



The Sunshine Coast Regional Council regulatory enforcement report



An investigation of actions taken by Sunshine Coast Regional Council in response to complaints about power boat noise.

April 2019

© The State of Queensland (Queensland Ombudsman) 2019

The Queensland Ombudsman supports and encourages the dissemination of its information. The copyright in this publication is licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives (CC BY-NC-ND) 4.0 International licence.



To view this licence visit:

<https://creativecommons.org/licenses/by-nc-nd/4.0/>

Under this licence you are free, without having to seek permission from the Queensland Ombudsman, to use this publication in accordance with the licence terms. For permissions beyond the scope of this licence contact this Office.

Content from this report should be attributed to the Queensland Ombudsman, *The Sunshine Coast Regional Council regulatory enforcement report*, April 2019.

ISBN 978-0-9946327-7-7 (online)

Queensland Ombudsman
Level 18, 53 Albert Street
Brisbane QLD 4000
GPO Box 3314
Brisbane QLD 4001

Phone: (07) 3005 7000
Fax: (07) 3005 7067

Email: ombudsman@ombudsman.qld.gov.au
Web: www.ombudsman.qld.gov.au

Contents

Glossary	ii
Executive summary	iii
1 Background	1
1.1 Circumstances	1
1.2 Attempts to resolve	1
1.3 Complaint to the Queensland Ombudsman	1
1.4 Scope of the Queensland Ombudsman investigation	2
1.5 Relevant legislation and policies	2
2 Council's response to complaints	3
2.1 Actions taken by council	3
2.2 Council's response to the Office	4
2.2.1 Section 440ZA of the EP Act	4
2.2.2 Section 440 of the EP Act	4
3 Analysis	6
3.1 Applicability of legislation	6
3.1.1 Section 440ZA of the EP Act	6
3.1.2 Section 440 of the EP Act	6
3.2 Matters to consider	6
3.3 Council's actions	7
3.4 Adequacy of council's response to the homeowner's complaints	10
3.5 Failure to exercise regulatory function	12
4 Conclusion	13
Appendix A: Jurisdiction and procedural fairness	14
Appendix B: Legislation and policies	16

Glossary

Term	Meaning
boat owner	the owner of the boats moored at the property neighbouring the homeowner's property
CEO	the Chief Executive Officer of the Sunshine Coast Regional Council
chief executive	the chief executive of the Department of Environment and Science
council	Sunshine Coast Regional Council
council's policy	<i>Compliance and Enforcement Policy 2018</i> of Sunshine Coast Regional Council
department	Department of Environment and Science
EP Act	<i>Environmental Protection Act 1994</i>
EP Regulation	Environmental Protection Regulation 2008
homeowner	the complainant to the Office of the Queensland Ombudsman
Ombudsman Act	<i>Ombudsman Act 2001</i>
the Office	the Office of the Queensland Ombudsman

Executive summary

I have chosen to publish this report to highlight the role councils have in regulating noise nuisance. Councils have regulatory responsibility for environmental nuisance, including noise, under the *Environmental Protection Act 1994* (EP Act).

This investigation considered whether the actions of Sunshine Coast Regional Council (council) in response to a homeowner's complaints about noise were reasonable; and whether council had met its regulatory responsibilities.

As the Queensland Ombudsman, I am empowered to investigate complaints and make recommendations to the agency being investigated to improve its practices and procedures.

This report outlines:

- the complaint about noise
- council's actions in response to the complaint
- council's response to the queries raised by the Office of the Queensland Ombudsman
- the steps a regulator should take in responding to a noise complaint.

After considering the evidence, I formed the view that council had not met its regulatory obligations.

Council failed to complete the necessary step of collecting sufficient evidence to determine whether there was a breach of any provisions in the EP Act relating to environmental nuisance.

Council's decision to take no action on the complaint was also flawed. Council cited its *Compliance and Enforcement Policy 2018* (council's policy) as a basis for not taking any action. While council's policy sets out the circumstances where council could decide to take no action, it did not cover the circumstances of this case. Council therefore did not comply with its policy.

Regulators are not able to opt out of fulfilling their regulatory responsibilities.

In this case, council should have investigated whether there was a breach of the relevant legislation and, if there was, taken appropriate action. Under council's policy, no action may be taken in certain circumstances, but, if this was the case, transparency and accountability require it to have provided clear reasons to the person who made the complaint.

I have recommended council investigate the complaint and, if a breach is found, take appropriate action.

In response to my recommendation, council advised that it would:

- engage a suitably qualified consultant to independently undertake an assessment, including the collection of data with a sound level meter
- determine what further action may be reasonable and proportionate having regard to the EP Act and its policy.

Opinion 1

Council failed to meet its regulatory obligations in respect of a complaint made to it concerning noise, in that it:

- did not collect evidence necessary to establish whether a breach of s 440 of the *Environmental Protection Act 1994* had occurred
- incorrectly applied its *Compliance and Enforcement Policy 2018* to determine that no action should be taken.

This is unreasonable administrative action under s 49(2)(b) of the *Ombudsman Act 2001*.

Recommendation 1

Council investigate the complaint concerning noise to determine whether a breach of s 440 of the *Environmental Protection Act 1994* can be established and, if a breach is found, take appropriate action having regard to its *Compliance and Enforcement Policy 2018*.



Phil Clarke
Queensland Ombudsman

1 Background

This report is about whether the actions of Sunshine Coast Regional Council (council) in response to complaints it received from a homeowner about power boat noise were reasonable.

1.1 Circumstances

A homeowner, who lives in a residential area adjoining a canal, was concerned with noise emanating from the neighbouring residential property.

The owner of the neighbouring property (boat owner) moors two large power boats to the property's pontoon. These boats are used for a commercial tourism enterprise. From around 5.45am every Saturday and Sunday, and every day during holiday periods, employees arrive at the property. The employees start the boats' engines so they can run idle while the boats are loaded with materials required for the day, which takes up to 45 minutes. The boats then depart to a commercial jetty to collect their passengers for the day.

The homeowner believed the noise was excessive.

1.2 Attempts to resolve

The homeowner emailed the boat owner advising of the issue and expressing the desire that they be able to 'sort this out' so that a formal complaint to council would not be required. The boat owner responded that they had discussed the matter with council and that the noise described did not constitute noise pollution. They agreed, however, to speak with their skippers about 'keeping it down to the extent they can on early starts'.

The homeowner was unhappy with the continued level of noise and made a complaint to council. The actions taken by council in response to the homeowner's complaints are set out in Chapter 2 of this report.

Council reached the conclusion that it was unable to further assist and advised the homeowner 'it may be more beneficial for you to consider approaching the Department of Justice and Attorney General Dispute Resolution Service ... for the purposes of having your concerns mediated'.

1.3 Complaint to the Queensland Ombudsman

The homeowner complained to the Office of the Queensland Ombudsman (the Office) that council had not adequately investigated their concerns. They stated that 'we have had no response as to why our complaint was not conducted as one would expect'.

1.4 Scope of the Queensland Ombudsman investigation

The Office decided to investigate the adequacy of council's investigation of the homeowner's complaint in relation to noise.

There are other aspects of the complaint that were considered by the Office, but which will not be addressed in this report. This report focuses solely on whether council met its regulatory responsibilities in relation to noise.

The boat owner is mentioned in this report only in the context of council's administrative actions. Nothing in this report should be interpreted as being critical of, or reflecting negatively upon, the boat owner. The Office did not investigate whether the boat owner has breached any law concerning noise and has not reached any view in relation to this. The focus of this report is on council's actions.

Appendix A contains information regarding the Office's jurisdiction and procedural fairness requirements.

1.5 Relevant legislation and policies

Relevant to this matter are the *Environmental Protection Act 1994* (EP Act), the *Environmental Protection Regulation 2008* (EP Regulation) and council's *Compliance and Enforcement Policy 2018* (council's policy). Relevant excerpts from these documents are set out in Appendix B.

2 Council's response to complaints

2.1 Actions taken by council

Following a complaint from the homeowner on 21 September 2016, council attended for a site inspection. The homeowner advised that the visit occurred at 9am, well after the activities complained of usually occur. They further advised that council met briefly with the boat owner, who started the 'quieter small boat but not the larger louder vessel'. Council later advised the homeowner that it was not necessary to start the larger boat because they 'know boats'.

Council then wrote to the homeowner on 8 November 2016 and advised that it had found no evidence of a breach of the planning scheme. Council later clarified in its email of 5 December 2016 that:

I investigated your complaint and determined as there was not a Home Based Business operating from the premises under complaint there was not [sic] breach of the Planning Scheme.

Despite further correspondence between the homeowner and council about whether the boat owner was operating a home-based business, council maintained its position. This issue is not the subject of this report.

During this correspondence, the homeowner provided clarification to council regarding the exact nature of the complaint, and that it related primarily to noise.

In an email of 6 March 2017, council advised:

... I did have regard to whether there was alternative legislation that may impact your situation. In particular this might have included the *Environmental Protection Act 1994* however I am not convinced that the nuisance provisions would be invoked in this circumstance either.

The homeowner sought an internal review on this point and was advised by council in a letter dated 29 May 2017 that:

... (council) sought to understand whether there was any jurisdiction for council to take compliance action. This centred on a legal and operational understanding of s440ZA of the *Environmental Protection Act 1994* (the Act). You were provided advice, in an email of 6 March 2017, that this provision is unlikely to be invoked and this assessment is supported by our internal legal advice and an understanding of the operational effect of this provision.

... there does not appear to be any legislative jurisdiction to effectively deal with any perceived noise nuisance. Given the current situation it may be more beneficial for you to consider approaching the Department of Justice and Attorney General Dispute Resolution Service ... for the purposes of having your concerns mediated.

In an email of 4 July 2017 from council to the homeowner, council reiterated that 'council does not have jurisdiction to deal with [sic] noise complaint that you raise'.

2.2 Council's response to the Office

The homeowner complained to the Office that council had not adequately investigated their concerns. They were particularly concerned that council had not inspected at a time when the noise was occurring to assess the noise and its impact upon them and their partner.

The Office raised issues with council about the applicability of s 440ZA and s 440 of the EP Act.

2.2.1 Section 440ZA of the EP Act

Under s 440ZA of the EP Act, a person must not operate, or permit the operation of, a power boat engine at premises in a way that makes audible noise during the times specified, which relevantly include before 8am on a Sunday or public holiday and before 7am on other days.

The Office made inquiries with council concerning the basis of its view that it had no jurisdiction to deal with the matter under s 440ZA of the EP Act.

Council advised that, having regard to internal legal advice, s 440ZA governs noise from power boats 'at premises' and the waterway is not part of the 'premises'. As the boats in question are situated on the waterway rather than 'at premises', it is not captured by the operation of s 440ZA.

The Office obtained its own legal advice as to whether s 440ZA would apply to the situation in question and that advice was that it would. In light of this, in a letter of 15 January 2018, the Office requested that council reconsider its position.

Council sought external legal advice and this advice supported its previous position that the situation is not captured by s 440ZA. Council accepts the external legal advice that it has received, noting that 'the advice obtained resonates with the general understanding and practical implementation of the noise standards'.

2.2.2 Section 440 of the EP Act

Under s 440 of the EP Act, a person must not unlawfully cause an environmental nuisance.

The Office asked council whether it might consider investigating the noise complaint in accordance with s 440 of the EP Act. Council advised that it had formed the view that there is no legislative basis for council to take action, and that this included investigating whether there might be a breach of s 440.

In the Office's letter to council of 15 January 2018, it again raised the issue of the applicability of s 440 to the current situation.

Council responded in an email of 2 February 2018 that:

... while in principle we accept the application of s.440 (environmental nuisance) there are technical aspects of this that require further probing prior to considering any assessment or compliance action.

In response to a request for council to advise its intended course of action, it advised that it would be seeking external legal advice.

In its letter of 27 June 2018, council noted that 'the application of s.440 is complex'. Council also noted a number of matters to which it would need to have regard in establishing an environmental nuisance under s 440 of the EP Act, and that further consideration would be required before those matters could be established.

Council referred to its policy, including the factors authorised persons may take into account in assessing the most appropriate enforcement action, which it stated are:

- risk (potential to cause physical, financial, environmental or other harm and the consequences of it happening);
- cost (value of time and resources to obtain a positive and beneficial outcome);
- evidence (facts or observations presented in support of an assertion);
- behaviour (the way in which a person responds to a situation considerate of circumstance and exerting a positive demeanour);
- circumstances (facts that surround a situation or event that should be kept in mind when making a decision); and/or
- public interest (the outcome is considerate of the benefits offered to the entire community, or a group within the community or individuals).

Council referred to a comparative example of a tradesperson warming up their vehicle, loading up tools and departing their premises, which it says is similar to the current case in that the alleged offenders are not carrying out a home-based business, but are loading goods onto their vehicle, warming their vehicle up, and in due course departing from their premises to carry out their work in another location. It reiterated its view that it is not a home-based business, nor is it an activity that materially changes the intensity, scale or impacts relevant to the land.

Council advised:

On the balance of the information available to this point Council does not support allocating further resources to compliance investigations on the limited prospect of being able to support enforcement action(s) or more pertinently to defend that action or commence a prosecution.

3 Analysis

3.1 Applicability of legislation

The EP Act is administered by the Department of Environment and Science (department).

Under s 514 of the EP Act, administration and enforcement of parts of the EP Act may be devolved by regulation to a local government. Section 98(a) of the EP Regulation devolves administration and enforcement of s 440 to each local government for its local government area, and s 99(b) similarly devolves administration and enforcement of s 440ZA.

3.1.1 Section 440ZA of the EP Act

Section 440ZA of the EP Act specifically relates to noise from the operation of power boat engines. Council is of the view that the current situation is not captured by the operation of s 440ZA based on external legal advice that it has obtained. Having regard to the legal advice that I obtained in relation to the matter, I do not share council's view.

I remain unconvinced that council's position concerning its interpretation of s 440ZA would be found to be correct if the matter were tested in a court of law. The matter will remain a difference of opinion until that time.

In response to the proposed report, the Chief Executive Officer (CEO) of council referred to my comment that I remain unconvinced that council's position concerning its interpretation of s 440ZA would be found to be correct if the matter were tested in a court of law. He reiterated that council's position in this regard is based on independent legal advice previously provided.

While I acknowledge the point raised by the CEO, the comment continues to accurately reflect my position on the matter.

3.1.2 Section 440 of the EP Act

Council's initial position was that there was no legislative basis for it to take action under s 440 of the EP Act. Council now agrees that s 440 could be used if council assessed that the boat owner's operation of the vessels amounts to unlawful environmental nuisance.

3.2 Matters to consider

When a local government receives a complaint, as a regulator, there are two main issues for its consideration.

1. Whether there is a breach of relevant legislation

To determine if there is a breach of relevant legislation, the local government must:

- (a) consider which legislative provision/s potentially apply and whether the local government has the responsibility to enforce those provisions

- (b) consider each relevant legislative provision to determine what elements need to be satisfied for a breach to be established
- (c) collect evidence sufficient to make a determination as to whether each of the necessary elements has been satisfied.

2. If there is a breach, what action should be taken

Local governments will generally have a policy concerning the way in which they undertake compliance and enforcement activities. In determining the appropriate action to take once a breach has been established, local governments should have regard to this policy. As always, a policy should only be departed from in exceptional circumstances.

3.3 Council's actions

Having considered the actions that a local government should take when presented with a complaint of noncompliance with a legislative provision, I will now consider what actions council took in this case.

1. Whether there is a breach of relevant legislation

(a) consider which legislative provision/s potentially apply and whether the local government has the responsibility to enforce those provisions

While it does not appear that council initially made a full assessment in relation to which legislative provisions may potentially apply in respect of the situation described by the homeowner, council has now agreed that s 440 of the EP Act is relevant to the complaint made.

(b) consider each relevant legislative provision to determine what elements need to be satisfied for a breach to be established

It does not appear that council initially considered the elements which need to be satisfied to establish a breach of s 440. I note, however, that legal advice since obtained by council contained some analysis of the relevant elements.

(c) collect evidence sufficient to make a determination as to whether each of the necessary elements has been satisfied

As noted by council in its response to the Office, a number of elements must be satisfied before a breach of s 440 can be established.

An assessment against the general emissions criteria and the noise emissions criteria is an important aspect of considering whether action should be taken. These are contained in s 363C of the EP Act.

There is no evidence that council has attended during the time when the noise complained of is occurring, that is, in the early morning. It is therefore not possible for council to have completed an assessment against all of the criteria contained in s 363C. Council has therefore not collected evidence sufficient to make a judgement under s 363C.

While council has now completed the tasks set out in (a) and (b) above, it has not completed (c). Council has therefore not established whether there is a breach of relevant legislation.

2. If there is a breach, what action should be taken

In determining what action should be taken in response to a regulatory breach, council should have regard to its policy.

In this case, council decided that no action should be taken. In reaching this conclusion, it appears from its letter to the Office of 27 June 2018 that it had regard to the following matters:

- the application of s 440 is complex
- there are a number of elements that must be satisfied
- establishing whether those elements would be satisfied may require further consideration
- factors that authorised persons may take into account in assessing the most appropriate enforcement action, as set out in its policy
- the actions complained of have not been assessed as being a breach of the planning scheme.

It is unclear the extent to which these factors support a conclusion that no further action should be taken, in that:

- The legislation in question having some complexity and requiring investigative work to establish a breach is not unusual and is not a reason for not proceeding with an investigation.
- The factors in council's policy considered by council are relevant to the formality and extent of the action that is taken when a breach has been established. The list of factors does not constitute a basis upon which a decision can be made that no investigative action should be taken.
- Whether or not the actions complained of would be a breach of the planning scheme is not a determining factor as to whether an environmental nuisance can be established. In this regard it would not appear to be a relevant factor.

As previously noted, council also advised:

On the balance of the information available to this point Council does not support allocating further resources to compliance investigations on the limited prospect of being able to support enforcement action(s) or more pertinently to defend that action or commence a prosecution.

There was no indication in council's response that it had undertaken an assessment of the prospects of being able to support enforcement action(s), and such an assessment would be difficult to complete having regard to the limited investigative effort it had put into the matter to date. It is therefore not certain the basis upon which it considered these prospects to be limited.

In council's policy, there is a list of circumstances in which it is considered appropriate that no action be taken. This states as follows:

Council takes no action where an investigation identifies:

- the legislation is not applicable in the circumstances
- there is insufficient evidence
- another agency has taken action and issues of duplicity arise
- the statutory time limit has expired
- an exemption, exception or defence available under relevant legislation is clearly applicable in the circumstances
- a public interest factor(s) dictates that no action is the appropriate response.

It is then necessary to determine whether any of these circumstances apply, so as to support council's decision to take no further action. Each of these circumstances are addressed in turn as follows:

- council has accepted that s 440 of the EP Act is applicable in the circumstances
- while there is insufficient evidence, this is purely because of a lack of investigative action on council's part
- there is no indication that there is another agency which has taken action
- there is no statutory time limit that has expired
- there has been no indication that there is an exemption, exception or defence available under relevant legislation that is clearly applicable in the circumstances
- council has not indicated that there are public interest factors dictating that no action is the appropriate response.

None of the circumstances in which it is considered appropriate to take no action, under council's policy, appear to exist in this case.

It is noted that one of the purposes of council's policy is to 'display transparency in the process of investigation and enforcement'. Having regard to this, in the event that there were public interest factors impacting on council's decision, it is imperative that council articulate what those public interest factors are and explain why those factors support a position that no action should be taken. Similarly, if it is council's position that its policy should be departed from because of exceptional circumstances, council should state what those exceptional circumstances are and why they support a departure from the policy.

Having regard to the above, in making the decision not to further consider this matter, it appears that council took into account irrelevant factors and did not comply with its policy.

3.4 Adequacy of council's response to the homeowner's complaints

In comparing the matters that a regulator should consider (as set out in Chapter 3.2 of this report) to the matters that council in this case considered (as set out in Chapter 3.3), it is clear that council did not complete all of the steps required for a full consideration of the complaint.

While, following contact from the Office, council has undertaken some assessment work in relation to the complaint to identify the legislative provision that potentially applies and the elements that need to be satisfied for a breach to be established, it has not collected evidence sufficient to make a determination as to whether each of the necessary elements has been satisfied. Council therefore did not determine whether a breach had occurred before applying its policy to determine what action should be taken.

As discussed in Chapter 3.3, this case does not meet the criteria under council's policy for taking no enforcement action at all. In this respect, in deciding not to take any action, council has not complied with its policy.

In the Queensland Ombudsman publication, *Tips and traps for regulators*¹, it was noted that:

Regulators should develop and implement policies that ensure:

- cases are effectively prioritised across priority ratings
- most investigative resources are allocated to cases with higher ratings
- wherever practicable (and subject to the regulator's legislation) cases with the lowest priority ratings are addressed in less formal and more cost effective ways.

While council may be of the view that prosecution action would not be warranted for a case of this nature, this is not a defining factor as to whether any action at all should be taken. There are many steps, other than instituting enforcement action, council could take to encourage compliance. In this regard, council's policy notes that council uses a range of flexible and targeted measures including:

- communication and education activities
- timely provision of information and advice
- persuasion
- cooperative assistance
- routine monitoring and inspection programs
- auditing
- risk management
- performance feedback
- community workshops
- access to information via the internet and other media outlets.

In this case, if the boat owner is found to be in breach of s 440 of the EP Act, council could provide advice to them and/or persuade them to take actions to ensure the breach does not continue. This may involve considering the necessity for the engines to be run for that period of time at that time of the day, or considering whether mooring the boats at a commercial jetty would be more appropriate. It is noted that an approach of this nature would not be resource intensive.

¹ Queensland Ombudsman, *Tips and traps for regulators*, Second Edition, October 2009, page 20.

Opinion 1

Council failed to meet its regulatory obligations in respect of a complaint made to it concerning noise, in that it:

- did not collect evidence necessary to establish whether a breach of s 440 of the *Environmental Protection Act 1994* had occurred
- incorrectly applied its *Compliance and Enforcement Policy 2018* to determine that no action should be taken.

This is unreasonable administrative action under s 49(2)(b) of the *Ombudsman Act 2001*.

In response to the proposed report, the CEO stated that council responded to the complaint in a manner that was consistent with the EP Act, the Sunshine Coast Planning Scheme 2014 and associated statutes, and council's policy. He said:

The Council takes matters like this seriously and takes pride in responding to community concerns with balance, professionalism, and accuracy.

The CEO advised that council does not agree with my view that it failed to meet its regulatory obligations in respect of the complaint on the basis that it:

- Undertook significant due diligence in seeking to establish whether there was sufficient legislative scope in order to identify and manage a potential breach of the EP Act;
- Engaged its in-house processes in response to the Complaint;
- Undertook communications with the complainant; and
- Sought and received relevant independent legal advice ... to facilitate decision making.

I note council's submission above, however, disagree that it met its regulatory obligations in respect of this complaint. The majority of actions taken by council, as referred to above, were only taken in response to communications with the Office over a lengthy period of time. Furthermore, in reaching its final position, expressed by council prior to this report being prepared, council had not collected evidence necessary to establish whether a breach had occurred, and had incorrectly applied its policy to determine that no action should be taken. I therefore maintain the view that council had not met its regulatory obligations in respect of this complaint.

Recommendation 1

Council investigate the complaint concerning noise to determine whether a breach of s 440 of the *Environmental Protection Act 1994* can be established and, if a breach is found, take appropriate action having regard to its *Compliance and Enforcement Policy 2018*.

In response to the proposed report, council advised that it would:

- engage a suitably qualified consultant to independently undertake an assessment, including the collection of data with a sound level meter
- determine what further action may be reasonable and proportionate having regard to the EP Act and its policy.

3.5 Failure to exercise regulatory function

As previously noted, regulatory responsibility in respect of s 440 of the EP Act has been devolved to local governments.

Under s 514(7) of the EP Act, if the chief executive of the department (chief executive) is satisfied that a local government has failed to administer or enforce a devolved matter, the chief executive may do so and the costs incurred in doing so are payable by the local government to the State.

The Office made enquiries with the department about the way in which this provision is administered, and whether the department could investigate an alleged breach of s 440 once the relevant local government has decided not to investigate. In response, the department noted s 514(7) of the EP Act and advised:

To be able to take action under section 514(7) of the EP Act, the department must firstly be made aware of the matter. Local government will then be afforded the opportunity to address the issue prior to the department attempting to take action and recover costs. Generally this will occur by sending a formal letter to the local government notifying them of the department's investigation and inviting them to give reasons why certain actions have not been taken. If, after considering the local government's response, the department decides to take further action, the department can only do the thing(s) that it is satisfied the local government has failed to do.

In this case, as council has failed to administer or enforce a devolved matter, that being compliance and enforcement in relation to s 440 of the EP Act, it is open to the department to take the action described above.

4 Conclusion

The purpose of commencing this investigation was to consider whether council's response to the complaints it received from the homeowner about power boat noise were reasonable, and whether council had adequately fulfilled its regulatory responsibilities in relation to noise.

Regulatory responsibility for environmental nuisance, including in relation to noise, has been devolved to council. I consider it important that agencies understand what is required of them in fulfilling their regulatory functions.

I considered council's actions in response to the complaint it received, and also its response to the queries raised by the Office. I also considered the steps that a regulator should take in responding to a complaint, and compared this against the steps that council took in this case.

The investigation found that council did not complete the first step in terms of its responsibilities by collecting sufficient evidence to determine whether there was, in fact, a breach of the legislative provision relating to environmental nuisance. It then cited its policy as a basis for not taking any action. While council's policy set out the circumstances in which council could decide to take no action, it did not cover the circumstances of this case. In this respect, council did not comply with its policy. I found that council failed to meet its regulatory obligations concerning this noise complaint and that this was unreasonable administrative action.

It is not appropriate for a regulator to reach a conclusion when a complaint is first received that it will not investigate or take any action at all, purely because the issue would not warrant formal enforcement proceedings. There are many other options available to regulators to meet their obligations, including providing advice and using persuasion.

It is noted that there are circumstances in which it is appropriate that an agency not expend its resources in investigating a potential breach of legislation that it administers. These should be set out in an agency's compliance and enforcement policy. Circumstances could include where it is clear that any enforcement action would not be justifiable because the statutory time limit has expired, or there is a clearly applicable defence or exception. Another possible circumstance is if there are public interest factors which dictate that no action is the appropriate response. If, however, this were to be invoked, transparency and accountability would require that the regulator state these factors to the complainant in clear and unequivocal terms.

Regulators are not able to opt out of fulfilling their regulatory responsibilities. In this case, council should have investigated whether there was a breach of s 440 of the EP Act and, if there was, taken appropriate action having regard to its policy. I have recommended that council takes these actions.

Under the EP Act, if a local government does not administer or enforce the matters devolved to it, such as the regulation of environmental nuisance, the department may do so and recover its costs from the local government. This is a provision that, in my view, should never be required to be invoked on the basis that it is incumbent upon local governments to always ensure that they have fulfilled their regulatory responsibilities.

Appendix A: Jurisdiction and procedural fairness

Ombudsman jurisdiction

The Ombudsman is an officer of the Queensland Parliament empowered to deal with complaints about the administrative actions of Queensland government departments, public authorities and local governments. As council is an 'agency' for the purposes of the *Ombudsman Act 2001* (Ombudsman Act), it follows that the Ombudsman may investigate its administrative actions.

Under the Ombudsman Act, the Ombudsman has authority to:

- investigate the administrative actions of agencies on complaint or on the Ombudsman's own initiative (without a specific complaint)
- make recommendations to an agency being investigated about ways of rectifying the effects of its maladministration and improving its practices and procedures
- consider the administrative practices of agencies generally and make recommendations, or provide information or other assistance to improve practices and procedures.

The Ombudsman Act outlines the matters about which the Ombudsman may form an opinion before making a recommendation to the principal officer of an agency. These include whether the administrative actions investigated are contrary to law, unreasonable, unjust or otherwise wrong.

Although the Ombudsman is not bound by the rules of evidence, the question of the sufficiency of information to support an opinion of the Ombudsman requires some assessment of weight and reliability. The standard of proof applicable in civil proceedings is proof on the balance of probabilities. This essentially means that, to prove an allegation, the evidence must establish that it is more probable than not that the allegation is true. Although the civil standard of proof does not strictly apply in administrative decision-making (including the forming of opinions by the Ombudsman), it provides useful guidance.

'Unreasonableness' in the context of an Ombudsman investigation

It is important to note that, in expressing an opinion under the Ombudsman Act that an agency's administrative actions or decisions are 'unreasonable', the meaning of the word 'unreasonable' is applied in the context of the Ombudsman Act. In this context, 'unreasonable' takes on its popular or dictionary meaning, not the far narrower 'Wednesbury' test of unreasonableness, which involves a consideration of whether an agency's actions or decisions were so unreasonable that no reasonable person could have taken them or made them.

Procedural fairness

The terms 'procedural fairness' and 'natural justice' are often used interchangeably within the context of administrative decision-making. The rules of procedural fairness have been developed to ensure that decision-making is both fair and reasonable.

The Ombudsman must also comply with these rules when conducting an investigation. Further, the Ombudsman Act provides that, if at any time during the course of an investigation it appears to the Ombudsman that there may be grounds for making a report that may affect or concern an agency, the principal officer of that agency must be given an opportunity to comment on the subject matter of the investigation before the final report is made.

A proposed report was provided to council to satisfy this requirement and council was invited to make a submission in response. In reaching a final view in relation to this matter, I have taken into account submissions received from council.

Section 55(2) of the Ombudsman Act provides that the Ombudsman must not make adverse comment about a person in a report unless that person is given an opportunity to make submissions about the proposed adverse comment. The person's defence must be fairly stated in the report if the Ombudsman still proposes to make the comment.

I do not consider that any comments made in this report could be considered as being adverse to any particular individual.

Appendix B: Legislation and policies

Environmental Protection Act 1994 (current as at 1 January 2018)

Chapter 7 (Environmental management), Part 5A (Direction notices) of the *Environmental Protection Act 1994* (EP Act) includes the following provision:

363C Matters to consider before issuing a direction notice relating to particular emissions

- (1) This section applies to a contravention of section 440 involving an emission of aerosols, fumes, light, noise, odour, particles or smoke.
- (2) Before deciding to issue a direction notice in relation to the contravention, the authorised person must—
 - (a) consider the general emission criteria stated in subsection (3); and
 - (b) if the emission is of noise, consider the noise emission criteria stated in subsection (4); and
 - (c) having regard to those criteria, consider whether it would be appropriate to issue the direction notice or to first try to resolve the matter in another way.
- (3) The general emission criteria, for a particular emission, are as follows—
 - (a) the emission's characteristics or qualities;
 - (b) the emission's amount or rate;
 - (c) the duration and time of the emission;
 - (d) whether the emission is continuous or fluctuating;
 - (e) the characteristics and qualities of the receiving environment, including the types of emissions that could reasonably be expected in the receiving environment;
 - (f) the emission's impact on the receiving environment;
 - (g) in relation to each affected person for the emission—
 - (i) any views of the affected person about the emission of which the authorised person is aware, including views about the degree of interference caused, or likely to be caused, by the emission to lawful activities at the place occupied by the affected person; and
 - (ii) the order of occupancy between the person causing the emission and the affected person; and
 - (iii) for the period during which the person causing the emission has occupied the place from which the emission is generated and the affected person has occupied the place affected by the emission—
 - (A) any structural or other changes to either of those places; and
 - (B) any change to the activities conducted at either of those places by the person causing the emission or affected person;
 - (h) any mitigating measures that have been taken or could reasonably have been taken by the person causing the emission.
- (4) The noise emission criteria are as follows—
 - (a) if the authorised person has measured a sound pressure level for the noise—that level;
 - (b) the audibility of the noise;
 - (c) whether the noise is continuous at a steady level or whether it has a fluctuating, intermittent, tonal or impulsive nature;
 - (d) whether the noise has vibration components.
- (5) In this section—

affected person, for an emission, means a person who the authorised person knows to be affected by the emission.

Chapter 8 (General environmental offences), Part 3 (Offences relating to environmental harm) of the EP Act includes the following provision:

440 Offence of causing environmental nuisance

- (1) A person must not wilfully and unlawfully cause an environmental nuisance.
Maximum penalty—1,665 penalty units.
- (2) A person must not unlawfully cause an environmental nuisance.
Maximum penalty—600 penalty units.
- (3) ...
- (4) ...

Chapter 8 (General environmental offences), Part 3B (Offences relating to noise standards), Division 3 (Default noise standards) of the EP Act includes the following provision:

440ZA Operating power boat engine at premises

- (1) A person must not operate, or permit the operation of, a powerboat engine at premises in a way that makes audible noise—
 - (a) on a business day or Saturday, before 7a.m. or after 7p.m; or
 - (b) on any other day, before 8a.m. or after 6.30p.m.
- (2) In this section—
operate, a power boat engine, includes flushing the engine.

Chapter 11 (Administration), Part 1 (Devolutions) of the EP Act includes the following provision:

514 Devolution of powers

- (1) The Governor in Council may, by regulation, devolve to a local government the administration and enforcement of—
 - (a) the whole or part of an environmental protection policy; or
 - (b) the issue of environmental authorities; or
 - (c) another matter under this Act (other than chapter 2 or chapter 7, part 8).
- (2) The administration and enforcement of this Act for a matter relating to an area below the high or low water mark forming the boundary of a local government's area may be devolved to the local government.
- (3) On the commencement of the regulation—
 - (a) the local government becomes the administering authority for the devolved matter; and
 - (b) the local government's chief executive officer becomes the administering executive for the devolved matter; and
 - (c) the administration and enforcement of the devolved matter is a function of local government to be performed by the local government for its area.
- (4-6A) ...
- (7) If the chief executive is satisfied the local government has failed to do anything in the administration or enforcement of the devolved matter—
 - (a) the chief executive may do the thing; and
 - (b) the reasonable costs and expenses incurred by the chief executive are a debt payable by the local government to the State.

Environmental Protection Regulation 2008 (current as at 1 July 2018)

Chapter 7 (Administration), Part 1 (Devolution of powers), Division 1 (Matters devolved to local government) of the Environmental Protection Regulation 2008 (EP Regulation) includes the following provisions:

98 Environmental nuisance

The administration and enforcement of the following provisions of the Act is devolved to each local government for its local government area—

- (a) section 440;
- (b) ...

99 Noise standards

The administration and enforcement of the following provisions of the Act is devolved to each local government for its local government area—

- (a) ...
- (b) chapter 8, part 3B, division 3.

Council's Compliance and Enforcement Policy 2018

Council's *Compliance and Enforcement Policy 2018* (council's policy) was endorsed by council on 13 September 2018. The policy is not different in material respects to council's previous policy, *Compliance and Enforcement Policy 2009*.

Council's policy states the following under the heading 'Policy Purpose':

Council has an obligation to discharge its statutory responsibilities where unlawful activities are identified.

The policy provides clarity as to what individuals or businesses may expect from council, if subject to enforcement action and provides a level of confidence that council's compliance and enforcement practices:

- communicate how council values those that voluntarily comply with the law
- demonstrate proportionality in decision making
- display transparency in the process of investigation and enforcement
- are open to scrutiny.

Under the heading 'Principles of achieving effective compliance, risk management and enforcement', council's policy states:

Council advocates firm but fair regulation that provides positive community outcomes. The underlying principles in achieving this objective are:

- applying proportionality in the application of the law and in securing compliance
- being consistent in approach
- procedural fairness and principles of natural justice applied
- displaying transparency in what individuals and businesses may expect from council if they default
- that any enforcement action is considerate of risk.

Incidents requiring regulatory intervention may differ. In assessing the most appropriate enforcement action, authorised persons take into account:

- risk (potential to cause physical, financial, environmental or other harm and the consequences of it happening)
- cost (value of time and resources to obtain a positive and beneficial outcome)
- evidence (facts or observations presented in support of an assertion)
- behaviour (the way in which a person responds to a situation considerate of circumstance)

and exerting a positive demeanour)

- circumstances (facts that surround a situation or event that should be kept in mind when making a decision)
- Public interest (the outcome is considerate of the benefits offered to the entire community, or a group within the community or individuals).

Under the heading 'Voluntary compliance principles with the support of education', council's policy goes on to state:

To achieve its compliance objectives, council uses a range of flexible and targeted measures, including:

- communication and education activities
- timely provision of information and advice
- persuasion
- cooperative assistance
- routine monitoring and inspection programs
- auditing
- risk management
- performance feedback
- community workshops
- access to information via the internet and other media outlets.

Under the heading 'Application' and the subheading 'Investigation – no action' in council's policy, it states:

Council takes no action where an investigation identifies:

- the legislation is not applicable in the circumstances
- there is insufficient evidence
- another agency has taken action and issues of duplicity arise
- the statutory time limit has expired
- an exemption, exception or defence available under relevant legislation is clearly applicable in the circumstances
- a public interest factor(s) dictates that no action is the appropriate response.

Under the heading 'Application' and the subheading 'Informal action' in council's policy, it states:

In some instance, the unlawful activity has a relatively inconsequential impact, yet it is deemed remedial action is necessary. The prerequisites for issuing an informal action may include that the:

- offence was of a trivial or minor nature
- subject has received no previous warnings concerning the unlawful activity.

Where an investigation identifies that a Prescribed Infringement Notice or prosecution action has resulted for a similar or like offence, informal actions may include the issue of one or more of the following:

- caution (verbal advice)
- advisory letter (where advice is being confirmed)
- written request for remedial action.

