

Enforcement Guideline

Environmental Regulation Division

Document title	Enforcement Guideline
Contact details	Department of Environment, Parks and Water Security
Endorsed by	NT EPA on 9 June 2022
Endorsed by	Controller of Water on 12 July 2022
Endorsed by	Minister for Environment on 12 July 2022
Approved by	Chief Executive
Date Approved	12 July 2022
Document review	Annually
TRM number	NTEPA2022/0051-001~0005

Version	Date	Author	Changes made
1.0	30/05/2022	Environmental Regulation Division	First version.

In preparing this guideline, the Division has relied on the Queensland Government's Department of Environment and Science Enforcement Guidelines, available at [Department of Environment and Science Enforcement Guidelines \(des.qld.gov.au\)](https://des.qld.gov.au/enforcement-guidelines)

Disclaimer

These guidelines do not bind the Division in the exercise of its discretion with respect to the use of its statutory tools and initiation of legal proceedings. It is intended as a guide only.

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it contains generalisations. You should obtain professional advice if you have any specific concern.

The Division has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information.

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1. Introduction

The Environmental Regulation Division in the Department (the Division) has a range of statutory and regulatory responsibilities directed at supporting sustainable economic development and protecting and managing the Territory's natural resources. The Division supports the Minister for Environment, the CEO of the Department, the Controller of Water Resources and the NT EPA to administer a range of legislation that protects the Territory's water and environmental resources. For convenience, a reference to "the Division" in this guideline includes the CEO of the Department, the Minister, the Controller of Water Resources, NT EPA and statutory officers under the relevant legislation.

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

The effective protection of the environment, as well as good regulatory practice, calls for the Division to have clear guidelines governing the taking of enforcement action. These Enforcement Guidelines complement the Division's **Compliance and Enforcement Policy**.

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

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

1.1 Scope

The Division supports the administration of a number of pieces of legislation, including:

- *Environment Protection Act 2019*
- *Waste Management and Pollution Control Act 1998*
- *Water Act 1992*
- *Marine Pollution Act 1999*
- *Petroleum Act 1984 (in relation to environmental matters only)*
- *Environmental Offences and Penalties Act 1996*

In addition to the above legislation, the Division is also responsible for compliance with Regulations and statutory instruments (licences, approvals, permits and plans) made or issued under these acts.

Under these pieces of legislation there are a number of different entities that may exercise direct or delegated powers, such as authorised officers and inspectors. To ensure consistency and transparency of enforcement actions, these Enforcement Guidelines apply to decisions about enforcement actions made by all decision makers in the Division.

This guideline addresses the compliance and enforcement tools the Division most commonly uses. There are additional tools available in certain circumstances under some legislation; however, due to their more limited application, they are not addressed in this guideline. Where appropriate, the Division will still consider and apply these additional tools, in accordance with its Compliance and Enforcement Policy.

1.2 Purpose

These Enforcement Guidelines assist the Division in making decisions about taking enforcement action under environment legislation. The guidelines set out principles of a general nature to provide an understanding of how the Division will approach enforcement.

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

It is important to note that these are guidelines and not directions. These guidelines are not intended to prescribe the circumstances in which the Division will take enforcement action or what action it will take. However, it should provide broad guidance as to the Division's approach to its enforcement tools. The enforcement guidelines are designed to assist the making of enforcement decisions to achieve **consistency, efficiency, effectiveness** and **transparency** in the administration of environmental legislation by the Division.

1.3 Procedure

The Division will assess all reports it receives of possible contraventions of its legislation, and based on an initial assessment will determine whether to investigate or whether to take no further action and close the report. The Division may decide not to investigate if the report:

- relates to a matter that is outside the Division's compliance and enforcement priorities as identified in its **compliance and enforcement policy** and **compliance and enforcement plan**
- is outside the Division's regulatory responsibilities, or
- does not disclose a possible contravention of its legislation.

Further information may be required to conduct an investigation. If a report proceeds to an investigation, the Division will decide the appropriate response. In some cases, the decision may be to take no action, for example, if an investigation reveals that no contravention of the legislation has occurred. In some cases, the Division may provide advice, guidance, or assistance to help a person comply with the legislation. In other cases, it may be necessary for the Division to take enforcement action in response to a contravention of the legislation.

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

The range of enforcement actions available to the Division include:

- warning letters
- penalty infringement notices
- administrative notices and orders made under legislation
- compliance plans
- directions
- civil penalty proceedings
- enforceable undertakings
- prosecution
- suspension or cancellation of permit, licence or approval.

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

From time to time, the Division becomes aware of matters that are offences against its legislation, and which are also offences against legislation (or provisions of the environment legislation) administered by

another division in the Department or another government agency. In these circumstances, the following principles apply:

- The Division may consult the other division/agency to determine which entity should lead any investigation, and which entity would be the appropriate entity to take any enforcement action. There may be circumstances in which it is appropriate for a joint investigation to take place, and for each entity to take its own enforcement action.
- The Division may be the appropriate agency to lead an investigation or take enforcement action where one or more of the following applies:
 - the subject matter is more closely aligned with the Division's portfolio of responsibilities than that of the other agency,
 - enforcement action by the Division would more effectively prevent or remedy the contravention and its impacts, or
 - the penalties that apply for the offence under the Division's legislation reflect the seriousness of the offence more accurately than the penalties under the other entity's legislation.
- The Division may refer a matter to a local government for investigation or enforcement action where the matter is the responsibility of the local government
- Where dishonesty or other criminal offences are involved, the Division may refer the matter to the Northern Territory Police Force, the Australian Federal Police or other authorities as appropriate.

1.4 Principles

Decisions about which enforcement tool or tools are applied are guided by the Division's regulatory strategy, which is set out in the Division's **compliance and enforcement policy**. In particular, when considering enforcement action, the Division is guided by the eight principles at section 1.4 of the policy and the following:

- where enforcement action involves litigation, the Division is bound by the Northern Territory Government's Model Litigant Policy. The principles ensure that, when conducting litigation, the Territory meets the community's and the courts' expectations that it will conduct itself in a manner which exemplifies the principles of justice, and that the Territory's power will be used in the public interest.
- where enforcement action involves prosecution, the Division is bound by the Guidelines of the Director of Public Prosecutions. These guidelines ensure a consistent approach to the prosecution of serious offences throughout the Northern Territory and set standards against which the performance of prosecutors may be measured.

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

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

2. Who enforcement action will be taken against

One of the main aims of the Legislative Assembly in making a contravention of the law a criminal offence is to deter the offenders and others from similar behaviour. By extending criminal liability to many people (for example, landowners, occupiers, and directors and managers of corporations), the law generates

increased awareness and responsibility for legal obligations within corporate structures and throughout the community.

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

2.1 Identification of offender(s)

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

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

2.2 Notification

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

- the alleged offender notified the Division of the contravention promptly
- the information assisted in the control or mitigation of any impacts
- the information substantially aided the Division's investigation of the incident
- the information was available from other sources
- there was a failure to comply with an obligation to notify the Division of the contravention
- the notification occurred prior to the Division or any other regulatory body obtaining knowledge of the contravention.

2.3 Corporate liability

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

2.4 Liability of employees and contractors

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

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

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

2.5 Liability of directors and executive officers

Most of the Division's legislation contains provisions extending liability for offences committed by a corporation to its executive officers.

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

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

The general legislative exceptions to executive officer liability are that the executive officer:

- was not in a position to influence the corporation's conduct;
- did not know, and could not reasonably have been expected to know, that the contravention would happen; or
- the officer took all reasonable steps to ensure that the corporation complied with the law.

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

- arranged regular professional assessments of the corporation's compliance with the provision
- implemented any appropriate recommendations arising from an assessment of the corporation's compliance; and
- employees, agents and contractors had a reasonable knowledge and understanding of the requirement to comply with the relevant provision.

2.6 Unlicensed operators

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

- the Division's first priority is to ensure that any risk of environmental harm or impacts from an unlicensed operation is appropriately managed

- the Division will work cooperatively with other regulators who may also have responsibility for regulating the unlicensed activity (for example, an unlicensed industrial site may have failed to obtain a development permit as well as an environmental authorisation)
- in deciding the appropriate response, the Division will take account of the level of competitive advantage enjoyed by the unlicensed operator as one factor for consideration, however in most cases, some type of enforcement action will be taken in response to an unlicensed operator
- in rare cases, the Division may defer enforcement action until an unlicensed operator has had the opportunity to obtain the relevant environmental authorisation and operate lawfully. In such cases the operator will be expected to meet contemporary standards for the management of its environmental risk.

2.7 Liability of external administrators

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

2.8 Liability of government agencies

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

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

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

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

3. Choice of enforcement action

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

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

- official warnings

- infringement notices
- statutory notices and directions made under legislation
- proceedings for court orders provided for under legislation
- enforceable undertakings
- prosecution
- suspension or cancellation of permit, licence or approval.

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

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

3.1 Determining seriousness of a contravention of legislation

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

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

- the objectives of the relevant legislation, including the nature of the offence and type of impact the offence provision is designed to deter or prevent (section 3.1.1)
- the actual or potential impact or harm of the offence (section 3.1.2)
- the level of culpability of the alleged offender (section 3.1.3)
- the financial or other benefit received from the contravention.

3.1.1. Objectives of legislation

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

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

3.1.2. Impact or Harm

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

To determine the level of impact, for example for the offence of contravention of an environmental approval condition, reference may be made to the level and extent of impact on the environment resulting from the contravention.

3.1.2.1. Administrative offences

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

- failure to comply with the duty to notify
- a contravention that undermines a legislative scheme (e.g. failure to pay environmental securities etc.)
- the provision of false or misleading statements in applications or other material submitted to the Division
- failures in respect of conditions that relate to reporting or the keeping and provision of documents.

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

Five levels of impacts have been developed to assist the Division in classifying the environmental impact or harm of an alleged offence and inform a decision on the appropriate enforcement response (refer to Table 1 – Criteria to be considered in determining impact of contravention). These levels also include the risk or potential impact of an alleged offence. If an offence satisfies criteria across a range of the impact levels, generally, it will be assigned the highest applicable level. For example, if there is an incident which has caused permanent impacts on the environment (which falls into the serious level), however the level of public concern is low (which falls into the minor level); the matter will be regarded as serious.

3.1.3. Culpability

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

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

IMPACT	5 Serious impact or risk of impact	4 Major impact or risk of impact	3 Moderate impact or risk of impact	2 Minor impact or risk of impact	1 Low impact or risk of impact
	<ul style="list-style-type: none"> • permanent or long-term impact, or potential impact • impact is on, or potentially on, a wide-scale or of great intensity • widespread or high level of public concern about the incident or impact to public health, safety and wellbeing • where offence is of an administrative nature, it severely undermines the legislative scheme or the offender provides false or misleading information 	<ul style="list-style-type: none"> • medium to long-term impact, or potential impact • impact is on, or potentially on, a medium to wide-scale or of medium to great intensity • high level of public concern or impact to public health, safety or wellbeing • where the offence is of an administrative nature, it undermines the legislative scheme or the offender conceals information or avoids liability for fees or taking necessary actions to prevent offence 	<ul style="list-style-type: none"> • temporary to medium-term impact, or potential impact • impact is on, or potentially on, a localised to medium scale or is of a low to medium intensity • moderate level of public concern or impact to public health, safety or wellbeing • where the offence is of an administrative nature, it has a moderate impact on the legislative scheme, or the offender carelessly fails to comply with administrative requirement 	<ul style="list-style-type: none"> • transient impact, or potential impact • impact is on, or potentially on, a localised scale or is of a low intensity • low level of public concern or impact to public health, safety or wellbeing • where the offence is of an administrative nature, it has no impact on the legislative scheme or is of an inadvertent nature 	<ul style="list-style-type: none"> • no or minimal impact, or potential impact • no or very low public concern or impact to public health, safety or wellbeing • where the offence is of an administrative nature, it could not have been prevented

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

CULPABILITY	5 Serious culpability	4 Major culpability	3 Moderate culpability	2 Minor culpability	1 Low culpability
	<ul style="list-style-type: none"> • intentional or wilful acts • past non-compliances or convictions involving the same or similar legislative provisions • non-compliances of an ongoing or long duration • no attempt at clean-up or remedial action undertaken • motivated by profit or obtained a material benefit from the non-compliance • involves serious misleading conduct or false statements • failure to notify • deliberate disregard of clear directions, warnings or administrative actions (from employees, consultants, the Division, or other government officers) which may have prevented or mitigated the impact • the impact or risk of impact was obvious or preventable by implementing or following accepted industry standards. 	<ul style="list-style-type: none"> • reckless acts • past non-compliance of the same or similar legislative provisions, or education or advice previously provided on the legislative provisions • regular non-compliance, or of a long to medium duration • indifferent attempt at remediation or remediation ineffective • obtained profit or material benefit • involves deliberate misleading conduct or false statements • failure to notify effectively or notification outside of reasonable timeframes • wilful ignorance of warnings (from employees, consultants, the Division, or other government officers) which may have prevented or mitigated the impact • the impact or risk of impact was foreseeable or easily preventable 	<ul style="list-style-type: none"> • negligent acts • isolated prior non-compliances with legislation or similar legislation • non-compliance of an medium duration • genuine attempt at remediation or remediation partially effective • attempt at notification of incident within reasonable timeframe • involves misleading conduct or false statements due to carelessness • may have benefitted from the non-compliance • was aware of the risk of impact or the impact was foreseeable • the impact or risk of impact was due to poor standards of operation 	<ul style="list-style-type: none"> • careless acts • isolated prior non-compliances with legislation that occurred more than three years ago • non-compliance of a medium to short term • comprehensive attempt at remediation or remediation partially completed • notification of incident within reasonable timeframe • does not involve misleading conduct or false statements • the impact or risk was difficult to foresee • the impact or risk of impact was not prevented by reasonable standards of operation 	<ul style="list-style-type: none"> • inadvertent acts • no prior non-compliances with legislation or similar legislation • non-compliance of short-term duration • remediation effective • notification to Division of incident as soon as practicable • did not benefit from the non-compliance • the impact or risk of impact was not foreseeable • the impact or risk of impact was not prevented by high standards of operation (greater than accepted industry standards).

4. Official warnings

Official warnings are generally not provided for in legislation, but are an enforcement response that the Division may take in relation to minor contraventions of legislation. Official warnings may be given verbally and confirmed in writing at a later date.

It may be where the imposition of a financial penalty is not considered appropriate, and where a warning that the offender's conduct is a contravention of the legislation is considered a sufficient compliance response based on the circumstances of the matter, for example, a first contravention or one that is easily remedied.

Official warnings should be used for minor contraventions of the Division's legislation, involving little or no impact and where the offender has a low level of culpability. They are not appropriate for ongoing or repeated minor contraventions or in circumstances where there is a poor compliance history.

In general, official warnings may be used:

- to signal that further non-compliance of a similar nature will result in an escalating enforcement response
- where there is no evidence of financial benefit
- when there is minimal harm or potential harm to the environment, health or wellbeing, and
- for breaches of an administrative nature that do not involve misleading conduct.

In general, official warnings will not be used:

- if an official warning has previously been issued to the same person for a similar non-compliance
- if advice and guidance is unlikely to change the person's behaviour
- where there has been direct financial benefit
- where there has been a moderate impact, or
- for misleading conduct.

5. Infringement notices

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

The offences for which infringement notices can be issued, and the associated penalties, are set out in the respective regulations of the legislation the Division administers. The Division is an enforcement agency for the purpose of the *Fines and Penalties (Recovery) Act 2001*.

5.1 Considerations for issuing an infringement notice

In making decisions about issuing an infringement notice, the Division is more likely to consider issuing an infringement notice where:

- the contravention is minor and the scale of the impact is known and small
- the facts of the offence are clear
- there have been isolated or non-systemic instances of non-compliance, and

- there have been lower levels of environmental harm.

Infringement notices should be issued only where the infringement notice is likely to act as a deterrent. If an infringement notice is not likely to deter the offender from committing a similar offence in the future, consideration should be given to whether prosecution is a more appropriate response.

An infringement notice will generally not be appropriate where:

- the contravention is ongoing
- the financial benefit obtained by delaying or avoiding compliance is significantly greater than the infringement penalty
- if the Division has previously taken action against the person, particularly in recent or very similar circumstances
- the contravention relates to misleading conduct or failure to follow a statutory direction, or
- the matter raises complex questions about the interpretation of a provision of its legislation.

Infringement notices should be issued as soon as reasonably possible after the offence comes to the attention of the Division.

5.2 Issuing multiple infringement notices

An infringement notice cannot relate to more than one alleged contravention, however, the Division may issue multiple infringement notices each relating to a separate contravention when it considers it appropriate to do so taking into account all of the circumstances.

In deciding whether to issue more than one infringement notice, the Division takes into account a range of considerations including;

- whether the Division believes that there have been multiple contraventions of infringement notice provisions
- where the circumstances of the individual contraventions vary, but the particular legislative provision is the same (for example where the operator has engaged in the same contravention in multiple locations across the Territory, the Division may decide to issue infringement notices for the conduct at each location), and
- where there are circumstances which make it desirable to issue multiple notices to deter similar conduct by the specific person involved or the broader industry.

6. Administrative actions

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

There are a broad range of administrative actions available to the Division, including:

- pollution abatement notices
- compliance plans
- performance agreements
- directions
- environment protection notices
- audit notices, and

- stop work orders.

The Division may take an administrative action where:

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

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

For example, it may be appropriate to issue a notice to a company to conduct an environmental audit to determine the likelihood of pollution resulting in environmental harm occurring and the adequacy of safeguards in place. However, this administrative action does not prevent the Division from prosecuting the company for an unlawful emission associated with an environmental harm caused by the failure of safeguards. In this situation, the environmental audit informs the necessary steps to prevent the pollution occurring in the future, whilst a prosecution will punish and deter the conduct that resulted in the environmental harm.

In some situations it may not be appropriate to take more than one enforcement action in response to a situation. For example, it may not be appropriate to issue an pollution abatement notice if the person has entered into a compliance plan (which is being complied with) to rectify the same issue.

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

7. Prosecution

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

Where enforcement action involves prosecution, the Division is bound by the Guidelines of the Director of Public Prosecutions. These guidelines ensure a consistent approach to the prosecution of serious offences throughout the Northern Territory and set standards against which the performance of prosecutors may be measured.

7.1 The decision to prosecute

The decision to prosecute is generally made by the NT EPA, Controller or Minister. The decision is based on:

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

7.1.1. Prospects of success

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

- the available evidence is capable of proving each element of the offence beyond reasonable doubt
- the admissibility of evidence
- the credibility of available witnesses

- the availability or strength of any expert evidence required to prove the offence
- any defences that are plainly open to the alleged offender.

7.1.2. Public interest considerations

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

- the seriousness of the offence including the impacts or potential impacts caused by the alleged offence
- the degree of culpability of the alleged offender including any mitigating or aggravating circumstances (including notification, cooperation or a display of contrition)
- the availability and effectiveness of any alternatives to prosecution
- the alleged offender's compliance history
- whether the alleged contravention is a continuing or subsequent offence
- the prevalence of the alleged offence and the need for general deterrence
- the length of time since the alleged offence occurred
- the age and physical or mental health of the alleged offenders
- whether there are counter-productive features of the prosecution
- in cases involving Aboriginal and Torres Strait Islander use or management of natural resources, the views of the traditional owners of the area
- the length and expense of any court hearing
- the likely outcome in the event of a conviction having regard to the sentencing options available to the court
- any precedent which may be set by not instituting proceedings
- whether the consequences of a prosecution would be unduly harsh or oppressive
- whether proceedings are to be instituted against others arising out of the same incident
- the sentencing principles set out in the *Sentencings Act 1995*
- the extent to which the alleged offender cooperates in the investigation or prosecution of other offenders.¹

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

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

7.2 Choice of charges

¹ The Division does not have the power to grant indemnity from prosecution to accomplices: this power rests with the Director of Public Prosecutions. The Guidelines of the Director of Public Prosecutions set out how an application for an indemnity from prosecution can be made. The DPP Guidelines are available online at www.dpp.nt.gov.au. An accomplice who pleads guilty and agrees to testify against an alleged co-offender may receive a sentencing discount for that co-operation.

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

7.3 Mode of trial – summary or indictable proceedings

Some offences under legislation administered by the Division are indictable offences which may be heard summarily if the prosecution and the defendant consent.

Proceeding summarily on an indictable offence may have the effect of limiting the financial penalty that may be sought by the prosecution and imposed by the Court. For prosecutions commenced by the Division, the Division will consider the Director of Public Prosecution's guidelines.

7.4 Charge negotiations

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

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

7.5 Sentencing considerations

The *Sentencing Act 1995* outlines the general factors that can be considered by a court at sentence. The following is a non-exhaustive list of factors which may be considered by the Division in preparing sentence submissions:

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

- the availability and appropriateness of alternative sentencing orders
- the maximum penalty for the offence
- any relevant sentencing precedents or comparative cases.

7.6 Sentencing orders

In addition to any penalties, fines or orders which may be made by the courts under the *Sentencing Act 1995*, legislation administered by the Division provides for additional specific orders upon sentencing an offender for certain offences. The availability of these additional orders is to provide the court with the flexibility to impose a penalty or order that:

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

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

7.7 Recording of convictions

Section 7 of the *Sentencing Act 1995* gives the Court the discretion to decide to record or not record a conviction for an offence.

The decision about whether a conviction is recorded lies entirely within the discretion of the judge presiding over a particular case. Some factors which the *Sentencing Act 1995* states must be considered by the judge in exercising their discretion are:

- the seriousness of the offence
- the offender's character and age
- any extenuating circumstances that applied at the time of the offence.

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

- there is a wilful element to the offence
- the nature of the offence is serious – such as serious environmental harm, material environmental harm, or providing false or misleading information or documentation to the Division
- the defendant has previously been successfully prosecuted by the Division or found guilty of a similar offence in the Northern Territory or another jurisdiction
- there is a commercial element to the offence, that is, the offender obtained or was likely to have obtained a commercial benefit as a result of the offence
- the defendant is a corporation
- the defendant failed to notify the Division of an offence where it was required to do so by legislation or other statutory instrument (such as an environmental approval or a notice of approval under the *Petroleum Regulations 2016*);
- the defendant has a relevant compliance history

- there is rehabilitation required as a result of the offence.

Whenever the Division asks the Court to record a conviction, it will do within the ambit of the *Sentencing Act 1995* and will take into account the factors that the Court must consider under section 7 of that Act.

8. Suspension or cancellation of licence, permit or approval

Legislation administered by the Division usually contains a list of grounds for the suspension or cancellation of permits, licences or approvals. These grounds might include a failure to perform administrative requirements such as payment of fees, failure to provide a financial assurance, and submission of annual performance statements. They might also include the holder being convicted of an offence under that legislation or not meeting specified suitability criteria for the permit, licence or approval.

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

When deciding whether to cancel or suspend a licence, permit or authority, the requirements of the legislation will be complied with and the Division may consider the principles within these Enforcement Guidelines. The holder of the licence, permit or approval will be given the opportunity to respond before the Division proceeds with suspending or cancelling the licence, permit or approval.

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

9. Rights of review

Decisions made by the Division are generally subject to rights of review by persons affected by those decisions.

There are three types of review that may be available:

- internal review
- merits review by the Northern Territory Civil and Administrative Tribunal (NTCAT), or
- judicial review by the Supreme Court of the Northern Territory.

A right to internal review or review by NTCAT for a particular decision will depend on the legislation that applies to the decision. Written notification of a decision includes information about the review rights that apply to the decision.

Some decisions, such as the decision to prosecute, are not reviewable.