

# Compliance and Enforcement

## Penalty Notice Guidelines



Planning

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## 1. Introduction

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Penalty notices are one of a range of options available to the Department of Planning (the **Department**) to deal with offences under environmental planning and assessment legislation.

Enforcement action taken by the Department in response to planning offences will serve either two purposes:

- 1) to **remedy** a breach or **restrain** a threatened breach, by:
  - a. an order or a notice issued by the Department requiring action to be taken, or not be taken;
  - b. by commencing civil enforcement proceedings in the Land and Environment Court seeking orders to remedy or restrain a breach.
  
- 2) to **punish** an offender and **deter** the offender and general community from committing like offences in the future, by:
  - a. issuing a penalty notice requiring payment of a fine; or
  - b. criminal prosecution which results in imposition of a fine or imprisonment.

The choice of enforcement will depend upon the particular circumstances surrounding an offence, particularly the seriousness of the offence and whether a remedial or punitive outcome is sought.

Authorised officers should choose enforcement options which are proportionate to the alleged offence and which are most likely to deter future offences.

In some cases a combination of options may be considered necessary to enforce an approval and provide an effective deterrent against further breaches (for example a penalty notice and an Order issued under section 121B of the Act).

These guidelines describe the circumstances in which it is appropriate for authorised officers to issue penalty notices and sets out the procedures to be followed. These guidelines should be read in conjunction with the Department's *Breach Management Policy* and *Prosecution Guidelines*.

September 2010

## 2. Purpose of these Guidelines

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These guidelines have been developed for the Department when issuing penalty notices for offences under the *Environmental Planning and Assessment Act 1979* (the **Act**) and the *Environmental Planning and Assessment Regulation 2000* (the **Regulation**).

The purpose of these guidelines is to:

- provide information on the penalty notice system and the Department's use of penalty notices;
- identify offences which may be dealt with by penalty notices;
- outline the procedures for issuing penalty notices; and
- define roles and responsibilities of Departmental officers involved in the process.

These guidelines are not intended to apply to other agencies or councils which may also have powers to issue penalty notices for offences against the Act or Regulation.

### 3. What is a penalty notice?

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A penalty notice is a notice served on a person who appears to have committed a prescribed offence under the Act or the Regulation. The person may elect to pay the specified fine for the offence or elect to defend the matter in court. The notice is similar in form to a parking ticket.

A penalty notice may also be referred to as an infringement notice, a penalty infringement notice or a “PIN”.

Generally speaking, penalty notices are issued for one-off, relatively less serious offences.

#### 3.1 Penalty notice offences

The Regulation prescribes the offences for which penalty notices may be issued and the fines payable<sup>1</sup>. The offences include:

- i. Carrying out development without the Minister’s approval under Part 3A of the Act or non-compliance with conditions of approval (breach of s75D of the Act);
- ii. Carrying out development without development consent under Part 4 of the EPA Act or non-compliance with conditions of consent (breach of s76A of the Act);
- iii. Contravention of certain orders issued under the Act<sup>2</sup>, including orders to:
  - cease using premises for a specific purpose;
  - demolish or remove a building;
  - not to conduct, or cease conducting, an activity on premises;
  - cease use of a building;
  - comply with a development consent
  - remedy or restrain a breach of Part 3A or an approval under that Part.
- iv. Offences involving the issuing of certificates by certifying authorities; and
- v. Offences involving fire safety certificates and fire safety statements.

At the time of this publication, the prescribed fines range from \$100 to \$3,000.

Authorised officers must be familiar with the prescribed offences and ensure they rely on the most up-to-date version of Schedule 5 of the Regulation. The Regulation is available online at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

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<sup>1</sup> Regulation, clause 284(1) and Schedule 5.

<sup>2</sup> Act, section 121B, orders 1, 2, 8, 9, 10, 11, 15, 18 and 19

## 3.2 Who can issue a Penalty Notice?

Penalty notices may only be issued by officers authorised by the Minister or Director-General to serve penalty notices under section 127A of the Act. The Director-General's authorisation of officers under section 121I to exercise investigative powers does not include the power to issue penalty notices; those officers can only issue penalty notices if they are authorised to do so under section 127A.

Authorisation to issue a penalty notice is given to a named officer and not by reference to a specific position. A list of officers authorised to issue penalty notices may be found on the Department's intranet or by enquiry to the Compliance Manager.

Penalty notices may also be issued by authorised council officers or by police officers<sup>3</sup>.

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<sup>3</sup> Regulation, clause 284(3)

## 4. The penalty notice system

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The penalty notice system operates under what is known as the Self Enforcing Infringement Notice Scheme (**SEINS**), which is an automated processing system operated by the State Debt Recovery Office (**SDRO**). The SDRO is the fines division of the Office of State Revenue and is responsible for the collection, processing and enforcement of fines in NSW.

### 4.1 What happens after a penalty notice is issued?

The recipient of a penalty notice can either:

- vi. Pay the infringement notice penalty amount within the prescribed period (21 days from date of issue).
- vii. Transfer responsibility for the offence by making a statutory declaration nominating the person actually responsible for the offence. For example, a developer who receives a penalty notice may wish to nominate a subcontractor responsible for the breach.
- viii. Request a review of the matter by the SDRO. The payment date of the offence will be extended. In most circumstances, the request will be referred to the Department for consideration and advice to SDRO.
- ix. Elect to have the matter heard before a court.

Once a penalty notice is issued, the matter is dealt with by the SDRO and the Department has no further role except in the following circumstances:

- to consider any representation made by the alleged offender;
- withdraw the penalty notice if the Department decides to do so; and
- to attend the Local Court if the alleged offender elects to defend the matter in court.

The SDRO gives the alleged offender 21 days within which to exercise one of the four options listed above. If the notice is still outstanding after 21 days the SDRO forwards a reminder notice to the person named in the original notice. The reminder notice allows a further 28 days to exercise one of the above options.

Penalty notices which are not finalised within the prescribed time period will be subject to further enforcement action by the SDRO and a further penalty amount is imposed.

A flow chart of the process which occurs when a penalty notice is issued is shown in **Figure 2**.

Further information on the infringement system can be found online at [www.sdرو.nsw.gov.au](http://www.sdرو.nsw.gov.au).

## 4.2 Relationship between penalty notices and court proceedings

The issuing of a penalty notice does not in itself institute court proceedings. The matter will only proceed to court if the alleged offender elects to defend the matter rather than pay the fine. If a person elects to have the matter determined by a court, proceedings are brought in the criminal jurisdiction of the Local Court.

If the Court finds the person guilty, the amount on the penalty notice is not necessarily the amount that the Court will order to be paid. The Court may impose a considerably higher penalty than the penalty notice amount. In the case of the Local Court, a maximum of \$10,000 may be imposed.

Payment of a fine is not considered as an admission of guilt nor does it lead to the recording of a criminal conviction.

If the fine is paid, no criminal proceedings can be taken against any person for the alleged offence. However, civil enforcement proceedings may still be taken in respect of the same breach to restrain or remedy the breach.

## 4.3 Relationship between penalty notices and other compliance options

The issuing of a penalty notice does not preclude the use of other compliance options (except criminal proceedings as noted above).

While penalty notices are generally appropriate for breaches that can be remedied easily, the notice itself does not require the offender to remedy the breach. If the penalty does not induce the offender to remedy the breach, the Department may need to take additional enforcement action to effect an appropriate remedy, for example, through the use of orders issued under section 121B of the Act or civil proceedings.

## 5. Deciding whether to issue a penalty notice

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### 5.1 Does it appear that an offence has been committed?

A penalty notice may be issued if it appears to an officer authorised to issue penalty notices that a penalty notice offence has been committed. It is important to remember that there must be sufficient evidence to prove all the elements of the offence, particularly if a person elects to have the alleged offence dealt with by a court.

As a minimum, before issuing a penalty notice, the authorised officer must know:

- what particular offence was committed;
- who committed the offence;
- the person's address (if it is a company, its registered office);
- where the offence took place; and
- when the offence took place.

### 5.2 Is a penalty notice the appropriate response for the offence?

An officer may be satisfied that, as a matter of fact, there is sufficient information to establish that a penalty notice offence has been committed. However, the decision to issue a penalty notice is discretionary and an authorised officer can determine whether a penalty notice is an appropriate response to a particular offence. Officers will refer to the Department's *Breach Management Guidelines* for further information on choosing an appropriate enforcement response.

The circumstances of each offence, especially the seriousness, will determine whether it warrants a penalty notice or whether a stronger or more lenient response is appropriate.

- i. Generally, penalty notices **are** an appropriate response for offences where the breach is:
  - relatively minor;
  - an isolated or one-off incident;
  - capable of being remedied quickly and easily;
  - supported by sufficient evidence,and a fine is likely to be an effective deterrent.
- ii. A more lenient response, such as a warning letter or negotiation, may be appropriate for less serious offences.
- iii. Penalty notices are **not** appropriate for more serious offences, that is, where a breach is:
  - causing or is likely to cause environmental harm;
  - ongoing and not within the alleged offender's capacity to remedy quickly;
  - a continuing non-compliance of repeated orders or notices; and/or
  - warrants a higher penalty than the fine prescribed for a penalty notice.

Such cases may warrant criminal prosecution proceedings or civil enforcement proceedings. Officers will refer to the Department's *Prosecution Guidelines* for more information on enforcement options for serious offences.

If there is any doubt about the seriousness of the offence and appropriate enforcement option, consultation with Legal Services is recommended before proceeding.

- iv. Penalty notices are also **not** appropriate in other circumstances, for example where:
- further inquiries are needed to ascertain the nature of the problem and develop an effective long-term solution;
  - an unreasonably long period has elapsed since the alleged offence (note that, in any event, the statutory limitation within which to take action for an alleged offence is 2 years from when evidence of the alleged offence became known to an authorised officer<sup>4</sup>);
  - the evidence is insufficient such that if a Court heard the matter, it would be unlikely to succeed.

### 5.3 Multiple breaches

As already noted, penalty notices primarily deal with one-off breaches that can be remedied easily. By contrast, where multiple breaches have occurred, there is likely to be a major or continuing problem which requires a long-term solution.

In deciding whether to issue multiple penalty notices (for example, for multiple breaches identified by a compliance inspection of an approved project), consideration needs to be given as to whether the breaches warrant the commencement of legal proceedings to achieve a more effective outcome and a higher level of deterrence.

Where multiple penalty notices are chosen as the most appropriate response, the investigating and authorised officers would need to be of the view that prosecution is not warranted. In general, no more than two penalty notices should be issued contemporaneously, however the final number will depend on individual circumstances and the reasons for issuing multiple penalty notices should be fully documented.

### 5.4 Penalty notices to public authorities

There are particular public interest issues that need to be considered in deciding whether to issue a penalty notice to a State or local government entity. Firstly, the public has an interest in public authorities abiding by the law and that the law should be applied equally to the private and public sectors. Secondly, it is ultimately the taxpayer that bears the cost of financial penalties issued to public authorities.

As with all breaches, direct negotiation can be the most effective means to achieve compliance. However, in some cases, taking punitive action may be necessary where direct negotiation has not been effective or to act as a general deterrent.

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<sup>4</sup> Act, section 127(5) to (5C)

The Department will take into consideration the guidelines in Premier's Memorandum No. 1997-26 "*Litigation Involving Government Authorities*"<sup>5</sup> when deciding whether to issue a penalty notice to a public authority. The guidelines will apply if a public authority which has been issued with a penalty notice elects to have it dealt with by a court. The Department will take steps, as set out in the guidelines, to consult with the authority and attempt to reach agreement on as many issues as possible.

The guidelines are based on the general principle that litigation between Government authorities is undesirable and should be avoided whenever possible. However the guidelines are not intended to interfere with the normal prosecution discretion of Government authorities.

In any case, a penalty notice will only be issued to a public authority with the approval of the relevant Executive Director.

## 5.5 Consultation with other regulatory authorities

Compliance action taken by another authority does not preclude the Department from issuing a penalty notice and/or taking other compliance action in response to a breach of the legislation. However, where an offence is identified that another regulatory agency or local council may also be addressing, the Department will consult with the responsible authority to facilitate a coordinated and constructive compliance approach.

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<sup>5</sup> A copy of the Memorandum can be found on the website of the Department of Premier and Cabinet - [www.dpc.nsw.gov.au](http://www.dpc.nsw.gov.au).

## 6. Before issuing a penalty notice

A summary of the procedure for issuing a penalty notice is shown in **Figure 1** and detailed below.

### 6.1 Investigation and recommendation to issue a penalty notice

The investigation may be carried out by an officer authorised to issue a penalty notice or by another officer.

The investigating officer must collect sufficient evidence to prove the offence in court (in the event that the penalty notice is contested by the alleged offender). Evidence may include items such as inspection notes, photographs or video, samples and statements from the alleged offender(s) or witnesses.

Recorded statements or observations on the following are useful, particularly should the matter proceed to Court:

- the state of mind of the appellant i.e. whether the offence was wilful and/or premeditated;
- the reason for committing the offence;
- cooperation with officers.

The investigating officer will provide a brief of the evidence to the authorised officer, together with a recommendation on issuing a penalty notice and other compliance options, as appropriate.

Any evidence gathered during the course of the investigation must be kept and maintained in accordance with the *Evidence Act 1995* and any relevant Departmental procedure, in particular, the Department's *Breach Management Guidelines*.

It is absolutely essential that the brief of evidence prepared by the investigating officer establishes that an offence has been committed because if the person who receives the notice elects to have the matter heard in Court, the Department must be able to prove in Court that the offence was committed by that person.

### 6.2 Decision to issue a penalty notice

Upon receipt of a brief of evidence and recommendation for a penalty notice, the authorised officer will either:

- approve the recommendation;
- request further information from the investigating officer; or
- reject the recommendation and consider alternative compliance options.

To issue a penalty notice the authorised officer must hold the belief that:

- a penalty notice offence has been committed, and
- sufficient evidence has been collected to prove all the elements of the offence.

The decision on whether or not to issue a penalty notice will be recorded on the relevant Departmental file, together with the reasons for the decision.

### 6.3 Advice to alleged offenders

As soon as possible after an offence is identified, the alleged offender will be notified of the offence, advised whether there is a likelihood of further compliance action and the range of possible compliance actions that may be taken. This also affords the alleged offender the opportunity to remedy the alleged breach.

If it is decided to issue a penalty notice, advice of that decision will also be given to the alleged offender as soon as possible after the penalty notice is completed.

## 7. Drafting a penalty notice

### 7.1 Completing the form

There are three parts to a penalty notice:

- Part A is the original notice and is the page sent to the SDRO. At the bottom of the first page there is a section to provide notes regarding the offence. The 'fixed penalty handbook' provided by the SDRO will provide the Department's client code and the offence codes required for each notice.
- Part B is the duplicate and remains in the infringement book for future reference and auditing.
- Part C is the triplicate and is sent to the alleged offender. You will note that Part C does not contain the notes on Parts A and B, rather it provides information regarding the offender's payment or appeal options. A copy of Parts A and C of a penalty notice form is provided at **Annexure A**.

### 7.2 Drafting tips

#### The offence

It is essential that the notice be carefully worded so that it is clear which offence has been committed.

Under "short title of offence" the title of the offence must use identical wording to that provided in the fixed penalty handbook issued to the Department by the SDRO.

On the lines under "description of offence must be completed and if applicable, comments of offender" provide a short description of the evidence; for example "commencement of operation in the absence of a conditions compliance report required by condition 3 of project approval number 1234", or "significant dust emissions from vehicles travelling on unsealed surface of construction site in breach of condition 12 of major project approval number 1234".

#### Correct Legal Entity

The correct legal entity must be named in the notice for the notice to be valid. For notices issued to businesses or companies, establish the registered company name by searching the Australian Securities and Investments Commission (ASIC) database found on line at [www.asic.gov.au](http://www.asic.gov.au).

For individuals, record their full name, address and, if possible, the details of their employer.

## 8. Serving a Penalty Notice

### 8.1 Who must be served?

The notice must be served on the person who appears to have committed the offence. The person served has to be an individual or an incorporated body (such as a company or body corporate).

### 8.2 How must a penalty notice be served?

The notice has to be served personally or by post to a street address, not a Post Office box.

### 8.3 When must it be served?

There is no specific timeframe set out in the legislation for the serving of penalty notices. However, a penalty notice will be served as soon as possible after the Department investigates the alleged offence, to allow the recipient maximum opportunity to recall the events the subject of the notice.

As a matter of best practice it is desirable that penalty notices be served within 28 days of the breach being investigated or within 28 days of advising the alleged offender of the breach, whichever occurs first.

### 8.4 Submission of a penalty notice to the SDRO

There is no legal timeframe within which Part A of the penalty notice is to be submitted to the SDRO. However, for the purposes of this procedure Part A of the penalty notice should be forwarded to the SDRO at the same time the notice is issued to the alleged offender, or at least **within 1 week**.

### 8.5 Notifications within the Department

The authorised officer issuing a penalty notice is to notify the Director General **within 24 hours** of the penalty notice being issued. Notification via email is sufficient, with copies sent to the Compliance Manager and all direct line reports below the Director General. The notification should include:

- The name of the alleged offender;
- A brief description of the alleged offence;
- The name of the issuing officer; and
- Copied attachments of any other relevant information.

The Compliance Manager is to be provided with a copy of each penalty notice at the same time the notice is issued to the offender, or at least **within 1 week**.

The Compliance Manager is to provide the Director General with a monthly list of penalty notices issued, and consolidate accounts with the SDRO.

## 8.6 Penalty notice books

The SDRO has a responsibility to client organisations to effectively manage the printing and release of penalty notice books. Situations where individual infringement books have remained in use for a number of years without being finalised have previously caused problems for the SDRO in identifying available penalty notice book ranges when printing new books. This has resulted in active infringement number duplications, which may, in turn, seriously affect infringement processing and audit controls. For this reason a single book will initially be issued to the Department's Head Office to be held by the Compliance Manager, and a second book to the Jindabyne office.

The SDRO also provides infringement book holders and contemporaneous notebooks.

## 8.7 Cancellation of a penalty notice

In situations where the details on a penalty notice form have been completed and there has been a subsequent decision not to issue the notice before it is served, the notice may be cancelled. For the purpose of this procedure a cancellation is to be forwarded to the SDRO as soon as practicable but within **2 weeks** of being completed.

Penalty notices forwarded to the SDRO for cancellation **must** be in the following format:

- Endorsed with the word "cancelled" on both Parts A and C.
- Clear statement of the reason for cancelling the notice.
- Name (printed in the box), Signature (in addition to name), Authority (name of organisation) and the date of cancellation must be provided by the issuing (authorised) officer.

**Note:** the SDRO processing fee is not charged for cancelled notices.

## 8.8 Withdrawal of a penalty notice

Information may become available following the issuing of a notice that may warrant its withdrawal. Circumstances in which a penalty notice may need to be withdrawn include:

- the notice was issued to the wrong person;
- it has since been determined that there is not a breach of the legislation;
- a lesser compliance action (eg warning letter) is more appropriate; or
- it has since been determined that prosecution is more appropriate.

In such circumstances a penalty notice may be withdrawn as soon as practicable, but within 28 days of service. The authorised officer who issued the penalty notice is responsible for completing the following process to withdraw a notice:

- prepare a letter on the Department's letterhead notifying the SDRO of a withdrawal and a brief statement regarding the reasons;
- forward to the SDRO Business Development Unit (fax 02 4937 9060); and
- contact the person to whom the penalty notice was issued and notify them that the notice has been withdrawn and provide the reason(s) for the withdrawal.

If the penalty notice has already been paid prior to withdrawal then the SDRO will refund the payment.

Where an alleged offender has elected to have the matter heard in Court, and there has been a subsequent decision to withdraw the penalty notice, the SDRO must be advised by the authorised officer at least **10 days** prior to the allocated date for the hearing.

**Note:** this provision should be viewed as a safety net only and not an option to be applied regularly.

## 8.9 Representations

A representation is a written application from the alleged offender for the penalty notice to be reviewed or withdrawn. Only written representations referred to the Department by the SDRO will be considered.

To ensure impartiality, representations should be reviewed by an authorised officer other than the person who issued the original penalty notice. In most cases this will be the Compliance Manager unless the Compliance Manager issued the notice. The details of the representation process are shown in **Figure 3**.

### *Representations made to the SDRO*

The following process shall be followed:

1. The SDRO, upon receipt of a representation, will forward to the Compliance Manager a representations package consisting of a “pink” representation schedule, an infringement inquiry sheet and the actual representation from the alleged offender.
2. The Compliance Manager will, **within 2 days** of receiving the representations package, request from the authorised officer who issued the penalty notice:
  - (a) A briefing note including all facts relating to the issue of the penalty notice; and
  - (b) a statement specifying that the notice was or was not issued in accordance with this procedure, and a recommendation to pursue one of the following options:
    - Infringement to stand (“ITS”) - the penalty notice should remain in force and the penalty is to be paid; or
    - Caution - there are extenuating circumstances where leniency may be considered. These circumstances should be clearly set out; or
    - No action - the notice was issued incorrectly or not in line with Departmental policy and no offence is disclosed.

This information will be forwarded to the Compliance Manager **within 1 week** of receiving the request.

3. The Compliance Manager will facsimile the outcome of the review, contained in the completed representations schedule, to the SDRO **within 2 weeks** of the representations package being received.

If consideration of the representation is likely to take more than 2 weeks, a request to have the matter suspended should be immediately sent to the SDRO. The Director

General (or delegate) must approve of the suspension action prior to the SDRO being notified.

The SDRO is to be advised by facsimile immediately a decision on the representation is made.

### *Representations to the Department or the Minister*

Any representation made to the Department or the Minister should be immediately forwarded to the SDRO to be processed as described above. Written advice that the representation has been forwarded to the SDRO must be sent to the person making the representation.

### *Records of representations*

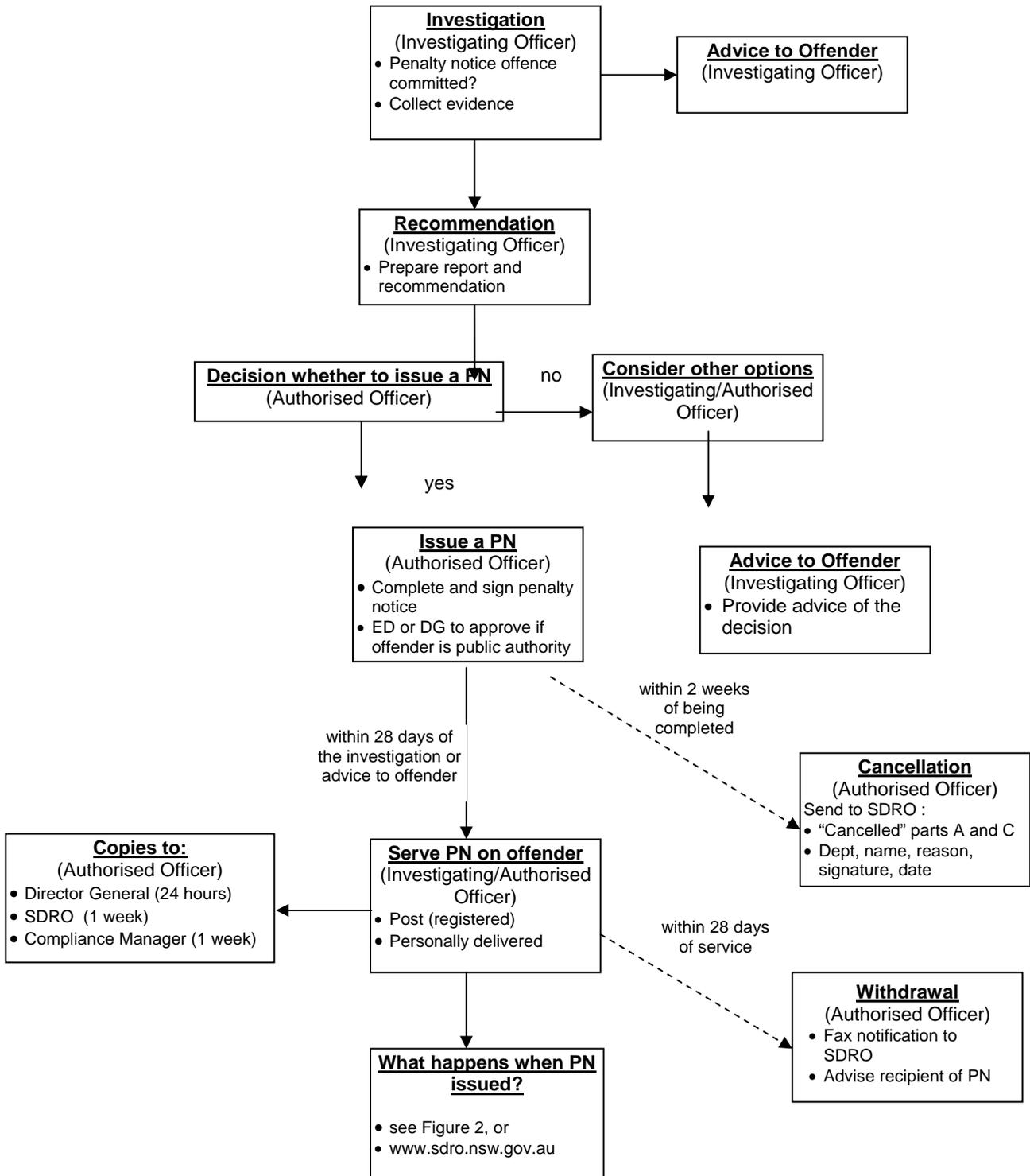
The Compliance Manager is responsible for the maintenance of completed representations and SDRO schedule files. For audit purposes, a representation file must be retained for two years after the date of issue of the penalty notice.

## 8.10 Court elections

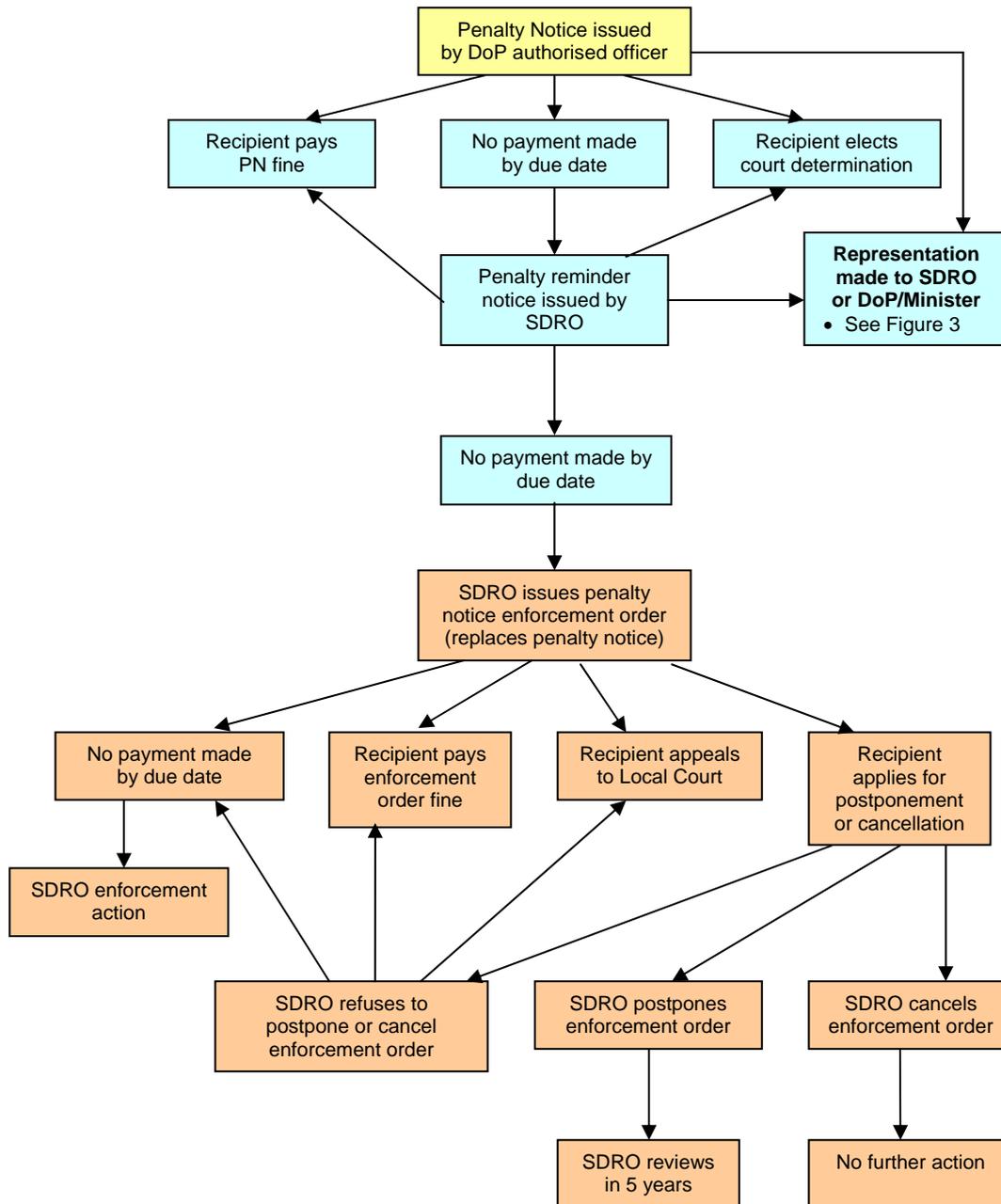
If an alleged offender elects to have a matter determined in Court, they will fill out the "court election" component of the penalty notice and return it to the SDRO. The SDRO will then advise the Department.

Any Court election received by the Department must be referred **immediately** to Legal Services Branch. The legal officer will also require a brief of evidence from the authorised officer who issued the penalty notice.

**Figure 1: Departmental procedure for issuing a penalty notice**



**Figure 2. What happens when a penalty notice is issued (Overview of the SEINS process)**



**Figure 3: Procedure for managing representations**

