

Powers and Notices

Draft Guideline for Authorised Officers and Enforcement Officers

Protection of the Environment Operations Act 1997

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ISBN 978 1 925987 70 6
EPA 2020P2100
January 2020

www.epa.nsw.gov.au

Contents

List of boxes	3
1. Introduction	4
1.1. Overview of the guideline	4
1.2. Training	5
1.3. The role of the EPA	5
1.3.1. Protection of the Environment Operations Act 1997	6
1.4. The concept of the appropriate regulatory authority	6
1.5. Statutory powers	7
1.6. Delegation of powers	8
1.7. Authorised officers	8
1.8. Enforcement officers	8
1.9. Identification card	9
1.10. Being a credible regulator	9
1.10.1. NSW EPA guiding principles	9
2. Key powers of authorised officers	10
2.1. Overview	10
2.2. Using POEO powers under other environment protection legislation	10
2.3. Powers of entry	11
2.3.1. Asking permission	11
2.3.2. Statutory powers of entry	12
2.3.3. Residential premises	12
2.3.4. Search warrants	13
2.4. Powers to search	13
2.5. Collecting evidence, including information and records	14
2.5.1. Recording information	14
2.5.2. Photographs and recordings	15
2.5.3. Taking samples	15
2.5.4. Seizing items	16
2.5.5. Chain of custody	17
2.6. Power to require answers	17
2.6.1. Interviews	18
2.6.2. Corporations	20
2.7. Statements from witnesses and victims	21
2.8. Powers to identify persons	21
2.9. Powers of arrest	21
2.10. Power to inspect, test and seize vehicles, vessels and other articles	22
2.11. Chapter 7 offences	23

2.12. Sharing information with other law enforcement or public-sector agencies	24
3. Notices under the POEO Act	24
3.1. Types of notices	24
3.1.1. Environment protection notices and compliance cost notices	25
3.2. Clean-up notices	26
3.2.1. Who can issue a clean-up notice and when?	26
3.2.2. What can you require in a clean-up notice?	27
3.2.3. Administrative fee	28
3.3. Prevention notices	28
3.3.1. Who can issue a prevention notice and when?	28
3.3.2. What can a prevention notice require?	29
3.3.3. Administrative fee	30
3.3.4. Appeals	30
3.4. Prohibition notices	30
3.5. Compliance cost notices	31
3.5.1. Enforcing compliance cost notices	31
3.6. Notices to provide information and records	32
3.6.1. Who can issue a notice to provide information and records and when?	32
3.6.2. What is required before you can issue a notice to provide information and records?	32
3.6.3. Give the required warnings	33
3.7. Smoke abatement notices	34
3.8. Regulating noise	35
4. Issuing and enforcing notices	35
4.1. Drafting notices	35
4.1.1. What to include in the background section	36
4.1.2. Directions	37
4.2. The correct legal entity	37
4.2.1. An individual	37
4.2.2. A corporation	37
4.3. Procedural fairness	38
4.4. Issuing notices	39
4.5. Varying and revoking notices and multiple notices	40
4.5.1. Varying and revoking environment protection and noise control notices	40
4.5.2. Multiple notices	40
4.6. Serving notices	41
4.7. Enforcing notices	41
5. Penalty notices and other regulatory options	41
5.1. Regulatory approaches	41
5.2. Regulatory tools	42
5.3. Overview of the penalty notice system	42

5.4. Issuing penalty notices	43
5.4.1. Penalty notices to be issued by enforcement officers	43
5.4.2. EPA enforcement officers	44
5.5. When should penalty notices be issued?	44
5.6. Court elected penalty notices	45
5.7. Reviews of penalty notices	45
5.8. Official cautions	45
5.9. Prosecutions	45
5.10. Orders	46
5.11. Enforceable undertakings	47
6. References	47
6.1. Legislation references	49
7. Further reading	50
Appendix A. Dictionary	51
Appendix B. Types of notices	52

List of boxes

Box 1.1: What you need to know before using your powers	4
Box 2.1: Can work, health and safety requirements stop you entering a premises?	13
Box 2.2: Information and records	14
Box 2.3: When to caution and when to provide a warning	19
Box 2.4: Warnings when using a statutory power to require answers	20
Box 2.5: Classification of offences	23
Box 3.1: What is reasonable suspicion?	26
Box 3.2: What is reasonable action?	27
Box 3.3: Prevention notices	28
Box 3.4: Meaning of environmentally unsatisfactory manner (section 95 of the POEO Act)	29
Box 3.5: Examples of preventive action (section 96(3) of the POEO Act)	29
Box 3.6: Prevention notices relating to water pollution (section 96(3A) of the POEO Act)	30
Box 3.7: Identifying the matter and purpose	33
Box 3.8: Interviews can be more productive	34
Box 3.9: What is 'excessive smoke'? (section 135A of the POEO Act)	34
Box 4.1: Issuing a notice to the correct legal entity	38
Box 4.2: Considerations when issuing a notice	40
Box 5.1: Who can penalty notices be issued to?	44
Box 5.2: Proving an offence 'beyond reasonable doubt'	46

1. Introduction

This guideline is designed to help regulatory authorities, authorised officers and enforcement officers understand and use their powers under the *Protection of the Environment Operations Act 1997*.

1.1. Overview of the guideline

This guideline has been produced by the NSW Environment Protection Authority (EPA) to provide an introduction to the key powers given to authorised officers and enforcement officers under the *Protection of the Environment Operations Act 1997* (POEO Act) and guidance on how to use those powers lawfully and appropriately.

The guideline also includes information to help you regulate in a fair, consistent and transparent way – to help you and your organisation be **credible regulators**. Further reading and references to other relevant documents, forms and notice templates are also provided.

This guideline does not cover all regulatory tools under key environment protection legislation. Where appropriate, it provides references to other relevant policies (for example the *EPA Compliance Policy*), information materials (for example the EPA's *Noise Guide for Local Government*) and tools (for example notice templates). This guideline is **not** a substitute for a thorough understanding of the legislation officers administer, for appropriate training or for the need to obtain your own legal advice.

This document replaces the EPA documents:

- *Powers of Authorised Officers 2006*
- *Guide to Notices 2009*.

Box 1.1: What you need to know before using your powers

Before you exercise any function under environment protection legislation, you should ask yourself the following questions:

- Is your organisation the appropriate regulatory authority for the matter under the POEO Act (see Section 1.4 of this guideline)?
- Do you have power under delegation or authorisation (see Sections 1.6 and 1.7), and are the powers you intend to use appropriate for the matter?
- Is the matter within your area of jurisdiction (geographic area over which you have authority) (see Section 1.7)?
- Are there any preconditions you need to satisfy, or matters you need to consider, before exercising your powers (see Section 2 of this guideline)?
- Do the circumstances justify you using your powers? Use your regulatory discretion. There may be a more appropriate regulatory approach (see Section 5). For example there is no need to exercise your powers to enter a premises if the occupier has invited you to enter.
- Is it safe for you and for others? Work health and safety (WHS) always comes first.
- What is the most appropriate regulatory response? The answer will depend on the circumstances and your organisation's policies. EPA officers' responses to environmental issues and non-compliances should be guided by the *EPA Compliance Policy*.

This guideline will help you answer each of these questions.

1.2. Training

The EPA offers a two-day course called “POEO Act” to equip authorised officers under the POEO Act with competencies to fulfil their responsibilities.

Other courses that may be relevant to authorised officers include:

- Government Investigations – national qualifications are offered with Diploma and Certificate IV courses
- Checking Briefs of Evidence
- Giving Evidence in Court
- Investigative Interviewing and Statement Taking
- Sampling (for compliance and investigations purposes)
- Drafting Statutory Instruments
- Electronic Surveillance Devices
- Environmental Noise
- Litter Enforcement
- Waste and Resource Recovery
- Asbestos Awareness

You can find information on relevant training courses at the [EPA Learning](#) website.

The EPA delivers regulatory training to Commonwealth, State and Territory, and Local Government organisations. This is a project of the Australasian Environmental Law Enforcement and Regulators neTWork (AELERT). The network is a particularly rich source of information, helping officers across Australasia to be more effective and credible regulators. For further information visit the [AELERT](#) website.

1.3. The role of the EPA

The *Protection of the Environment Administration Act 1997* (POEA Act) established the EPA and the EPA Board in NSW. Under the POEA Act, the EPA has responsibility (among others) for investigating and reporting on alleged non-compliance with environment protection legislation for the purposes of prosecution or other regulatory action (section 7(2)(e) of the POEA Act).

The POEA Act gives the EPA environment protection functions under **environment protection legislation**, which is defined to include the following Acts (and regulations and instruments made under those Acts):

- *Contaminated Land Management Act 1997*
- *Dangerous Goods (Road and Rail Transport) Act 2008*
- *Environmental Trust Act 1998*
- *Environmentally Hazardous Chemicals Act 1985*
- *Ozone Protection Act 1989*
- *Pesticides Act 1999*
- *Protection of the Environment Operations Act 1997*
- *Radiation Control Act 1990*
- *Recreation Vehicles Act 1983*
- *Waste Avoidance and Resource Recovery Act 2001*.

1.3.1. Protection of the Environment Operations Act 1997

The POEO Act is the key piece of environment protection legislation used by the EPA and other public authorities to prevent, control and investigate pollution in NSW. It works in conjunction with planning legislation through development consent and approval processes. It divides responsibility for regulation of environmental matters between the EPA, local government and other appropriate regulatory authorities (ARAs) (see section 6 of the POEO Act and Section 1.4 of this guideline). The POEO Act creates a three-tiered structure of offences with the most serious offences being Tier 1, and Tier 3 being penalty notice offences. See Box 2.5 for more information.

Various regulations have been made under the POEO Act, such as the Protection of the Environment Operations (General) Regulation 2009 (POEO General Regulation), which includes penalty notice provisions (see Schedule 6 of the POEO General Regulation).

The POEO Act contains investigative powers, principally under Chapter 7. They can also be exercised under some other environment protection legislation (see Section 2.2 of this guideline).

1.4. The concept of the appropriate regulatory authority

The POEO Act allocates responsibilities for environment protection to the EPA and other regulatory authorities, including councils. This is done by allocating responsibility for certain activities or matters to the appropriate regulatory authority or ARA. When you are considering whether you can exercise certain powers under the POEO Act, it is important to consider whether your organisation is the ARA for that matter.

Section 6 of the POEO Act and Chapter 7 Part 1 of the POEO General Regulation set out who is the ARA for various matters.

Generally, the NSW EPA is responsible for regulating:

- scheduled activities, being activities listed in Schedule 1 of the POEO Act, and other matters that require an environment protection licence, such as scheduled development works (section 47 of the POEO Act)
- premises to which an environment protection licence applies, including all activities carried on at the premises
- activities carried on by the State or a public authority
- activities carried on by an authorised network operator (within the meaning of the Electricity Network Assets (Authorised Transactions) Act 2015) (section 6(2)(c1) of the POEO Act)
- other matters for which the EPA is prescribed as the ARA under the POEO General Regulation.

In most cases, councils are the ARAs responsible for regulating non-scheduled activities (section 6(2) of the POEO Act), except activities undertaken by a public authority that the EPA will regulate, or where a public authority has been declared the ARA. For example Transport for NSW, formerly NSW Roads and Maritime Services (RMS), and the Sydney Olympic Park Authority are prescribed as the ARA for some matters specified in Chapter 7 Part 1 of the POEO General Regulation.

The public authorities declared under that Part of the POEO General Regulation are the only regulatory authorities prescribed.

Figure 1 gives a broad overview of who the ARA is for various matters. It is provided as a quick visual guide only; in all cases you should refer to the legislation, and in complex cases seek legal advice.

Sometimes a regulatory authority or authorised officer of the authority may mistakenly exercise the powers of an ARA when they are not the ARA. If this happens they must notify the correct ARA in writing as soon as they become aware of the mistake. In this scenario, sections 212C and 212D of the POEO Act set out the next steps to take. Consider seeking legal advice to ensure your regulatory actions are valid.

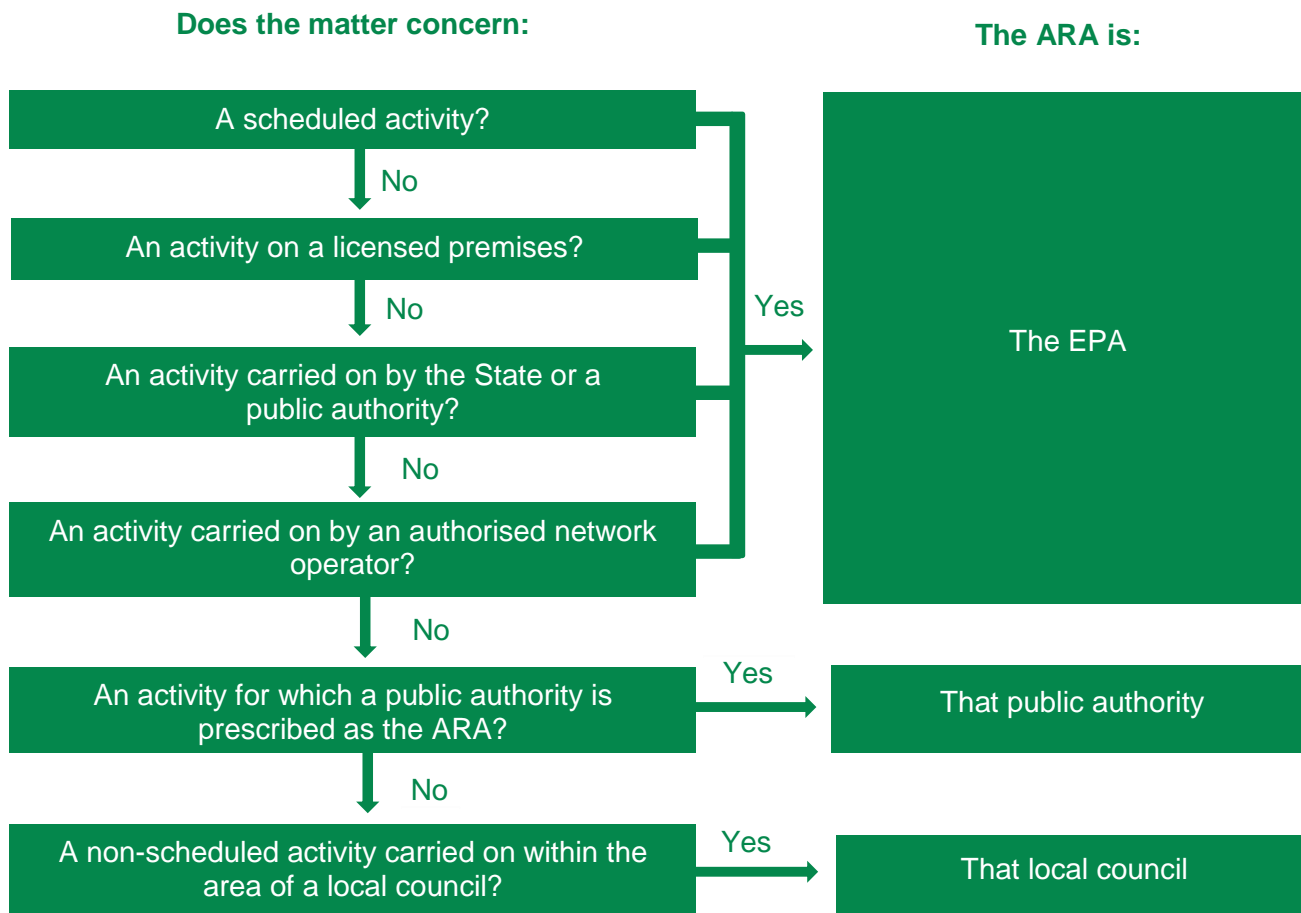


Figure 1: Appropriate regulatory authority summary

1.5. Statutory powers

There are three types of statutory powers:

- **Express power** – Legislation gives a power to a person, body or office holder (for example the Minister administering the Act, the EPA or the Chairperson of the EPA).
- **Powers under delegation** – Legislation allows a person, body or office holder who is expressly given a power (for example the Minister or the EPA Chair) to delegate their powers to another person (such as an EPA officer). See Section 1.6 of this guideline for more information.
- **Powers through authorisation** – Legislation authorises an authorised officer to exercise a specified power (for example a power specified under Chapter 7 of the POEO Act and in relation to other environmental legislation specified in section 186 of the POEO Act). The EPA may appoint any person as an authorised officer. Other regulatory authorities may appoint any officer or employee as an authorised officer. See Sections 1.7 and 1.8 of this guideline for more information.

The key powers of authorised officers also apply to enforcement officers for the purposes of issuing penalty notices. These powers are contained in Chapter 7 of the POEO Act. A number of these enforcement and investigative powers can be used under other environment protection legislation (see Section 2.2 of this guideline). Other legislation (not covered by this guideline) also provides enforcement and investigation powers. An example is the *Biodiversity Conservation Act 2016*.

Officers may be authorised under multiple pieces of legislation and the powers under each may vary slightly. It is essential you understand the differences to ensure you are using the correct power for the matter you are regulating and using that power appropriately. This is discussed further in Section 2 of this guideline.

Section 184 of the POEO Act provides the purposes for which authorised or delegated powers under Chapter 7 of the Act may be exercised (see Section 2.1 of this guideline). The ways these powers may be given to an officer (delegation or authorisation) are further discussed in Sections 1.6 and 1.7.

1.6. Delegation of powers

The POEO Act provides the EPA and other ARAs with various powers. The EPA and other ARAs can then **delegate** functions and certain powers to persons or classes of persons (usually to members of staff in specific roles) in accordance with the relevant power to delegate.

Powers are usually delegated through a delegation instrument, which is a written document setting out the powers that are delegated and who they are delegated to.

Before you exercise a function of environment protection legislation under delegation (rather than via an authorisation you hold, as discussed in Section 1.7 below), you need to make sure you have the appropriate delegation. Officers should check their relevant delegation instruments.

1.7. Authorised officers

As well as expressly giving powers to certain organisations, such as the EPA and other regulatory authorities, the POEO Act permits those organisations to appoint persons or classes of persons (such as members of staff) to the role of authorised officer (section 187 of the POEO Act). Authorised officers are appointed to exercise certain functions and powers under the POEO Act, such as investigation powers under Chapter 7.

Exercising the functions of authorised officers is different from exercising functions of the EPA or ARA by delegation. When a person is appointed as an authorised officer they are able to exercise the powers of an authorised officer in their own right (subject to any policies on the use of authorised officer powers).

An Instrument of Appointment and Authorisation is usually the type of document that provides for a person's authorisation under the POEO Act (or other relevant legislation). It gives the details of the function and powers that person may exercise.

An authorisation of a person as an authorised officer can be given generally; subject to conditions, limitations or restrictions; or only for limited purposes. The authorisation of an authorised officer appointed by a regulatory authority other than the EPA is limited to matters concerning the functions of the regulatory authority under the POEO Act or other environment protection legislation (section 188(3) of the POEO Act). For example a council can only appoint officers to act in or in relation to its local government area.

As an authorised officer, you should exercise your powers in a fair and reasonable manner and without exceeding the powers afforded to you. See Section 1.10 of this guideline, which includes other guiding principles for being a credible regulator.

An organisation should consider developing policies that detail how and who will be authorised, and conditions for that authorisation, including circumstances where authorisation may be suspended or revoked.

1.8. Enforcement officers

Officers who can issue penalty notices under the POEO Act are called **enforcement officers** rather than **authorised officers**. Being appointed as either an enforcement officer or an authorised officer does not automatically mean you are appointed as the other. Ensure that you know what your appointment and authorisation enable you to do.

The list of persons and classes of persons prescribed as enforcement officers is set out in clause 81 of the POEO General Regulation; however, you are only an enforcement officer if your organisation has duly authorised you to exercise the functions of an enforcement officer. You can be an enforcement officer in any council area where the council has authorised you to exercise the functions of an enforcement officer in that area. For that reason, it is possible to be an authorised officer in more than one council area.

Enforcement officers can exercise the functions of an authorised officer under Chapter 7 of the POEO Act in relation to penalty notice offences other than:

- the power to require a person’s name and address in relation to a proposed noise control notice or a noise abatement direction (section 204(2) of the POEO Act)
- powers with respect to vehicles, vessels and other articles (under Part 7.6 of the POEO Act).

Further information about issuing penalty notices can be found in Section 5 of this guideline.

Authorised officers authorised or appointed by the EPA may be able to issue penalty notices under other environment protection legislation. For example the NSW *Pesticides Act 1999* (Pesticides Act) states that an authorised officer may serve a penalty notice (section 76(1) of the Pesticides Act). The Pesticides Act defines an authorised officer as a person appointed by the EPA under Part 7.2 of the POEO Act as an authorised officer for the purposes of the Pesticides Act.

1.9. Identification card

Regulatory authorities must provide authorised officers and enforcement officers with an identification card (section 189(1) of the POEO Act). There are no specific requirements in the POEO Act about the type or content of the card. The EPA recommends identification cards display the officer’s name, a suitable photo of the officer, and the name and logo of the issuing authority and, on the back, list the powers given to the officer. Note, though, that the officer’s card is not the instrument of appointment and authorisation (see Section 1.7 of this guideline).

When exercising the functions of an authorised officer or enforcement officer, you must produce your identification card upon request. For example this means that, if requested, you must show your identification card to an occupier of a premises before you enter the premises, or to an individual you are proposing to issue with a penalty notice. It is good practice to show your identification whether or not you are asked to do so.

1.10. Being a credible regulator

All individuals given powers through the mechanisms listed in Section 1.5 should exercise their powers in accordance with the law and perform their duties in a consistent, fair and transparent manner. The EPA has developed the following guiding principles to help EPA officers undertake their duties fairly and credibly. It is good practice to consider these principles before undertaking any regulatory function.

1.10.1. NSW EPA guiding principles

The EPA aims to be a modern and effective regulator that exercises its statutory authority fairly and credibly. It takes strong and appropriate regulatory action based on the following principles:

- Responsive and effective
- Targeted
- Proportional
- Firm but fair
- Informed
- Consistent
- Transparent
- Ethical and accountable
- Collaborative.

Each of these guiding principles is explained in Appendix I of the *EPA Compliance Policy*.

As a regulatory authority or as an authorised officer, you should exercise your powers in a fair and reasonable manner and without exceeding the powers afforded to you. If you do something as an authorised officer that is beyond your power, the evidence may be inadmissible and you or your organisation may be subject to civil proceedings by the person who was impacted by your actions.

It is important you learn how to exercise discretion about when it is appropriate to use your powers and which powers are the most suitable to be exercised. The *EPA Compliance Policy* and Section 5 of this guideline provide some considerations when choosing an appropriate regulatory response to environmental issues and non-compliances.

EPA officers should consider the [EPA Compliance Policy](#) when making regulatory decisions. Authorised officers and enforcement officers from other regulatory authorities should consider their authority's relevant policies when exercising powers under the POEO Act.

2. Key powers of authorised officers

This section discusses the key investigative powers of authorised officers under Chapter 7 of the POEO Act and gives some guidance on exercising discretion.

2.1. Overview

The key powers of authorised officers (which also mostly apply to enforcement officers for the purposes of issuing penalty notices – see Section 1.8 of this guideline) are contained in Chapter 7 of the [Protection of the Environment Operations Act 1997](#) (POEO Act). Section 184 of the POEO Act provides the purposes for which powers under Chapter 7 can be exercised:

- determining whether there has been compliance with or a contravention of the Act
- obtaining information or records for purposes connected with administration of the Act
- generally administering the Act and protecting the environment.

The key powers under Chapter 7 of the POEO Act are:

- powers of entry and search
- powers to question and identify persons
- powers to require information and records be provided and to issue notices (see Section 3 of this guideline).

These powers provide authorised officers with considerable investigative powers and should be used responsibly. The courts have recognised that the powers to enter, search and seize represent an invasion of a person's common law rights and so if there is any doubt about whether powers have been lawfully exercised, the courts are likely to rule in favour of the person whose rights may have been infringed.

Officers need to ensure they are always acting within their powers. See Section 1.6 of this guideline for further information. When exercising a power, ask yourself:

1. What offence am I investigating?
2. What legislation is that under?
3. What powers do I have under that legislation?
4. Am I authorised or delegated to use those powers (check your authorisation or delegation)?
5. Is it appropriate to exercise this power?

2.2. Using POEO powers under other environment protection legislation

Chapter 7 powers discussed in this section may also be exercised under the following Acts (and the Regulations under each Act):

- [Contaminated Land Management Act 1997](#)
- [Dangerous Goods \(Road and Rail Transport\) Act 2008](#)
- [Ozone Protection Act 1989](#)

- *Pesticides Act 1999*
- *Radiation Control Act 1990*
- *Snowy Mountains Cloud Seeding Act 2004*
- *Waste Avoidance and Resource Recovery Act 2001*.

The Chapter 7 powers may also be exercised under any repealed provision of any Act or Regulation amended or repealed by the POEO Act, for:

- offences committed against the Act or Regulation before its repeal
- any other matter that continues to have force or effect, subject to any savings or transitional regulations (see section 186 of the POEO Act).

When exercising Chapter 7 POEO Act powers in relation to these Acts, an authorised officer generally has the same powers and the same limits to these powers as outlined in that chapter; however, there may be some variations in those powers. For example the powers of entry are modified slightly under the Contaminated Land Management Act and the Radiation Control Act. When exercising powers in relation to any other Acts, you should be aware of any variations.

2.3. Powers of entry

There are three ways in which an authorised officer may seek entry to premises to carry out their functions (Part 7.4 of the POEO Act):

- asking the occupier for permission to enter the premises (Section 2.3.1)
- exercising a statutory power of entry (Section 2.3.2)
- obtaining a search warrant to enter the premises (Section 2.3.3).

The most appropriate option will depend on the circumstances.

The definition of 'premises' in the POEO Act includes:

- a building or structure, or
- land or a place (whether enclosed or built on or not), or
- a mobile plant, vehicle, vessel or aircraft.

2.3.1. Asking permission

In appropriate circumstances (when not exercising your powers), you should ask the occupier's permission to enter their premises and to do the things you intend to do when in the premises. You may intend to do one or more of the following things: inspect the activity, take samples, examine or copy records, take photos or audio or video recordings, or search and seize items in relation to an offence, among other things.

There is an implied invitation to knock on someone's door unless the gate is locked, or there is some other restriction that prevents you from approaching the front door. If you state your request to enter and provide the occupier with information about what you intend to do, and the occupier gives you permission, that is sufficient consent for you to enter the premises and do those things.

It is the EPA's usual approach to obtain and document in writing the person's consent to enter and do the things you intend to do by recording it in a field officer notebook and asking the person to sign it. You do not need to rely on your statutory powers or to get a search warrant in those circumstances; however, you must leave the premises immediately if asked to leave (that is, if consent is withdrawn) unless you then exercise your statutory powers of entry.

2.3.2. Statutory powers of entry

In some circumstances it may be appropriate to use your statutory powers of entry. This may include, for example, where an occupier does not give you permission to enter their premises, where permission is not able to be granted (for example a vacant lot) or where you are concerned that evidence may be lost or destroyed. Under Part 7.4 of the POEO Act (section 196) you may use your power as an authorised officer to enter **non-residential** premises:

- where you reasonably suspect industrial, agricultural or commercial activities are being carried out (when the activity is happening)
- where you reasonably suspect pollution has been, is being or is likely to be caused, at any time, or
- any other premises, at any reasonable time.

You should show your identification and explain the power you are using and the reason for entering the premises. You should record the reason why you decided you could enter the premises.

Note that the powers of entry under the *Contaminated Land Management Act 1997* (section 96C) and the *Radiation Control Act 1990* (section 16) are slightly different from those in the POEO Act.

The powers of entry apply equally whether you are entering the premises on foot or 'by means of' a vehicle, vessel or aircraft, or in any other manner (section 196(2)). If an unmanned vehicle, vessel or aircraft (or drone) is used to achieve entry, it must be operated by or under the authority of an authorised officer (section 196(2A)). EPA authorised officers should consider the *Guidelines on EPA Use of Unmanned Aircraft*, which provides information about the issues you should take into account when exercising a power of entry by means of unmanned aircraft. It is recommended authorised officers from other regulatory authorities also consider the advice the guidelines contain when using unmanned aircraft. It is essential you comply with all relevant requirements relating to unmanned aircraft use, including the *Civil Aviation Safety Regulations 1998* (Cwlth), the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and the *Surveillance Devices Act 2007* (SD Act).

Remember, if you use your powers to enter premises to investigate an incident under the POEO Act, you can only gather information for purposes relevant to the POEO Act. If you find evidence of an offence under another Act you should seek legal advice.

In gaining entry, you may use reasonable force and seek help from other authorised officers or police officers (section 196(3) of the POEO Act). You must do as little damage as possible while exercising your powers of entry and search (section 201 of the POEO Act). Regulatory authorities are liable to pay compensation for any damage caused by entering the premises, unless the occupier has obstructed or hindered the authorised officers in gaining entry (section 202 of the POEO Act), but not for any damage caused by the exercise of any other power.

An authorised officer can be accompanied and assisted by a person who helps that authorised officer carry out their functions under Part 7.4 (section 199A of the POEO Act). For example in dangerous situations, you might be accompanied by the police when entering premises. You may also seek the help of an unmanned aircraft operator to enter premises using a drone.

2.3.3. Residential premises

Statutory powers of entry cannot be used to enter residential premises or that part of a premises used only for residential purposes (section 197 of the POEO Act). To enter parts of premises used only for residential purposes, you need the occupier's permission or a search warrant under section 199 of the POEO Act.

Sometimes it will be hard to determine whether a premises is residential. In such cases, gather as much information as possible about the premises. For example take time to observe what is going on at the premises, doorknock neighbours and ask them what the premises are being used for, obtain other background information that may indicate what the premises are being used for and/or check council records. Council zoning on its own does not provide enough information as to whether the premises are residential.

Box 2.1: Can work, health and safety requirements stop you entering a premises?

Always remember, just because you have the power to enter premises doesn't mean it is appropriate to enter. You should consider work health and safety (WHS) requirements under legislation and you should follow your organisation's relevant WHS policies and procedures.

In general, all authorised officers should exercise care when undertaking site inspections and ensure they use the appropriate personal protective equipment (PPE).

In emergency situations (such as pollution incidents), you may need to enter premises without completing the WHS induction training for the premises.

If you need to enter to investigate without completing a site induction, consider how you can ensure your safety; for example borrow PPE from the company or ask for machinery to be turned off. In other situations (such as a scheduled visit or routine inspection), you will generally have time to do any required WHS induction training for the premises.

2.3.4. Search warrants

A search warrant is a legal document issued by a court or an eligible issuing officer, under the Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA), authorising one or more authorised officers to enter and search a premises as defined in the POEO Act. For an authorised officer to obtain a search warrant, a court must be satisfied there are reasonable grounds for issuing a search warrant. If issued, a search warrant sets out the permissible scope of entry to the premises and the search.

Application forms for search warrants are provided under LEPRA. Section 199 of the POEO Act must be read in conjunction with LEPRA to properly apply for a search warrant. Once issued, the search warrant and LEPRA will govern the search and seizure.

It may be appropriate to obtain a search warrant if you intend to enter and search premises that have both business and residential parts to them.

If the occupier of the residential premises is continually unavailable or has refused you entry, or you have concerns that alerting the occupier may result in the loss or destruction of important evidence, it may be appropriate to obtain a search warrant. Note that search warrants **must be** obtained to enter, without the permission of the occupier, any part of a premises used only for residential purposes.

2.4. Powers to search

After lawfully entering premises (by consent, by exercising a power or by executing a warrant), an authorised officer has powers to do anything necessary for the purposes of Chapter 7 of the POEO Act. Actions, listed in section 198(2) of the POEO Act, may include:

- taking samples
- examining and inspecting any works, plant, vehicle, aircraft or other articles
- taking photographs or recordings
- examining or copying records
- seizing anything connected with an offence or suspected offence (see Section 2.5 of this guideline).

These powers also apply to the use of unmanned aircraft, which can be used to take samples or photographs, for example.

2.5. Collecting evidence, including information and records

Box 2.2: Information and records

Information – In a broad sense, information includes facts provided or learned about something or someone. It is important to collect information to support your decision-making processes during an investigation. Information may (or may not) be used as evidence in legal proceedings.

Records – Records includes plans, specifications, maps, reports, books and other documents (whether in writing, in electronic form or otherwise). Records may (or may not) be used as evidence in legal proceedings.

Evidence – In a broad sense, evidence is something that furnishes proof of a matter. Information or records may ultimately be used as evidence. Evidence could also include statements or affidavits, objects, photographs, samples, or audio or video recordings.

After lawfully entering a premises you may need to collect evidence to help prove an offence. It is critically important to collect and record evidence relevant to the time of the offence, and to do so as close as possible to the time of the offence. You will need to obtain evidence to prove each element of the offence beyond reasonable doubt. This may include:

- recording in your official notebook what you have seen, heard or smelled
- speaking with witnesses, victims and suspects and recording conversations – remember to give the required caution, or direction and warning (see Section 2.6 of this guideline)
- taking photographs or video evidence
- collecting samples.

Remember, before determining whether evidence is admissible, the court determines whether it was lawfully obtained, among other factors. For example if you entered residential premises without permission or without a search warrant, any evidence you took may be rejected by the court.

This section does not attempt to be a comprehensive guide to collecting evidence. You should ensure your organisation gives you appropriate training in collecting and recording evidence. See Section 1.2 for relevant training that is available.

The requirements of the NSW *Evidence Act 1995*, the NSW PPIP Act and other relevant legislation should be considered when gathering and managing evidence.

2.5.1. Recording information

Gathering, documenting and sharing information is a vital part of law enforcement work. Whether the information is about an incident you attended, a person you spoke to in the park, or information you received from a member of the public, it is important you record it somewhere appropriate.

When working in the field, always record what you have seen, heard or smelled as soon as possible, by noting it down in your field notebook. Make sure you include the time, date and location and the names and addresses of any other people present. If appropriate, record information about the weather, including wind direction, temperature and percentage of cloud cover.

If you are recording conversations in your field notebook, use the person's exact words where possible. You should read your notes back to the person you have spoken to or interviewed and, if possible, get them to sign each relevant page of the notebook to confirm it is an accurate record.

It is important officers can produce contemporaneous¹, comprehensive, accurate and legible notes on investigation matters, and that they are kept in a readily identifiable and available form for future reference. The EPA provides official notebooks to all EPA officers performing investigation duties. It is recommended your organisation also provides you with an official notebook.

2.5.2. Photographs and recordings

Photographs and audio and video recordings can be important evidence as well as information to assist in your decision making. Ensure you record the details (time, date, location, direction and subject) of each photograph so you can properly identify it. Photograph logs are useful for storing this information in a way that allows you to find a specific photograph later and the information it contains. Video footage provides an accurate record of site inspections and search and seizure operations. After lawfully entering a premises, you can take video footage if it is considered necessary for purposes under Chapter 7 of the Act.

The NSW SD Act covers devices for listening, tracking (such as a GPS device), optical (camera) and data surveillance (such as computer usage). As the use of covert surveillance devices involves a major intrusion into the privacy of citizens, the SD Act places severe restrictions on their use and imposes heavy penalties for their misuse. It is important you understand when you can use surveillance devices and the restrictions that apply to their use. You should consider seeking legal advice before using surveillance devices.

The SD Act does not affect authorised officer powers under Chapter 7 of the POEO Act if the powers are exercised lawfully. There are a few things to note:

- You cannot generally video while on private premises without lawfully entering the premises in accordance with your statutory powers, obtaining a search warrant or asking the occupier's permission.
- You can install a camera within or on land your organisation owns with your organisation's consent (requirements of the NSW *Workplace Surveillance Act 2005* should be considered in this case) or on private land with the consent of the owner or occupier to enter the premises and install such a device.
- You cannot use a listening device to record a private conversation, including records of interview, without appropriate consent. However, an authorised officer is permitted to tape-record or otherwise record interviews compelled under sections 203 or 204 if the officer has informed the person that the conversation will be recorded under the POEO Act (section 203A). See Section 2.6 of this guideline for more information on using powers to require answers.

2.5.3. Taking samples

After lawfully entering premises, authorised officers may take samples. This involves taking a representative amount of a substance to be analysed. Analysis will usually determine what the substance is and its harm or potential harm to the environment.

When sampling you should:

- follow your organisation's relevant procedures for collecting, preserving and handling samples
- consider the types of contaminants you may need to test for
- use the correct container for the substance/s being collected
- ensure the preservation and integrity of the samples
- record details that may help with interpretation (for example possible pollutants, weather conditions, water depth, condition of the soil or vegetation)

¹ Contemporaneous notes are used to make a contemporaneous and accurate record of a conversation or an event, that is notes made at the time the conversation occurs or at the time the event occurs. These notes can also be written as soon as practicable after the conversation or the event occurs.

- record the holding time
- document information about each sample and completing a sample submission form (as appropriate for your organisation)
- seal, label and secure each sample
- initiate and maintain the chain of custody (see Section 2.5.5)
- take photos of each sample site and record the details of each photo.

Your laboratory or organisation should have a range of bottle types available to cover the contaminants (and situations) commonly encountered by regulatory officers. These bottles will have been cleaned and/or tested appropriately. You can usually find information about what bottles to use on the bottle label and/or in notes provided by your laboratory.

Examples of the types of samples you may need to collect include:

- water samples at discharge points from sources such as construction sites, sewage plants, landfill sites, mines, quarries, and agricultural runoff sites, near to where they enter a waterbody (such as a watercourse, river, creek, dam or drain)
- water samples where there is evidence of oil slicks, fish kills, scum or settled material
- soil samples suspected to have been affected by spills and discharges
- vegetation samples or swab samples for pesticides or herbicides
- fallout² samples (either trace fallout or bulk fallout) wherever fallout is observed.

The EPA offers a sampling training course through the Professional Development and Training Program (see the [EPA Learning](#) website).

If you are unsure about any technical aspect of the sampling you need to do, ask your laboratory staff for help; for example what bottles to use, whether there are special sampling requirements for specific substances you suspect the pollution discharge contains, how to preserve and handle samples, how to fill in the necessary forms or what the samples should be tested for.

Analyses should be undertaken by a laboratory accredited to perform the testing needed.

For further information see the NSW EPA's *Approved Methods for the Sampling and Analysis of Water Pollutants in New South Wales* (2004) and *Approved Methods for the Sampling and Analysis of Air Pollutants in New South Wales* (2007). Another useful reference is *Using the ANZECC Guidelines and Water Quality Objectives in NSW* ('ANZECC guidelines') (DECC 2006). These three guidelines provide a framework for conserving ambient water quality in our natural environment. All are referenced in Section 6 of this guideline.

2.5.4. Seizing items

After lawfully entering premises, authorised officers have powers to seize things connected with an offence or suspected offence (that is evidence), including hard and electronic copies of documents. The power to enter and seize something without the owner's permission is a significant power. It allows officers, in certain circumstances, to legally enter and take property from its rightful owner. It can be an emotional, highly charged experience for those involved. This power should be used only in appropriate circumstances.

Once you have lawfully entered a property, you must have reasonable grounds for believing the thing you intend to seize is connected with an offence against the POEO Act or the Regulations (section 198(2) of the POEO Act). Therefore, you need to examine the thing first to determine whether it is

² Fallout refers to the settling to the ground or settling on other hard surfaces (such as houses and vehicles) of airborne particles ejected to the atmosphere from explosions, eruptions, industrial activity, factory fires, bushfires, etc. This does not refer to radioactive fallout.

connected to an offence; especially if it is a document. The power to seize does not allow you to seize an item to stop it being used to commit further offences.

Prior to seizing an item, you should consider how you will store and secure it and when and how you will return it. It may be more practical, and fairer to the owner of the item, to take a photograph of the evidence instead of seizing it. You should consider seeking legal advice if you intend to seize computers or other electronic devices.

All documents or other things being seized should be recorded in a field exhibit book/form, labelled, packaged and retained under personal control of the exhibit officer. A copy of the list of items seized should be given to the occupier of the premises after the search. While this is not a statutory requirement under the POEO Act, it is good practice.

Where it is not possible or practical to physically remove the item for evidence (for example it is very big and heavy or is part of another structure, or it is not safe to do so) you may 'direct the occupier of the premises where the thing is seized to retain it at those premises or at another place under the control of the occupier'. This is often called 'seize in situ'.

Authorised officers who obtain items under section 198 of the POEO Act do not have the power to keep or destroy those items. The items must be returned to the owner, usually once the relevant statutory period has lapsed or the prosecution is completed. It is important to look after and maintain the integrity of those items, so they can be returned in the same condition. If the item was required for evidence in a court matter, the prosecutor may seek an order from the court to have the item destroyed.

2.5.5. Chain of custody

The chain of custody is about ensuring the 'legal integrity' of your physical and electronic evidence (such as samples and seized items). It is especially important to document any transfers of the evidence between people. For example several different people may be involved in transporting a specific water sample from the place where it was collected to the appropriate laboratory where the sample will be tested. Each time the sample changes hands it is known as a transfer. Record the details of each transfer to maintain the chain of custody. It is best practice to use a chain of custody form to record the movement of evidence (samples, seized items, etc.) and include the officer's details and the reasons for transfer/removal.

2.6. Power to require answers

There are two ways you, as an authorised officer, can seek answers from people while undertaking your regulatory duties:

- voluntarily, by asking for the information
- involuntarily, by requiring answers using your powers under Part 7.5 of the POEO Act (section 203), including serving notices requiring a person to attend to answer questions.

The power to require answers under Part 7.5 of the POEO Act is in addition to the powers of ARAs and authorised officers to issue notices requiring a person to provide information and records under Part 7.3 of the POEO Act (sections 191, 192 and 193). These powers to issue notices are discussed in Section 3 of this guideline. The law requires authorised officers to give cautions and/or directions and warnings to alert the person of the implications of answering an officer's questions and the person's rights. The timing and nature of these cautions, or directions and warnings, depend on whether the interview is being conducted on a voluntary basis or under the POEO Act power to require answers to questions.

If a person wishes to seek legal advice before providing an answer you should accommodate this request where practicable and reasonable. In urgent cases, such as during a pollution incident, you may wish to seek your own legal advice on whether to proceed with questioning the person without their legal representative present.

2.6.1. Interviews

You can obtain answers by conducting an interview.

Interviewing victims, witnesses and suspects is an important tool for gathering information for an investigation, which could potentially be used as evidence. Interviews are sometimes conducted informally in the field. At other times a prepared and more formal record of interview is conducted at a designated time and place. To ensure admissibility:

- a statement or affidavit should be taken from a witness or a victim (see Section 2.7 of this guideline)
- a record of interview (an audio recording or a written transcript) should be obtained from a suspect (a person suspected of committing an offence) or a witness who is not willing to provide a statement.

Voluntary answers and the caution for voluntary answers

In most circumstances you should first offer a voluntary interview. Many people will voluntarily answer the questions of an authorised officer at the premises or in the field; at the scene of an incident for example. A suitable line of questioning may be:

'I am making enquiries in relation to X at time/date/place. I intend to ask you further questions about this matter. Do you understand that?'

If prior to or during questioning you form the belief that there is sufficient evidence to establish that the person has committed an offence, you must **caution** them. The caution must be given as soon as you form the belief that the person has committed an offence. The caution is all about fairness and is a requirement under the Evidence Act to remind people of their common law right to silence.

A suitable caution states:

"You do not have to say or do anything but anything you do say or do will be recorded and may be used in evidence. Do you understand that?"

Record the person's response to provide evidence of their level of understanding. Anything said after this caution may be admissible against that person.

If the interview is carried out voluntarily you will need to obtain the person's consent to audio record the conversation. If they refuse to be audio recorded, you should write or type every word of the interview as a transcript, such as:

"I said:

He said:

I said:

He said:"

You should ask the suspect to read over the written transcript and ask them to sign the document and mark up and initial any errors. If they fail to comply with that request or refuse to sign, you and your corroborating officer should record the reasons for the refusal in the written note and sign it yourselves.

Warnings when using a statutory power to require answers (for a directed interview or involuntary answers)

Generally, officers should exercise powers to require answers only once they have offered the person a voluntary interview and the offer has been refused.

Part 7.5 of the POEO Act gives you (as an authorised officer) the power to ask a person you suspect on reasonable grounds to have knowledge of the relevant matters to answer questions in relation to those matters (section 203(1) of the POEO Act). If such a person refuses to answer questions, they can be required to do so (**directed**). If the person objects (because the answer may incriminate them personally) they must still answer the question, but the answer is generally not admissible against that individual. The answer may be admissible against the individual for failure to comply with a requirement under Chapter 7, however, if they provided false or misleading information in their answer (section 212(3) of the POEO Act). The information in the person's answer may be admissible against other persons or it may lead you to other admissible evidence.

When directing people to answer your questions, you must **warn** them that it is an offence not to answer or to knowingly answer a question in a false or misleading way. If you don't warn them, and they don't answer or they answer in a false or misleading way, they have not committed an offence.

The **direction** (and associated **warning**) should state:

"I am an authorised officer of [state your organisation] and require you to answer the following questions. I warn you that if you neglect or fail to answer without lawful excuse you are guilty of an offence against the [POEO Act].

It is also an offence to knowingly answer any question falsely or in a way that is misleading in a material respect.

You may, however, object to answering a question on the grounds that it might incriminate you. If you do object, you must still answer the question, but the answer is not admissible in evidence against you personally, except for the offence of knowingly answering a question falsely or in a way that is misleading in a material respect.

Do you understand that?"

You should record the person's response to provide evidence of their level of understanding. If they don't understand, break the **direction** into parts and explain it to them until they understand.

If the person is required to give answers under Part 7.5 of the POEO Act, you can record the interview if you first advise the person that you will do so. The interview can be recorded, even if the person objects (section 203A of the POEO Act). In that case you should note the objection. The advantage of recording the interview is that it provides more reliable evidence of what the person said, as opposed to referring to a written transcript of the interview, where what was said can be contested. It also saves time. You must give a copy of the recording to the person interviewed (section 203A(3) of the POEO Act).

Box 2.3: When to caution and when to provide a warning

When you are asking a person questions and they are answering those questions **voluntarily**, you must **caution** them as soon as you form the belief there is sufficient evidence to establish that they have committed an offence. If you don't form the belief the person has committed an offence, you don't need to caution them.

When **directing** people to answer your questions (under section 203(1) of the POEO Act), you are requiring them to do so **involuntarily** and you must **warn** them that it is an offence not to answer. This power to require answers to questions overrides a person's right to silence.

Requiring a person to attend an interview

As an authorised officer, you may serve a written **notice**:

- requiring a person to attend at a specified place and time to answer questions, if attendance at that place is reasonably required so that the questions can be properly put and answered (section 203(5) of the POEO Act)
- nominating a place and time to answer questions that is reasonable in the circumstances if the place and time nominated by the person first is not reasonable or they do not nominate a place and time (section 203(6)).

You can find a template for a notice to nominate a time and place to answer questions [here](#).

The EPA or another ARA may serve a written notice requiring a corporation to nominate in writing a representative (who must be a director or officer of the corporation) to answer questions (section 203(2)). You should check whether you have delegated power to issue such a notice (see Section 2.6.2 of this guideline).

The notice should identify the matter/s that answers are to be sought about. See Section 4 of this guideline for tips on drafting and issuing notices.

If you issue a notice under Part 7.5 of the POEO Act the interview automatically becomes a **directed** interview. This is because you are denying the person their right to silence by telling them they must nominate a time and place to attend and answer questions. Remember to give the required direction and associated warning at the start of the interview.

If you require a person to attend an interview under Part 7.5 of the POEO Act, do not caution the person under the Evidence Act during the process of asking them questions. See the subsection above 'Voluntary answers and the caution for voluntary answers' for situations where using a caution is appropriate.

Box 2.4: Warnings when using a statutory power to require answers

In *Port Macquarie-Hastings Council v Waite* [2019] NSWLEC 146, the NSW Land and Environment Court considered the admissibility of a record of interview conducted between the defendant and the prosecutor, Port Macquarie-Hastings Council. The Council was investigating the defendant in respect of alleged contraventions of the *Environment Planning and Assessment Act 1979* (EPA Act). The case is relevant as the investigative powers in the EPA Act and the POEO Act are very similar.

The Court looked at whether the interview was voluntary or directed and whether the Council was required to warn the defendant that he could object to answering a question during the interview on the ground that it might incriminate him in order for the record of interview to be admissible in evidence. The Council's investigating officer had given a general caution about Mr Waite's right to silence but had not specifically warned him that he could object to answering questions on the grounds of self-incrimination.

The Court found that the defendant had been 'required' under section 119K (1) of the EPAA (now section 9.23) to attend and answer the Council's questions. The Council was therefore required to give the warning in section 119S (3) of the EPAA. Its failure to do so rendered the record of interview inadmissible.

This case is an important reminder for investigating officers to follow the precise requirements of the legislation and to be clear about whether answers to questions are being sought on a directed or voluntary basis. Failure to do so could lead to evidence being inadmissible. Legal advice should be sought if necessary.

Note that this case study is a guide only and does not constitute legal advice. The case referred to may be superseded by other cases at any time. Readers should seek their own legal advice in relation to their specific circumstances.

2.6.2. Corporations

When dealing with corporations (entities incorporated under the Commonwealth *Corporations Act 2001*), to ensure admissions made by a person are binding on the corporation, you need to make sure the person is authorised to speak on behalf of that corporation. If a person is not authorised to speak on behalf of the corporation, they may still provide useful information or be a valuable witness in any legal action. The answers of a company officer or other person may bind the corporation by virtue of their position within the corporation, and/or if the answers relate to matters within the scope of the officer's position; however, you should seek legal advice in this situation.

To avoid any issues about whether a person's answers bind the corporation, the EPA or another ARA can issue a written notice requiring the corporation to nominate a director or officer of the corporation to be the corporation's representative for the purpose of answering questions (section 203(2) of the POEO Act). Answers given by a person nominated in this way bind the corporation (section 203(3) of the POEO Act).

A corporation is not protected by the privilege against self-incrimination, so a company representative, director or employee cannot decline to answer questions on the grounds they might incriminate the corporation (section 212(2) and (3) of the POEO Act). The privilege against self-incrimination applies only to individuals. Any admissions after the direction and associated warning is given may still be admissible against the corporation.

You can find a template for a notice to nominate a corporation representative [here](#).

2.7. Statements from witnesses and victims

You may also obtain answers by getting a written statement or affidavit. These are often obtained from witnesses and victims and are provided voluntarily.

A statement or affidavit from a witness should be taken as close to the time of the incident as possible when a witness's recollection is fresh.

The Land and Environment Court rules require evidence to be provided in the form of an affidavit. For Local Court matters witness statements would be prepared.

Obtain witness or victim statements as soon as possible after the incident. You can initially discuss the matter under investigation, then the witness or victim drafts the written statement. If the witness or victim asks for assistance you may help them draft the statement.

When the witness or victim is satisfied the statement is accurate and complete, ask them to read it in full then sign the statement as a true and correct statement and have it witnessed, and give them a copy.

If the matter looks like it may go to court, you should seek legal advice early about whether statements or affidavits are required.

You should use your organisation's templates for witness statements.

Note that there are formal requirements when witnessing and signing an affidavit and you should check this with your legal team.

Occasionally a witness or victim may decline to sign a statement. If this happens, record their reasons for the refusal.

2.8. Powers to identify persons

As an authorised officer, you can **require** a person you suspect on reasonable grounds has committed or is committing an offence against the POEO Act or the Regulations to provide their name and residential address (section 204(1) of the POEO Act). However, you should always ask politely first and only exercise these powers if the person fails to cooperate (that is **request** the information before you **require** it).

If you do **require** a person to provide this information, it is an offence for them to fail to provide it, or to provide a false name or residential address. When directing a person to provide their name and residential address, you must **warn** them that it is an offence not to answer or to provide details that are false (section 212(6) of the POEO Act). If you don't warn them, and they don't comply, they have not committed an offence.

You can **request** a person you suspect on reasonable grounds has committed or is committing an offence to provide proof of their name and address (section 204(2A) of the POEO Act), but it is not an offence for them to fail to provide such proof.

If a person is not suspected of committing an offence, you can only **request** them to provide their name and address. The person may do so voluntarily but is not **required** to.

2.9. Powers of arrest

As an authorised officer, you have the power to arrest a person you suspect on reasonable grounds has committed or is committing an offence (section 204(1) of the POEO Act) if that person has refused to state their name or residential address, or has stated a name or address you believe is false (section 204(3) of the POEO Act).

While this power of arrest exists, it should only be used in the most serious circumstances and only:

- if you are appropriately trained
- if the situation is safe
- in accordance with your organisation's policy and procedures for arrest.

You and your organisation are advised to obtain legal advice before exercising this power.

The EPA takes the approach that when an authorised officer thinks a person should be arrested the officer should **call the police for assistance**. There is a duty of care for a person who has been arrested, and the potential for civil action to be taken against an officer who arrests a person inappropriately.

2.10. Power to inspect, test and seize vehicles, vessels and other articles

Authorised officers of some regulatory authorities have the power to inspect and test articles (including vehicles, vessels, aircraft, plant) under Part 7.6 of the POEO Act (and, regarding repeat waste offences, under Part 7.6A). These powers are summarised in Table 1.

Authorised officers of local authorities **do not** have powers under Part 7.6 of the POEO Act.

Table 1 Summary of powers to inspect, test and seize vehicles, vessels and other articles

Section of POEO Act	Power	Authorised officer	Limitations
206	Inspect and test	EPA	Any article
206	Inspect and test	Police	Any article
206	Inspect and test	Appropriate marine authority	Vessels only
206	Inspect and test	Officer under the <i>Marine Estate Management Act 2014</i>	Vessels situated within marine parks and aquatic reserves
207	Require articles to be tested or inspected	EPA	Any article
208	Stop for inspection or testing	EPA	Vehicles or vessels
208	Stop for inspection or testing	Police	Vehicles or vessels
208	Stop for inspection or testing	Appropriate marine authority	Vessels only
208	Stop for inspection or testing	Officer under the Marine Estate Management Act	Vessels situated within marine parks and aquatic reserves
209	Seize to test for noise	EPA	Any article, except for vehicles or vessels
210	Require information about articles	EPA	Any article
210B	Seize – repeat waste offences	EPA	Motor vehicles or vessels

Note: 'article' includes any plant, motor or other vehicle, aircraft, vessel or other thing of any description; 'vessel' means any kind of vessel used in navigation.

To stop, inspect or test under this power, as an authorised officer you can:

- enter, operate, photograph, video and inspect the article
- enter the premises where the article is located
- test any substance being carried by the article (such as in a fuel tank) and take a sample
- direct the vehicle or vessel to stop (using a sign or other reasonable method)
- direct the vehicle or vessel to an appropriate place for the inspection/testing.

You must inspect/test the vehicle or vessel as soon as practicable (and within one hour) and as close to where you stopped it as practicable, or you can direct the vehicle or vessel to be moved to a suitable place for inspection or testing (section 208(2) of the POEO Act). Alternatively, you can direct, by written notice, a suitable date, time and place for the inspection or testing (section 208(2A) of the POEO Act).

While this power of arrest exists, it should only be used:

- if you are appropriately trained
- if the situation is safe
- in accordance with your organisation's policy and procedures for stopping vehicles.

The EPA takes the approach that EPA authorised officers should not stop vehicles and vessels; instead they should **call the police for assistance**.

Often the EPA works with police or Transport for NSW (formerly RMS) inspectors in noisy vehicle and dangerous goods compliance campaigns. In these cases, the police and/or Transport for NSW will exercise the power to stop the vehicle and may direct the vehicle to an inspection area where EPA officers can undertake an inspection. EPA authorised officers may also issue notices requiring the owner or person in possession of any article to have it tested (section 207 of the POEO Act). The notice can specify the timeframe for compliance and where and who is to do the testing to determine whether it complies with the POEO Act and Regulations (section 207).

2.11. Chapter 7 offences

The POEO Act sets out general offences under section 211 that relate to an authorised officer's Chapter 7 powers. It is an offence to:

- neglect or fail, without lawful excuse, to comply with a requirement made under Chapter 7
- knowingly provide false or misleading information
- wilfully delay or obstruct an authorised officer
- impersonate an authorised officer.

These are **Tier 2 offences**.

For more serious breaches of Tier 2 offences that are dealt with by a court, the maximum penalty that may be imposed by the court is:

- \$1,000,000 for a corporation, with a further \$120,000 per day for a continuing offence
- \$250,000 for an individual, with a further \$60,000 per day for a continuing offence.

Tier 3 offences are Tier 2 offences that instead may be dealt with by a penalty notice.

Box 2.5: Classification of offences

Tier 1 offences are the offences under Part 5.2 of the POEO Act, including if a person wilfully or negligently:

- disposes waste (section 115 of the POEO Act),
- causes any substance to leak, spill or otherwise escape (section 116 of the POEO Act) or
- causes an ozone-depleting substance to be emitted into the atmosphere (section 117 of the POEO Act)

in a manner that harms or is likely to harm the environment.

Tier 2 offences are all other offences under the POEO Act and regulations.

Tier 3 offences are Tier 2 offences that may be dealt with under Part 8.2 of the POEO Act by issuing a penalty notice (see Sections 5.2–5.4 of this guideline).

2.12. Sharing information with other law enforcement or public-sector agencies

When undertaking regulatory functions, agencies often rely on cooperation with other state and federal law enforcement agencies. When sharing information, you should consider the requirements of state and federal legislation governing the collection, storage, use and disclosure of personal information, including but not limited to:

- *Privacy and Personal Information Protection Act 1998* (NSW) (PIIP Act)
- *Government Information (Public Access) Act 2009* (NSW)
- *Privacy Act 1988* (Cwlth)
- *Data Sharing (Government Sector) Act 2015* (NSW).

The PPIP Act limits when personal information can be disclosed and requires agencies to comply with the information protection principles (IPPs) set out in sections 8 to 19 of the PPIP Act. There are specific exemptions from the IPPs set out in sections in Part 2 Division 3 of the PPIP Act, including when the disclosure of information is for law enforcement or investigative purposes or where the person consents to the release of the information. Your organisation should consider the exemptions in the PPIP Act when deciding whether it can share information. Before sharing information between agencies, you should seek legal advice. Additional requirements apply where information is proposed to be shared outside of the state, including to the Commonwealth.

The POEO Act also puts limits on the disclosure of information (sections 319 and 320) and there are common law limits on the ability to disclose information that was obtained by an agency coercively (that is in the exercise of POEO Act powers). Other environment protection legislation, such as the *Contaminated Land Management Act 1997* (section 107) and the *Pesticides Act 1999* (section 44), also contain limits on disclosure of information.

In some circumstances, agencies may request information from persons, including the EPA, using a statutory notice under the POEO Act, such as a section 192 notice for information and records (see Section 3.6 of this guideline).

You should seek legal advice before sharing information with other agencies.

3. Notices under the POEO Act

This section discusses different notices that can be issued under the POEO Act as investigative tools or to protect or remediate the environment.

3.1. Types of notices

Notices are a key strategic tool for responding to and investigating incidents of alleged environmental harm or other breaches of environment protection legislation. As always, you need to use your judgement, in discussion with management, as to whether serving a specific type of notice is the most appropriate action in any given circumstance. As with other powers provided under the POEO Act, you may be able to ask the person to do something or provide records without invoking your statutory powers.

Types of notices include:

- **environment protection notices**

- clean-up notices
- prevention notices
- prohibition notices (only issued by the Minister)
- compliance cost notices

The first three notices listed above are collectively called ‘environment protection notices’ (section 90 of the POEO Act). In relation to the fourth type of notice listed above, the ARA may by notice in writing require a person to pay costs for the ARA’s actions relating to an environmental protection notice (section 104 of the POEO Act).

- **investigative notice**

- notice to provide information and records (see Section 3.6 of this guideline)
- notice to require attendance at a time and place to answer questions (see subsection ‘Requiring a person to attend an interview’ in Section 2.61 of this guideline)
- notice to nominate a corporate representative (see Section 2.6.2 of this guideline)
- other investigative notices in Chapter 7 of the POEO Act.

The first three notices listed above are written notices that are provided for under Chapter 7 of the POEO Act and commonly used during investigations.

- **other notices and directions**

- penalty notices (see Section 5 of this guideline)
- smoke abatement notices (see Section 3.7 of this guideline)
- noise abatement directions (see Section 3.8 and Table B3 of this guideline)
- noise control notices (see Section 3.8 and Table B3 of this guideline)
- other notices under the POEO Act.

Sections 3.2 to 3.8 of this guideline outline the notices that are commonly issued by ARAs and authorised officers. Some notices that may be issued under the POEO Act are not covered in detail in this guideline (see also Appendix B); however, much of the advice in Section 4 of this guideline is still applicable when drafting, issuing and serving other types of notices.

All notices issued on behalf of an ARA must be issued by a person who has the delegated authority from the ARA to issue the notice. Delegations are usually given to a position rather than an actual person. Delegations depend on the notice type and can change; officers should always check their delegations. Other types of notices may be issued by an ‘authorised officer’ under the POEO Act.

3.1.1. Environment protection notices and compliance cost notices

Environment protection notices and compliance cost notices are set out under Chapter 4 of the POEO Act. More than one type of notice can be issued to the same person. Carefully consider which type of notice is most appropriate and ensure that notices are issued for their lawful purpose and, where multiple notices are issued, do not conflict or overlap.

Chapter 4 of the POEO Act also has offence provisions for non-compliance with requirements of environment protection notices. Regulatory action may be taken for failure to comply with an environment protection notice. Penalty notices may be issued for failure to comply with clean-up and prevention notices. For more serious breaches that are dealt with by a court, the maximum penalty that may be imposed by the court is:

- \$1,000,000 for a corporation, with a further \$120,000 per day for a continuing offence
- \$250,000 for an individual, with a further \$60,000 per day for a continuing offence.

It is also an offence under Chapter 4 to:

- knowingly make a false or misleading statement in a report required by an environment protection notice (section 113)
- wilfully delay or obstruct a person carrying out action in relation to an environment protection notice (section 112).

It is an offence to fail to comply with a clean-up notice or prohibition notice without a reasonable excuse.

You may also obtain an order from the Land and Environment Court directing the recipient of a notice to comply with the notice or to take other action to remedy or restrain the breach of the POEO Act (Part 8.4). Failure to comply with a court order (contempt of court) is a serious offence and may result in significant penalties.

3.2. Clean-up notices

A clean-up notice is issued under Part 4.2 of the POEO Act by the ARA. A clean-up direction can be provided **in writing or orally**. The power to issue clean-up directions orally means a direction can be given with immediate effect, which may be important in an emergency. A clean-up direction issued orally must be confirmed within 72 hours by a written clean-up notice, or it no longer has effect (section 93 of the POEO Act). There is no statutory right of appeal against a clean-up notice.

You can find a clean-up notice template [here](#).

3.2.1. Who can issue a clean-up notice and when?

An ARA may issue a clean-up notice when it reasonably suspects a pollution incident has occurred or is occurring (section 91(1) of the POEO Act). A clean-up notice may be issued when a leak, spill or other escape or deposit of a substance that results in pollution is likely to occur, has occurred or is occurring; that is not just once it has occurred.

For example a clean-up notice may be issued for a suspected:

- air pollution incident (see also the [Local Government Air Quality Toolkit](#))
- water pollution incident (see also Managing Water Pollution in NSW on the [EPA website](#)).

Clean-up notices may **not** be issued if the incident only involves the emission of noise. The POEO Act [dictionary](#) provides definitions of 'pollution incident' and 'pollution'.

The ARA may issue a clean-up notice to the **owner or occupier** of the premises where the pollution incident has occurred or is occurring or to the person reasonably suspected to be the **polluter** (that is who caused the pollution incident). In an emergency situation, the EPA may issue a clean-up notice even if it is not the ARA (section 91(2) of the POEO Act).

A public authority (as defined in section 92(5) of the POEO Act) that is **not** the owner, occupier or polluter may also be directed by the EPA to clean up a pollution incident, even if others have been directed to clean it up (section 92 of the POEO Act). The EPA sometimes issues these clean-up notices in emergencies.

If the person directed to clean up did not cause the pollution incident, the costs of complying with the clean-up notice may be recovered in court (section 91(4) of the POEO Act). Failure to comply with the requirements of a clean-up notice, without reasonable excuse, is an offence.

Box 3.1: What is reasonable suspicion?

Case study 1

In *Environment Protection Authority v Sydney Drum Machinery Pty Ltd (No 4)* [2016] NSWLEC 59, the director of Sydney Drum Machinery Pty Ltd pleaded not guilty to committing two offences against section 91(5) of the Act in failing to comply with two clean-up notices without reasonable excuse. In dealing with the charges, the NSW Land and Environment Court considered what is a 'reasonable suspicion' in the context of issuing a clean-up notice. The Court found that to issue a clean-up notice, the EPA must reasonably suspect that a pollution incident has occurred or is occurring. Whether a

suspicion is 'reasonable' is an objective question that must be considered in light of all the facts known, or reasonably capable of being known, to the decision-maker at the time of making the decision. The Court stated that the facts upon which the suspicion is based must be sufficient to induce such suspicion in a reasonable person.

Case study 2

In *Kempsey Shire Council v Slade* [2015] NSWLEC 135, the NSW Land and Environment Court considered what is a 'reasonable suspicion' in the context of a public authority issuing a compliance cost notice under section 104(2)(b) of the POEO Act. The Court found that the public authority must have formed a genuine suspicion that a particular person (or persons) caused the pollution incident. A reasonable suspicion involves less than a reasonable belief but more than a possibility. The Court stated that the suspicion must be reasonable in that there is some objective and factual basis for the suspicion, which would create in the mind of a reasonable person in the public authority's position an apprehension that that person caused the pollution incident to which the clean-up order relates.

Note that these case studies are a guide only and do not constitute legal advice. The cases referred to may be superseded by other cases at any time. Readers should seek their own legal advice in relation to their specific circumstances.

3.2.2. What can you require in a clean-up notice?

Clean-up action, in relation to a pollution incident, includes:

- taking action to prevent, minimise, remove, disperse, destroy or mitigate any pollution resulting or likely to result from the incident
- ascertaining the nature and extent of the pollution incident and resulting pollution
- preparing and carrying out a remedial plan of action
- taking action to remove or store waste that has been disposed of on land unlawfully.

This list can be found in the definition of 'clean-up action' in the dictionary of the POEO Act. A clean-up notice may also require the recipient to provide progress updates (section 91(3) of the POEO Act).

For example you might give a direction to:

- put out booms and absorbent matting to prevent or minimise oil spreading from a spill
- remove manure from a sensitive location
- install and maintain sediment and erosion fencing to prevent sediment leaving the premises.

When issuing a clean-up notice you should comply with the principles of procedural fairness (see Section 4.3 of this guideline).

Box 3.2: What is reasonable action?

In *Environment Protection Authority v Sydney Drum Machinery Pty Ltd (No 4)* [2016] NSWLEC 59, the defendant challenged the validity of a clean-up notice issued under section 91 of the POEO Act on the basis that the clean-up actions required under the notice were unreasonable. The NSW Land and Environment Court stated that reasonableness cannot be judged by determining whether it was the 'best' or 'preferable' decision. Rather, the correct inquiry is whether the decision was within power and not unreasonable in the relevant sense. The Court accepted that the cost of compliance, the capacity to comply with a requirement imposed (objectively judged) and expert advice may be relevant when determining whether a direction imposed by a notice is reasonable. However, the Court emphasised that the relevance of these factors can only be determined by referring to the facts and circumstances pertaining at the date of the decision to give the relevant direction. The Court noted that each of these factors requires objective assessment rather than by assessment directed to the circumstances of the particular recipient.

Note that this case study is a guide only and does not constitute legal advice. The case referred to may be superseded by other cases at any time. Readers should seek their own legal advice in relation to their specific circumstances.

3.2.3. Administrative fee

An ARA can charge a fee prescribed in the POEO General Regulation to cover the administrative costs of preparing and serving (but not varying) a clean-up notice (clause 99 of the POEO General Regulation). The fee must be paid within 30 days. A fine of up to \$22,000 can be given by a court if a person is prosecuted for not paying the fee on time. The ARA may extend the time for payment or waive all or part of the fee (section 94 of the POEO Act). For example the ARA might waive the fee for charities or in cases of demonstrated hardship or bankruptcy.

3.3. Prevention notices

An ARA may issue this type of notice in writing under section 96 of the POEO Act. A prevention notice is issued to ensure that an activity is carried on in future in an **environmentally satisfactory manner**. Failure to comply with the requirements of a prevention notice is an offence.

A template for a prevention notice can be found [here](#).

Box 3.3: Prevention notices

Case study 1

In *Cantarella Bros Pty Ltd v City of Ryde Council* [2003] NSWLEC 388, the NSW Land and Environment Court considered the validity of a prevention notice issued under section 96 of the POEO Act. The notice was issued following a complaint about coffee odours being emitted from the applicant's premises and directed the preparation of an odour impact assessment report. In finding that the notice was valid, the Court stated that section 96 will operate in circumstances where the authority has a reasonable suspicion and issues a notice that is intended to ensure the activity is carried out in an environmentally satisfactory manner in the future. The Court accepted that one mechanism by which the regulatory authority may ensure this occurs will be to require the relevant person to disclose, following investigation, information as to the current environmental performance of the premises. The Court also noted that where a notice provides for a time period in which work is to be undertaken after which criminal sanctions operate, care needs to be exercised in ensuring that the time limit is accurately stated and free from ambiguity.

Case study 2

In *Udy v Hornsby Shire Council* [2007] NSWLEC 242, the respondent council issued a prevention notice under section 96 of the POEO Act that required the applicant to cease importing fill and removing trees from land. The applicant appealed against the notice, contending that the notice and the actions it required were beyond power. The Court found that the notice was within power and valid, stating that a prevention notice is not limited to regulating economic or business activities but extends to private activities. The Court also found that prevention notices are not limited to ongoing activities; they may address a 'one-off' activity and may require activities cease altogether.

Note that these case studies are a guide only and do not constitute legal advice. The cases referred to may be superseded by other cases at any time. Readers should seek their own legal advice in relation to their specific circumstances.

3.3.1. Who can issue a prevention notice and when?

An **ARA** may issue a prevention notice when it reasonably suspects that an activity has been or is being carried out in an **'environmentally unsatisfactory manner'**.

Box 3.4: Meaning of environmentally unsatisfactory manner (section 95 of the POEO Act)

An activity is carried on in an environmentally unsatisfactory manner if:

- it is carried on in contravention of, or in a manner that is likely to lead to a contravention of, the POEO Act, the Regulations made under it or a condition attached to an environment protection licence, including a condition of a surrender of a licence, or an exemption given under the POEO Act or the Regulations made under it
- it causes, or is likely to cause, a pollution incident
- it is not carried out by such practicable means as may be necessary to prevent, control or minimise pollution, the emission of any noise or the generation of waste, or
- it is not carried on in accordance with good environmental practice.

Depending on the circumstances, a prevention notice may be issued to the **occupier**, and/or the **person who is carrying on the activity** (section 96(2) of the POEO Act). If the occupier is not the person carrying on the activity, the notice requires the occupier to take all available steps to cause the required action to be taken (section 96(4) of the POEO Act). Where there is an environment protection licence in place, it may be more appropriate to address the issue by placing appropriate conditions on the licence, rather than by issuing a prevention notice.

3.3.2. What can a prevention notice require?

A prevention notice must specify the **action** to be taken and, if appropriate, the **date** for compliance. Some specified actions may be ongoing. A prevention notice may direct the person to take action (**preventive action**) to ensure that in future the activity is carried on in an environmentally satisfactory manner.

Box 3.5: Examples of preventive action (section 96(3) of the POEO Act)

The action to be taken may include:

- installing, repairing, altering, replacing, maintaining or operating control equipment or any other plant
- modifying, or carrying out any work on, plant
- ceasing to use plant or altering the way plant is used
- ceasing to carry on, or not starting to carry on, an activity
- carrying on an activity in a particular manner
- carrying on an activity only during particular times
- monitoring, sampling or analysing any pollution, or otherwise ascertaining the nature and extent of pollution or the risk of pollution
- action with respect to the transportation, collection, reception, re-use, recovery, recycling, processing, storage or disposal of any waste or other substance
- preparing a plan of action to control, prevent or minimise pollution or waste
- reviewing the carrying out of an activity

For example prevention notices may direct the recipient to:

- install bunding to the relevant standard at a waste-oil collection area to prevent spills from the collection area
- develop and submit a management plan to control waste and odours from compost storage
- carry out and submit a noise assessment to determine whether operations are complying with project specific noise criteria (only if the ARA reasonably suspects that the operation has made offensive noise)
- construct a wet weather treatment pond to capture and treat discharge from the premises.

A prevention notice may also require the recipient to provide reports detailing the progress made in carrying out the required action (section 96(5) of the POEO Act).

If the preventive action requires development consent or any other approval, the ARA issuing the notice should give the recipient sufficient (and reasonable) time to obtain the required approvals.

When issuing a prevention notice the ARA should comply with the principles of procedural fairness (see Section 4.3 of this guideline).

Box 3.6: Prevention notices relating to water pollution (section 96(3A) of the POEO Act)

The ARA needs to consider certain matters when giving directions in a prevention notice relating to actual or likely water pollution (section 96(3A) of the POEO Act).

“The appropriate regulatory authority, when determining the action to be specified in a [prevention] notice relating to an activity that causes, is likely to cause or has caused water pollution, must consider:

- a. the environmental values of water affected by the activity, and
- b. the practical measures that could be taken to restore or maintain those environmental values, and
- c. if the appropriate regulatory authority is not the EPA—any guidelines issued by the EPA to the authority relating to the exercise of functions under this section.”

The EPA has published Considering Environmental Values of Water when Issuing Prevention Notices (DEC 2006) for the purposes of section 96(3A)(c) of the POEO Act.

The dictionary of the POEO Act states that environmental values of water means “the environmental values of water specified in the *Australian and New Zealand Guidelines for Fresh and Marine Water Quality 2000* as in force from time to time” (ANZECC/ARMCANZ 2000).

3.3.3. Administrative fee

An ARA can charge a fee prescribed in the POEO General Regulation to cover the administrative costs of preparing and serving (but not varying) a prevention notice (clause 99 of the POEO General Regulation). It is an offence not to pay the fee within 30 days. A fine of up to \$22,000 can be given by a court if the person is prosecuted. The ARA may extend the time for payment or waive all or part of the fee (section 100 of the POEO Act). For example the ARA might waive the fee for charities or in cases of demonstrated hardship or bankruptcy.

3.3.4. Appeals

A person may appeal against a prevention notice to the Land and Environment Court within 21 days of the notice being served (section 289 of the POEO Act). Prevention notices operate from the day they are issued (unless another date is specified), so an ARA may require action within the appeal period. The recipient must comply with the notice unless the Land and Environment Court directs that the notice is stayed; that is the requirements in the notice are temporarily put on hold pending the court’s consideration of the notice. If the court stays the notice, the notice does not operate until the stay ceases, or the Land and Environment Court confirms the notice, or the appeal is withdrawn, whichever occurs first (section 99 of the POEO Act).

3.4. Prohibition notices

Prohibition notices are not discussed in detail in this guideline, as they may only be issued by the **Minister** administering the POEO Act and only on the recommendation of the EPA. Prohibition notices must be issued in writing and can be issued to the occupier of the premises or the person carrying out the activity. The EPA may recommend to the Minister that a notice be given under section 101 of the

POEO Act if the EPA is of the opinion that the emission or discharge of pollutants from, or within, any premises in which any activity is carried on:

- is causing, or is likely to cause, such harm to the environment
- is, or is likely to be, so injurious to public health, or
- is causing, or is likely to cause, such discomfort or inconvenience to anyone not associated with the management or operation of the activity;

that the giving of the notice is warranted (section 101(1) of the POEO Act).

The notice can direct the occupier of the premises and/or the person carrying on the activity to stop doing the activity, or any specified aspect of it, for a specific timeframe. If the occupier is not the person carrying on the activity, the notice issued is taken to require the occupier to take all available steps to stop the activity (section 101(3) of the POEO Act), for example by allowing the person who was carrying on the activity (and was issued a notice) to access the premises to stop the activity.

The administrative costs of issuing or varying a prohibition notice are not recoverable, and there is no statutory right of appeal. Failure to comply with the requirements of a prohibition notice, without reasonable excuse, is an offence.

3.5. Compliance cost notices

Compliance cost notices allow public authorities (such as councils carrying out compliance-related actions) and ARAs to recover reasonable costs and expenses associated with:

- monitoring and ensuring that the recipient of a clean-up, prevention or noise control notice (sections 104 and 267B of the POEO Act) has complied with that notice
- taking any action that is needed because a prevention or prohibition notice was not complied with (section 104(4) of the POEO Act)
- voluntary clean-up action taken by public authorities under section 92 of the POEO Act (section 104(2)).

The compliance cost notice must be issued in writing to the same person who was issued with the clean-up, prevention, prohibition or noise control notice. In the case of voluntary clean-up action taken by public authorities, the notice may be issued to the occupier of the premises at which the authority reasonably suspects the pollution incident occurred or to the person reasonably suspected of having caused the pollution incident.

All claims must be justifiable as they can be challenged in court. You should keep detailed records, including receipts for all expenses incurred, and develop a standard form for recording staff hours.

You can find compliance cost notice templates [here](#).

3.5.1. Enforcing compliance cost notices

If a person fails to comply with the compliance cost notice, the ARA or public authority may recover any unpaid amounts as a debt in court. If the person served with the compliance cost notice complies with the notice but was not the person who caused the pollution or noise, they can recover in court any costs from the person who did cause it (sections 105 and 267B of the POEO Act).

An ARA or public authority can register the compliance cost notice against any land owned by the person (section 106 of the POEO Act). A charge on the land is created to secure payment to the authority (section 107 of the POEO Act). This charge will end when the amount is paid, on sale or other disposition of the property (with consent from the authority who issued the notice), or if the land is sold to a purchaser in good faith for value who, at the time of sale, had no notice of the charge (section 107(3) of the POEO Act).

Costs associated with registering the notice and any resulting charge can be recovered from the person served with the notice (section 107(8) of the POEO Act). Unpaid amounts can be recovered as a debt in court.

3.6. Notices to provide information and records

The power to require information and records is a Chapter 7 POEO Act investigation power, expressed through a written notice. The general offences that relate to Chapter 7 powers are set out in section 211, including:

- neglecting or failing, without lawful excuse, to comply with a requirement
- knowingly providing false or misleading information.

The general concepts outlined in Section 2 of this guideline regarding the exercise of Chapter 7 POEO powers apply.

3.6.1. Who can issue a notice to provide information and records and when?

The EPA, other ARAs or an authorised officer may issue a written notice to a person requiring information and records in connection with any matter relating to the regulatory authority's responsibilities or functions.

Notices requiring information and records may be issued by:

- the **EPA** (section 191 of the POEO Act)
- other **ARAs** (section 192 of the POEO Act) – notice template [here](#).
- **authorised officers** (section 193 of the POEO Act) – notice template [here](#).

The EPA can issue a notice for information and records whether or not it is the ARA in the circumstances (section 191(2) of the POEO Act). An EPA authorised officer can issue a notice whether or not the EPA is the ARA in the circumstances (section 193(2) of the POEO Act). Other regulatory authorities can only issue notices if they are the ARA (section 192).

It is important to use the correct type of notice from the list above. If a notice is issued by the EPA or other regulatory authority, an officer with delegated power may issue the notice, using their delegated power. Authorised officers may issue notices under section 193 using their powers as an authorised officer. You should always check the relevant delegation instrument or your instrument of authorisation to make sure you have the power to issue the notice.

3.6.2. What is required before you can issue a notice to provide information and records?

When issuing a notice requiring information or records, you must:

- issue the notice for a relevant purpose (the statutory purpose under section 184 of the POEO Act)
- require information or records in connection with a matter within the responsibilities or functions of the regulatory authority (the subject matter).

As with all Chapter 7 powers, the power to issue notices requiring information or records may only be exercised for a purpose specified in section 184 of the POEO Act. Those purposes are:

- determining whether there has been compliance with or a contravention of the Act
- obtaining information or records for purposes connected with administration of the Act
- generally administering the Act and protecting the environment.

You can think of the **matter** as meaning the subject matter about which the information or records is being sought. For example it may be the particular incident or suspected contravention that is being investigated, such as the transport of waste from a premises between specified dates.

You should set out the purpose and matter in the background to the notice using separate headings (see Box 3.7). The matter needs to be outlined with enough detail and be specific enough for the

recipient of the notice to know why the information or record is being sought. This means, where relevant, you should include such details as:

- the responsibility or function of the regulatory authority to which the matter relates
- relevant provisions of legislation, including under what section the notice is issued
- any potential offences that are being investigated
- any relevant licences, notices or other instruments
- if the notice relates to a potential contravention, the period when the contravention is thought to have occurred
- an outline of the facts that have led to the investigation, including referring to any premises or locations that are relevant.

It is not necessary to identify a suspect (and generally a suspect should not be named in a notice) or to provide all details of the investigation.

Additionally, notices must:

- specify the information or records that must be provided (section 194 of the POEO Act)
- only require information and records that relate to the matter (such as the contravention being investigated)
- only require records that exist – you cannot ask the person to create new records but you can ask for information to explain existing records or why records do not exist
- only require a person to provide records that are within the recipient's possession or power to obtain lawfully (section 195 of the POEO Act) – the recipient cannot be expected to make extensive enquiries of people they do not have a direct relationship with
- give a reasonable time for the provision of the information/records (section 194 of the POEO Act)
- specify the way information/records are to be provided (such as written/electronic) – the regulatory authority may take copies of records (section 195(2) of the POEO Act)
- contain the required warnings (see Section 3.6.3 of this guideline).

You cannot charge a fee to cover the administrative costs of issuing this type of notice.

Box 3.7: Identifying the matter and purpose

In *D'Anastasi v Department of Environment, Climate Change and Water* [2011] NSWCA 374, the NSW Court of Appeal considered the validity of a notice requiring information and records issued under section 193 of the POEO Act. The Court found that section 193 of the POEO Act requires a notice to identify the 'matter' within the responsibilities and functions of the regulatory authority that the information and/or records are connected to. The Court stated that in identifying the matter, the notice must go beyond simply stating that alleged contravention of some identified section is being investigated. The Court emphasised that notices must provide a description of the matter that is sufficient to enable the recipient to identify the relationship between the information and records being sought and the 'matter' to which the notice relates.

Note that this case study is a guide only and does not constitute legal advice. The case referred to may be superseded by other cases at any time. Readers should seek their own legal advice in relation to their specific circumstances.

3.6.3. Give the required warnings

The offence provisions in section 211 of the POEO Act (and discussed in Section 2.11 of this guideline), also apply to this power to provide information and records. You must **warn** the person that it is an offence to fail to comply with the notice (that is not provide the required information and records) or to provide false or misleading information.

If you do not warn the person, they cannot be penalised for failing to comply.

If a person objects (because the information or records may incriminate them personally), they must still provide the required information and records but any information provided is generally not admissible

against that person. Information may be admissible against a person in relation to a charge of providing false or misleading information in breach of Chapter 7 (section 212(3) of the POEO Act). The information provided by the person may be admissible against other persons.

However, any records provided may be used against either a person or corporate entity in criminal proceedings. Any record furnished by a person is not inadmissible on the grounds that the record may incriminate them personally (section 212(4) of the POEO Act).

Box 3.8: Interviews can be more productive

When considering how best to obtain *information* using your statutory powers, you have two options: a written notice under sections 191–193 of the POEO Act, or through your section 203 power to require answers. A written notice requiring answers to questions may not be as productive as a personal interview because written answers can be carefully screened and crafted. Also, some answers may raise new issues and it is very difficult to draft a notice to provide information and/or records covering all eventualities, so you might end up having to serve multiple notices.

3.7. Smoke abatement notices

Smoke abatement notice provisions (section 135B of the POEO Act) may be used to address poor woodheater operation, by requiring the recipient to take action to prevent excessive smoke from a chimney on or in residential premises. These provisions are aimed at householders who allow their heaters to emit visible smoke for lengthy periods of time.

Box 3.9: What is ‘excessive smoke’? (section 135A of the POEO Act)

“...*excessive smoke* means the emission of a visible plume of smoke from a chimney for a continuous period of not less than 10 minutes, including a period of not less than 30 seconds when the plume extends at least 10 metres from the point at which the smoke is emitted from the chimney.”

Authorised officers of councils may consider issuing a smoke abatement notice where a householder has been given adequate information on correct woodheater operation, but makes little or no effort to prevent excessive wood smoke emissions.

A smoke abatement notice must be issued in writing to the **occupier** of the premises. It can be issued if excessive smoke is being, or has been, emitted from a chimney attached to residential premises. The notice must be issued within seven days of the observation (section 135B(1) of the POEO Act).

A smoke abatement notice directs a person to ensure excessive smoke is not emitted from the chimney at any time after 21 days following the giving of the notice. This ensures the householder has reasonable time to carry out the necessary improvements, maintenance or repairs. The notice applies for six months unless revoked earlier. This enables the notice to be valid for one winter period only.

Before issuing a notice, you could consider whether a warning (given verbally or in writing) would provide sufficient incentive for the householder to improve the operation of their heater.

A smoke abatement notice cannot be issued for a chimney that is in or on an incinerator or is used only for smoke originating from outside a residence.

Failure to comply with a smoke abatement notice, without reasonable excuse, is an offence under section 135C. A penalty notice imposes a fine under Schedule 6 of the POEO General Regulation. For more serious breaches, a larger penalty of up to \$3,300 may be imposed by a court.

You can find a sample smoke abatement notice on the EPA's [Smoke abatement notices](#) webpage.

Other resources for local government, including methods for recording observations of excessive smoke, can be found on the EPA's [Wood smoke resources for local government](#) webpage.

3.8. Regulating noise

The EPA protects human exposure to noise by regulating industrial, construction and agricultural noise (primarily through environment protection licences) and works in partnership with councils and the police to ensure neighbourhood noise and motor vehicle noise are controlled.

The POEO Act:

- identifies the authority responsible for regulating noise (section 6)
- defines 'noise' and 'offensive noise' (Act [dictionary](#))
- provides a range of regulatory tools to manage noise, including a noise control notice, noise abatement direction, a prevention notice, and a noise abatement order
- makes it an offence to breach the conditions of a notice, direction or order.

The ARAs for noise include:

- the EPA – for activities in Schedule 1 to the POEO Act, works carried out by state or public authorities (such as council road works) and licensed premises, and certain non-scheduled activities in clauses 89, 90 and 92 of the POEO General Regulation, such as large outdoor entertainment activities
- the EPA – noisy vehicle offences under the POEO Noise Control Regulation 2017
- the Olympic Park Authority – for entertainment activities within that park that are not carried out by a state or public authority
- the relevant marine authority for vessels in navigable waters or premises used in connection with those vessels
- councils – most other premises/activities in its local government area.

Regulatory tools to manage noise, including noise control notices, prevention notices and noise abatement directions and orders are detailed in Part 4 of the EPA [Noise Guide for Local Government](#).

Table B3 provides a summary of these tools.

4. Issuing and enforcing notices

This section provides some guidance on drafting and issuing notices to ensure they are enforceable, and how to enforce them.

Notices, directions and orders are key strategic tools that allow regulatory authorities and authorised officers to respond to alleged environmental harm or other breaches of environment protection legislation.

4.1. Drafting notices

If a notice is not drafted carefully it can be unenforceable or invalid.

ARAs and authorised officers should ensure that all notices they issue:

- meet all statutory prerequisites for issuing the notice (such as a reasonable suspicion that a pollution incident has occurred in the case of a clean-up notice)
- are signed by a person with power to issue the notice (power by authorisation (Section 1.7 of this guideline) or delegation (Section 1.6 of this guideline))
- are issued to the correct legal entity – ensure the 'person' to whom you are issuing the legal instrument is a legal entity (see Section 4.2 of this guideline)

- require only what is reasonable (such as after considering the likely costs and time required to comply), appropriate and within the power of the notice to require
- have requirements that relate to the subject of the notice (for example conditions in a clean-up notice should be related to pollution from activities at the subject premises)
- have requirements that are directed to the recipient (that is it is within the recipient's power to comply with them)
- are clear and certain as to what needs to be done and by when it needs to be done
- define all relevant premises or locations
- use plain English and consistent terminology, and explain any technical terms
- are translated into the recipient's native language, if they may not understand the notice in English
- include appropriate information and warnings required under section 212 (see Section 2.6 of this guideline)
- where appropriate, afford the person procedural fairness (for example the opportunity to comment on a draft clean-up notice)
- include any appeal rights and timeframe
- are courteous and brief
- generally, do not name a suspect.

It is generally helpful to explain in a covering letter what the ARA will do with the requested information. For example an officer may intend to consider this report and, if satisfied with the recommended actions, issue a subsequent prevention notice to require these works to be carried out.

4.1.1. What to include in the background section

It is very important that the 'background' section of a notice explains why and for what purpose the notice is being issued, and demonstrates that all the statutory prerequisites to issuing the notice have been met. For example a clean-up notice should establish that a pollution incident has or is likely to occur, and why you are the ARA for the activity.

The background to the notice should provide the notice recipient with enough information to understand what the notice relates to, what statutory powers are being exercised and why they are being asked to do something. The information that needs to go in the background depends in part on the type of notice being issued.

Include the following in the background:

- a plain English outline of the facts that led to the notice being issued; avoid referring to facts that are not directly relevant to the matter
- separate sections (with headings) that clearly set out the incident, matter or contravention that is the subject of the notice and, in the case of investigative notices, the purpose for which the notice is being issued
- details of how any statutory prerequisites for issuing the notice are met
- if relevant, details of why the regulatory authority is the ARA (for example whether the activities carried on at the premises are scheduled activities and on what basis)
- details of why the notice is being issued to the person (such as the owner, occupier or person carrying out relevant activities)
- a list of all legislative provisions and licence conditions that relate to the incident, matter or contravention
- the notice number, the premises and any relevant licence number
- the relevant period the notice relates to (for example if the notice is about a breach, include the date and approximate time the breach is suspected to have occurred).

4.1.2. Directions

It is important to clearly specify what the notice recipient must do, in what order and by when. You should consider the following when drafting your notice conditions:

- The directions must relate to the matters set out in the background to the notice.
- Where the recipient is directed to carry out certain actions, specify those actions in a sequential manner (what, where, by when) and with sufficient detail for the recipient to understand what they need to do to comply with the notice. Include useful headings to group requirements or show various stages of works.
- Use precise dates for when specific actions, or group of actions, must be completed (for example do not say 'immediately' or 'within 14 days of the issue of this notice').
- Specify the date by which reports and other information should be submitted and the method (such as electronically) and/or the address where they should be lodged (and a contact person).
- Require the report to be in writing and clearly specify what should be included in it.
- Specify what evidence (such as receipts, documentation or photographs) the recipient must retain or provide to confirm any required actions have been carried out.
- Specify whether it is necessary to engage an expert to carry out required actions and/or whether any publicly available guidelines must be followed.
- Conditions should not require compliance with separate technical reports, letters or other documents. It is much better to spell out or repeat the requirements in the legal instrument so there is no doubt about what is required. A variation to the legal instrument may be needed.
- Consider providing maps or other diagrams to explain the area that required actions relate to.

4.2. The correct legal entity

Notices must be issued to a 'legal entity'. The law recognises two legal entities: an individual and an incorporated body. The latter can include a company, statutory body, incorporated association (non-profit organisations), cooperative (such as an association or society) or other body corporate (such as a council). They are collectively termed a 'corporation' in this guideline.

4.2.1. An individual

If you are issuing a notice to an individual, you should use their full name to avoid ambiguity (for example this avoids confusion where a parent and child have the same initial but different first names).

4.2.2. A corporation

A company is a corporation established under the *Corporations Act 2001* (Cwlth). A corporation is an artificial legal person. This means it can own property, enter into contracts, sue and be sued and be the subject of a criminal prosecution. Like an individual human (a natural person), a corporation is a distinct legal entity. This means that it is a separate person from its directors, managers, employees and shareholders.

A **company** is usually identified by one of the following:

- Proprietary Limited
- Pty Ltd
- Limited
- P/L
- NL (which stands for No Liability).

Every company registered under the Corporations Act has a unique, nine-digit Australian Company Number (ACN) (or an ARBN if it is an overseas corporation). The ACN should not be confused with an Australian Business Number (ABN). ABNs are issued to all businesses for taxation purposes and do not relate to an organisation's status as a corporation or as a legal entity.

The following are **not legal entities**:

- business or trading names
- partnerships
- joint ventures
- a division of a corporation
- a management committee that is not a body corporate
- a community group that is not an incorporated association
- an unincorporated association
- some government departments and agencies (check whether it is established under legislation)
- private trusts or statutory trusts that are not bodies corporate
- cooperative research centres (unless incorporated).

Business or trading names are not legal entities; they are just names under which legal entities do business. If the owner of a business or trading name is an individual, the legal entity to which the notice is issued should be written as, for example, 'Mr Zac Smith trading as XYZ Australia'. If the owner of the business or trading name is a corporation, the legal entity should be written as, for example, 'XYZ Pty Ltd trading as XYZ Australia' (see Box 4.1).

Similarly, partnerships and joint ventures are not legal entities; however, each individual member or organisation of a partnership or joint venture is a legal entity.

You can find the name and type of a company or organisation by doing a basic 'Organisations and Business Names' search of the ASIC registers on the [ASIC Connect](#) webpage.

Box 4.1: Issuing a notice to the correct legal entity

A notice could be issued to:

- XYZ Pty Ltd (a corporation)
- XYZ Pty Ltd trading as ABC Paints (a corporation that operates under a trading name)
- Mr John Smith trading as ABC Paints (an individual who operates under a trading name)

but not to ABC Paints, as that is only the trading name and is not a legal entity on its own.

It is important to check the spelling of the names of both individuals and organisations. A small error could cause doubts about the enforceability of a notice.

4.3. Procedural fairness

When making decisions affecting the rights or other interests of individuals, you should comply with the principles of procedural fairness (also known as natural justice). This means, as a decision-maker, you should afford a person whose interests will be adversely affected by a decision an opportunity to be heard and you should be impartial and unbiased in the matter to be decided.

Failure to comply with these principles may affect the legal validity of the decision. You should check whether the legislative provisions under which you are issuing a notice specify any consultation requirements. Seek legal advice if you are unsure. Not all notices require procedural fairness.

Procedural fairness can be afforded by:

- providing a fair hearing – allowing a person adversely affected by a decision to present their case. This may include, for example,
 - providing a draft clean-up, prevention or noise control notice to the notice recipient and considering their comments before issuing a final version of the notice
 - notifying a third party who may be impacted by actions required by a clean-up, prevention or noise control notice. For example if you issue a clean-up notice to an occupier or a public authority and the occupier or public authority has a right to recover the cost of complying with the notice from a polluter, consider whether you should give the polluter (if known) an opportunity to comment on the notice
- being impartial in the decision-making process – regulatory authorities and officers are to be unbiased and not hold a vested interest in the outcome of a process
- basing decisions on evidence provided and having a rational basis on which the decision-maker has decided to accept the evidence as credible. For example you might decide whether a bund is big enough to contain a spill based on a calculation of the volume of the drums in the bund.

The amount of consultation required, or the time needed for input, may vary depending on the type of notice being issued, what it requires the person to do and the circumstances. Generally, procedural fairness requirements will be more extensive where a notice will have significant impacts on a person's interests.

Notices sometimes need to be issued in an emergency. The need for urgent action is likely to make it difficult to provide procedural fairness in the normal way or as extensively. In these cases, consider how you can provide procedural fairness; for example you could discuss the requirements with the proponent and then incorporate their comments before issuing the notice or giving the direction. In this case remember to make a record of the conversation as evidence.

4.4. Issuing notices

As discussed in Sections 1.5 to 1.7 of this guideline, whether you have power to issue a notice depends on whether the notice may be issued by the EPA or ARA (in which case you must have delegated power) or by an authorised officer (in which case you must be authorised to do so). It is important to check the legislation carefully to see who the notice may be issued by.

If a person has delegated authority to issue a notice, they do not need to also be an authorised officer under the POEO Act. For example an EPA officer with the appropriate delegation may issue a section 191 notice (requiring information and records to be provided to the EPA); however, the officer must be an authorised officer to issue a section 193 notice (which similarly requires the recipient to provide information).

Most notices need to be issued in writing. The exception to this is a clean-up direction that **may** be issued orally but **must** be confirmed in writing within 72 hours from the time it was given; or the oral direction ceases to have effect.

All notices must be issued to the correct person depending on the type of notice. For example a prevention notice can be issued to the person carrying on the activity and/or the occupier.

Box 4.2: Considerations when issuing a notice

Sometimes, you can legally issue the notice to more than one person. Once you have identified who the notice may be issued to, you should consider who the most appropriate person is.

When proposing to issue a notice, the EPA considers:

- who is most responsible. It is often more appropriate to issue a notice to the person who has overall responsibility for an activity rather than a subcontractor
- the ability of the person to pay a fine or carry out works. For example if a pollution incident is occurring and you consider works need to be undertaken urgently, you could consider issuing the notice to the person (this includes a corporation) who will have the financial capacity to undertake the works, rather than the person who caused the pollution. They can then choose to recover costs from the polluter in court.

You should also consider your organisation's relevant policies.

It is also important to ensure the notice is issued to a legal entity (see Section 4.2 above).

Notices may be issued to persons, or for matters or things outside NSW, so long as the matter or thing affects the NSW environment (section 109 of the POEO Act).

When issuing notices, ensure you afford procedural fairness (see Section 4.3 above).

4.5. Varying and revoking notices and multiple notices

4.5.1. Varying and revoking environment protection and noise control notices

An environment protection notice or noise control notice may be revoked or varied by a **subsequent notice** from the regulatory authority that issued the original notice (sections 110 and 266 of the POEO Act). This may include varying in the notice the directions or timeframe for compliance. All requests from the notice recipient to vary a notice should be provided in writing. You should only give an extension after carefully considering the reasons for the request. Importantly, you should only extend a timeframe by a **variation notice** – not verbally, by letter or by email.

Where timeframes specified in a notice have lapsed, there is a **continuing obligation** on a person to comply with a notice issued to them under the POEO Act, even if the due date has passed (section 319A of the POEO Act). You cannot recover administrative costs associated with issuing a variation notice.

4.5.2. Multiple notices

More than one environment protection notice may be issued to the same person under Chapter 4 of the POEO Act (section 108 of the POEO Act). Be careful to ensure that all notice requirements are clear and avoid confusing or overlapping requirements.

It is also possible to issue more than one notice to the same person for an incident that may be in potential breach of two (or more) separate Acts.

Be careful about serving the same notice to multiple people, as it can be difficult to work out who to take action against if the notice is not complied with.

You should consider your next steps and seek legal advice before issuing multiple notices.

4.6. Serving notices

Only serve a notice using a method allowed under legislation. Under section 321 of the POEO Act, a notice or any other document may be served on a person by:

- delivering it personally
- leaving it with another person at the place of residence or business of the person
- sending it by post (to the person's place of residence or business or the place indicated by the person as an address to which correspondence may be posted)
- leaving it addressed to the person at a document exchange
- sending it by fax or email (in accordance with arrangements indicated by the person).

Where notices are served on corporations, the provisions of the Corporations Act regarding service of documents also apply.

It is good practice to personally deliver a notice or use registered post. This is so you can easily prove the person received the notice. You should keep records, such as registered mail or fax receipts, as evidence that the notice was served and the recipient received it. It is also best to use only one method to serve a notice. If you serve a notice using two methods, for example both email and post, you may have difficulty determining the date the notice was served.

4.7. Enforcing notices

After a notice is issued, it is important to keep track of the due dates so you can take prompt follow-up action and determine whether the conditions have been met. Regulatory action for failing to comply with a notice may be considered (see Section 5 of this guideline). The maximum penalties for failing to comply with specific notices are listed in Section 3.1.1 of this guideline.

5. Penalty notices and other regulatory options

This section provides an overview of regulatory options and guidance on issuing and serving penalty notices.

5.1. Regulatory approaches

Environmental improvement and enforcement are most effective when they raise environmental awareness and encourage behavioural change. That is when they have the most potential to improve compliance rates and secure long-term environmental improvements.

Your regulatory response should be escalated depending on the risk to the environment and human health, the seriousness of the non-compliance, the apparent attitude to compliance, and the compliance history of the person and frequency of issues arising. In each matter, choose the tool that would best repair environmental damage and reduce incidences of re-offending. There is no 'one-size-fits-all' response to non-compliance; the choice of approaches and regulatory tools depends on the issue and context.

Consider your organisation's relevant policies. The [*EPA Compliance Policy*](#) outlines things to consider when choosing an appropriate response and provides more information about regulatory and compliance tools you might use. An escalation process is shown in Figure 3 of the EPA Compliance Policy.

You could consider how you and your organisation can become or continue to be credible regulators (see Section 1.10 of this guideline). For example you can share your experiences and learn from other regulators by being an active member of the AELERT network. The AELERT network is a particularly rich source of information, helping officers across Australasia to be more effective and credible regulators. Training courses are run by the EPA as part of AELERT's training program (see Section 1.2 of this guideline).

5.2. Regulatory tools

The EPA uses a range of approaches: both statutory and non-statutory tools.

Non-statutory tools used by the EPA include the following:

- **Advisory letters** are usually issued to advise a person of the need to meet their compliance responsibilities and to avoid breaches, often as a result of an inspection you conducted or some other regulatory work that was undertaken; you are advising the person that they need to do something.

Formal warnings are used for incidents where the aim is to avoid escalating environmental harm or the opportunity exists to achieve prompt voluntary compliance with legislative requirements; the seriousness of the non-compliance is usually at the lower end of the scale.

Statutory tools used by the EPA include the following:

- **Notices** are used to address environmental harm that is occurring or is about to occur. Section 3 of this guideline provides information on common notices under the POEO Act, and Section 4 provides information on drafting, issuing and serving notices.
- **Penalty notices** may be issued by the EPA or other regulatory authorities under the POEO Act and other environmental legislation. They are often used for minor breaches where you have sufficient, relevant, admissible evidence to be able to prove all elements of an offence beyond a reasonable doubt (see Sections 5.3 to 5.7).
- **Official cautions** may be issued as an alternative to a penalty notice where an officer believes on reasonable grounds that a person has committed a Tier 3 offence and it is appropriate to give an official caution in the circumstances, having regard to the factors set out in the Attorney General's Caution Guidelines under section 19A(3) of the Fines Act 1996 (Fines Act). For example an EPA officer may consider using an official caution when the breach is both minor and was not deliberately committed. You need to exercise discretion based on your organisation's relevant guidance (see Section 5.8).
- **Enforceable undertakings** are an alternative regulatory tool for use where there has been a serious breach of legislation; however, it is a less serious response than prosecution (there is no criminal conviction). The EPA can accept a written undertaking by a company or individual to take action to deal with an actual or potential breach. This gives the EPA a legislative basis for negotiating environmental improvements, which are enforceable through the NSW Land and Environment Court (see Section 5.11 of this guideline). The EPA Guidelines on Enforceable Undertakings (2017) set out when the EPA is most likely to accept an enforceable undertaking and the specific factors it considers when evaluating whether an enforceable undertaking is an appropriate response in the circumstances.
- **Prosecutions** are used for serious breaches or repeat offenders (see Section 5.9 of this guideline).
- **Varying, suspending or revoking** an environmental protection licence or other regulatory instrument is used to include additional requirements to achieve compliance or where new issues have emerged, or for very serious issues to prevent further activity from taking place.

5.3. Overview of the penalty notice system

Information about issuing penalty notices is provided in Section 5 of the EPA Prosecution Guidelines. The penalty notice system was introduced to provide an effective and efficient means to deal with minor breaches of criminal provisions that are not considered serious enough to warrant court proceedings. A penalty notice carries a fixed penalty that is much less than the maximum penalty that can be given

in court. Penalty notice provisions under the POEO Act are found in Division 3 of Part 8.2 of the Act and Chapter 6 and Schedule 6 of the POEO General Regulation.

Penalty notices may be issued by enforcement officers if it appears to them that a person or company has committed a penalty notice offence under certain legislation, including the POEO Act (Tier 3 offences). Penalty notice offences are listed in Column 1 of Schedule 6 of the POEO General Regulation. Not all offences are penalty notice offences; for example Tier 1 offences under the POEO Act are not penalty notice offences. Schedule 6 also sets out the penalty amounts for each offence and which class of officer may issue a penalty notice for which type of offence.

Fixed Penalty Handbooks issued by Revenue NSW contain lists of offence codes for penalty notice offences. Handbooks are updated regularly to include codes for new offences. You will need the codes to fill out and issue a penalty notice. You should refer to the relevant Fixed Penalty Handbook and the POEO General Regulation, rather than your internal documents, when issuing a penalty notice to ensure you have the correct codes and amounts. See the [Revenue NSW](#) website for administrative enquiries and to log in to their business partner portal to download fixed penalty handbooks.

When a person is issued with a penalty notice, they can:

- pay the fine
- seek a review, or
- elect to have the matter determined in a court.

Payment of the fine does not result in a criminal conviction and is not an admission of guilt. If you issue a penalty notice under the POEO Act, and it is paid, further regulatory action for that offence (such as commencing a prosecution) cannot be taken. An unpaid fine is recoverable as a civil debt. Each regulatory authority is required to keep a public register (section 308 of the POEO Act) including details of each penalty notice issued by that authority (section 308(2)(j1) of the POEO Act).

Penalty notices under the POEO Act can be issued to a person personally or by post. For offences applying to an owner of a vehicle or vessel, a penalty notice may be issued by leaving the notice on the vehicle or vessel. For the latter, it can be addressed to the owner of the vehicle or vessel, without naming the owner or stating their address (clause 83 of the POEO General Regulation).

You should refer to the *EPA Prosecution Guidelines*, your organisation's equivalent guidance material and the Attorney General's *Caution Guidelines* under the *Fines Act 1996*. These are listed in Section 6 of this guideline.

5.4. Issuing penalty notices

Before issuing a penalty notice, you must be sure of the facts, meaning the facts are apparently incontrovertible. Every element of the offence must be present and there must be sufficient, relevant, admissible evidence to prove the offence.

You should be familiar with the wording of the particular offence provision before issuing the notice; for example the provision will state who can be found guilty of an offence. Under section 143 of the POEO Act, the person transporting waste and the owner of the waste can be issued with a penalty notice. Check for exemptions and defences. Also check things such as whether the relevant section contains the word 'or' or 'and', which indicates which elements you must prove.

5.4.1. Penalty notices to be issued by enforcement officers

Penalty notices can only be issued by enforcement officers (see Section 1.8 of this guideline) under the POEO Act (section 226). Before issuing a penalty notice, you should always check you have been appointed by your organisation to exercise the functions of an enforcement officer.

Clause 81 of the POEO General Regulation lists the persons of authorities prescribed as enforcement officers. It sets out the 17 classes of enforcement officers.

Council officers can only issue penalty notices "in relation to" their council's area (section 6(4) of the POEO Act).

A council officer can be an enforcement officer in respect of another council only if that other council has also duly authorised that person to exercise the functions of an enforcement officer under Division 3 of Part 8.2 of the Act (clause 81(3), POEO General Regulation).

The concept of what is “in relation to” the council area does not prevent officers from exercising functions outside their local government area. Examples of where this might be appropriate include speaking with witnesses at locations outside the local government area or responding to a pollution incident that crossed a local government area boundary. In other cases, officers should report their observations to the relevant council for it to follow up.

You cannot issue a penalty notice for, nor should you be investigating, an offence allegedly committed by the organisation you work for, or by one of its officers or employees (section 226(2) of the POEO Act and clause 81(4) of the POEO General Regulation). If you realise your organisation has committed or potentially committed an offence you should talk to your manager and/or follow your organisation’s procedures for reporting non-compliances.

5.4.2. EPA enforcement officers

Only enforcement officers of the EPA can issue a penalty notice for:

- an offence in relation to an environment protection licence, other than littering (section 226(3)(a) of the POEO Act)
- an offence alleged to have been committed by the state or a public authority, other than littering (section 226(3)(b) of the POEO Act)
- an offence (other than a littering offence) alleged to have been committed in relation to activities carried on by an authorised network operator (within the meaning of the *Electricity Network Assets (Authorised Transactions) Act 2015*).

Box 5.1: Who can penalty notices be issued to?

To issue a penalty notice to a person or company you must ensure you have the correct legal entity, and you must be able to prove the person or company committed the offence and has not provided a common or statute law defence. Factors to take into consideration are provided in the *EPA Prosecution Guidelines* or you can refer to your organisation’s relevant policy.

5.5. When should penalty notices be issued?

Officers are responsible for conducting investigations and taking enforcement action for a wide range of offences under the POEO Act, including pollution incidents, waste dumping, and smoky vehicles; EPA officers are also responsible for action on licence breaches. You need to use your judgement, in discussion with management, as to whether a penalty notice or other tool is the most appropriate in any given circumstance. Your organisation’s relevant policy should explain when a penalty notice is the appropriate regulatory tool.

For continuing offences, where several penalty notices may have already been issued, you may consider whether this is still the most appropriate regulatory response. You may wish to escalate the matter and court proceedings may be more appropriate even if each breach is comparatively minor.

Section 228 of the POEO Act provides that a penalty notice can be withdrawn within 28 days of being served, even if it is paid. The EPA can also direct an enforcement officer to withdraw a penalty notice.

A penalty notice should be issued early so Revenue NSW has enough time to deal with it, and if court elected, there is enough time for it to be prosecuted.

A recipient of a penalty notice can choose to have it reviewed, court elected and/or they may simply not pay it. This process can take months, particularly if the recipient seeks a review before they court elect it (see Section 5.7 of this guideline).

The normal prosecution limitation periods/statute bar periods apply even when a penalty notice is issued and so there must be enough time left to commence a prosecution if the recipient court elects the penalty notice (see Section 5.6 of this guideline).

You should follow your organisation's relevant policies.

Further information about penalty notices can be found in Section 5 of the *EPA Prosecution Guidelines*.

5.6. Court elected penalty notices

If the recipient court elects a penalty notice the court election is made to Revenue NSW, which then sends it to the issuing agency for consideration.

Your organisation may wish to commence criminal proceedings as if the penalty notice had not been issued. The EPA recommends that in the interest of fairness and consistency all authorised officers implement the guidance set out in the *EPA Prosecution Guidelines* in relation to penalty notices.

You may have to attend court as a witness.

5.7. Reviews of penalty notices

A person may also request a review of any penalty notice issued to them. The request is made through Revenue NSW, which sends the request to the issuing agency for determination. The review **must** be conducted by an authorised officer who was not involved in making the decision to issue the penalty notice.

If you conduct internal reviews of penalty notices, you should be guided by the Attorney General's *Internal Review Guidelines under the Fines Act 1996* and/or your organisation's policies.

The organisation that issues the penalty notice must advise the person and Revenue NSW of the outcome of the review in writing. Revenue NSW uses the copy of the letter as their official record of the decision. If a penalty notice is withdrawn, Revenue NSW will repay any penalty amount paid and Transport for NSW will reverse any action taken to record demerit points (where applicable).

If a person elects to have a matter dealt with by a court while a review is in progress, the review is terminated.

5.8. Official cautions

An officer who is authorised to issue penalty notices can choose to give a person or company an official caution instead if it is a more appropriate response and the officer has evidence the person or company committed a penalty notice offence. More information is provided in the EPA Compliance Policy. Follow your organisation's relevant policies and the Attorney General's *Caution Guidelines under the Fines Act 1996*, which provides further guidance on when an official caution is appropriate.

Issuing an official caution does not prevent the ARA from taking alternative enforcement action later, if it becomes apparent that the latter response is more appropriate.

5.9. Prosecutions

The *EPA Prosecution Guidelines* set out the factors the EPA takes into account in deciding whether, how and in what court, to prosecute offences under legislation administered by the EPA. The Guidelines reflect the EPA's current policies. For serious breaches or repeat offenders, prosecution may be the appropriate option.

As a general principle, where a serious breach of the environment protection laws comes to the attention of the EPA, the EPA will lead any investigation and take any appropriate action. However, the EPA partners with other ARAs, such as councils, to assist in investigations and undertake joint regulatory activities.

For most offences under the POEO Act, your organisation must commence proceedings in court within 12 months after the date the offence is alleged to have been committed or after evidence of the alleged offence first came to the attention of a relevant authorised officer (section 216 of the POEO Act).

For **prescribed offences** (listed in section 216(6)) the timeframe is within three years after the date the offence is alleged to have been committed or after evidence of the alleged offence first came to the attention of any relevant authorised officer.

The POEO Act contains several sentencing options, including custodial sentences for the most serious offences (Tier 1 offences and repeat waste offences) as well as fines.

In court, the **case of the prosecution** is not proved unless it can satisfy the court that the elements of the offence have been proved beyond reasonable doubt (Evidence Act). The **defendant** bears the onus of proving they had a reasonable or lawful excuse, as referred to in any offence provision (section 256 of the POEO Act). Other evidentiary provisions are outlined in Part 8.5 of the POEO Act.

Box 5.2: Proving an offence 'beyond reasonable doubt'

Beyond reasonable doubt is the standard of proof in criminal cases in NSW, higher than the civil standard of the 'balance of probabilities'. The case of the prosecution is not proved unless it can satisfy the court that the elements of the offence have been proved beyond reasonable doubt (Evidence Act).

5.10. Orders

Under Part 8.3 of the POEO Act, an ARA may seek orders from the courts to recover costs and expenses and obtain compensation for offences proven. Orders can be made in addition to any penalty or action imposed in relation to the offence. Courts can require the following orders:

- **Restoration or prevention** orders to prevent, control, abate or mitigate any harm to the environment, to make good any resulting environmental damage, or prevent a recurrence of the offence (section 245).
- **Clean-up costs** orders and **compensation** orders may be used if clean-up has not occurred, or costs have not been recovered (sections 246–247).
- **Investigation costs** orders require the offender to pay certain costs and expenses incurred during the investigation of the offence (section 248(1)).
- **Monetary benefits** orders require the offender to pay a sum up to the amount of the monetary benefit derived from the offence (section 249(1)).
- **Environmental audit** orders require the offender to carry out a specified environmental audit of activities carried on by the offender (section 250(1)(d)).
- **Training** orders require the offender or its employees or contractors to attend training (section 250(1)(f)).
- **Environmental service** orders require the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit, or pay an amount to the Environmental Trust or a specified organisation for that purpose (section 250(1)(c), (e) and (h)).
- **Publication orders** require the offender to publish details of the offence and the orders made by the court in, for example, a newspaper and/or in a company's annual report (section 250(1)(a) and (b)).
- **Restorative justice activity** orders require the offender to carry out any social or community activity for the benefit of the community or persons that are adversely affected by the offence that the offender has agreed to carry out (section 250(1A)).

The POEO Act provides that a local court may not make certain orders, such as a monetary benefits order, an environmental service order, an environmental audit order, or a restorative justice activity order (see sections 249 and 250 of the POEO Act). These orders are available in addition to or in lieu of any

fine or custodial sentence that may be imposed. One or more orders may be made against the offender (see section 244 of the POEO Act).

Some of the abovementioned orders are now also available under other legislation the EPA administers (for example the Pesticides Act). The principles set out in this section apply equally to proceedings under that legislation.

For further information refer to the EPA's [guidelines for seeking environmental court orders](#).

5.11. Enforceable undertakings

Enforceable undertakings are voluntary, legally binding, written agreements between the EPA and a company or individual that is alleged to have breached environmental legislation. The agreement includes commitments by the company or individual, in response to an alleged breach, that are designed to improve environmental outcomes and prevent similar incidents occurring in the future.

The EPA uses enforceable undertakings where there has been a serious alleged breach of the legislation. All enforceable undertakings are made public and placed on the public register. They are a more serious regulatory response than issuing a warning letter or penalty notice but a less serious regulatory response than prosecution (which can be used to incur a criminal conviction).

For further information refer to the EPA's *Guidelines on Enforceable Undertakings*.

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7. Further reading

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Appendix A. Dictionary

Most definitions of terms used in this guideline can be found in the dictionary of the *Protection of the Environment Operations Act 1997* (POEO Act). More are provided here.

appropriate regulatory authority has the same meaning as in section 6 of the POEO Act. See also Section 1.4 of this guideline.

authorised officer has the same meaning as in the dictionary of the POEO Act. See also Section 1.7 of this guideline.

authorised network operator has the same meaning as in the *Electricity Network Assets (Authorised Transactions) Act 2015*.

enforcement officer has the same meaning as in section 226 of the POEO Act and clause 81 of the POEO General Regulation. See also Section 1.8 of this guideline.

environmentally unsatisfactory matter has the same meaning as in section 95 of the POEO Act. See also Box 3.4 of this guideline.

excessive smoke has the same meaning as in section 135A of the POEO Act. See also Box 3.9 of this guideline.

person for the purposes of Section 4.2 of this guideline includes corporations and individuals.

prescribed offence has the same meaning as in section 216(6) of the POEO Act.

preventive action has the same meaning as in section 96(3) of the POEO Act. See also Box 3.5 of this guideline.

residential premises has the same meaning as in section 135A of the POEO Act.

Appendix B. Types of notices

Table B1 Environmental protection notices and compliance cost notices

All section references refer to the POEO Act.

Instrument	Section	Issued by	Issued to	When may the notice be issued?	Purpose of notice
Clean-up notice	91	ARA	Owner, occupier or polluter	There is a reasonable suspicion that a pollution incident has occurred or is occurring at or from the premises, or a person is causing or has caused a pollution incident	To require 'clean-up action' in relation to a 'pollution incident' (as defined in the POEO Act dictionary)
	92	EPA	Public authority	There is a reasonable suspicion a pollution incident has occurred or is occurring	To require 'clean-up action' in relation to a 'pollution incident' (as defined in the POEO Act dictionary)
Prevention notice	96	ARA	Occupier or person carrying on the activity	Where there is a reasonable suspicion that an activity has been or is being carried on in 'environmentally unsatisfactory manner' at any premises or by any person (otherwise than at premises)	To ensure that the activity is carried on in future in an 'environmentally satisfactory manner' (within the meaning of section 95)
Prohibition notice	101	Minister	Occupier or person carrying on the activity	The EPA recommends to the Minister that a notice be given because it is of the opinion that the emission or discharge of pollutants is causing or likely to cause such harm to the environment; or is likely to be so injurious to public health or cause such discomfort or inconvenience to any persons not associated with the management or operation of the activity, that the giving of the notice is warranted	To stop an activity, or any specified aspect of it
Compliance cost notice	104(1)(3)(4); 267B	ARA (for clean-up, prevention and noise control notices)	Person issued the original notice	Reasonable costs and expenses were incurred by the ARA in connection with monitoring and ensuring compliance with a clean-up, prevention or noise control notice or taking action under section 98; or by the EPA taking action under section 103; for example council incurs cost in ensuring compliance with a noise control notice.	To recover costs incurred in connection with: <ul style="list-style-type: none"> monitoring action required by, or ensuring compliance with, a clean-up, prevention or noise control notice or any other associated matters (section 104(1)(3) and 267B) taking action where a person failed to comply with a prevention or prohibition notice (section 104(4))
		EPA (for prohibition notices)			
	104(2)	Public authority	Occupier or polluter	The authority has incurred reasonable costs and expenses in taking clean-up action under section 92 and reasonably suspects that the pollution incident occurred at or from the premises, or the person caused the pollution incident	To recover costs incurred in connection with clean-up action under section 92 of the POEO Act

Table B2 Investigative notices

All section references refer to the POEO Act.

Instrument	Section	Issued by	Issued to	When may the notice be issued?	Purpose of notice
Notice requiring an approved GPS tracking device	144AC	EPA	A person who is engaged in the transportation of waste	There is a motor vehicle or trailer that is being used by the person to transport waste	To ensure that approved GPS tracking devices are installed, used and maintained in waste transportation vehicles and that such devices are not tampered with
Notice to provide information and records	191	EPA	Any person	Information or records are required for matters relating to the authority's responsibilities or functions under the POEO Act. For regulatory authorities other than the EPA, this is limited to matters for which it is the ARA	To gather evidence in an investigation
	192	Regulatory authority (other than the EPA)			
	193	Authorised officer			
Require a person to attend at a specified place and time to answer questions	203(5)	Authorised officer	Person	You reasonably suspect a person has knowledge of matters in respect of which information is reasonably required for the purposes of the POEO Act and attendance at that place is reasonably required in order that the questions can be properly answered	To make sure a person attends an interview at a set time and place
Nominate a specified place and time to answer questions	203(6)	Authorised officer	Person	The person does not nominate a place and time to answer questions under section 203(6) or the place and time nominated by the person is not reasonable in the circumstances	To determine a time and place for an interview
Require a corporation to nominate a representative to answer questions	203(2)	EPA or other regulatory authority	Corporation	You reasonably suspect a person has knowledge of matters in respect of which information is reasonably required for the purposes of the POEO Act	To get information about relevant matters from a company representative
Require information about articles	210	EPA	Owner, manufacturer, assembler, supplier, importer, seller		To require information about an article

Table B3 Other relevant notices, directions and orders

All section references refer to the POEO Act.

Instrument	Section	Issued by	Issued to	When may the notice/direction be issued?	Purpose of notice or direction
Penalty notice for an offence specified in Schedule 6 of the POEO General Regulation	223	Enforcement officer	Person who appears to have committed a penalty notice offence	It appears to you that a penalty notice offence has been committed	May be used to issue an on-the-spot fine and deter further unlawful behaviour (see <i>EPA Prosecution Guidelines</i>) Designed to deal with minor or one-off breaches that can be remediated easily
Direction concerning fires	134	Authorised officer	Occupier or person in charge of fire	You are of the opinion that a fire is prohibited by EPA order or by regulations, or air pollution from the fire is injurious to health or is causing/likely to cause serious discomfort or inconvenience to any person	To extinguish a fire immediately or to direct someone not to light or maintain a similar fire on the premises during a specified period not exceeding 48 hours
Smoke abatement notice	135B	Authorised officer	Occupier	It appears that excessive smoke is being, or has within the past seven days been, emitted from a chimney on or in residential premises	To ensure that excessive smoke is not emitted from the chimney at any time after 21 days following the giving of the notice
Notice to repair motor vehicle	161(1)	Authorised officer	Owner of a motor vehicle	You reasonably suspect the vehicle emits excessive air impurities	To require a vehicle to be serviced or repaired so that it no longer emits excessive air impurities
Notice regarding anti-pollution device	161(2)	Authorised officer	Owner of a motor vehicle	The vehicle is not fitted with prescribed working anti-pollution device/s or any such device or part of the vehicle has been adjusted so that the vehicle emits excessive air impurities	To require the owner to install, service or repair prescribed anti-pollution devices or readjust/restore the device or part to prevent emissions of excessive air impurities
Noise control notice	264	ARA	Occupier or person making the noise	Measure and establish acceptable noise for activity or article There is no requirement that the noise must be offensive before a noise control notice may be issued	To prohibit carrying out any activity that emits noise above a specified level (when measured at a specified point) at all times or on specified days or between specified times
Noise abatement direction	276	Authorised person – authorised officer or police officer, and for vessels in navigable waters an officer or employee of the authorised marine authority	Occupier or person making the noise	If it appears that offensive noise is being or has been emitted within the last seven days from any premises	To temporarily stop the emission of the offensive noise

Instrument	Section	Issued by	Issued to	When may the notice/direction be issued?	Purpose of notice or direction
Noise abatement order	268	Local Court	Occupier of premises from which noise is alleged to be emitted or person alleged to be making the noise	If the Local Court is satisfied on the balance of probabilities that the alleged offensive noise exists, or that although abated it is likely to recur on the same premises (upon application for an order by the occupier of the premises)	To allow occupiers of a premises to seek intervention from the Local Court when offensive noise is being emitted and require the respondent to the application to abate or prevent a recurrence of the offensive noise
Notice for breach of licensing requirements	86	ARA	Occupier	The occupier of a premises carries out work at the premises in contravention of Part 3.2 (without a licence for scheduled development work or scheduled activities)	To require the occupier to remove the work that has been carried out or restore the premises to their previous state