

# EPA's enforcement and prosecution of government entities, including local government

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 enforcement, including prosecutions, in relation to alleged offences by government entities, including local government.

To ensure equity and transparency this policy emphasises that EPA will use its enforcement and prosecution powers in the same way for government entities as for private entities.

## 2 Relevant legislation and guidelines

### 2.1 Environmental laws

This policy applies to all comprehensive investigations and prosecutions of government entities, including local government, for alleged breaches of the *Environment Protection Act 1970* (EP Act) and the *Pollution of Waters by Oils and Noxious Substances Act 1986* (POWBONS Act).

The EP Act binds both private and government entities.<sup>1</sup> In addition, some government entities, such as statutory authorities, are co-regulators of the environment who have obligations to prevent pollution and environmental risks arising from their activities.<sup>2</sup>

Local government entities in particular, hold a unique place as co-regulators of the environment in that they have specific powers under the EP Act. Local government also has statutory responsibilities in the areas of nuisance, health, planning and development. In addition, local government entities are regulated by EPA when they engage in activities which have the potential to cause adverse impacts on the environment, such as waste management activities.

### 2.2 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 POWBONS Act and carrying out EPA's compliance and enforcement powers.

This 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).

### 2.3 Guidelines of the Director of Public Prosecutions

In deciding whether or not to prosecute, EPA adopts the *Guidelines of the Director of Public Prosecutions* (DPP) (Prosecution Guidelines),<sup>3</sup> which are based on the *Australian Prosecutorial Guidelines*. They guide EPA in the exercise of its prosecutorial discretion and all EPA's prosecution-related activities are conducted in accordance with these Prosecution Guidelines.

In particular, 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>4</sup>

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

### 2.4 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.

Broadly, 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).

<sup>1</sup> See s.2(1), *Environment Protection Act 1970*, 'Application of Act'.

<sup>2</sup> For example, there is regulatory overlap between the roles of EPA, the Department of Sustainability and Environment (DSE), Sustainability Victoria (SV), the Department of Primary Industries (DPI), Department of Premier and Cabinet (DPC), Departments of Planning and Community Development (DPCD), Innovation, Industry and Regional Development (DIIRD), and the catchment management authorities. For example, DSE has portfolio responsibility for environmental protection, regulatory responsibility for forests, water catchments and biodiversity, and is responsible for crown land, including illegal dumping.

<sup>3</sup> In particular, Policy 2: the Prosecutorial Discretion, available at [www.opp.vic.gov.au](http://www.opp.vic.gov.au).

<sup>4</sup> See page 30 of the C&E Policy for more detail on these criteria.

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## 3 EPA's Policy position

All government entities have a responsibility to comply with the law, including the EP Act and POWBONS Act. Government entities are subject to prosecution or other enforcement action for breaches of the EP Act and POWBONS Act in the same manner as any other duty-holder.<sup>5</sup>

EPA will use its enforcement powers and exercise prosecutorial discretion with fairness in relation to all duty-holders, whether they are government or private entities. This position applies regardless of the unique standing of local government and government entities as co-regulators of the regulatory framework.

## 4 How EPA will apply the policy

In applying this policy EPA will:

1. apply the Prosecution Guidelines to all duty-holders. EPA will not treat government entities any more or less favourably than other duty-holders
2. apply the Prosecution Guidelines in the context of EPA's principles of compliance and enforcement, set out in the C&E Policy.<sup>6</sup> In particular, procedures relating to the investigation and prosecution of government entities will be transparent and accountable to the public. EPA will also publish the outcomes of enforcement action in media releases at the conclusion of court proceedings
3. consider alternatives to prosecution (such as enforceable undertakings, warnings or no further action) in accordance with EPA's C&E Policy<sup>7</sup>
4. undertake prosecution proceedings against all duty-holders, including government entities, in a manner that avoids unnecessary public expenditure.<sup>8</sup> This could include, where appropriate:
  - a) undertaking early consultation with the accused to narrow the legal and/or factual issues in dispute
  - b) agreeing with the accused as to a statement of facts for use during court proceedings
  - c) ensuring that the overall time and cost of prosecution proceedings, including court time and EPA legal costs, are proportionate to the seriousness of the alleged offence/s.
5. act in accordance with the *Victorian Government's Model Litigant Guidelines*
6. consult with government entities and all duty-holders to promote compliance. For example, via advice, guidance and partnerships, EPA will ensure that government entities understand the meaning of compliance and how to identify and manage the risks of their activities
7. ensure that any agreements or memorandums of understandings entered into with government entities are consistent with the application of this policy.

<sup>5</sup> EPA regards anyone who has a duty or obligation under the EP Act as a duty-holder.

<sup>6</sup> In particular, see page 5 of the C&E Policy.

<sup>7</sup> If any other party is charged in relation to the same offence(s), the co-accused party's rights must also be taken into account.

<sup>8</sup> Ibid.