

## Part 4 Regulating noise impacts

The key regulatory tools for managing local environmental noise impacts are provided by the *Protection of the Environment Operations Act 1997* (POEO Act) and the **POEO (Noise Control) Regulation 2000**. A range of notices, directions and orders in relation to noise can be issued under the POEO Act. The Regulation describes offences and outlines penalties for those offences.

Other legislation that can be used to manage specific noisy situations includes:

- *Environmental Planning and Assessment Act 1979 (and Regulation 2000)*, which provides for orders for breach of development consent or development consent conditions with a Penalty Notice option
- *Companion Animals Act 1998*, which provides for Nuisance Dog and Cat Orders requiring the owner to prevent nuisance behaviour for six months
- *Local Government Act 1993 (s. 124) Order No 18*, which requires an occupier of a premises to keep animals, including birds, in an appropriate manner specified in the order
- *Local Government Act 1993 (s. 125)*, which enables a council to abate a public nuisance or order a person responsible for a public nuisance to abate it
- *Strata Schemes Management Act 1997*, which provides for various notices, orders for breaches of strata by-laws, and disputes between neighbours in strata title schemes.

This Guide focuses on the use of powers under the POEO legislation. The Department of Local Government may give advice on the appropriate use of other powers.

The decision regarding which of these instruments to use will depend on the circumstances of each noise problem and on the judgement of the officer. It may be helpful for council officers to discuss the statutory options available for addressing noise with a senior manager or council's legal officer.

### 4.1 Deciding on a course of action

There are many factors to consider when deciding on the best course of action in response to a specific noise problem.

Issuing a Penalty Notice tends to provide more streamlined enforcement procedures for many common noise problems where a fine may provide

an adequate deterrent. For example, the Noise Control Regulation requires that a motor vehicle not be used in any place, other than a road, in a manner that results in offensive noise (clause 14). If the use of trail bikes on private land was emitting offensive noise and a council officer decided to enforce compliance with the Regulation, then a Penalty Notice could be issued immediately on a single site visit by an enforcement officer.

#### Which notice or direction to use?

Things to consider when choosing which notice or direction to use:

- Is council the ARA, and is the investigating officer an authorised officer or an enforcement officer?
- If a Penalty Notice is to be issued by an officer, is that officer an enforcement officer who has powers to issue Penalty Notices for that offence?
- Will the fine from a Penalty Notice prevent the noise from continuing?
- Can the problem be easily remedied? For example, reducing the volume on a stereo, or stopping the use of trail bikes.
- Is work required to reduce noise? For example, insulation of a noisy pool pump.
- Does council have the expertise and equipment to take noise measurements?
- Do noise measurements need to be taken or can the officer easily assess the noise as being offensive?
- Is it a complex noise problem? For example, are there several different noise sources on a site?
- Is it possible to set an achievable noise level that should be met?
- Is it more appropriate to require best management practices to be adopted to minimise noise?
- How will council determine compliance with any notice served?
- Does the ARA have enough evidence to act on and to defend any appeal of a notice in court?

In comparison, if an officer decided to issue a Noise Abatement Direction under the POEO Act, then at least two assessments of the noise are normally needed. The first is to assess whether offensive noise is or was being made and, if so, to issue the direction. Subsequent assessment would then be required to determine whether the direction was being complied with. A Penalty Notice could be issued if offensive noise continued to be made within 28 days in breach of the direction.

There may be situations where the Regulation has been applied, but where the problem has escalated or is ongoing. For example, if the trail bikes continued to be used on the private property, despite warnings and Penalty Notices, it may be appropriate for an officer to consider the other regulatory tools provided by the POEO Act. A Prevention Notice or a Noise Control Notice could be served on the trail bike rider or the occupier of the land requiring certain action to be taken or setting a noise limit that must not be exceeded.

#### 4.1.1 Concurrent enforcement actions

Prior to amendments made to the POEO Act in 2005, a notice did not take effect during the appeal period. Therefore issuing of a direction in combination with the notice was considered useful to cover the appeal period in situations where a noisemaker continued to make offensive noise during the appeal period.

This approach is no longer as relevant, as the POEO Act now provides that Prevention Notices and Noise Control Notices can take effect immediately. The reasonableness of when a notice takes effect should be considered to ensure that the process meets the requirements of natural justice.

#### 4.1.2 Animal noise

As there are a range of possible enforcement options available to control noise from animals, it is recommended that individual councils develop and adopt internal procedural guidelines for dealing with noise complaints relating to animals. This allows all complaints relating to a particular animal noise to be treated consistently within local communities.

When assessing the available options it is important to remember that each enforcement action has a differing cost implication for both council and the recipient of the action.

When choosing to issue an order under the *Companion Animals Act 1998* or *Local Government Act 1993*, it will be necessary to first give notice to the owner of the animal that is causing noise impacts and request that they take action to mitigate the noise within a particular time period specified by legislation. The notice should

also outline council's intention to give the order on a specified date, the terms of the proposed order and the owner's right to make representations to the council as to why the order should not be given. It is recommended that the specific provisions in the relevant Acts be referred to for detail prior to issuing any orders.

#### Regulatory options for dealing with animal noise

- The *Companion Animals Act 1998* provides for the service of orders to control nuisance dogs and cats (ss. 21 & 31). The Act assists by defining the characteristics of noise from the animal that would be regarded as a nuisance, including that it interferes with a person's 'peace, comfort or convenience'.
- The *Local Government Act 1993* provides for the service of an order (Order 18 under s. 124) to require the occupier of premises to keep animals, including birds, in an appropriate manner. In terms of noise, the regulations provide that poultry are not to be kept in a manner that creates a nuisance or health risk. Unlike the *Companion Animals Act 1998*, the *Local Government Act 1993* does not provide a definition of nuisance.
- The POEO Act allows for the use of Prevention Notices to control noise from animals.

NOTE: the definition of 'activity' under the Act includes the keeping of an animal. The Protection of the Environment (General) Regulation 1998 clause 59 provides a reduced appeal period of seven days for Noise Control Notices relating to the keeping of an animal.

## 4.2 The Protection of the Environment Operations Act 1997

Table 2 (see next page) summarises enforcement options available under the POEO Act. This may help in deciding which instrument is most appropriate given the specific circumstances of the noise problem. The following sections detail each relevant enforcement option available under the POEO Act.

These are:

- 4.2.1 Noise Control Notices (POEO Act ss. 263–267B)
- 4.2.2 Noise Abatement Directions (POEO Act ss. 275–279)
- 4.2.3 Noise Abatement Orders (POEO Act ss. 268–274)
- 4.2.4 Prevention Notices (POEO Act ss. 95–100)
- 4.2.5 Compliance Cost Notices (POEO Act s. 104(3) and 104(4))

4.2.6 Noise pollution from operating plant and dealing with materials (POEO Act ss. 139–140)

NOTE: *Maintaining a Public Register*—Part 9.2 of the POEO Act requires each Council, as a regulatory authority, to maintain a public register with details including each Environment Protection Notice, Noise Control Notice, Prevention Notice and Compliance Cost Notice.

#### 4.2.1 Noise Control Notices (POEO Act ss. 263–267B)

A Noise Control Notice is used to prohibit an activity or the use of equipment from emitting noise above a specified noise level.

##### Scope

A Noise Control Notice prohibits noise from an activity or a piece of equipment from being emitted above a specified level when measured at a specified point. A Noise Control Notice can be applied to a wide range of premises, including industrial, commercial and residential sites.

The notice must specify the:

- acceptable noise level
- measurement location(s)
- days and times when noise levels apply
- activity or article that is to be controlled.

Failure to provide an appropriate description of the noise source or measurement location may make the notice difficult to enforce. If the notice does not specify the hours during which the noise limit applies, then the noise limit applies to the whole 24-hour period (POEO Act s. 264).

##### Limitations

A Noise Control Notice cannot require or specify works, for example, the preparation of an acoustic report on attenuation. In such instances a Prevention Notice is more appropriate.

##### Using a Noise Control Notice

A Noise Control Notice may be useful when a problem requires work to reduce noise, and where an acceptable noise level can be specified. A Noise Control Notice can also be used before an event occurs by setting an acceptable noise level in advance of when an activity will occur (e.g. a motor sport event or an outdoor concert). A Noise Control Notice remains in force until the ARA revokes it.

##### Specifying a noise level

Before issuing a Noise Control Notice, it is advisable to measure the background noise level. This information makes it possible to assess the intrusiveness (i.e. the extent that noise exceeds the background noise level) of any noise limit being considered for inclusion in the notice. It is possible to use a previously measured background level for the location, provided you can demonstrate that the level is representative of the background in the specific case. A measurement of the problem noise should then be made to determine whether the noise level specified is exceeded. The measuring point selected needs to be representative of the area to be protected. Section 2.4 *Noise measurement* provides advice on how to measure noise. The *NSW Industrial Noise Policy* (Chapter 10) provides additional guidance on noise emitted from existing industrial premises.

A Noise Control Notice must specify:

1. a noise limit that the activity or equipment must not exceed. When deciding what noise limit to set, it is important that the limit be realistic and achievable. Different noise limits may be set for different periods, for example you might set a lower noise limit at night. Don't forget to attach an appropriate noise descriptor and measurement period to the set noise limit (e.g.  $L_{Aeq\ 15\ min}$ )
2. the location where the specified noise limit(s) must be measured. This is usually at the nearest residential boundary, or if the boundary is a long way from a dwelling, such as in rural areas, at 30 metres from the residence. At night, noise can be assessed at 1 metre from a bedroom window to assess the potential for sleep disturbance. However, it is important to ensure that the measurement location is accessible to whoever receives the notice so they or the issuing officer can check compliance. Where access to check compliance is a problem, a more accessible location to measure compliance can be specified, and the noise level can be adjusted accordingly
3. the times and/or days when the noise limit(s) applies. If none are specified then the noise limit applies at all times
4. the noisy activity or article that must be controlled.

A Noise Control Notice must be issued in writing (POEO Act s. 264). A template for a Noise Control Notice is attached in Appendix 4 to this Guide (source: *EPA Guide to Notices 1999*).

**Table 2: Summary of statutory instruments for noise under the POEO Act**

**For use by councils**

| Notice or instrument                            | Precondition                                                                                              | When to use                                                                                                          | Example                                                                                                                                                                               | Appeal period & time in effect                                                                                                                                                                                                                                                                                                                                                 | Penalty for prosecution                                                                                                                                    | Penalty Notice fine                                                                                                                                |
|-------------------------------------------------|-----------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------|
| Noise Control Notice (POEO Act s. 264)          | Measure noise and establish an acceptable noise level for the article or activity.                        | Used to specify noise level and measurement point in a formal way.                                                   | Noise levels from the pump must not exceed 45 dB(A) $L_{\text{eq},15\text{min}}$ at any time between 7 am and 10 pm on any day when measured at the northern boundary of 45 Smith St. | Notice can take effect immediately or on a later date as the notice may specify. Remains in force until revoked or varied by ARA. A person served with a notice may, within 21 days of being served, appeal to the Land and Environment Court. The lodging of an appeal will not delay the commencement of the notice unless the Land and Environment Court directs otherwise. | Corporations \$60,000, and for each day offence continues \$6,000. Individuals \$30,000, and for each day offence continues \$600 (POEO Act s. 265).       | Corporation \$400<br>Individual \$200                                                                                                              |
| Prevention Notices (POEO Act s. 96)             | Applies if activity is being carried out in an environmentally unsatisfactory manner as defined by s. 95. | Action specified in the notice must be undertaken. (This notice can also address other pollution or waste problems.) | Prepare, by a certain date, an action plan to reduce noise from the site and submit it to the ARA.                                                                                    | Notice can take effect immediately or on a later date as the notice may specify. Remains in force until revoked or varied by ARA. A person served with a notice may, within 21 days of being served, appeal to the Land and Environment Court. The lodging of an appeal will not delay the commencement of the notice unless the Land and Environment Court directs otherwise. | Corporation \$1,000,000, and for each day offence continues \$120,000. Individual \$250,000, and for each day offence continues \$60,000. (POEO Act s. 97) | Failure to comply with notice:<br>Corporation \$1,500<br>Individual \$750<br>Failure to pay admin. fee:<br>Corporation \$1,000<br>Individual \$500 |
| Compliance Cost Notice (POEO Act s. 104 & 267B) | Where council incurs costs in ensuring compliance with a Prevention Notice.                               | Provides for recovery of compliance costs, including monitoring.                                                     | Pay \$100, being reasonable costs incurred by council in taking listed steps to monitor compliance with a Prevention Notice.                                                          | Costs must be paid by due date in notice.                                                                                                                                                                                                                                                                                                                                      | Legal action to recover amount owing.                                                                                                                      | N/A                                                                                                                                                |

**Table 2: (cont'd) Summary of statutory instruments for noise under the POEO Act**

**For use by council officers and Police officers**

| Notice or instrument                        | Precondition                                                                                                                                                                 | When to use                                  | Example                                                         | Appeal period & time in effect                                                                                                 | Penalty for prosecution                                                 | Penalty Notice fine                   |
|---------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------|-----------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------|---------------------------------------|
| Penalty Notice (POEO Act s. 224)            | An offence against the POEO Act or the POEO (Noise Control) Regulation for which POEO (Penalty Notices) Regulation says council officers & Police can issue Penalty Notices. | Can be used to fine offender on the spot.    | Offensive noise was made contrary to Noise Abatement Direction. | Penalty must be paid within 28 days of being served unless notice revoked or offender elects to go to court and is prosecuted. | Various                                                                 | Various                               |
| Noise Abatement Direction (POEO Act s. 276) | Offensive noise is occurring or has occurred within the last seven days.                                                                                                     | Quick response to temporary offensive noise. | Cease making offensive noise from stereo system.                | Remains in force for up to 28 days. Can be revoked.                                                                            | 30 penalty units (currently \$3300 @ \$110 per unit) (POEO Act s. 277). | Corporation \$400<br>Individual \$200 |

**For use by individuals**

| Notice or instrument                    | Precondition                                                              | When to use                                                                                               | Example                                                                                                                                                                               | Appeal period & time in effect                                                                                                                                                                                                                                                                                         | Penalty for prosecution                                                     | Penalty Notice fine              |
|-----------------------------------------|---------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------|----------------------------------|
| Noise Abatement Order (POEO Act s. 268) | Any occupier of premises whose occupation is affected by offensive noise. | Allows residents to seek intervention by Local Court (magistrate) without reference to Police or council. | Magistrate satisfied (on balance of probabilities) that offensive noise is being emitted. Order issued to person making the noise directing that offensive noise must not be emitted. | In force immediately or at the time specified in the Order. Lasts until revoked by the Local Court. Option of appeal to Land and Environment Court within 21 days of order being made. The lodging of an appeal will not delay the commencement of the notice unless the Land and Environment Court directs otherwise. | 30 penalty units (currently \$3300 @ \$110 per penalty unit) (POEO s. 269). | No provision for Penalty Notice. |

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## Power to issue a Noise Control Notice

An ARA can issue a notice to:

- the occupier of the premises concerned, or
- the person carrying on the activity, or operating the article, or
- the person proposing to carry on the activity or operate the article (POEO Act s. 264).

Councils can issue Noise Control Notices for activities they are responsible for under the POEO Act. The Waterways Authority can issue Noise Control Notices in relation to non-scheduled activities involving non-pilotage vessels in navigable waters.

Police **do not** have the power to issue Noise Control Notices.

## Appeals and revocation

A Noise Control Notice can be appealed to the Land and Environment Court within 21 days of being served (POEO Act ss. 267 and 290). Where the notice relates to the keeping of an animal the appeal period is within seven days of the notice being served (clause 59 POEO (General) Regulation 1998).

A Noise Control Notice can take effect immediately or on a later date as the notice may specify. The lodging of an appeal will not delay the commencement of the notice unless the Land and Environment Court directs otherwise. If the Court directs a delay, the notice will take effect only after the delay date, or when the Court confirms the notice, or if the appeal is withdrawn (POEO Act ss. 267 & 290).

## Offence

It is an offence to contravene a Noise Control Notice. An offence occurs if the activity or article emits noise above the noise limit specified in the notice during the relevant times or days. However, this does not apply where the noise cannot be detected outside the premises without the aid of an instrument (POEO Act s. 265). This means that any noise above the specified level must also be audible.

The ARA may require the person concerned to pay for all or any reasonable costs and expenses it incurred in monitoring and ensuring compliance with the notice (see section below).

## Penalties

A breach of a Noise Control Notice can be prosecuted in the Land and Environment Court with a maximum penalty of \$60,000 for a corporation and \$30,000 for an individual. Daily penalties also apply for each day the offence continues. A maximum penalty of \$22,000 can be issued in the Local Court for breach of a notice.

Alternatively, an enforcement officer can issue a Penalty Notice for a breach of a Noise Control Notice. This provides for fines of \$200 for an individual and \$400 for a corporation, which can be issued 'on the spot' where this is practicable (POEO (Penalty Notices) Regulation 1999). Council receives the bulk of any fines imposed by the court or by a Penalty Notice.

## Administrative fee for a Noise Control Notice

Cost recovery options for a Noise Control Notice include an administrative fee for serving the notice and a separate Compliance Cost Notice for monitoring or ensuring compliance with the notice.

The mandatory administrative fee of \$320 (at the time of publication) is intended to cover the costs of preparing and giving a Noise Control Notice (POEO Act s. 267A). The fee must be paid within 30 days of receiving the notice. Where the Noise Control Notice is appealed, payment of the fee is suspended until the court has decided the appeal. The administration fee is prescribed by clause 61A of the POEO (General) Regulation 1998.

Appropriate regulatory authorities have discretionary power to waive the administration fee or to extend the period for payment (POEO Act s 267A).

## Power to issue a Compliance Cost Notice

A Compliance Cost Notice can be served to recover the costs incurred by the ARA for monitoring and ensuring compliance with a Noise Control Notice (POEO Act s. 267B). This may include such things as travel to the site to do follow-up inspections and any measurements an officer may take to ensure that the conditions of the notice are being complied with. It is issued by the ARA to the person who was issued with the Noise Control Notice.

The notice does not include the cost of preparing and issuing a Noise Control Notice, which is covered by the administrative fee described in the previous section.

The Compliance Cost Notice should specify a time for payment. The notice should also indicate that if the payment is not received by the specified date then the ARA may take steps to recover the unpaid amount. The ARA may recover any unpaid amounts specified in the notice in a court. There is no right of appeal under the POEO Act.

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## 4.2.2 Noise Abatement Directions (POEO Act ss. 275–279)

Noise Abatement Directions can be issued if offensive noise:

- is being emitted, or
- has been emitted at any time within the past seven days from any premises.

The Direction lasts for up to 28 days.

### Scope

Noise Abatement Directions are useful for quickly dealing with temporary noise problems such as loud music, where the noise can reasonably be reduced or stopped. A direction is an official instruction that offensive noise must cease. A direction can be issued within seven days of the offensive noise occurring and lasts for up to 28 days.

### Using a Noise Abatement Direction

A Noise Abatement Direction can be issued if it appears to an authorised person that offensive noise is being made or has been made in the past seven days (POEO s. 276). An ‘authorised person’ is generally an ‘authorised officer’ (i.e. a person appointed as such under section 187 of the POEO Act) or a Police officer (POEO s. 275).

Offensive noise is defined in the POEO Act. In deciding whether a particular noise is offensive the authorised person would need to apply the definition of offensive noise from the POEO Act and consider what a reasonable person would find offensive. Determining offensive noise is discussed in detail in section 2.3 of this Guide.

The authorised person need not have witnessed the offensive noise before issuing a Noise Abatement Direction. For the direction to be issued, it is sufficient for it to appear to the authorised person that offensive noise occurred in the past seven days. Where an authorised person has not heard the noise, it is preferable to ask witnesses to make a signed statement about the noise and its effect on them.

A template for a Noise Abatement Direction is included as Appendix 4.

### Power to issue a Noise Abatement Direction

An authorised person can issue a Noise Abatement Direction to:

- the occupier of the premises concerned, or
- the person making or contributing to the making of the offensive noise.

### Serving a Noise Abatement Direction

A Noise Abatement Direction can be issued verbally or in writing to the person the authorised person believes to be the occupier of the premises from which the offensive noise originates, or to any person the officer believes is making or contributing to the noise, or both. Where further action may be required it is recommended that a written direction be provided so there is clear evidence of its details. This is helpful for both the regulator and the person receiving the direction.

A Noise Abatement Direction should specify the source or type of offensive noise, for example, ‘cease using concrete saw or any other power tools’.

### Restrictions

Section 278 of the POEO Act states that a Noise Abatement Direction, other than one given by an EPA authorised officer, may not be directed to the State, a person acting on behalf of the State, a State public authority, or a person acting in the capacity of a member, officer or employee of that authority. It also has no force if it affects:

- any activity carried on, by or for the State or a State public authority
- any activity or work that requires or is subject to an EPA licence (see Schedule 1 of the POEO Act).

### Appeals and revocation

There is no right of appeal against a Noise Abatement Direction under the POEO Act.

A direction may be revoked by the person who gave the direction or by another authorised person (POEO Act s. 279).

### Offence

It is an offence to breach a Noise Abatement Direction. This happens if the offensive noise specified in the direction is made again within 28 days of the direction being given (or within a shorter time period if so specified in the notice).

### Penalties

Penalty Notices can be issued for failing to comply with a Noise Abatement Direction, with fines of \$200 for an individual and \$400 for a corporation.

The maximum penalty the Land and Environment Court may impose for not complying with a Noise Abatement Direction is 30 penalty units (at the time of publication \$3,300 (\$110 per penalty unit as set by the *Crimes (Sentencing Procedure) Act 1999* s. 17).

### Special powers of Police for serving or enforcing Noise Abatement Directions

Police officers have special powers for serving and enforcing Noise Abatement Directions. These include the power:

- to enter premises with a warrant (POEO Act s. 280)
- to require certain information (name and address) (POEO Act s. 281)
- to seize equipment making offensive noise in breach of a Noise Abatement Direction (POEO Act s. 282).

#### Warrant to enter premises (POEO Act s. 280)

A Police officer can enter premises (with a warrant) to give a Noise Abatement Direction or to investigate whether a direction has been contravened (POEO Act s. 280(1)).

A magistrate can issue a warrant following a complaint by a Police officer (received either directly or indirectly, see POEO Act s. 280 (2) & (3)) if the Police officer:

- has been denied entry to a particular premises
- believes that offensive noise is being or has been emitted from the premises in the past seven days, and
- issues a direction immediately on entering the premises or calls for an investigation to be carried out to see whether a direction has been contravened.

The POEO (General) Regulation 1998 (clause 58 and Schedule 4 Forms 1, 2 & 3) provides the prescribed forms for the magistrate and the Police officer to record details of the case and the information that must be provided to the occupier of the premises where the warrant is being executed.

#### Police powers after entry by warrant (POEO Act s. 281)

If a person is causing or contributing to offensive noise or has done so within the last seven days then a Police officer can require a person to provide:

- their name and address, or
- the name and address of the occupier of the premises if that person is not the occupier.

The person must first have been warned that they are obliged to provide this information. It is an offence not to provide this information or to give false information, with a maximum penalty of 30 penalty units (POEO Act s. 281(3)).

#### Police power to seize equipment (POEO Act s. 282)

A Police officer can seize or secure any equipment that is making offensive noise if a Noise Abatement Direction is in force and a person is contravening the direction. The person must be warned that the continued use of the equipment may lead to its being seized. If equipment is seized a receipt then needs to be issued to the person. Equipment must be returned or released within 28 days. Other Police powers are not affected (POEO Act s. 283).

### 4.2.3 Noise Abatement Orders (POEO Act ss. 268–274)

Individuals can seek a Noise Abatement Order independent of any regulatory authority such as a council or the Police.

Noise Abatement Orders can only be made by a Local Court.

The magistrate generally issues the order based on the ‘balance of probabilities’.

#### Scope

Any occupier of premises who believes their occupation of the premises is being affected by offensive noise can seek a Noise Abatement Order without involving a regulatory authority such as council or the Police. This is done by filing an Application Notice to a chamber magistrate at the Local Court seeking a Noise Abatement Order. The Court may issue a Noise Abatement Order requiring offensive noise to cease if it is satisfied that the noise was offensive.

#### Using a Noise Abatement Order

Where council or the Police have decided that no further action is justified for a particular matter, the resident can be advised about the option of seeking a Noise Abatement Order from a Local Court.

The burden of proof required for an order to be issued is less than that required for criminal enforcement action by a regulatory authority (i.e. the magistrate may make a ruling on ‘the balance of probabilities’ based on the evidence presented, rather than having to be convinced beyond reasonable doubt).

#### Obtaining a Noise Abatement Order

Any person wanting to seek a Noise Abatement Order should make an appointment to discuss their proposed course of action with the chamber magistrate at the Local Court. The following steps are involved in issuing a Noise Abatement Order:

1. The occupier of affected premises should call the chamber magistrate and discuss the proposed course of action. The chamber magistrate may request a meeting.

2. The occupier of the premises should then file an application notice with the court registry.
3. The court registrar then assesses the application notice and, if approved, the Court will serve a Court Attendance Notice requiring the defendant to attend court.
4. The magistrate may issue an order if satisfied, on the balance of probabilities, that offensive noise either exists or is likely to recur.

As issuing an order involves court time and possibly the involvement of legal representation, the chamber magistrate will often encourage parties to undertake mediation to prevent this time-consuming and potentially expensive process. This being the case, parties should be encouraged to approach the local Community Justice Centre or seek other mediation opportunities before completing the Application Notice.

It is not necessary to obtain legal advice when seeking an order, although this may be advisable depending on the circumstances. An order takes effect either immediately or at a time specified in the order. An order may be revoked or varied by a local court.

### Appeal

A person against whom a Noise Abatement Order has been made may appeal to the Land and Environment Court within 21 days of the order being made (POEO Act s. 290). The lodging of an appeal will not delay the commencement of the notice unless the Land and Environment Court directs otherwise. If the Court directs a delay, the notice will take effect only after the delay date, or when the Court confirms the notice, or if the appeal is withdrawn (POEO Act ss. 267 & 290).

### Restrictions

Under section 270 of the POEO Act, a Noise Abatement Order may not be directed to the State, a person acting on behalf of the State, a State public authority or a person in the capacity of a member, officer or employee of the authority. It also has no force if it affects an activity carried on, by or for the State or a State public authority, or an activity that requires or is subject to an EPA licence.

### Offence

A person who contravenes the terms of a Noise Abatement Order is guilty of an offence (POEO Act s. 269).

The person who applied for the order can seek to have the person given the order prosecuted for contravening the order. Section 218 of the POEO Act identifies who may initiate a prosecution for a breach of a Noise Abatement Order.

Where an order has been breached, the breach will have to be established according to a criminal standard of proof (i.e. beyond reasonable doubt). This is more onerous than the standard of proof required to obtain an order.

### Penalties

The maximum penalty for not complying with a Noise Abatement Order is 30 penalty units (at the time of publication \$3,300 (\$110 per unit set by section 17 of the *Crimes (Sentencing Procedure) Act 1999*). A Penalty Notice **cannot** be used for a breach of an order.

### 4.2.4 Prevention Notices (POEO Act ss. 95–100)

Prevention Notices are used to control activities that are conducted in an ‘environmentally unsatisfactory manner’.

Actions need to be specified in the Prevention Notice.

### Scope

A Prevention Notice can be used to control activities that are conducted in an ‘environmentally unsatisfactory manner’ (as defined in s. 95 of the POEO Act) and should specify the action to be taken to remedy the problem.

Section 96(3) of the POEO Act provides a list of examples of actions that a Prevention Notice can require. This includes requiring an operator to develop an action plan and to supply progress reports on the action required by the Prevention Notice (POEO Act s. 96(5)).

A Prevention Notice can encourage an operator to apply best management practice to an activity. It is likely to be appropriate where:

- there is a complex activity with many noise sources, and changes to operational practices are needed
- it may be difficult or unreasonable to specify an acceptable noise level that must be met
- there are a number of environmental issues requiring action, e.g. noise, air, water or waste problems. A single Prevention Notice can be used to manage all these problems for a particular site or activity.

The Prevention Notice is designed to set out actions that are needed for an activity to operate in an environmentally satisfactory manner. It is oriented towards finding solutions that would control the noise and cannot be used to simply ban an activity unless this is the only way it can be resolved in an environmentally satisfactory solution.

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## Using a Prevention Notice

Before preparing the Prevention Notice you must establish that the activity is being carried out in an environmentally unsatisfactory manner. Section 95 of the POEO Act defines this term. Section 95(c) and (d) contains the most relevant parts of the definition in relation to noise, and states that an activity is being carried out in an ‘environmentally unsatisfactory manner’ if:

- it is not carried on by such practicable<sup>2</sup> 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.

The term ‘practicable means’, as used here, is not defined by the POEO Act, so it is given its natural meaning. The Macquarie Dictionary defines practicable as ‘*capable of being put into practice, done or effected especially with the available means or with reason or prudence; feasible.*’ If there is action that can be taken to prevent, control or minimise the emission of noise, then a prevention notice may be issued.

A Prevention Notice needs to specify:

1. the actions the operator should take to ensure that the activity is carried out in an environmentally satisfactory manner. Section 96(3) of the POEO Act lists some of the things that can be required in a Prevention Notice.
2. If suitable measures to control the noise are not apparent, the Prevention Notice can require that an action plan (noise management plan) be developed by the operator as a first step. The operator usually best understands the noise source and may be able to think of innovative solutions with your encouragement.

An action plan could specify the details that council expects the operator to address. For example, the Prevention Notice may require that the action plan be prepared by a suitably qualified person, that noise be measured or monitored, and that certain control measures have been considered as part of the plan, such as relocating or enclosing equipment or changing operating times. There could also be a requirement that the plan be submitted to council for approval before being implemented. If a two-stage approach was being followed then a further notice could be issued to implement the approved measures. Management options that are developed to reduce the noise need to be feasible and reasonable.

3. the date(s) when the action required in the Prevention Notice must be completed. If an action plan has been requested then you need to specify

a date(s) for the plan to be submitted and implemented.

Where the Prevention Notice is issued to the occupier, but the occupier is not the person carrying on the activity, the occupier must take all available steps to cause the action to be undertaken (POEO Act s. 96(4)).

A template for a Prevention Notice is included in Appendix 4 (source: *EPA Guide to Notices 1999*).

## Power to issue a Prevention Notice

Only an ARA can issue a Prevention Notice. Police **do not** have the power to issue Prevention Notices.

A notice can be issued to:

- the occupier of the premises concerned, and/or
- the person carrying on the activity (POEO Act s. 96(2)).

The Prevention Notice must be issued in writing.

## Appeals

A person given the Prevention Notice may appeal to the Land and Environment Court within 21 days of being served with the Prevention Notice (POEO Act s. 289).

A Prevention Notice operates from the day the notice is given or from a later date as the notice specifies. The lodging of an appeal will not delay the commencement of the notice unless the Land and Environment Court directs otherwise. If the Court directs a delay, the notice will take effect only after the delay date, or when the Court confirms the notice, or if the appeal is withdrawn (POEO Act ss. 267 & 290).

## Offence

A person who fails to comply with the Prevention Notice is guilty of an offence under section 97 of the POEO Act.

The ARA may require the person concerned to pay for all or any reasonable costs and expenses it incurred in monitoring and ensuring compliance with the notice. See section 4.2.5 of this Guide.

If a person has not complied with the Prevention Notice, the ARA itself (or its employees, agents or contractors) can take the action that the Prevention Notice requires (POEO Act s. 98). The ARA may then require the person concerned to pay for all or any reasonable costs and expenses it incurred in taking that action (POEO Act s. 104(4)).

These cost recovery mechanisms are in addition to any prosecution that may be undertaken.

## Penalties

A Penalty Notice can be issued for failure to comply with a Prevention Notice with fines of \$750 for an individual and \$1500 for a corporation.

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A breach of a Prevention Notice can be prosecuted in the Land and Environment Court, with maximum fines being \$1,000,000 for a corporation or \$250,000 for an individual. There are also daily penalties if the offence continues.

#### Administrative fee for a Prevention Notice

Cost recovery options for Prevention Notices include an administration fee for serving the notice and a separate Compliance Cost Notice for monitoring or ensuring compliance with the notice.

The mandatory administrative fee of \$320 (at the time of publication) is intended to cover the costs of preparing and giving a Prevention Notice (POEO Act s. 100). The fee must be paid within 30 days of receiving the notice. Where the Prevention Notice is appealed, payment of the fee is suspended until the court has decided the appeal. The administration fee is prescribed by clause 61 of the POEO (General) Regulation 1998.

Appropriate regulatory authorities have discretionary power to waive the administration fee or extend the period for payment (POEO Act s. 100). Examples of circumstances in which appropriate regulatory authorities might consider waiving the fee are:

- demonstrated cases of financial hardship
- where the Prevention Notice has been issued to a charitable organisation.

#### 4.2.5 Compliance Cost Notices (POEO Act s. 104(3) and 104(4))

A Compliance Cost Notice allows an appropriate regulatory authority to recover the costs of monitoring or ensuring compliance with a Prevention Notice.

It is a separate notice which can be served after a Prevention Notice has been given.

##### Scope

A Compliance Cost Notice can be served to recover the costs incurred by the ARA for monitoring or ensuring compliance with a Prevention Notice (POEO Act s. 104 (3)). It is issued to the person who was issued with the Prevention Notice.

The notice does not include the cost of preparing and issuing a Prevention Notice, which is covered by the administration fee described in the previous section.

##### Power to issue a Compliance Cost Notice

The ARA that has issued a Prevention Notice to a person may issue a Compliance Cost Notice. A Compliance Cost Notice must be issued in writing.

#### Using a Compliance Cost Notice

A Compliance Cost Notice is used to recover the costs associated with monitoring and follow-up action taken as a result of issuing a Prevention Notice. This may include such things as travel to the site to do follow-up inspections, time spent on inspection to ensure that conditions of the notice are being complied with, and measurements an officer may take to ensure that the conditions of the notice are being complied with.

Officers need to keep accurate records of the time spent in ensuring compliance with the Prevention Notice. The ARA will need to determine an hourly fee charge for the purpose of issuing Compliance Cost Notices.

A template for a Compliance Cost Notice is included in Appendix 4.

#### Appeals

There is no right of appeal under the POEO Act.

#### Payment method

Compliance Cost Notices should specify a time for payment. The notice should also indicate that if the payment is not received by the specified date then the ARA may take steps to recover the unpaid amount.

#### Failure to comply

The ARA may recover any unpaid amounts specified in the notice in a court.

#### Registering Compliance Cost Notices

Compliance Cost Notices may be registered with the Registrar-General, creating a charge over any land owned by the person who is the subject of the notice (POEO Act s. 106). This charge will cease to have effect either (POEO Act s. 107):

- on payment to the ARA or public authority of the amount concerned, or
- on the sale or other disposition of the property with the written consent of the authority, or
- on the sale of the land to a purchaser in good faith who, at the time of the sale, has no notice of the charge.

Compliance Cost Notices can be registered with the Registrar-General if attempts to recover the costs have not been successful.

#### Administrative fee for registering Compliance Cost Notices

The ARA may require the person concerned to pay for all or any reasonable costs and expenses it incurred in the lodgement or registration of the notice and any

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resulting charge, including the costs of discharging the charge. The ARA may also take steps to recover any unpaid amounts specified in the notice in court (POEO Act s 107(8)).

#### 4.2.6 Noise pollution from operating plant and dealing with materials (POEO Act ss. 139–140)

There are two general provisions for noise from premises in sections 139 and 140 of the POEO Act. These relate to the operation of plant and handling of materials, respectively.

##### Operation of plant causing noise (POEO Act s. 139)

In situations where council is the ARA, an authorised council officer or enforcement officer can prosecute or issue a Penalty Notice to the occupier of premises where the council officer considers that a noise problem from the premises is being caused by the operation of plant that is poorly maintained or not operated correctly (A Penalty Notice may be issued only by an enforcement officer). In other words, the occupier has failed:

- to maintain the plant in an efficient condition, or
- to operate the plant in a proper and efficient manner.

An example is the operation of worn conveyor belts causing noise as the loose belt is drawn through the drivers.

##### Dealing with materials causing noise (POEO Act s. 140)

In situations where council is the ARA, a council officer, who is authorised by the council to do so, can prosecute or issue a Penalty Notice to the occupier of a premises where the council officer considers that noise is occurring because materials are not being dealt with in a proper or efficient manner by the occupant. For the purposes of this section of the Act:

- ‘deal with’ means process, handle, move, store or dispose of
- ‘materials’ include raw materials, materials in the process of manufacture, manufactured materials, by-products, or waste materials.

An example is the practice of throwing or dumping empty glass bottles into steel drums or containers, thereby making noise.

No warning is required to be given before issuing a Penalty Notice or proceeding with a prosecution where section 139 or 140 of the POEO Act is breached.

## 4.3 The POEO (Noise Control) Regulation 2000

The Noise Control Regulation streamlines the handling of common neighbourhood noise problems by providing more specific controls than the general powers provided under the POEO Act. The provisions of the Regulation are aimed at residential activities and equipment, rather than those on commercial or industrial premises. Noise resulting from residential construction is not intended to be covered by the Regulation as noise from the construction of a dwelling is dealt with through specific conditions of consent given under planning legislation. The Regulation has three main parts relevant to noisy items. These are:

- **Part 2**, which provides for control of the noise from individual motor vehicles operating on public roads and off-road, including on private property, and noise from motor vehicle accessories such as alarms. Council officers, Police and EPA officers have powers in relation to particular provisions
- **Part 3**, which deals with noise from marine vessels such as powerboats, Jet Skis™ and other personal water craft. This part applies mainly to the activities of Waterways Authority officers and Water Police
- **Part 4**, which deals with common neighbourhood noise problems such as the times of use of air conditioners, swimming pool pumps, power tools, building intruder alarms and loud music. This part is most applicable for councils and Police.

Details of offences which can be dealt with by issuing a Penalty Notice are listed in the POEO (Penalty Notices) Regulation 1999, which lists the fine and the class of officer who can be authorised to issue a Penalty Notice for a particular offence.

Table 3 summarises the offences under the Regulation for which councils can issue Penalty Notices. In all cases, council enforcement officers can issue a Penalty Notice where an offence occurs in relation to activities for which council is the ARA and which occur in or in relation to a council’s local government area.

The Regulation applies different methods of control to different neighbourhood noise problems. These controls are:

- preventing the use of certain articles where they can be heard during noise-sensitive periods (e.g. night time)
- placing limits on how long an article can emit noise (e.g. alarms)
- prohibiting the use of certain articles where they emit offensive noise (e.g. off-road trail bikes).

**Table 3: Offences for which Penalty Notices can be issued by councils under the POEO (Noise Control) Regulation 2000**

| Noise source                                                                                                                                                                                                                     | Offence                                                                               | Relevant part of the Regulation | Warning required | Penalty Notice                          |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------|---------------------------------|------------------|-----------------------------------------|
| <b>Motor vehicle</b> used off-road                                                                                                                                                                                               | Cause or permit vehicle to emit offensive noise in a place (not a road)               | Clause 14                       | No               | Individual \$200<br>Corporation \$400   |
| <b>Motor vehicle</b> operated on a residential premises                                                                                                                                                                          | Cause or permit repeat of vehicle noise after warning                                 | Clause 15(1)                    | Yes              | Individual \$200<br>Corporation \$400   |
| <b>Refrigeration unit</b> fitted to a motor vehicle                                                                                                                                                                              | Cause or permit repeat of refrigeration unit noise after warning                      | Clause 16(1)                    | Yes              | Individual \$200<br>Corporation \$400   |
| <b>Motor vehicle sound system</b>                                                                                                                                                                                                | Cause or permit offensive noise from motor vehicle sound system                       | Clause 17                       | No               | Individual \$150<br>Corporation \$300   |
| <b>Motor vehicle alarm:</b> use of car alarm while vehicle engine is running or ignition is on                                                                                                                                   | Cause or permit noise from motor vehicle intruder alarm with panic or override switch | Clause 23                       | No               | Individual \$200<br>Corporation \$400   |
| <b>Motor vehicle alarm</b> sounding continuously or intermittently                                                                                                                                                               | Cause or permit use of noisy alarm (for up to <b>24 hours</b> )                       | Clause 24(1)                    | No               | Individual \$200<br>Corporation \$400   |
| <b>Power tools</b> (including powered garden tools, electric power tools, pneumatic power tools, chain saw, circular saw, gas or air compressor) & <b>swimming pool pumps</b> (including spa pumps) used on residential premises | Cause or permit repeat of power tool or swimming pool pump noise after warning        | Clause 50(1)                    | Yes              | Individual \$200<br>Corporation \$400   |
| <b>Musical instruments &amp; amplified sound equipment</b> (includes radio, television, computer, tape recorder, CD player, DVD player or PA system used on residential premises)                                                | Cause or permit repeat of musical instrument or sound equipment noise after warning   | Clause 51(1)                    | Yes              | Individual \$200<br>Corporation \$400   |
| <b>Air conditioner used on residential premises</b>                                                                                                                                                                              | Cause or permit repeat of air conditioner noise after warning                         | Clause 52(1)                    | Yes              | Individual \$200<br>Corporation \$400   |
| <b>Building burglar alarms sounding continuously or intermittently</b>                                                                                                                                                           | Cause or permit use of noisy intruder alarm (for <b>up to 24 hours</b> )              | Clause 53(1)                    | No               | Individual \$200<br>Corporation \$400   |
|                                                                                                                                                                                                                                  | Cause or permit use of noisy intruder alarm (for <b>24 to 48 hours</b> )              |                                 |                  | Individual \$400<br>Corporation \$800   |
|                                                                                                                                                                                                                                  | Cause or permit use of noisy intruder alarm (for <b>more than 48 hours</b> )          |                                 |                  | Individual \$600<br>Corporation \$1,200 |

The following discussion of the Regulation groups the noise sources into three areas:

- **miscellaneous articles** (e.g. power tools, amplified music, air conditioners)
- **alarms** (e.g. burglar and car alarms)
- **motor vehicle related** (e.g. trail bikes off-road, vehicle sound systems, truck-mounted refrigeration units).

### 4.3.1 Miscellaneous articles

- **Power tools and swimming pool pumps**
- **Musical instruments and sound systems**
- **Air conditioners on residential premises**

The Regulation identifies times when certain items must not be used in residential premises so as to be audible inside a habitable room of another residence (whether windows and doors are open or not). Items with restricted times of use include:

- power tools and swimming or spa pool pumps (Noise Control Regulation clause 50)
- musical instruments and sound systems (Noise Control Regulation clause 51)
- air conditioners (Noise Control Regulation clause 52).

These provisions provide a means of determining whether noise from one of the listed items of equipment, which is heard in a neighbouring dwelling, may warrant action based on the time of day that the noise is being emitted. These provisions do not exclude other courses of action if 'offensive noise' is emitted within the allowed times of use. A Noise Abatement Direction, for example, could be issued if an authorised officer considered that a musical instrument was causing offensive noise, regardless of the time of day.

Table 4 lists the restricted times of use for each item.

### What constitutes an offence?

Simply operating an item during restricted hours set out in the Regulation is not immediately an offence. A warning needs to be given and contravened before an offence against the 'time of use' provisions of the Regulation is committed.

Any person can give the warning. However, it is preferable for an authorised officer to issue the warning so that if it is necessary to issue a Penalty Notice, the officer can be sure the warning has been given correctly. A warning can be given verbally or in writing. The warning needs to be given within seven days of the noise occurring. If the item is operated outside hours permitted by the regulation within 28 days of the warning, and the noise is audible inside a habitable room in another dwelling, then an offence has been committed.

A warning must be clear and be understood by the person receiving it. Ideally, it should be confirmed in writing. The person receiving the warning should:

- understand that the warning has a legal basis. This could be achieved by referring to the relevant clause in the Regulation or by giving the person a copy of the clause
- appreciate what they are required to do. This means understanding that they must not cause or permit the particular noise to be emitted within 28 days of the warning being issued
- understand that they will commit an offence if they do not comply.

#### Contravention of a time of use provision

A contravention of a 'time of use' provision occurs where noise from these items can be heard within a habitable room of any residential premises during restricted hours (regardless of whether any door or window to that room is open).

**Table 4: Restricted times of use for miscellaneous articles**

| Type of noise                                                                                               | Times during which restrictions apply                                                                                |
|-------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------|
| Power tools and swimming/spa pool pumps (POEO (Noise Control) Regulation, clause 50)                        | Before 8.00 am or after 8.00 pm on Sundays and public holidays<br>Before 7.00 am or after 8.00 pm on any other day   |
| Musical instruments and electrically-amplified sound equipment (POEO (Noise Control) Regulation, clause 51) | Between midnight and 8.00 am on any day                                                                              |
| Air conditioners (POEO (Noise Control) Regulation, clause 52)                                               | Before 8.00 am or after 10.00 pm on weekends or public holidays<br>Before 7.00 am or after 10.00 pm on any other day |

If an offence has been committed, an enforcement officer can issue a Penalty Notice, or council can bring a prosecution in court, provided there is adequate evidence to support the case. Evidence that may help support enforcement action could include a signed statement from one or more witnesses, identifying the source (if known) and nature of the noise, when and where it was heard, an indication of its volume and its effects on them.

If necessary, a Noise Abatement Direction could be used to control offensive noise, regardless of hours of use, as this provision of the POEO Act applies at all times (see section 2.3 Offensive noise).

### 4.3.2 Alarms

- Motor vehicle intruder alarms
- Building intruder alarms

The Regulation limits the duration for which a building or car intruder alarm may sound. Time limits for alarms manufactured before or after certain dates are presented in Table 5.

No warning is required for an offence to occur.

**Table 5: Restricted duration of noise from alarms**

| Type of noise                                                             | Restrictions on the duration of the noise emitted                                                                                                                                                                                                                                |
|---------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Motor vehicle intruder alarm (POEO (Noise Control) Regulation, clause 24) | <ul style="list-style-type: none"> <li>• more than 90 seconds if the vehicle was manufactured <b>before</b> 1 Sept 1997</li> <li>• more than 45 seconds if the vehicle was manufactured <b>on or after</b> 1 Sept 1997</li> </ul>                                                |
| Building intruder alarm (POEO (Noise Control) Regulation, clause 53)      | Sound is audible in a habitable room of a residential premises, and sounds for: <ul style="list-style-type: none"> <li>• more than 10 minutes if the alarm was installed before 1 Dec 1997</li> <li>• more than 5 minutes if the alarm was installed after 1 Dec 1997</li> </ul> |

The Regulation provides that where an alarm sounds intermittently, it is taken to sound continuously for the purpose of measuring the duration for which it has sounded. For example, a car alarm that sounds for 70 seconds, stops for 60 seconds and sounds again for 70 seconds is taken to have sounded for more than the permitted 90 seconds. This approach applies for both building and car alarms.

### What constitutes an offence?

In the case of a building alarm, an offence is committed by an occupier of the premises who causes or permits an alarm to sound for longer than the specified time limit *and* it is audible inside a habitable room of a dwelling. In the case of a car alarm, an offence occurs if a person causes or permits an alarm to sound for longer than the specified time limit. However, it would not be an offence if the alarm sounds and the car has been involved in an accident, or has been damaged or broken into.

Although the Regulation provides different time limits for alarms manufactured (cars) or installed (buildings) before and after December 1997, this can often be difficult to determine. If in doubt, the alarm can be assumed to have been manufactured before December 1997 and the greater of the two time periods can be applied for a building or car alarm sounding. If the matter goes to court, however, it will not be sufficient to assume that the alarm was installed before December 1997—evidence will need to be given to establish when the alarm was installed. For cars, the date of manufacture of the vehicle is recorded on the vehicle’s compliance plate, which is located in the engine compartment.

### Options for dealing with noisy alarms

When an alarm is sounding for longer than permitted and is causing a disturbance, a council officer has several options, including:

- contacting the owner or occupier of the building or vehicle and asking them to stop the alarm
- issuing a Penalty Notice where an offence has occurred (enforcement officer only).

In certain circumstances (described below), council authorised officers can also enter premises (including vehicles) where an alarm is sounding and disable the alarm (POEO Act, Part 7.4).

### Contacting the owner or occupier

The owner of a property may be traced through council’s rates database and other information available to council. Councils may also consider developing a register of building alarms (both monitoring and standalone), with contact details for owners and occupiers in the event that an alarm is activated. This may facilitate disabling an alarm with the help of the person responsible for the property. Real estate agents may also hold spare keys or alarm codes for premises they administer.

The security company that monitors an alarm (as may be displayed on a window sticker) may also provide information about contacting the owner or be able to disable the alarm.

A car alarm hotline is also available for the public to report faulty car alarms. This service is provided by the

Australian Car Alarm Traders Association can be found on their website at [www.users.bigpond.com/acata](http://www.users.bigpond.com/acata).

### Issuing a Penalty Notice for sounding alarms

Enforcement officers from councils, the EPA, the Police, and the Sydney Harbour Foreshore Authority may issue penalty notices for motor vehicle intruder alarms and building intruder alarms. The Noise Control Regulation provides tiered penalty levels so that a higher penalty is incurred for alarms that sound for longer periods. Where an alarm sounds for more than 24 hours the penalty level is doubled. Where the alarm rings for longer than 48 hours the penalty level is trebled.

A Penalty Notice can be posted or delivered personally to the offender, as provided by section 224 of the POEO Act. In the case of a building alarm sounding where there is no person available to immediately serve a Penalty Notice to, then posting the notice is appropriate.

#### Summarising the powers to enter premises by Authorised Officers and the Police

Authorised officers may enter non residential premises without a warrant where offensive noise has been, is being or is likely to be caused (s.196). In the case of residential premises Authorised Officers will need either the permission of the occupier or hold a warrant in order to enter (s.197).

Police need a warrant to enter ANY premises if denied entry to those premises (s. 280)

Note: Entry to residential premises (s. 197) only occurs on entry to the dwelling, not on entry to the land.

### Entering premises

An officer may believe that the severity of the impact from a sounding alarm is such that taking action to disable the alarm is necessary. This may be the case when an alarm is making offensive noise for a long period (e.g. several hours or days) and where the owner or occupier cannot be contacted.

All other options for contacting the owner or occupier and dealing with a noisy alarm should be evaluated before you decide that entering the premises is necessary to disable the alarm and prevent the offensive noise from being emitted.

#### Council policy for noise from alarms

It is recommended that councils develop and adopt internal procedural guidelines for dealing with noise complaints relating to alarms. Having a formal procedure in place will allow council officers to know with confidence that they are acting in accordance with council policy when taking action such as seeking a warrant to enter residential premises.

Under Part 7.4 of the POEO Act, a council authorised officer can exercise a power of entry for the purposes set out in section 184, which provides that the power of entry may be exercised for purposes including:

1. determining whether there has been compliance with or a contravention of the POEO Act or Regulations, or a notice or requirement has been issued or made under that Act (e.g. the offence of causing or permitting the use of a noisy building intruder alarm under clause 53 of the Noise Control Regulation)
2. administering the Act and protecting the environment generally.

Council authorised officers can exercise the power of entry only where council is the ARA. Council enforcement officers (i.e. officers with the power to issue Penalty Notices under the POEO Act) can exercise this power of entry if it is being exercised in respect of the officer's functions as an enforcement officer. (See POEO Act ss. 188(3) & 189A.)

An authorised officer can enter premises (other than residential premises) at any time where the officer reasonably suspects that noise pollution has been, is being or is likely to be caused (POEO Act s 196(1)(b)).

Premises in the POEO Act is defined to include buildings, land and vehicles. Noise pollution means the emission of offensive noise, i.e. the noise made by an alarm must fall within the POEO Act's definition of 'offensive noise' for the entry to be authorised under section 196(1)(b). If the noise is not offensive noise, then the authorised officer or the enforcement officer could enter the premises at a 'reasonable time' relying on section 196(1)(c). Alternatively, the authorised officer or enforcement officer could enter the premises under section 196(1)(a) if the officer reasonably suspects that any industrial, agricultural or commercial activities are being carried on at the premises, at any time that those activities are being carried out there.

Authorised officers **do not** have the power to enter premises used only for **residential purposes** (apart from crossing residential land to gain access to another dwelling) unless they have the occupier's permission or a search warrant to enter the premises (s.197).

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The provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* that apply to warrants issued under section 199 of the POEO Act do not require the premises to be occupied when the warrant is executed. However, the Act does require that an ‘occupier’s notice’ be served on the occupier as soon as practicable after the warrant is executed if there is no-one at the premises who appears to be 18 years or over and to be the occupier.

The magistrate who authorises the warrant must also issue the occupier’s notice, which must contain a summary of the nature of the warrant and the powers conferred by the warrant. An occupier’s notice must specify:

- the name of the person who applied for the warrant
- the name of the authorised justice who issued the warrant
- the date and the time when the warrant was issued, and
- the address or other description of the premises that is the subject of the warrant.

More details are provided in section 67 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

Authorised officers and enforcement officers can use reasonable force to enter premises and can engage the assistance of Police officers and other people capable of helping with exercising functions under the POEO Act.

An authorised officer now has the specific power under s.198A to switch off or otherwise disable a building intruder alarm or motor vehicle intruder alarm that is sounding in breach of the POEO Act or Regulations. However in exercising this power, the authorised officer must first determine that he/she has a lawful right to enter the premises.

### Police powers of entry for alarms

Police do not have the power to enter premises for the purpose of disabling an alarm (POEO Act, Part 7.4).

Police officers have the power to enter premises (with a warrant) only to serve a Noise Abatement Direction or to investigate whether the direction has been breached (POEO Act s. 280). However, Police could seize or secure a sounding alarm under section 282 of the POEO Act, but only if the alarm is being used to contravene a Noise Abatement Direction and the person in charge of the alarm has been warned that its continued use may lead to its seizure (POEO Act ss. 275–279). See section 4.2.2 of this Guide.

### Liability for damages

Council could be liable to pay compensation for any damage caused by the authorised officer or enforcement officer in exercising a power of entry, unless

the occupier obstructed or hindered the officer in the exercise of that power (POEO Act s. 202).

It is also possible that compensation may be payable for any damage caused by the officer in exercising other powers while at the premises (e.g. in relation to switching off or seizing the alarm). Council should obtain its own legal advice if it is concerned that damage may be caused by its actions.

Before using a power to seize or switch off an alarm, councils and council officers should consider issues such as:

- the continued security of any premises that have been legally and forcibly entered. Consider arranging for a locksmith to assist in entering the premises and securing it on leaving (e.g. installing new locks)
- technical difficulties that may be encountered in disarming sophisticated alarm or security systems. Arranging for an alarm specialist to attend may be beneficial for quickly disabling and avoiding damage to the alarm system
- damage that may occur to the occupier’s or owner’s property as a result of disarming the alarm (e.g. if the power is switched off or the alarm system is damaged)
- the question of whether compensation will be payable to the occupier or owner for any damage caused by the actions of a council officer.

### 4.3.3 Motor vehicle noise

Provisions enforced by council and Police include:

- use of motor vehicles on residential premises (Noise Control Regulation clause 15)
- refrigeration units fitted to motor vehicles (Noise Control Regulation clause 16)
- vehicles operating in places other than roads; e.g. trail bikes (Noise Control Regulation clause 14)
- motor vehicle sound systems (Noise Control Regulation clause 17).

Vehicle noise is managed in two ways, discussed in detail below:

- restricted times for vehicles on residential premises and for refrigeration units fitted to vehicles (Table 6)
- offensive noise provisions for vehicles used off-road and for vehicle sound systems.

#### Motor vehicles on residential premises (POEO (Noise Control) Regulation clause 15)

A vehicle must not be operated on residential premises so that it can be heard in a habitable room of another residential premises within the restricted times, apart from when the vehicle is entering or leaving the premises. An offence will be committed where the

required warning has been issued and a person causes or permits the vehicle to be used in such a manner within 28 days of the warning. An example of where this clause would apply is where a vehicle at a residential premises is being revved or the engine is left running for an extended period. As a guide, an extended period might be longer than 5 to 10 minutes.

### Table 6: Restricted times of use for vehicles

#### Type of noise:

**Motor vehicle** used on residential premises (except when entering or leaving) (POEO (Noise Control) Regulation, cl. 15)

**Refrigeration unit** fitted to a motor vehicle (POEO (Noise Control) Regulation, cl. 16)

#### Times for which restrictions apply:

Before 8.00 am or after 8.00 pm on any Saturday, Sunday or public holiday

Before 7.00 am or after 8.00 pm on any other day

This clause does not cover the noise from an engine if the vehicle is on a public road. This situation is covered by Rule 291 of the Australian Road Rules (applied in NSW under the Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999) which makes it an offence to start or drive a vehicle in a way that makes unnecessary noise.

Police and RTA officers can enforce this provision.

The operation of a vehicle on residential premises should not cause offensive noise to a neighbour at any time of day (see clause 14).

#### Refrigeration units on motor vehicles (POEO (Noise Control) Regulation clause 16)

This clause is intended to apply to vehicles fitted with refrigeration units used to keep freight cold. An example might be frozen food delivery trucks parked with their refrigeration units left running for extended periods.

Conditions under which restricted times of use apply, including the provision of warnings, the definition of 'habitable room' and the noise test applied are the same as described in section 4.3.1 of this Guide.



*Trail bike noise can be annoying, especially when operating along fire trails near dwellings.*

#### Vehicles operating in places other than roads (POEO (Noise Control) Regulation clause 14)

'Places other than roads' means places other than an area open to the public, or used by the public, which was developed for, or has as one of its main uses, the driving or riding of motor vehicles. Examples include the use of trail bikes, four-wheel-drive vehicles and dune buggies operating in places other than roads. This may include private or public land, fire trails, bushland and recreation areas.

The regulation makes it an offence for vehicles operating in off-road locations to cause offensive noise. This could include noise affecting neighbours, people enjoying passive recreation on adjoining parks, or pedestrians.

#### Sound systems in motor vehicles (POEO (Noise Control) Regulation clauses 17 and 17A)

Offensive noise can result from motor vehicle sound systems operated at high volume. Often the music played in motor vehicle sound systems may have most of its energy in the lower frequencies. Such noise can travel further and is less attenuated by building facades.

Clause 17 makes it an offence for 'a person to cause or permit the sound system of a motor vehicle to be used in such a manner that it emits offensive noise'. Clause 17A took effect from 1 July 2002 and is very similar to clause 17 except:

- under clause 17A, only the driver of the vehicle can be guilty of an offence, and demerit points will be recorded against the licence of a driver who is fined.

As the vehicle must be pulled over to issue a fine, only the EPA and Police can enforce this clause; and

- clause 17A applies where the motor vehicle is being driven or used on a road or road-related area, whereas clause 17 does not contain any limitations regarding the location where the motor vehicle is being used.

No general noise limits apply to situations covered by offensive noise requirements. Section 2.3 provides details on how to assess whether noise is offensive.

### Penalties

Where an offence has occurred under clause 14 or 17 of the Noise Control Regulation, both the driver and the owner of the vehicle are taken to be guilty of the offence (see Noise Control Regulation clause 20A). This means that if a council enforcement officer wishes to issue a Penalty Notice, then it can be posted to the owner of the vehicle. The owner will not be liable if the owner was not in the vehicle at the time and provides a written statement nominating the driver at the time of the offence.

### Equity in penalties

Clause 20A of the Noise Control Regulation allows the owner of a vehicle issued with a Penalty Notice for offensive noise under clause 14 or 17 to nominate the driver as the offender when the owner was not in the vehicle at the time of the offence. This means that the person responsible for causing the offensive noise would be responsible for paying any fine. The Penalty Notice issued to the owner must be withdrawn and new one must be issued to the driver.

A similar system applies in relation to noise from vessels (see Noise Control Regulation clause 30A), littering from motor vehicles (see POEO Act s. 146), and for speeding and parking offences under the road transport legislation.

## 4.4 Traffic noise

Through road transport legislation, councils can impose vehicle weight restrictions and speed limits on certain roads, which can affect the level of noise generated by traffic on local roads. The design and location of traffic management structures (roundabouts, speed humps, chicanes etc.) can also (sometimes adversely at the location where the devices are installed) affect traffic noise generation. Consideration of noise impacts should be made when planning traffic management measures, particularly in residential streets.

Council may wish to refer to the *NSW Environmental Criteria for Road Traffic Noise* (ECRTN) to assist in their assessment of road traffic noise impacts. The RTA's *Environmental Noise Management Manual* provides additional advice on implementing the ECRTN

and information on best practice road traffic management.

## 4.5 Dealing with warnings and offences

For the following clauses in the Noise Control Regulation, a properly given warning needs to be issued to the noise maker before an offence can occur. It is an offence if the noise occurs within 28 days following the issue of a warning. These clauses are:

- 15–Use of motor vehicle on residential premises
- 16–Use of refrigeration units fitted to motor vehicles
- 32–Use of sound systems on vessels
- 50–Power tools and equipment
- 51–Musical instruments and sound equipment, and
- 52–Air conditioners.

Similarly, a Noise Abatement Direction (POEO s. 276) is also a warning in the same way.

It is in the interests of the Police and council to foster a good relationship in relation to noise matters. Therefore, cooperation between Police and council regarding Noise Abatement Directions and warnings under the regulation is encouraged as an effective approach to managing noise issues. Under the POEO (Penalty Notices) Regulation 1999 the EPA, councils and Police have powers to issue Penalty Notices for the offences listed above. Where a Noise Abatement Direction is given by one agency then another agency may be able to issue a Penalty Notice relating to that Direction. Case Study 3 describes a situation where this happens.

**However this is not a recommended course of action as it is more effective for council or Police to follow up their own Directions.** It is good practice for council officers to inform local police about Noise Abatement Directions that Council has issued, especially where it is likely that the problem will re-occur at night when council staff are off duty.

Offences under the POEO Act and Noise Control Regulation can be prosecuted in a court. Alternatively, Penalty Notices can be issued.

**The choice of taking either prosecution or Penalty Notice proceedings is available for all offences that are enforced by councils.**

Prosecutions for offences against the POEO Act and the Noise Control Regulation are criminal offences and must be proved beyond reasonable doubt. Sections 217, 218, 219, and 221 of the POEO Act identify who may institute criminal proceedings and for which offences.

Maximum fines for a prosecution of an offence against the POEO Act or Regulations are generally listed with the relevant section or clause.

**Table 7: When to prosecute or issue a Penalty Notice**

| Prosecution                                                                                                            | Penalty Notice                                                                                                                       |
|------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|
| Serious breach of the Act or Regulations.                                                                              | Minor breach of the Act or Regulations. The facts are obvious.                                                                       |
| Problem is a continuing situation where previous enforcement action has been unsuccessful.                             | Problem is a one-off situation and can be remedied easily. Up to two Penalty Notices may be reasonable for the same type of offence. |
| Education and other enforcement actions have failed to change behaviour. More important to address the serious breach. | A Penalty Notice is likely to be a viable deterrent. Opportunity to educate the noisemaker given that Penalty Notice is immediate.   |
| Want to deter similar offences—successful prosecution may help change others’ behaviour.                               |                                                                                                                                      |
| Larger penalty more suitable for the nature of the offence.                                                            | Smaller fine is suitable for the nature of the offence.                                                                              |

The *EPA Prosecution Guidelines* provide guidance on deciding when to prosecute or issue a Penalty Notice when an offence has been committed. Some of the things to consider when deciding whether to prosecute or issue a Penalty Notice for a breach of the POEO Act or Regulations are listed in Table 7.

Once a particular occurrence of an offence has been dealt with by issuing a Penalty Notice, it is not possible to proceed with a prosecution of the same occurrence of the offence. However, where a Penalty Notice has been issued and it becomes apparent that the offence is too serious to be dealt with by Penalty Notice, the notice can be withdrawn within 28 days of being served (even if the penalty required by the notice has been paid) and a prosecution can proceed (see POEO Act s. 228).

- Young people aged 15 to 17 years old can be issued with a Penalty Notice. If the Penalty Notice is referred to court it would be heard in the Children’s Court and lower penalties would apply.

#### 4.5.1 Dealing with offences committed by minors

Issuing Penalty Notices to people under 18 (minors) can be complex. In many cases it will be more appropriate to issue a warning, because special procedures apply when interviewing, issuing Penalty Notices or taking court action against children.

Where it is deemed appropriate to issue a Penalty Notice to a young person, seek legal advice.

- For children less than 10 years of age, it is not possible to issue a Penalty Notice, as they are presumed incapable of being guilty of an offence. In addition, the *Fines Act* specifically excludes children under 10 years old from being fined.
- Children aged 10 to 14 years can be issued with a Penalty Notice. However, if the matter was referred to the court for consideration then the prosecutor (e.g. council) would need to show that the child knew that what they were doing was wrong. The matter would be heard in the Children’s Court and lower penalties would apply.