

# EPA's investigation of complicity of all parties

Policy



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## 1 Issue dealt with by this policy

This policy sets out the approach of the Victorian Environment Protection Authority (EPA) to investigating the complicity of all parties involved in significant breaches of the *Environment Protection Act 1970* (EP Act) and *Pollution of Waters by Oil and Noxious Substances Act 1986* (POWBONS Act). It also sets out the key considerations for EPA in choosing a defendant in matters where there are multiple potential defendants, including corporations and corporate directors.

## 2 Relevant legislation and guidelines

### 2.1 Environmental offence provisions

The majority of offence provisions under the EP Act and POWBONS Act place duties on every 'person'. In Victorian law, section 38 of the *Interpretation of Legislation Act 1984* sets out that a 'person' includes a body politic or corporate as well as an individual. So, depending on the facts of a case, EPA could prosecute an individual, a government body, a company or any combination of these.

There are, however, some specific types of duty-holders who are singled out by environmental legislation as carrying a heavier burden than the average 'person', and it is these following duty-holders which EPA predominantly turns its attention to when determining the scope of a prosecution.

### 2.2 Obligations placed on specific duty-holders

#### 2.2.1 Occupiers

An 'occupier' is defined in s.4(1) of the EP Act:

"Occupier" in relation to any premises includes a person who is in occupation or control of the premises, whether or not that person is the owner of the premises, and in relation to multiple premises, different parts of which are occupied by different persons means the respective persons in occupation or control of each part.<sup>1</sup>

Section 62C of the EP Act deems the occupier of a commercial or industrial premises liable for any pollution arising from their operations on the site:

'If any segment or element of the environment is polluted as a result of a discharge, emission or deposit of any substance from or on any premises on which there is conducted any commercial or industrial undertaking, the occupier of the premises is deemed to have polluted that segment or element of the environment unless the occupier proves that the discharge, emission or deposit was unrelated to the commercial or industrial undertaking.'

In combination with the authority set out in the case of *Allen v United Carpet Mills Pty Ltd and Another*, the effect of s.62C is that, if you occupy a site from or on which pollution related to your undertaking occurs, you have committed an offence, whether you were reckless or negligent or not and whether you took all reasonable precautions or not.<sup>2</sup>

#### 2.2.2 Company officers

If a corporation by act or omission has contravened the EP Act or any EPA notice, licence or permit, section 66B of the EP Act deems individual directors and those concerned in the management of the corporation ('company officer') to be guilty of the same contravention.

Company officers can defend such a charge against them if they can prove that (section 66B(1A)):

- b) the person was not in a position to influence the conduct of the corporation in relation to the contravention
- c) the person, being in such a position, used all due diligence to prevent the contravention by the corporation

or

- d) the corporation would not have been found guilty of the offence by reason of its being able to establish a defence under the EP Act.

The C&E Policy lists criteria EPA will consider in deciding whether to prosecute a 'company officer':

- a) whether the person exercised due diligence in the performance of the company and actions to prevent the incident, including:
  - i. their degree of knowledge
  - ii. their capacity for decision making
  - iii. the actions or inactions of others
  - iv. any other relevant matters
- b) whether the officer failed to take reasonable steps to prevent the incident
- c) the degree of culpability involved in the officer's behaviour
- d) past advice or warnings provided to the officer regarding matters leading to the incident, or whether the officer should have reasonably known about past advice or warnings.<sup>3</sup>

Considering the above criteria, it will be rare that a manager who is not a 'company officer' will be of a sufficient level of authority or influence to attract criminal liability

<sup>1</sup> Note that s.4(3) of the EP Act goes on further to clarify the 'occupier status' of financial institutions which hold a security interest over a premises.

<sup>2</sup> See *Allen v United Carpet Mills Pty Ltd and Another* [1989]VR 323, where Nathan J held that the pollution offence is one of absolute liability.

<sup>3</sup> C&E Policy, p31.

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## 2.2.3 Owners and masters of ships

The EP Act deems that, in a case of pollution from a ship, both the owner and master are guilty of an offence. Section 63 states:

'If an offence is committed against this Act with respect to the discharge or emission of wastes or pollutants or noise from any ship, the owner and the master of the ship are each guilty of the offence.'

The POWBONS Act also specifies in a number of its offence provisions that both the master and owner are deemed guilty of an offence which occurs on or from their ship. The relevant offence provisions in the POWBONS Act are:

- section 8 - discharge into oil or oily mixtures into State waters
- section 9 - discharge of oil residues
- sections 11 and 13 - oil record book offences
- section 18 - discharge of substances into State waters
- sections 20 and 22 - cargo record book offences
- section 23B - disposal of garbage into State waters
- section 23E - discharge by jettisoning of harmful substances into State waters
- section 23G - discharge of sewage into State waters
- sections 38, 44 and 53 - alteration etc. of construction of ships and cancellation of certificates.

## 2.2.4 Licensed premises

EPA licences industries which pose a particular risk to the environment<sup>4</sup>. Given the potential hazards these premises pose, the EP Act makes it an offence for the occupier to operate without a licence or to operate in contravention of a licence condition<sup>5</sup>. When a licence holder has any involvement in an incident, EPA will rigorously investigate compliance with each of its licence conditions.<sup>6</sup>

## 2.3 Principles of environment protection

Three principles enshrined in the EP Act are relevant in EPA's consideration of which persons to prosecute:

- Principle 1F(2) states that 'persons who generate pollution and waste should bear the cost of containment, avoidance and abatement'.
- Principle 1G(1) states that 'protection of the environment is a responsibility shared by all levels of Government, and industry, business, communities and the people of Victoria'.
- Principle 1K(b) states that 'enforcement of environmental requirements should be undertaken for the purpose of ... ensuring that no commercial advantage is obtained by any person who fails to comply with environmental requirements ...'

EPA must have regard to these principles when taking enforcement action.

## 2.4 EPA's Compliance and Enforcement Policy

EPA's *Compliance and Enforcement Policy* (C&E Policy) articulates EPA's approach, method and priorities in ensuring compliance with the EP Act and carrying out EPA's compliance and enforcement duties.

This policy on which person(s) to prosecute is a supplementary policy to the C&E Policy and should be read in the context of, and subject to the C&E Policy.

As with all supplementary policies this policy:

- is consistent with and supports the principles and aims of the C&E Policy
- will be reviewed to ensure its ongoing effectiveness and relevance and may be modified by EPA at any time.

For copies of EPA's C&E Policy and other supplementary policies see [www.epa.vic.gov.au](http://www.epa.vic.gov.au).

## 2.5 Victorian Government's Model Litigant Guidelines

The *Victorian Government's Model Litigant Guidelines* are policy guidelines that set standards for how all government departments, agencies and their lawyers should behave as a party to legal proceedings.

Relevantly to this policy, the guidelines provide that the State should act fairly and consistently in its dealings with all duty-holders and keep litigation costs to a minimum.

For a copy of the *Model Litigant Guidelines* see [www.justice.vic.gov.au](http://www.justice.vic.gov.au).

## 2.6 Prosecution guidelines

In deciding whether or not to prosecute, EPA adopts the *Guidelines of the Director of Public Prosecutions* (DPP) (Prosecution Guidelines)<sup>7</sup> which are based on the *Australian Prosecutorial Guidelines*.

Where a comprehensive investigation reveals evidence of a breach of the EP Act or POWBONS Act, EPA will apply the prosecution criteria of 'sufficient evidence', 'prospect of conviction' and 'public interest considerations' to determine what enforcement action, if any, should be taken.<sup>8</sup> Nothing in this policy interferes with, or detracts from, EPA's exercise of its prosecutorial discretion in accordance with the Prosecution Guidelines.<sup>9</sup>

In particular, the Prosecution Guidelines pose the following relevant questions which EPA considers each time there are multiple parties involved in an incident:

- 1) Where two or more alleged offenders are charged together, is there a realistic prospect of the proceedings being severed?<sup>10</sup>
- 2) If so, is the admissible evidence sufficient to prove the case against each alleged offender, should separate trials be ordered?

For a copy of the Prosecution Guidelines see [www.opp.vic.gov.au](http://www.opp.vic.gov.au).

## 3. EPA's policy position

EPA will investigate the complicity of all parties involved in significant environmental breaches. There will need to be sufficient evidence against a party for EPA to choose to prosecute. In cases where there is sufficient evidence against multiple possible defendants, this may mean EPA prosecutes one, some or all parties.

Every decision to prosecute is a balancing exercise based on all the above legislative obligations, principles and policy guidelines. EPA has the ultimate discretion in balancing the various considerations.

<sup>4</sup> Schedule 1 to the *Environment Protection (Scheduled Premises and Exemptions) Regulations 2007* sets out which premises require licences to operate.

<sup>5</sup> See s.27 of the EP Act.

<sup>6</sup> For a list of standard licence conditions, see EPA Publication 1322 - *Licence Management Guidelines*.

<sup>7</sup> In particular, Policy 2: The Prosecutorial Discretion, available at [www.opp.vic.gov.au](http://www.opp.vic.gov.au)

<sup>8</sup> See page 30 of the C&E Policy for more detail on these criteria.

<sup>9</sup> For an overview of the legislative framework and policy context for the Prosecution Guidelines see EPA's *Compliance and Enforcement Policy*.

<sup>10</sup> Under s.58(2) of the *Criminal Procedure Act 2009* a magistrate has the power to divide the hearing of charges against more than one accused.

## 4 How EPA will apply the policy

Every investigation has its unique facts, so EPA will have a different balancing exercise to perform each time it decides who to prosecute. Depending on the facts of the case, EPA will investigate and consider prosecution of:

- any person(s) who caused or permitted the environmental offence, be they contractors, individuals, companies (especially licensed premises) or government bodies
- the occupier(s) of any polluted premises or any premises from which pollution originated
- directors and those concerned in the management of any company which appears to be guilty of an offence
- in the case of pollution from a ship, the owner and the master of that ship
- in the case of waste-dumping, any person who caused or permitted the waste to be dumped.