



Australian Government

**Department of the Environment,
Water, Heritage and the Arts**

COMPLIANCE & ENFORCEMENT POLICY

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Department of the Environment, Water,
Heritage & the Arts

Compliance & Enforcement Policy

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1. Introduction

The Australian Government Department of the Environment, Water, Heritage and the Arts (the department) administers Australian Government environment, heritage and arts legislation and programs. The legislation encompasses a variety of statutory regimes containing a range of criminal and civil penalty provisions and civil and administrative remedies.

The purpose of this policy is to describe the principles used by the department when addressing possible contraventions of environment, heritage and arts legislation.

The policy describes the factors taken into account in determining appropriate responses to contraventions, including whether or not legal proceedings will be pursued. The department's approach and procedures for individual cases may vary where there are specific legislative requirements.

This policy sits within the broader Australian Government law enforcement policy context and is informed by:

- *The Prosecution Policy of the Commonwealth*, and
- *Commonwealth Fraud Control Guidelines*
- Directives and guidelines issued by the Attorney-General's Department, including:
 - *Legal Services Directions* - a set of binding rules about the performance of legal work for the Commonwealth
 - *Overarching Principles for Selecting Cases for Investigation and Administrative, Civil and Criminal Sanctions*
 - *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (December 2007)
- *Australian Government Investigations Standards*
- Australian National Audit Office (ANAO) Better Practice Guide *Administering Regulation* (March 2007)
- Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling* (April 2009)
- Relevant legislative obligations relating to security, privacy and freedom of information, and
- Emerging case law and other legal developments.

The department regularly reviews its compliance and enforcement policy and procedures, and incorporates lessons learned into its policies, procedures and the legislative process itself.

2. Objectives and guiding principles

The department's compliance and enforcement policy seeks to:

- maximise compliance with legislation
- help achieve the objectives of legislation
- promote and encourage the protection of the environment, heritage and the arts, and
- provide a credible and effective guide for stakeholders and the wider community.

In the course of implementing this policy the department will:

- ensure compliance and enforcement activities are undertaken in a manner which is:
 - in accordance with the law
 - effective and proportionate
 - fair and impartial
 - respectful of individuals, and
 - within officers' authority.
- administer and enforce its legislation in a coherent, consistent and objective manner, and
- conduct itself in accordance with the departmental *Service Charter* (available on the departmental website).

3. The department's responsibilities

The department deals with matters arising under legislation administered by the Minister for the Environment, Heritage and the Arts and the Minister for Climate Change and Water. Of that legislation, the following Acts, or regulations and ordinances made under them, contain offence or penalty provisions:

Aboriginal and Torres Strait Islander Heritage Protection Act 1984

Antarctic Marine Living Resources Conservation Act 1981

Antarctic Treaty (Environment Protection) Act 1980

Australian Antarctic Territory Act 1954

Environment Protection and Biodiversity Conservation Act 1999

Environment Protection (Sea Dumping) Act 1981

Fuel Quality Standards Act 2000

Hazardous Waste (Regulation of Exports and Imports) Act 1989

Heard Island and McDonald Islands Act 1953

Historic Shipwrecks Act 1976

National Environment Protection Measures (Implementation) Act 1998

Ozone Protection and Synthetic Greenhouse Gas Management Act 1989

Protection of Movable Cultural Heritage Act 1986

Sea Installations Act 1987

Water Act 2007

Water Efficiency Labelling and Standards Act 2005

Further information about compliance and enforcement aspects of these Acts can be obtained from the Department's:

- website at: <http://www.environment.gov.au/index.html>, or
- Community Information Unit on 1800 803 772.

The department also undertakes compliance and enforcement in relation to its programs and responsibilities using other legislation, for example where fraud, theft or other criminal activity may have occurred.

4. Compliance and enforcement approach

The department recognises that a range of compliance and enforcement mechanisms are necessary to provide an effective and flexible regulatory system. This enables the most appropriate response to be chosen for a given issue or incident.

The department promotes self regulation and encourages the community to act in accordance with environment, heritage and arts legislation and programs through measures such as targeted communication and education activities, timely provision of information and advice, persuasion, cooperative assistance and collaboration.

These measures help to:

- raise awareness of the benefits of complying with the legislation and program requirements, and the potential consequences of non-compliance
- remove barriers to compliance (e.g. lack of knowledge regarding legislative or program requirements, or how to comply)
- promote the objectives of the legislation and programs, and
- overcome factors that encourage non-compliance (e.g. lack of public support for, or misunderstanding of, legislative or program objectives).

Where possible, the department engages with the regulated community, including industry sectors. The department also encourages industry-wide codes that are complementary to our legislation and promote compliance.

Where these compliance approaches fail, enforcement mechanisms may be used. The department employs a range of enforcement sanctions to ensure the most appropriate response to breaches of its legislation or program requirements. Sanctions may include exclusion from programs, suspension or cancellation of permits, injunctions, remediation orders, pecuniary penalties (fines), and criminal prosecution.

The department works with partner agencies and co-regulators so as to ensure an appropriate whole-of-government approach is taken on compliance and enforcement matters.

5. Detecting contraventions

The department monitors compliance with and detects contraventions of Australian Government environment, heritage and arts legislation and the department's programs by analysing information from sources such as the general public, industry, non-government organisations and other government agencies.

Monitoring activities may be strategic, targeted or random, and may consist of:

- patrols
- audits
- sample collection
- site visits and inspections
- observations by departmental officers or other agencies, and
- intelligence analysis of information, data and reports.

The department strives to constantly improve its capacity to detect and respond to contraventions and works with other agencies to enhance this capacity. Where appropriate (for example, where the department's monitoring responsibilities overlap with those of other agencies), the department builds strategic partnerships. Information may be shared with other agencies where required or permitted by law.

The department recognises the value of information provided to it by the general public, and welcomes any details of suspected breaches of environment, heritage and arts legislation and program requirements. Information received is handled on a confidential basis and assessed to determine whether further investigative action should be taken.

Where information is received from the general public the department may not be able to provide feedback, as information on specific compliance and enforcement activities will not normally be released to the public. Notwithstanding this limitation, the department will endeavour to respond to correspondence in accordance with its *Service Charter*, to the extent that confidentiality and privacy considerations permit.

6. Investigating contraventions

All reported or detected contraventions of departmental legislation or program requirements are subject to initial assessment to ascertain their priority for further compliance and enforcement action. Prioritisation is undertaken to ensure the department's investigative resources are used in the most effective manner.

Initial assessment typically includes a preliminary examination and analysis of the report or allegation in order to decide the likelihood that a contravention has occurred, its seriousness and its probable consequences. If possible, the department will act to prevent a potential breach and discourage ongoing and future breaches.

Based on the outcome of initial assessment and the relevant provisions of legislation, the department will determine the appropriate level, if any, of further investigation or response. Depending on the results of the initial assessment, the department may:

- elect to not pursue the matter further (having regard to its jurisdiction, priorities, and how best to achieve the objects of the legislation or program)
- elect to not proceed with further investigative action, but take action to increase awareness and encourage compliance (such as use of educational material and engaging relevant stakeholder groups)
- elect to not proceed with further investigative action, but implement a mid-range compliance response such as seizure of a prohibited item, or
- proceed with further investigative action.

The department's investigations aim to:

- determine whether or not there has been a contravention of law
- gather evidence which would be admissible in criminal prosecutions or civil proceedings, or which may facilitate appropriate administrative measures
- improve controls to prevent contraventions
- deter further or similar action
- improve public confidence in the integrity of the regulatory system, and
- achieve an appropriate outcome within a reasonable time and at reasonable cost, according to legislative requirements and the nature of the investigation.

In certain circumstances the department may choose to (or be required to) refer suspected contraventions to the Australian Federal Police or other enforcement agencies for investigation. During such investigations, the department provides support to the relevant investigating agencies on matters relating to administration of Australian Government environment, heritage and arts legislation and programs. Any information shared with other investigating agencies will only be done so when required or permitted by law.

7. Responding to contraventions

The department aims to use the most appropriate compliance and enforcement option in response to each contravention.

Responses range from education and/or warnings to deterrent sanctions such as exclusion from programs, suspension or cancellation of permits or approvals, injunctions, remediation orders, seizure of goods, pecuniary penalties (fines) and criminal prosecution.

In determining the appropriate response to a contravention of legislation or a program administered by the department, the department considers a number of factors including:

- *The nature and severity of the harm done*
 - the seriousness of the harm caused by the contravention, both to other people and to the environment or cultural heritage
 - the cost of the contravention to the Australian Government or general community, and
 - Australia's obligations under relevant international agreements
- *The law*
 - objectives of the legislation and the specific penalty provisions
 - legal precedents affecting the case
 - the precedent and/or deterrent value of specific responses
 - the standard of evidence collected, and
 - the time elapsed since the contravention
- *The integrity of the regulatory system*
 - the prevalence of the type of contravention
 - the likely public concern about the seriousness of the contravention
 - the efficacy of the proposed response option, and
 - whether the proposed response will promote compliance, and engender confidence in the regulatory system.
- *Any aggravating or mitigating circumstances*
 - the level of malice or culpability – whether or not the contravention was intentional, reckless, negligent, or a mistake
 - the apparent commercial value of the contravention
 - the history of prior contraventions under the same or similar legislation (excluding spent convictions)
 - the likelihood of the contravention continuing or being repeated
 - whether the matter was self-reported, and
 - the level of cooperation afforded the authorities.

Responding to contraventions (continued)

Where legislation provides for a range of administrative, civil and/or criminal responses, the department will determine the most appropriate response based on the particular circumstances of the case.

The different types of responses used by the department are described in greater detail below.

7.1. Administrative Measures

Where appropriate the department may pursue administrative measures or alternative dispute resolution (ADR) rather than court based legal remedies.

Administrative measures are those implemented by the department or the Minister that do not require court action. Failure to comply with the conditions of some types of administrative measures may result in the department subsequently taking court action.

The department uses administrative measures to respond in a manner which is flexible, in proportion, and appropriate to the contravention. Administrative measures are typically less expensive to apply than court based measures, and often enable earlier resolution of the matter in question. Importantly, administrative measures lend themselves to achieving sound and timely environmental, heritage or arts outcomes in the public interest.

Administrative measures may include:

- cautions and educational messages
- requiring a person to take a particular action
- formal advisory or warning letters requiring future compliance
- infringement notices
- varying, or imposing further conditions on permits, licences or approvals
- suspending, revoking or cancelling permits, licences or approvals
- retaining bonds or securities lodged as a condition of permits, licences or approvals, to remediate any harm caused by a violation
- directed audits
- conservation or other agreements to compensate for the contravention or to prevent future contraventions
- enforceable undertakings
- Ministerial orders to correct a contravention, and
- forfeiture of items (e.g. illegal specimens).

The subject of an administrative sanction may, in some cases, have a right of appeal depending on the type of sanction used.

7.2. *Civil Remedies*

Some departmental legislation provides for a range of civil remedies, including civil penalty provisions.

A civil penalty provision is set out in a similar way to a criminal offence and is subject to proceedings in a court. Where the department has sufficient evidence that a civil penalty provision has been contravened (a 'civil contravention'), it may pursue civil penalties.

Where legislation lists civil penalty provisions the civil penalty options available to the department are contained in the legislation itself.

Civil penalties do not result in imprisonment or criminal convictions. However, civil pecuniary penalties (fines) contained in departmental legislation are typically of higher magnitude than those for the equivalent criminal offences. This reflects the need for economic deterrence to non-compliance, and the fact that civil penalties also seek to redress the harm done as a result of contraventions.

Civil penalties offer a number of advantages in the enforcement of environmental, heritage or arts legislation:

- they lend themselves to securing a sound environmental, heritage or arts outcome in the public interest
- they lend themselves to the sanctioning of organisations (e.g. bodies corporate) in addition to individuals, and
- they are subject to a lower burden of proof than criminal prosecutions.

Other civil remedies which are available to the department include:

- fines, to deter non-compliance with the legislation
- injunctions, to prevent certain behaviour from being taken or continuing
- court orders requiring certain actions to be taken, such as:
 - repair and mitigation of damage, or
 - actions necessary to conserve the environment on Commonwealth land.

Civil actions initiated by the department/Minister are normally heard in the Federal Court; however, they may also be heard in a Supreme Court of a State or Territory if specified in the legislation providing for the civil remedy.

The process used to pursue civil actions closely follows the procedures used in private civil actions.

Civil action is undertaken on behalf of the department/Minister by a legal service provider acting on instructions from the department.

7.3. Criminal Penalties

Legislation for which the department has compliance and enforcement responsibilities typically contains criminal offences. A person found guilty of committing a criminal offence may receive:

- a criminal record
- a fine, and/or
- imprisonment.

If the department considers criminal prosecution to be the most appropriate response to an alleged offence and sufficient evidence is gathered, it may prepare a brief of evidence. The brief may then be referred, at the department's discretion, to the Commonwealth Director of Public Prosecutions (CDPP), who has responsibility for prosecutions of offences against Australian Government law.

The department's decision to refer a matter to the CDPP is informed by a number of considerations. The department is likely to favour a referral to the CDPP where any of the following circumstances occur:

- The offence produced real or potential harm to the Australian Government or the community, including harm to the environment, cultural heritage, economy, resources, assets, or well being of Australia or Australians.
- The Australian Government or the community expect that the offence will be dealt with by prosecution conducted in public before a court.
- The offence is of such a nature or magnitude that is important to deter potential offenders and prosecution is likely to act as an effective deterrent.
- Previous administrative or civil responses to contraventions by the suspect have not resulted in compliance.

If a matter is referred, the final decision on whether a prosecution is to be instituted or continued rests with the CDPP. The CDPP's decision will be taken in accordance with the *Prosecution Policy of the Commonwealth*, which lists a number of criteria, including whether or not prosecution is in the public interest. In making its decision the CDPP takes into account the views expressed by the department on the issue.

The department has entered into a Memorandum of Understanding with the CDPP to govern the process by which criminal matters will be pursued.

8. Disclosure of information on compliance and enforcement activities

Responses to information requests regarding general compliance and enforcement matters will be handled in accordance with the department's *Service Charter* (available on the departmental website), subject to any confidentiality obligations and the legislative requirements relating to information security and privacy. Media inquiries will be handled by departmental Public Affairs.

The department does not release information on specific compliance and enforcement activities, such as active investigations, to the public unless it is absolutely necessary or required by the investigative process (for example, to seek information from potential witnesses). Information may be shared with co-regulators for the purpose of law enforcement and subject to relevant information security and privacy provisions.

In particular, no comment will be made that may:

- prejudice a person's right to a fair hearing or legal process
- impinge upon the privacy or safety of others involved in the investigation (such as complainants, witnesses and suspects), or
- prejudice any past or future actions of the department.

Even after completion, the details of investigative activities will normally remain confidential. However, most court proceedings are open to the public. Additionally, the enforcement outcome may be publicised where appropriate (for example, in accordance with Section 498 of the *Environment Protection and Biodiversity Conservation Act 1999*).

Requests for information relating to compliance or enforcement or matters made pursuant to the *Freedom of Information Act 1982* (FOI Act) will be handled in accordance with the processes set out in the FOI Act. Any decision to release or refuse to release information will be considered on a case-by-case basis in accordance with the provisions of the FOI Act.