

Sanction powers policy



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EPA acknowledges Aboriginal people as the first peoples and Traditional custodians of the land and water on which we live, work and depend. We pay respect to Aboriginal Elders, past and present and recognise their continuing connection to, and aspirations for Country.

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1. Purpose

Environment Protection Authority Victoria (EPA) is Victoria's environmental regulator.

As an independent statutory authority under the *Environment Protection Act 2017* (EP Act), our role is to prevent and reduce harm from pollution and waste. We do this in several ways:

- › working with the community, industry, business and governments to prevent and reduce the harmful impacts of pollution and waste on Victoria's environment and people
- › taking proportionate regulatory action against those who fail to meet their obligations
- › supporting all Victorians to understand their obligations under the law
- › providing clear advice on the state of our environment so that people can make informed decisions about their health.

This policy identifies the range of EPA's sanction powers and an explanation of how and why they will be used.

This policy should be read together with the following EPA documents:

- › *Compliance and enforcement policy*
- › *Inspection and inquiry powers guide*
- › *Remedial powers policy.*

2. EPA's use of sanction powers

EPA will take a proportionate and responsive approach to sanctions, ranging from an official warning, to a criminal prosecution. In determining what sanction may be sought, EPA will consider the culpability of the person, as well as the seriousness of the risk of harm that has arisen and any harm caused.

This approach will ensure consistency in the selection of any sanctions and predictability for the community, including anyone with a duty or obligation under the EP Act.

In determining the most appropriate sanction action to be taken, EPA will consider:

- > the current regulatory strategy
- > its strategic enforcement priorities
- > the *Compliance and enforcement policy*

and the following factors:

- > the nature and seriousness of the non-compliance
- > the risk of harm or any actual harm caused from the non-compliance
- > the attitude, behaviour and actions of the duty holder engaging in the activity
- > the public interest.

EPA supports 'responsive sanctioning' in its compliance and enforcement activities (see Figure 1). Responsive sanctioning is a way of using punishment constructively to improve environmental outcomes. Enforceable undertakings and court imposed orders are examples of how sanctioning can help achieve improvements. The court can require an offender to carry out specified projects to restore or enhance the environment, in addition to, or instead of, any other penalty.

EPA can impose some sanctions, such as issuing an infringement notice, and can pursue other sanctions through criminal or civil penalty proceedings. As part of the court process, EPA can ask the court to consider imposing a range of penalties and orders in resolving the matter.



A sanction is a penalty or punishment for breaching the law.



Relevant legislation
EP Act, section 6 'The concept of minimising risks of harm to human health and the environment'

Sanctions help achieve the following outcomes:

- > deter a person from another breach (specific deterrence)
- > send a message to the regulated community that EPA will take sanction action in similar future circumstances (general deterrence)
- > stop unlawful activity
- > remedy any harm caused by the non-compliance – which may include the use of restorative justice outcomes (protection of the environment and human health)
- > ensure future compliance is achieved
- > raise awareness of the law, expected behaviours, and consequences of non-compliance (denunciation of misconduct)
- > punish offenders and remove any commercial advantage from the non-compliance (punishment and deterrence).

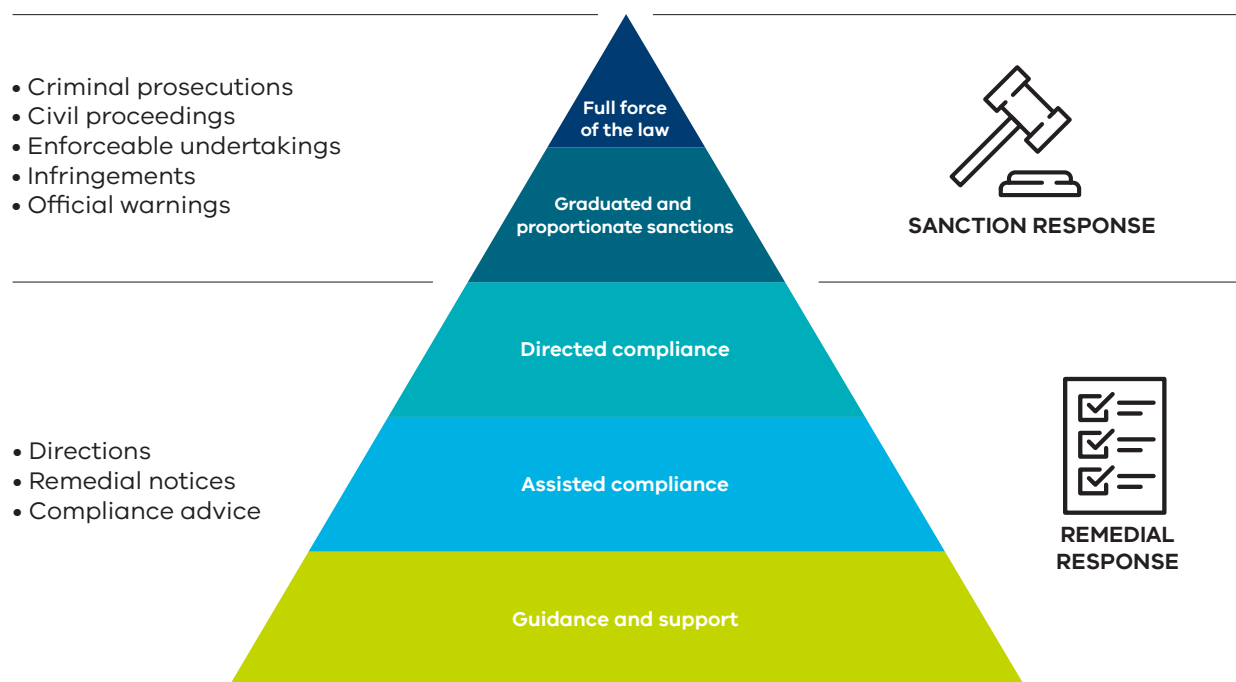


Figure 1 Sanction and remedial responses

2.1 Who can EPA take sanction action against?

All Victorians have duties and obligations under the EP Act. The general environmental duty (GED) requires anyone engaging in activity that poses risks to human health and the environment to understand and minimise those risks.

EPA can take sanction action against government, businesses or individuals engaging in an activity for failure to comply with the GED and other obligations under the EP Act.

EPA can also take sanction action against officers of bodies corporate if those officers failed to exercise due diligence to ensure their organisation is complying with the EP Act.

The EP Act defines an 'officer' of a body corporate to include anyone who has the capacity to make decisions, or participates in making decisions, that have a real or direct influence on an organisation's policy, planning or financial standing.

The following matters will be considered in deciding whether an officer exercised due diligence:

- > whether the officer knew, or ought to have known, about the body corporate's obligations
- > whether the officer was able to influence the body corporate
- > whether the officer could have reasonably prevented the contravention by the body corporate.

3. Types of sanctions

3.1 Infringement notices/official warnings

The *Infringement Act 2006* provides EPA the ability to issue infringement notices as set out in section 307 of the EP Act and Schedule 10 of the Environment Protection Regulations 2021 (EP Regulations).

Infringement notices are a way of dealing with minor or discrete breaches of the law where the impacts can be more appropriately dealt with by payment of a fine.

The *Infringement Act 2006* provides the option for EPA to issue an official warning or an infringement notice. An official warning does not carry a financial penalty amount, whereas an infringement notice does.

Who can receive an infringement notice?

EPA can issue an infringement notice to a person who has committed an infringeable offence under the EP regulations or EP Act.

Schedule 10 of the EP Regulations 2021 sets out the specific offences for which an infringement notice can be issued and how much the penalty is.

Are these notices reviewable?

If you have been issued with an infringement notice you may be able to apply for internal review. You cannot apply for internal review on an official warning.

3.2 Enforceable undertakings

EPA has discretion to accept an enforceable undertaking from a person in relation to any matter that EPA has a function or power in the EP Act.

An enforceable undertaking can be a constructive alternative to prosecution or a civil penalty proceeding. It allows an alleged offender to voluntarily enter into a binding agreement with EPA to:

- > undertake actions related to the alleged contravention of the law, and/or
- > remedy the harm caused to the community and environment.

If EPA is satisfied the person has complied with the enforceable undertaking, it will not pursue a criminal prosecution or civil penalty proceedings. If proceedings have commenced, EPA will suspend those proceedings if an agreement is reached to enter into an enforceable undertaking.

Where an enforceable undertaking is appropriate it can serve as an instrument for restorative justice opportunities particularly for the involvement of communities affected by a contravention.

What happens if an enforceable undertaking is not complied with?

If a person withdraws from or fails to complete an enforceable undertaking before compliance, EPA may commence civil penalty proceedings or a criminal prosecution.

Enforceable undertakings can be enforced through the courts. In such cases the court can make orders requiring a person to comply with the enforceable undertaking, take specified actions to minimise risks of human health and the environment or any other appropriate in the circumstances. Enforceable undertaking guidelines are available on EPA's website at www.epa.vic.gov.au.

3.3 Civil penalty proceedings

EPA may commence civil proceedings against a person who has contravened provisions of the EP Act in the Magistrates', County or Supreme Courts.

EPA will consider the use of civil penalty action where it is likely to result in a stronger deterrent impact and more effectively encompass the type and nature of the contravention.

The civil penalty provisions are listed in the table at section 314(3) of the EP Act and include many of the main offence provisions, including the general environmental duty (section 25).

The court may make a range of orders if it finds the person has contravened the EP Act: see page nine for a full list.

One of the orders a court may make is a pecuniary (monetary) penalty. Section 315(2) lists factors a court may have regard to in determining the amount of the pecuniary penalty, including:

- > the nature and extent of the conduct constituting the contravention
- > the nature and extent of any loss or damage suffered as a result of the conduct including costs of remedying any harm
- > the circumstances in which the contravention took place
- > whether the person has previously contravened a civil penalty provision
- > any relevant enforceable undertaking.

3.4 Criminal prosecution

EPA may commence a criminal prosecution against a person where:

- > there is sufficient evidence of a contravention of the EP Act, and
- > it would be in the public interest to do so.

If a person is found guilty of a contravention of the EP Act, the court has a range of sentencing options available including:

- > seeking that a conviction be recorded
- > a monetary fine
- > specific courts order
- > restorative justice outcomes
- > imprisonment.

When considering a prosecution, EPA will seek to calculate the economic benefit gained from delayed or avoided compliance.

EPA adopts the *Policy of the Director of Public Prosecutions* for Victoria. EPA observes the model litigant guidelines, the Victorian Charter of Human Rights pursuant to the *Charter of Human Rights and Responsibilities Act 2006* and the Victims' Charter pursuant to the *Victims' Charter Act 2006*.

Prospect of conviction and public interest considerations

EPA needs to consider the prospect of conviction; that is, an evaluation of how strong the case is likely to be when presented in court. This accounts for such matters as:

- › the availability, competence and credibility of witnesses
- › their likely impression on the court or tribunal that will determine the matter
- › the admissibility of any confession or other evidence
- › any lines of defence available to the defendant.

In determining whether to impose a criminal conviction, the courts will have regard to the criteria in the *Sentencing Act 1991*.

Public interest considerations

Public interest considerations include, but are not limited to:

- › the seriousness or, conversely, triviality of the alleged offence
- › whether it is only of a technical nature
- › any mitigating or aggravating circumstances
- › the characteristics of the alleged offender – any special infirmities/medical conditions, prior compliance history and background
- › the age of the alleged offence and consideration to its impact
- › the degree of culpability of the alleged offender
- › whether the prosecution would be seen as counter-productive – that is, by bringing the law into disrepute
- › the availability and efficacy of any alternatives to prosecution
- › the prevalence of the alleged offence and the need for deterrence, both specific and general
- › whether the alleged offence is of considerable public concern.

Imprisonment

A term of imprisonment can be imposed by the courts if an individual is found guilty of the following offences:

- › aggravated breach of the general environmental duty (section 27)
- › if a person is characterised as a repeat waste offender for the purpose of section 136
- › assault, intimidate or threaten (or attempts to assault, intimidate or threaten) an authorised officer.

Examples of when criminal prosecution may be pursued include the following:

- › Any unlawful activity continues after a permission is suspended or revoked.
- › Industrial or priority waste is stored or stockpiled without appropriate permission or approval.
- › Repeated infringement notices have been issued with no change in performance.
- › Failure to comply with a notice, direction or site management order including in a situation of imminent state of danger.
- › Obtaining a significant commercial advantage by failing to implement harm prevention measures.
- › Obtaining a significant commercial advantage by failing to maintain adequate systems, processes or procedures in the manner that minimise risk of harm to the human health and/or environment.
- › Assault, obstructions, intimidation or attempt to bribe an authorised officer has taken place.
- › Behaviour that involves dishonesty; for example, providing false or misleading information, obstruction or interference by a person.

4. Court orders

EPA can apply to the court to make certain orders, in addition to any other penalty that the court has imposed (see Table 1).

EPA's position is that court orders are intended to reflect the expectations of the community in relation to environment protection.

A Court may at any time adjourn a civil or criminal proceeding for a restorative justice process. The outcomes of the restorative justice process may be considered in the court outcome.

Table 1: Overview of court orders

Type of order	Description
Financial penalty	A monetary fine, noting that the maximum penalty is the same for criminal prosecutions and civil penalty proceedings.
Monetary benefits orders	A penalty imposed by the court that takes into account the monetary benefit obtained from the offending conduct. This may include a benefit that is acquired by delaying or avoiding compliance.
Adverse publicity orders	An order to make the person take steps to publicise the offence and its impacts.
General restoration and prevention orders	An order to prevent, minimise or remedy any harm. The court may also make this order to eliminate or reduce the risk of harm, and/or to prevent the continuation of recurrence of an offence or contravention. The specific orders can include education and training programs, revision of internal operations of their business and/or provide a financial assurance.
Restorative project orders	A Court may order a person to carry out a project for the enhancement or restoration of the environment in a public place or for public benefit. The project does not necessarily have to relate to the offence. An order may include the payment of money to a specified person or organisation, or to the Restorative Project Account.
Environment audit orders	An order to require a person to engage an environmental auditor and conduct an audit.
Interim orders	The term interim orders refer to an order issued by a court pending the determination of section 309 of the EP Act. It is generally issued to ensure status quo.
Restraining orders	The court may make an order restraining a person from engaging in specified conduct or requiring a person to take a specific action.

5. How EPA decides on which sanction to use

EPA's enforcement response will always aim to be proportionate to the misconduct, and its enforcement decisions will be consistent and transparent.

EPA will consider a range of factors when assessing whether to use a sanction power, and what type of sanction is appropriate, including the characteristics of the offender, the culpability of the offender and the risk of, or realised, harm to human health or the environment that has arisen as a result of the contravention.

Restorative justice outcomes may also be considered alongside any sanction.

Further, EPA's strategic regulatory focus will change over time to target emerging risks to human health and the environment. EPA will communicate its compliance plans, enforcement strategies, and future campaigns to provide clear information about areas and issues it is focussing on.

5.1 Suspension and revocation of a permission

EPA may suspend a permission in relation to any or all of its permission activities if the holder of that permission has contravened the EP Act. The EPA may also revoke a permission.

A decision by EPA to suspend and/or revoke a permission may be in addition to the use of sanction powers.

6. Range of factors EPA may consider

The following factors may warrant the full force of the law and higher levels of intervention:

- > the culpability of the person, particularly intentional and/or deliberate contraventions
- > the seriousness of the risk of harm to human health and the environment
- > if enforcement action is likely to have an educative or deterrent effect.

The following factors may warrant other sanction options, such as enforceable undertakings or infringement notices:

- > the culpability of the person is low
- > the risk of harm to human health and environment was low
- > if it involved an environment incident, reasonable systems were already in place to prevent the incident.

The table below is a guide to how EPA may determine the type of sanction appropriate against a range of factors.

Table 2: Overview of sanction types

Type of sanction	Description
Enforceable undertakings/ infringement notices	Low contravention of the EP Act and/or low culpability of the person.
Civil proceedings/criminal prosecution	Contravention of the EP Act that resulted in medium to high risk of harm to the environment or human health, and/or the culpability of the person was negligent/reckless/deliberate and/or intentional.

6.1 Culpability

The culpability of a person in relation to the contravention will be assessed against the following:

- > whether the contravention was deliberate, reckless or negligent
- > how long the incident or contravention has occurred for
- > whether or not the risk of harm is still occurring
- > the likelihood of the contravention being repeated
- > whether the system or process causing the contravention, or which could have prevented a contravention, is a significant departure from acceptable or widely known systems or process for preventing risk of harm
- > whether there was a monetary benefit derived from the contravention
- > the person's relevant compliance history
- > whether the person was previously the subject of
 - > an enforceable undertaking
 - > civil penalty proceeding
 - > prosecution under the EP Act
- > whether the contravention involves a failure to comply with the condition in a permission
- > whether the contravention involves a failure to comply with a remedial notice
- > if relevant, whether the person notified EPA of the contravention
- > the voluntary actions taken to mitigate the harm caused by the contravention and put in place mechanisms to prevent recurrence
- > whether the person was provided with EPA specific information and guidance in relation to compliance with the EP Act.

6.2 The nature of non-compliance and risk of harm

EPA will consider the nature and circumstances of the alleged contravention, including consideration of factors such as:

- > The seriousness and magnitude of the risk and impacts of harm caused by the contravention to human health, the community and the environment.
- > If the contravention relates to a breach of the general environmental duty, how far the duty holder has departed from the requirement to take reasonably practicable measures.
- > The duration of the contravention (and offending conduct).
- > If the contravention involves industrial waste or priority waste, the amount of, type and nature of the waste.
- > If the contravention does not involve actual harm, the likelihood of the risk eventuating and the degree of harm that would have resulted.
- > The cost of the contravention to the Victorian Government, other compliant businesses and community.
- > The measures necessary to ensure compliance with the law.
- > The measures taken to restore or remediate the harm caused to human health and the environment immediately after the contravention occurred.
- > The measures still required to restore or remediate the harm and achieve the best environmental outcome.

6.3 Other sanction factors

Possible other relevant factors, including the assessment of whether it is in the public interest to pursue sanctions, may include the following:

- › the prevalence of the type of contravention
- › the likely public concern about the seriousness of the contravention
- › whether the contravention undermines the operation of an aspect of the scheme including collection of fees and levies
- › whether the proposed enforcement action will promote compliance, and engender confidence in the regulatory scheme
- › the need for general deterrence
- › whether the contravention has undermined lawful participants taking part in the scheme, that is, disrupted the level 'playing field' of the scheme
- › the precedent which may be set by any failure to take enforcement action.

6.4 Restorative justice

Evaluation of whether a restorative justice process or outcome is relevant and appropriate as part of sanction shall include consideration of the following matters:

- › Who has been affected by this contravention or offence and in what way?
- › The connection between those impacted and those involved in the offence or contravention.
- › The potential benefits of a restorative process to assist repair of these impacts for both affected parties.

Restorative justice opportunities can inform outcomes in the following ways:

- › The opportunity to present an impact statement as part of proceedings which may inform the outcome of court orders.
- › Participation in a restorative justice adjournment which may inform the outcome of court orders.
- › A restorative project order or general restoration order.

6.5 Impact statements

The court is able to consider a statement from persons/organisation to assist with sentencing, penalty and the conditions of any of the court orders. These new provisions enable a statement to provide information to the court about the impact of an offence or contravention on the risks to human health and environment; the impacts to community and environmental values and any associated loss, injury or damage. These provisions will enable the court to more directly evaluate the consequences of an offence or contravention and will therefore form an important part of proceedings.

The consideration of impact statements in criminal proceedings are in addition to the consideration of victim impact statements under the *Sentencing Act 1991*.

6.6 Jurisdiction

The EP Act consists of both indictable and summary offences. In determining whether to prosecute an indictable offence summarily, EPA can submit to the court to determine the course of action that has the best chance of effectively achieving the objectives for the given matter. EPA may also consider the cost and legal process requirements involved.

7. Communication of sanctions

EPA will promote the outcomes of sanctions on our website. Information made publicly available includes details regarding the offence, the offender, our regulatory action, and the action of the offender to resolve the issue. This is to deter both repeat offending and others from offending more broadly.

Active investigations may be identified, however specific details will be limited to prevent prejudicing the outcome of the investigation.

References

Resource type	Title	Description	Publication
Policy	<i>Compliance and enforcement policy</i>	Outlines EPA's approach, method and priorities for ensuring compliance with our Acts and carrying out our compliance and enforcement powers.	EPA publication 1798
Guide	Inspection and inquiry powers guide	Explains how EPA authorised officers will use powers of inspection and inquiry to apply the EP Act.	EPA publication 1815
Policy	<i>Remedial powers policy</i>	Explains how EPA and its authorised officers (AOs) will use the remedial powers provided in the EP Act.	EPA publication 1813
Policy	<i>Policy of the Director of Public Prosecutions for Victoria</i>	The Director's Policy supplements the legal obligations under the <i>Public Prosecutions Act 1994</i> by ensuring that prosecutorial decisions are made according to principled standards.	www.opp.vic.gov.au/Resources/Policies