, the department will take into consideration the public interest considerations outlined in section 9.1.2, and:

- any new information received by the department that was not available when the original decision to prosecute was made
- whether the potential penalty, remaining charges, or remaining defendants adequately reflect the offending conduct
- whether a negotiated response provides an adequate deterrent for similar conduct, and/or adequately reflects the seriousness of the matter.

9.5 Sentencing considerations

The *Penalties and Sentences Act 1992* outlines the general factors that can be considered by a court at sentence. The following is a non-exhaustive list of factors which may be considered by the department in preparing sentence submissions:

- the impacts or potential impacts resulting from the offence, including:
  - the seriousness of the impact, or risk of impact, on the 'victim' of the offence
  - the potential for the impacts to be rectified or mitigated.
- the culpability of the offender, including:
  - the steps taken by the defendant to rectify or mitigate the impacts
  - the level of cooperation by the defendant with the department
  - any prior convictions of the defendants relevant to the matter currently being considered
  - any benefit or profit derived by the defendant due to the offence.
- the level of penalty sufficient to deter others from similar conduct
- the prevalence of the offence
- the availability and appropriateness of alternative sentencing orders
- the maximum penalty for the offence
- any relevant sentencing precedents or comparative cases.

9.6 Sentencing orders

In addition to any penalties, fines or orders which may be made by the courts under the *Penalties and Sentences Act 1992*, legislation administered by the department provides for additional specific orders upon sentencing an offender for certain offences. The availability of these additional orders is to provide the court with the flexibility to impose a penalty or order that:

- is proportionate and tailored to the particular circumstances of the case
- will enhance compliance with the legislation or achieve deterrence
- will allow for remediation or remedying of any impacts caused
- will provide for the recovery of any financial benefit received because of the contravention
- will restore or enhance for the public benefit.

Many other jurisdictions around Australia have incorporated these types of orders into their legislation, and have been successfully applying them for some time. The department will seek such orders in appropriate circumstances, and with reference to any applicable policies.

9.7 Recording of convictions

Section 12(1) of the *Penalties and Sentences Act 1992* gives the Court the discretion to decide to record or not record a conviction for an offence.

The decision about whether a conviction is recorded lies entirely within the discretion of the magistrate or judge presiding over a particular case. Some factors which the *Penalties and Sentences Act 1992* states must be considered by the magistrate or judge in exercising their discretion are:

- the nature of the offence
- the offender's character and age
- the impact that recording a conviction will have on the offender's economic or social wellbeing, and their chance of finding employment.

Factors which may also influence the department's decision as to whether to seek the recording of a conviction include, for example, where:

- there is a wilful element to the offence
- the nature of the offence is serious – such as serious environmental harm, material environmental harm, or providing false or misleading information or documentation to the department
- the defendant has previously been successfully prosecuted by the department or found guilty of a similar offence in Queensland or another jurisdiction
- there is a commercial element to the offence, that is, the offender obtained or was likely to have obtained a commercial benefit as a result of the offence
- the defendant is a corporation
- the defendant failed to notify the department of an offence where it was required to do so by legislation or other document (such as environmental authority, transitional environmental program or temporary emissions licence)
- the defendant has a relevant compliance history
- there is rehabilitation required as a result of the offence.

Whenever the department asks the Court to record a conviction, it will do within the ambit of the *Penalties and Sentences Act 1992* and will take into account the factors that the Court must consider under section 12(2) of the Act.

9.8 Appeals against sentence

While the department may appeal against a sentence imposed by a court, such appeals are generally rare. In considering whether to appeal against a sentence, the department will have regard to the principles regarding appeals against sentence set out in the ODPP guidelines, as well as the Model Litigant Principles (refer to section 1.4 of the Enforcement Guidelines). An appeal will only be instituted where the department considers that the appeal is likely to succeed.

10 Suspension or cancellation of licence, permit or authority

Legislation administered by the department usually contains a list of grounds for the suspension or cancellation of permits, licences or authorities. These grounds might include a failure to perform administrative requirements such as payment of fees or lodging of returns. They might also include the holder being convicted of an offence under that legislation or not meeting specified suitability criteria for the permit, licence or authority.

Payment of fees due under legislation is a fundamental obligation of someone who holds a permit from the department. Operators who fail to pay fees obtain a commercial advantage over their competitors, and can undermine the legitimacy of the regulatory regime. Where legislation administered by the department permits, the department may suspend or cancel the relevant permit, licence or authority of an operator with overdue fees.

When deciding whether to cancel or suspend a licence, permit or authority, the requirements of the legislation will be complied with and the department may consider the principles within these Enforcement Guidelines.

The aim of cancellation or suspension of a permit, licence or authority is not punitive; rather it is based on the need to protect the integrity of the legislative regime, the environment and the community from unsuitable operators.