

# Enforcement - OIR

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## 1. Background

The Offshore Infrastructure Regulator (OIR) is provided with functions and powers under the *Offshore Electricity Infrastructure Act 2021* (OEI Act). The OIR is responsible for regulating work health and safety, **infrastructure integrity**<sup>1</sup> and environmental management of **offshore infrastructure activities**<sup>2</sup> in the **Commonwealth offshore area**<sup>3</sup>.

While licence holders have obligations to effectively manage hazards, impacts, and risks to the workforce, the environment, and the integrity of infrastructure, the OIR's functions of compliance monitoring and enforcement provide assurance that licence holders are meeting mandated requirements and complying with relevant legislation. Where potential non-compliance with legislative duties and obligations are detected, the OIR may compel licence holders to take action or investigate to determine if a breach of the legislation has occurred.

## 2. Purpose

The purpose of this policy is to set out how the OIR will take enforcement actions that are outcomes focused, proportionate, responsive, informed, transparent, consistent, targeted and aligned with the principles of procedural fairness.

## 3. Scope

This policy describes the OIR's approach to taking enforcement action and the principles that the OIR applies when deciding on a particular course of action.

Where potential non-compliances with legislative duties and obligations are detected through inspections or other means, the OIR may take enforcement action as detailed in this policy.

This is not a legally binding document and is provided to inform stakeholders as to how the OIR may exercise its discretion under relevant legislation, without limiting this discretion. It reflects the current policies of the OIR, which may change from time to time, with all changes being notified publicly.

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<sup>1</sup> See section 8 of the OEI Act

<sup>2</sup> Ibid

<sup>3</sup> Ibid

## 4. Relevant legislation

The following Commonwealth legislation is relevant to the administration of the OIR's enforcement activities:

- *Offshore Electricity Infrastructure Act 2021* (OEI Act)
- Offshore Electricity Infrastructure Regulations 2022 (OEI Regulations)
- *Work Health and Safety Act 2011* (Cth) (WHS Act) as applied under the OEI Act
- Work Health and Safety Regulations 2011 (WHS Regulations) as applied under the OEI Regulations
- *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act)
- *Administrative Decisions (Judicial Review) Act 1977*.

## 5. Principles of enforcement

The OIR encourages voluntary compliance and promotes continuous improvement in industry performance. Further, the OIR encourages licence holders to effectively engage with the workforce in relation to work health and safety, infrastructure integrity and environmental management matters. Where necessary, the OIR will take enforcement action to ensure duty holders meet legislative requirements. In taking enforcement action, OIR will be:

- outcomes focused
- proportionate and responsive
- informed
- transparent
- consistent
- targeted
- aligned with the principles of procedural fairness.

### 5.1. Outcomes focused

Enforcement action will primarily target the achievement of clear work health and safety, infrastructure integrity and environmental outcomes. All enforcement actions will have the ultimate intent of driving licence holders to meet their obligations under the OEI Act and Regulations.

In response to an incident where a potential non-compliance is identified, the OIR may also give consideration to broader industry compliance. The OIR's approach to enforcement is based on achieving the best outcome.

### 5.2. Proportionate and responsive

If a potential non-compliance is identified, the OIR will act promptly to ensure licence holders address the potential non-compliance efficiently and effectively.

The OIR will ensure enforcement action is proportionate to the regulated risk posed by the potential non-compliance by considering:

- the hazards, impacts and risks to health and safety, infrastructure integrity or to the environment inherent in any incident or offence that may have been committed
- the gravity of any incident or offence that may have been committed
- the compliance history of the licence holder
- the potential to influence broader industry compliance.

### 5.3. Informed

The OIR's enforcement action will be informed by information obtained from a range of factors including:

- assessment
- inspections
- performance reporting
- investigations of incidents, accidents, and complaints
- duty holder compliance history and previous enforcement actions
- industry trends.

### 5.4. Transparent

Transparency is important in maintaining stakeholder confidence and helping duty holders to understand what is expected of them and what enforcement action may be taken. The OIR will explain to duty holders the basis for any enforcement action taken. The evidence upon which the enforcement action is taken will be shared with the responsible party (or parties) at an appropriate time.

### 5.5. Consistent

Consistency in enforcement decision making will be promoted by:

- the use of a standard process for enforcement action
- the use of an enforcement management tool that facilitates objectivity
- embedding quality assurance practices in the enforcement decision making process such as subjecting the decision to peer review (comparing the decision with similar decisions, and ensuring that established processes have been followed)
- appropriate training of OIR staff
- oversight of enforcement activity via an internal review process.

### 5.6. Targeted

Where potentially non-compliant activity is identified, all relevant parties who hold duties and obligations under the OEI Act framework will be considered for enforcement action. Any action subsequently pursued by the OIR will be risk-based and proportionate to secure compliance of regulated entities.

## 5.7. Aligned with the principles of procedural fairness

Enforcement action will be carried out within the powers and processes of the applicable legislation using the principles of procedural fairness. This means that enforcement action will:

- be based on proof or evidence
- provide an opportunity for the duty holder to respond to the issue or the incident, including appeals where applicable
- be taken without bias
- be fair
- be subject to appropriate review.

## 6. Enforcement actions

When the OIR decides to pursue a potential non-compliance with the legislation, consideration will be given to the range of enforcement actions. The form of action(s) pursued will have regard to factors such as the compliance history of the relevant licence holder and potential to influence broader industry compliance.

Having a range of enforcement actions available to the OIR to consider enables the selection of a proportionate, targeted and effective measure to pursue. The range of enforcement actions may also provide scope for escalation of the initial action to criminal and civil penalties if available and/or appropriate. The enforcement provisions available to the OIR under the OEI Act framework, including the applied provisions of the WHS Act, are summarised in the following sections.

### 6.1. Do not disturb notices

Section 205 of the OEI Act allows an OEI inspector to issue a written do not disturb notice if the inspector is satisfied on reasonable grounds that it is reasonably necessary to issue the notice in order to remove an immediate threat to the health or safety of any person or to allow the inspection, examination, measurement, or conducting of tests concerning the offshore premises or a particular plant, substance or thing at the offshore premises.

A period will be stipulated in the notice whereby a direction is given to a licence holder that a particular part of the offshore premises, or a particular plant, substance, or thing cannot be disturbed or to allow for the inspection, examination, measuring or testing for work health and safety, infrastructure integrity, or environmental purposes to take place. The notice may be renewed by another notice in the same terms.

Notification and display of notices will occur in accordance with section 206 of the OEI Act.

### 6.2. Prohibition notices

Section 207 of the OEI Act allows an OEI inspector to issue a prohibition notice regarding an activity if the inspector is satisfied on reasonable grounds that:

- an activity is occurring, or may occur at the premises that involves or would involve an immediate and significant threat to the health or safety of workers, infrastructure integrity or the environment and,
- it is reasonably necessary to issue the notice in order to remove the threat.

The notice must direct the licence holder to ensure that the activity is not conducted or not conducted in a specified manner. The notice may specify the action that may be taken to satisfy the OEI inspector that adequate action has been taken to remove the threat. The OIR is required by law to publish prohibition notices on its website as per section 212 of the OEI Act.

### 6.3. Improvement notices

Section 209 of the OEI Act allows an OEI inspector to issue an improvement notice if the inspector is satisfied on reasonable grounds that:

- a licence holder is contravening or has contravened and is likely to contravene again, a provision of the OEI Act or an applied WHS provision
- as a result there is, or may be, a significant threat to the health and safety of workers, the integrity of infrastructure or to the environment
- action is required to be taken by the licence holder to remove the threat.

The content requirements for the issue of an improvement notice are set out in sections 209 of the OEI Act and include the following:

- the reasonable grounds on which the OEI inspector suspects that a contravention is occurring or has occurred and is likely to occur again
- the reasonable grounds on which the OEI inspector suspects that as a result of the contravention there is or may be a significant threat to the health and safety of workers, the integrity of infrastructure or to the environment
- the nature of the threat
- the action required to be taken by the licence holder to remove the threat
- a period of time within which the licence holder must take action.

The OIR endeavours to ensure that improvement notices allow the licence holder adequate flexibility to achieve the necessary removal of the threat by implementing alternative controls or actions that are otherwise satisfactory to the OEI inspector.

The period stipulated in the notice will be sufficient for the specified action to be taken by the licence holder. The licence holder will generally be given the opportunity to provide comment on the notice prior to issue, including on what a reasonable period of time would be. Given that licence holders will generally have input into the specified period to complete the action, the OIR expects that requests for extension of the stipulated notice period will be rare.

However, if an OEI inspector believes on reasonable grounds that it is appropriate to do so, the OEI inspector may, in writing and before the end of the period, extend the period specified in the notice.

The OIR is required by law to publish improvement notices on its website as per section 212 of the OEI Act.

### 6.4. Infringement notices

Section 215 of the OEI Act and Division 3 of Part 13 of the WHS Act set out the provisions that are subject to infringement notices under part 5 of the Regulatory Powers Act.

## 6.5. Directions

Section 121 of the OEI Act gives the OIR the general power to give a written direction to a licence holder which may be extended to other persons as per section 121(3) about any of the following:

- how the licence holder is to comply with any provisions of the OEI Act, applied WHS provisions, the conditions of a licence, or the management plan for the licence
- how offshore infrastructure activities are to be carried out under the licence
- any matter, under the OEI Act or licensing scheme, a management plan may or must address.

Under section 122 of the OEI Act, a direction given to a licence holder requiring them to take action, or not to take an action, may extend to anywhere in the Commonwealth offshore area, including outside the licence area. If a direction given by the OIR requires the licence holder to take action in or in relation to the area of another licence, the OIR will give a copy of the direction to the holder of the other licence.

Section 124 of the OEI Act enables the OIR to do any or all of the things required by a direction if a person subject to a direction does not comply with the direction. The OIR may do any or all of the things required by the direction itself or it may engage another person to do those things on behalf of the OIR. In this case, any costs or expenses incurred by the OIR become a debt owed to the OIR by the person that was given the direction.

Section 126 of the OEI Act enables the OIR to give written remedial directions to a person who holds a licence or held a licence immediately before the surrender or cancellation of that licence. Such a remedial direction can require a person to do the following things to the satisfaction of the OIR:

- provide for the conservation of natural resources
- make good any environmental damage
- monitor environmentally sensitive areas and report to the OIR within a specified time
- do any other thing required to comply with a licence or management plan under the OEI Act
- do any other thing required to comply with a licence or management plan under the OEI Act that was in effect immediately before the licence was cancelled or surrendered.

## 6.6. Direction to revise management plan

The OEI Regulations allow the OIR to direct a licence holder to revise their management plan for that licence and resubmit the revised plan to the OIR for approval.

A direction issued by the OIR to revise a management plan will be made in writing and include information such as matters to be addressed by the revision, a date by which the revision is required to be submitted and the reasons for the revision. The direction to revise may include a requirement for the licence holder to carry out consultation in accordance with regulatory requirements.

The reasons for directing the revision will depend on the extent of deviation from the approved management plan. The grounds for a direction to revise may include:

- the conducting of activities that are not described in the management plan

- having inadequate controls in place to conduct activities so that risk is eliminated or reduced so far as is practicable
- failure to adhere to conditions of the licence
- failure to comply with management system procedures and policies described in the management plan as applicable to licence activities.

## 6.7. Withdrawal of acceptance of a diving safety management system

The applied provisions of the WHS Act and Regulations allow the OIR to withdraw acceptance of a diving safety management system (DSMS).

The OIR must withdraw acceptance of a DSMS if the OIR gave a notice to revise the DSMS to the person who holds the DSMS, and that person did not give the revision to the OIR.

## 6.8. Enforceable undertakings

Section 218 of the OEI Act allows the authorised person within the OIR (the CEO) to accept written undertakings given by a person in relation to certain listed enforceable provisions of the OEI Act and applied WHS provisions.

The following categories of undertakings may be accepted (as per section 114 of the Regulatory Powers Act):

- an undertaking that a person will take a specified action, in order to comply with an enforceable provision
- an undertaking that a person will refrain from taking specified action, in order to comply with an enforceable provision
- an undertaking that a person will take specified action directed towards ensuring that the person does not contravene an enforceable provision or is unlikely to contravene such a provision.

In the event of a non-compliance with an enforceable undertaking, the OIR may apply to a court for:

- an order directing compliance
- an order requiring any financial benefit from the failure to comply to be surrendered
- an order for damages
- any other order that the court considers appropriate.

Enforceable undertakings must be published on the OIR website in accordance with section 219 of the OEI Act.

## 6.9. Injunctions

The OIR may apply to a court for an injunction to restrain a person from contravening an enforceable provision, or to compel compliance with such a provision. In relation to the functions of the OIR, section 240 of the WHS Act and section 217 of the OEI Act set out the enforceable provisions that may be subject to injunctions, under part 7 of the Regulatory Powers Act.

Such provisions include the obligation to comply with notices such as do not disturb notices, prohibition notices and improvement notices. If a person is contravening any of these obligations, that person can be required by the court to cease the contravention.

## 6.10. Prosecution

The OIR may recommend that the Commonwealth Director of Public Prosecutions (CDPP) consider initiating criminal and/or civil prosecution actions where non-compliance with relevant legislation is identified.

The OIR will consider recommending prosecution action in circumstances where:

- it is warranted by the nature or severity of the incident or breach
- there has been repeated non-compliance with the relevant legislation
- false or misleading information has been supplied wilfully, or with an intent to deceive, in a manner which gives rise to a significant risk
- there has been a failure to comply with an enforcement notice
- OEI inspectors have been intentionally obstructed in the lawful course of their duties
- a relevant party fails to provide assistance to, hinders or obstructs an OEI inspector as required under the relevant legislation and despite warnings and reasonable opportunity to do so
- a prosecution would assist overall regulatory efforts to address widespread non-compliance.

Factors that the OIR will take into account in considering whether to refer a matter to the CDPP for potential prosecution include:

- the nature and seriousness of the non-compliance
- the compliance history of the responsible parties
- whether the behaviour is systemic or part of a growing industry trend
- the level of co-operation of the responsible parties involved in the non-compliance and any associated mitigating factors
- the strength of the case including what evidence is available or is likely to become available to prove non-compliance
- what impact the remedy will have on the responsible parties and other stakeholders, including deterrence
- the cost and time to conduct the prosecution.

The OIR may also pursue civil penalties in court for certain breaches of the legislation.

## 6.11. Adverse publicity order

Section 222 of the OEI Act and section 236 of the WHS Act allows the OIR to apply to a court for an adverse publicity order if a body corporate is found guilty of an offence under the OEI Act or a court orders a body corporate to pay a civil penalty for a contravention of the OEI Act.

In addition to any penalty that may be imposed by the court an adverse publicity order may require the body to:

- publicise, in the way specified in the order, the offence or civil penalty order, its consequences, the penalty imposed and any other related matter
- notify a specified person or specified class of persons, in the way specified in the order, of the offence or civil penalty order, its consequences, the penalty imposed and any other related matter
- give the OIR, within 7 days after the end of the period specified in the order, evidence that the action or actions were taken by the body in accordance with the order.

The OIR may take further court action as set out in section 222 of the OEI Act, in the event that the body fails to provide the required evidence of the action(s) taken or if the action(s) taken are not in accordance with the order.

## 7. Publication of enforcement actions

Section 212 of the OEI Act requires that the OIR publish on its website prohibition notices and improvement notices within 21 days of the notice being issued. Section 219 of the OEI Act requires publication of enforceable undertakings. The OIR has determined that it is in the public interest and is consistent with the regulator's functions, prescribed in OEI Act s.177, to also publish on the OIR's website general directions and remedial directions after they have been issued. To ensure fairness and consistency, the OIR will publish a notice or undertaking on its website as soon as reasonably practicable. Publication does not apply to a do not disturb notice, an infringement notice, or a provisional improvement notice issued by a health and safety representative.

The OIR will ensure that, as far as is reasonably practicable, personal information (as defined in the Commonwealth *Privacy Act 1988*) will not be published and such information in notices or undertakings is de-identified before being published.

If the OIR is made aware in writing that the decision to issue a notice is the subject of an application for judicial review by a court, OIR will not publish the notice. Where a notice has already been published on the OIR's website and the notice is or subsequently becomes the subject of an appeal, OIR will remove the notice from its website as soon as practicable after becoming aware of the application.

## 8. Review of OIR decisions

Decisions made by the OIR in relation to enforcement actions may be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.

Part 12 the WHS Act provides for review of decisions taken by the OIR under the applied provisions of the WHS Act by the Fair Work Commission.

The right to apply for review of a notice will be detailed on the back of the notice issued by OEI inspectors.

## 9. Working with other agencies – information sharing

The OEI Act provides for the using and sharing of offshore infrastructure information or things with other agencies. For persons with functions under the OEI Act, information or things may be shared between persons for the purposes of exercising their regulatory functions and administration of the OEI Act.

## 10. Transfer of enforcement actions

When an enforcement action has not yet fully been complied with by the licence holder who received the enforcement notice and there is a change of licence holder, the OIR will assess the circumstances on a case-by-case basis. The OIR will then determine whether continuing the enforcement action would be practicable, appropriate and whether grounds for issuing the enforcement action remain.

The OIR expects all responsible parties to cooperate prior to the change of licence holder and, where appropriate, share information to support resolution of outstanding enforcement matters.

The OIR will consult with and afford procedural fairness to both incoming and outgoing licence holders.

## 11. Monitoring

This policy is to be reviewed periodically by the OIR. Further reviews will be undertaken as a result of changes to legislation, through feedback elicitation or as a result of accumulated experience.

## 12. Related documents

N-02401-PL2179 - Policy – Inspection

N-03401-PL2100 – Policy – Investigation

N-11300-PL2064 – Policy - Regulatory fees and levies

N-17101-PL2102 – Policy – Sharing information with Australian agencies