



EPA
VICTORIA

Compliance and enforcement policy

Table of contents

1.	Purpose	3
2.	Our approach	4
2.1	Integrated and outcome focused	4
2.2	Risk-based approach	6
2.3	Dynamic enforcement response	6
3	Our tools to address non-compliance	10
3.1	Information, education and advice	10
3.2	Directing and requiring follow-up action to fix or remedy non-compliance	11
3.3	Penalties and sanctions	12
4.	Avenues for review and appeal	14



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. As Victoria's environmental regulator, we pay respect to how Country has been protected and cared for by Aboriginal people over many tens of thousands of years. We acknowledge the unique spiritual and cultural significance of land, water and all that is in the environment to Traditional Owners, 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.

The EP Act and Environment Protection Regulations 2021 (the Regulations) come into effect on 1 July 2021. They introduce a range of significant changes to environmental protection and EPA's approach to monitoring and detecting, remedying and addressing non-compliance.

EPA's Compliance and Enforcement Policy sets out our approach to applying Victoria's new legislative framework to our compliance and enforcement decisions. It also aims to provide clarity on how we will exercise our regulatory powers.

This policy covers:

- EPA's compliance and enforcement approaches for supporting and directing compliance
- our principles and criteria for decision-making, including the consideration of risk, and behaviour and motivations for compliance.

The Compliance and Enforcement Policy complements other key policies, including our *Permissions Scheme Policy* (publication 1799). Together, these policies and associated guidelines set the platform for the implementation and delivery of the EP Act.

What is compliance and enforcement?

EPA take a no tolerance approach to non-compliance and will take proportionate regulatory action against those who fail to meet their obligations.

In this policy 'compliance' is defined as the adherence to the legal requirements and obligations of the Act. Compliance is an ongoing process, so people and businesses need to regularly assess their risk and seek to improve their methods for eliminating or minimising those risks.

'Enforcement' is then the use of influence, authority and statutory powers under the Act to achieve or compel compliance.

2. Our approach

2.1 Integrated and outcome focused

The EP Act and Regulations provide a framework for protecting human health and the environment from the harmful effects of pollution and waste.

The cornerstone of the EP Act's focus on preventing harm is the general environmental duty (GED). The GED requires anyone conducting activities that pose risks of harm to human health or the environment from pollution or waste to understand those risks and take reasonably practicable steps to minimise them.

EPA uses a range of activities to hold duty holders accountable for these responsibilities and other obligations under the EP Act, including:

- › supporting people to understand, own and address their impacts on human health and the environment
- › working with others to address complex pollution and waste problems
- › taking a no tolerance approach to non-compliance and proportionate regulatory action against those who fail to meet their obligations
- › reviewing and refining our focus and approach based on risk, evidence and impact.

When we use our regulatory tools, we ensure that they are focused on the problem and desired outcome.

This approach uses a mix of encouragement and deterrence to motivate action, deliver improved outcomes, and involves several key elements; inform and educate, set standards, support to comply, monitor compliance, enforce the law and encourage higher performance (see Figure 1).

Who is a duty holder?

From government to business to community, all Victorians have duties and obligations under the EP Act.

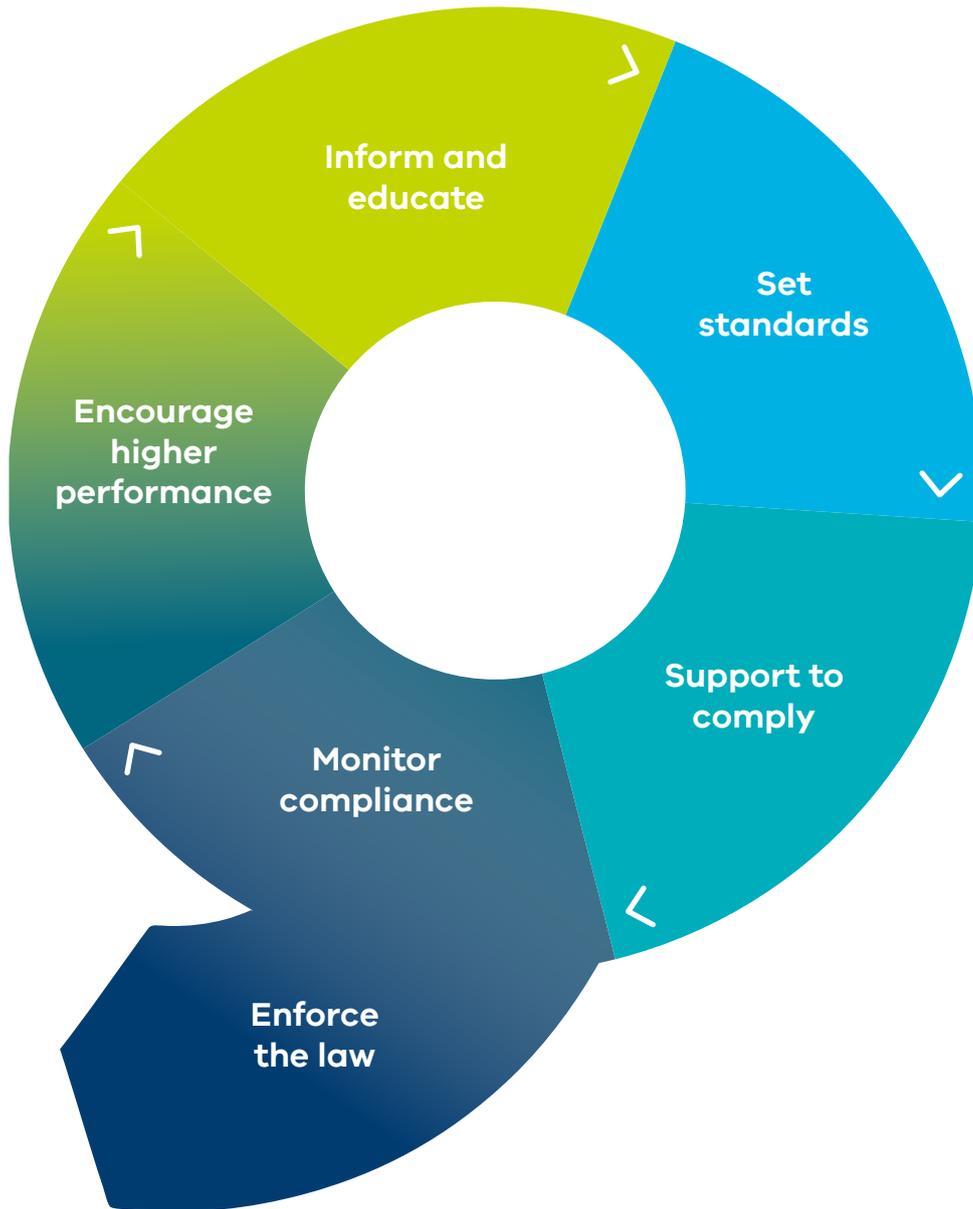
Anyone who holds a duty under the EP Act may be subject to inspections by EPA authorised officers, in accordance with their powers under the Act. EPA may take action even if harm has not yet occurred, and responsibility for preventing harm rests with anyone in management or control of the activity that may give rise to risks of harm.

The Act also includes additional powers that allow EPA to hold individual directors to account for the duties their company holds.

The duties under the EP Act may apply to:

- *employers*
- *contractors*
- *company officers*
- *other persons who manage or control the activity*
- *persons who manage or control land*
- *designers, manufactures, suppliers or installers of plant or equipment*
- *individuals whose activities create a risk of harm.*

Figure 1 EPA's regulatory activities



Encourage higher performance:

Work with leaders and partners to encourage higher performance, to raise industry practices and inform future standards.

Inform and educate:

Raise awareness of environmental duties of care, the human health and environmental risks and impacts of activities, environmental quality, and EPA's role and jurisdiction.

Set standards:

Set clear and authoritative health and environmental standards based on strong science, understanding of community aspirations and industry best practices.

Support to comply:

Provide advice, guidance and build partnerships to ensure duty holders know what compliance is and improve their capability in identifying and managing their risks.

Monitor compliance:

Determine the level of compliance with duties and standards and maintain a credible risk of detecting non-compliance.

Enforce the law:

Address non-compliance with the law by requiring parties to remedy non-compliance, seek redress for any harms, and where appropriate, pursuing a penalty or punishment.

2.2 Risk-based approach

The EP Act and Regulations provide a framework for protecting human health and the environment, with discretion regarding how we exercise our functions and where we direct our activities.

We prioritise our effort to the largest risks and those areas where we can make the biggest difference to the health and liveability of Victoria.

We adopt a risk-based approach that uses science and intelligence to assess risks in terms of the likelihood of the risk occurring and their impact (see Figure 2). In assessing risk, we also consider the practices and behaviours of duty holders that:

- > represent non-compliance with the laws we administer
- > present real or potential harm to human health and the environment
- > impact our ability to be an effective regulator
- > require a regulatory response due to public interest and concerns.

Our knowledge of risk is informed by our understanding of the condition of the environment and threats to its quality and standards of health.

We also seek out and use the insights from community and stakeholders, and intelligence from partner agencies and our operational activities. Our powers under the *Surveillance Devices Act 1999* will also enable us to use advanced technology to detect offences.

Likelihood: considers the posture of regulated entities including (a) the track record of the business — past incidents, inspections, enforcement and pollution reports; (b) the systems and controls an activity may have in place to identify and manage risk; (c) competence of the business and its operators; and (d) the level of resources the business dedicates to environmental management, compliance and maintenance.

Consequence: considers the actual or potential impacts on human health (including psychological health) and environment (including amenity). It also considers the scale and duration of any harm or impact, the impact to the integrity of the regulatory regime, and the level of public concern.

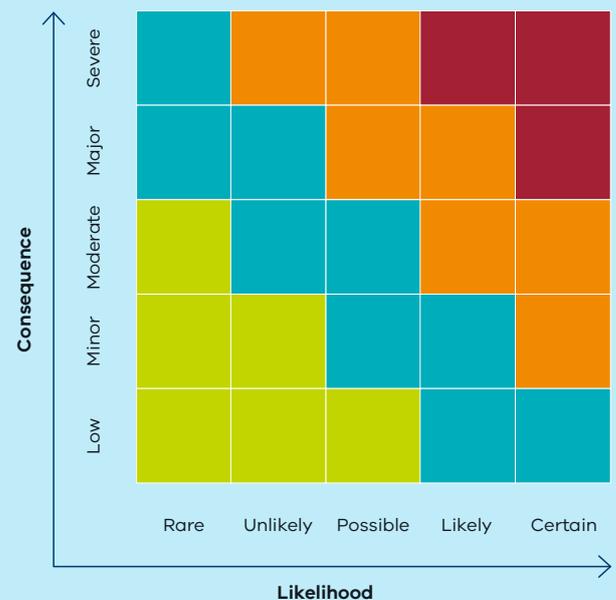


Figure 2 Model for risk-based prioritisation

2.3 Dynamic enforcement response

EPA selects from a wide range of regulatory tools to address non-compliance under the EP Act and/or to respond to an issue or incident (see Figure 3).

These tools and measures may be used individually or in combination, to respond in a way that is proportionate to the seriousness of the problem and focused on achieving the desired regulatory outcome (see Figure 4). EPA will also consider whether it is appropriate to implement restorative or punitive measures to ensure harm is repaired and the consequences for non-compliance are appropriate.

EPA's enforcement action aims to:

- > stop the unlawful activity and remedy any harm caused by the non-compliance (including using restorative justice outcomes)
- > ensure future compliance is achieved and sustainable
- > raise awareness of the law and consequences of non-compliance
- > punish offenders and remove any commercial advantage from the non-compliance.

In determining the appropriate enforcement response, we take an escalating approach and consider:

- > the nature and seriousness of the non-compliance
- > the risk of harm that has arisen from the non-compliance
- > the characteristics of the person engaging in the activity
- > other relevant criteria and factors (e.g. public interest).



Figure 3 Escalated and responsive approach to enforcement

2.3.1 Nature of non-compliance and risk of harm

In assessing alleged non-compliance, EPA will consider the nature and circumstances of the source of non-compliance and other relevant factors such as:

- › the seriousness of alleged non-compliance, including:
 - the degree of commercial advantage or gain
 - the impact of the omission or provision of false or misleading information on environmental risk
 - the extent to which controls fail to meet expected standard of management for a given risk.
- › the scale or extent of the risk of harm to human health and the environment (i.e. the actual or potential impacts on human health (including psychological health) or the environment (including amenity))
- › the level of public interest and concern arising from the alleged non-compliance
- › the prevalence of alleged non-compliance (i.e. how common the offence is).

2.3.2 Characteristics of the duty holder

EPA also considers the attitude, behaviour and actions of the duty holder when assessing the degree of culpability associated with non-compliance, specifically, whether the duty holder has:

- › proactively identified risks and implemented controls to minimise those risks
- › sought out and referred to industry and EPA guidance when they are unsure of how to manage risk
- › notified EPA and acted to contain pollution, as soon as they are aware of an incident
- › cooperated with EPA authorised officers during any inspections or investigations
- › fully complied with directions and notices and promptly advised EPA of any issues that impeded compliance.

EPA takes an escalating approach to enforcement. Where duty holders are resistant, evasive or hide information, or fail to account for their risks, they can expect more severe enforcement responses.

In assessing culpability, EPA may also consider:

- › how widely understood the risk was and if the duty holder's actions were reckless or deliberate
- › the duty holder's compliance history, including any previous notices issued, incidents or community pollution reports
- › the duration of non-compliance.

2.3.3 Other enforcement factors and criteria

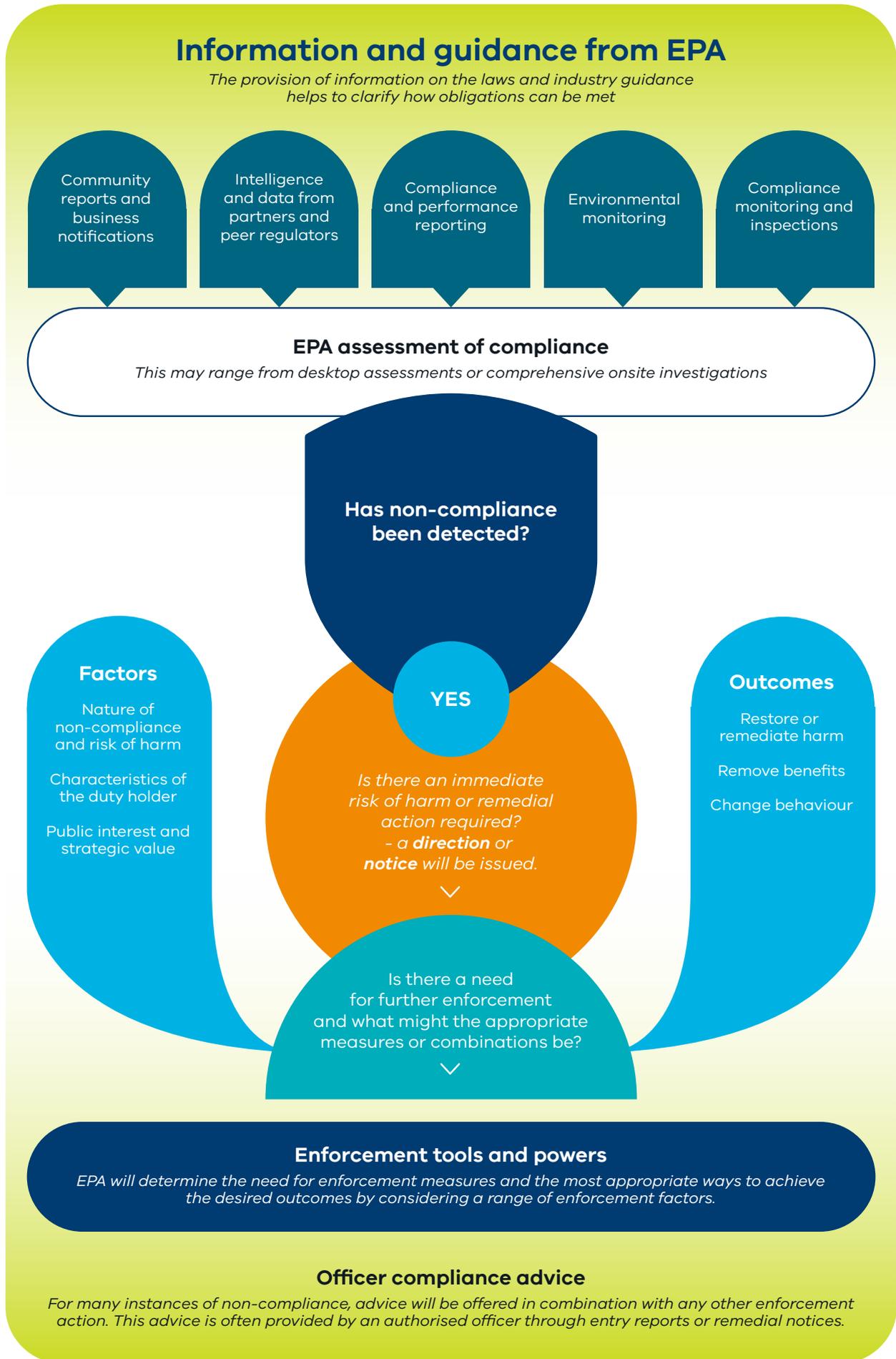
EPA will also consider other factors and criteria in determining the most appropriate enforcement response. These may include:

- › **Public interest:** where EPA believes there is a reasonable prospect of conviction, we will consider whether prosecution in a criminal court or proceedings in a civil court is in the public interest. An alternative measure may also be more appropriate to provide restorative outcomes.
- › **The deterrent impact of enforcement:** the degree to which the use of enforcement action will deter the specific offender from re-offending as well as other duty holders from committing similar offences.
- › **EPA's strategic priorities:** we periodically set areas of strategic priority for compliance and enforcement action.

Factors that may influence our choice to not pursue enforcement action include:

- › one-off or isolated events of low impact or harm
- › matters that are more effectively dealt with by another agency.

Figure 4 Illustration of enforcement decision-making



3. Our tools to address non-compliance

The EP Act provides EPA with a range of regulatory tools to sustain compliance and enforce the law.

3.1 Information, education and advice

EPA provides information and guidance to help duty holders understand how they can reduce the risk of harm to human health and the environment. Guidance is a core component of a duties model because it provides approaches to identifying risks and practical measures that a duty holder can take to comply with their obligations without prescribing particular approaches.

In addition to the information we provide, we expect businesses to proactively seek out information to further improve their own understanding of the environmental risks caused by their activities and how to manage them.

Over time, we expect the management of environmental risks to improve. As the capability and performance of businesses increases, those who fail to effectively manage their environmental risks will face more serious enforcement action.

EPA authorised officers play a key role in providing information and advice to duty holders on how to comply with the EP Act. In cases, where non-compliance is detected, EPA authorised officers will identify the steps the duty holder can take to remedy the situation. This includes referring duty holders to applicable EPA guidelines and other relevant information.

Information and guidance provided by EPA and authorised officers does not provide the duty holder with any additional rights or defences in relation to alleged non-compliance. The degree to which the duty holder has followed any EPA advice will be considered in determining our enforcement response.

What is reasonably practicable?

Determining what is “reasonably practicable” in relation to minimising risks of harm requires the duty holder to have regard to five factors:

- (a) the likelihood of those risks eventuating*
- (b) the degree of harm that would result if those risks eventuated*
- (c) what the person concerned knows, or ought reasonably to know, about the harm or risks of harm and any ways of eliminating or reducing those risks*
- (d) the availability and suitability of ways to eliminate or reduce those risks*
- (e) the cost of eliminating or reducing those risks.*

3.2 Directing, and requiring follow-up action to fix or remedy non-compliance

Where non-compliance is detected, an EPA authorised officer will consider issuing a remedial notice or direction to bring the duty holder into compliance or set out the steps to deal with actual harm, waste or contamination.

An authorised officer may give directions to a person in control of an activity if they reasonably believe that it is necessary to do so because of an immediate risk to the health or safety of any person. The immediate nature of these situations mean that directions will normally be given verbally and later confirmed in writing as soon as possible. Failure to comply with directions without lawful reason is a serious offence and may result in prosecution.

Remedial notices may be issued where an authorised officer forms the belief, based on reasonable grounds, that the duty holder is not complying with an aspect of the EP Act, or there is the presence of a waste or contamination issue that needs treatment. Notices represent a formal record that EPA has required action by a duty holder to remedy a risk of harm. The range of notices include:

- › Improvement notice – requires a person to take action to remedy non-compliance
- › Prohibition notice – requires a person to stop an activity that involves an immediate risk of harm
- › Notice to investigate – requires a person to investigate potential contamination or harm
- › Environmental action notice – requires a person to take action to clean-up contamination or industrial waste
- › Waste abatement notice – requires a person to remove, dispose or restore a place affected by litter or waste.

In situations that require long term management or rehabilitation, site management orders may require the owner or occupier of land that may be contaminated to undertake a broad range of actions to manage risks of harm. Requirements may include long-term maintenance of environmental controls such as installing and maintaining infrastructure, monitoring of contamination on the site, and ongoing reporting requirements.

EPA will follow up to confirm compliance directions, notices and orders. If a duty holder fails to fulfil their obligations by the specified date they may be prosecuted for that failure and for the alleged breach of the Act that initiated the process.

Alternatively, EPA may pursue a civil remedy in the Magistrates', County or Supreme Court to require a person to undertake specified actions to prevent, minimise or remedy a contravention or to comply with a requirement.

What are the powers of an EPA authorised officer?

EPA authorised officers can enter commercial and residential premises to conduct inspections and assess compliance with the duties and other obligations and determine whether there is a risk to human health or the environment from pollution or waste. These officers can examine or test anything at the premises, take samples away for analysis, take pictures or recordings if required, inspect documents, request information and take away anything that may be evidence of a breach of the Act. Anyone at the premises must cooperate with the authorised officer.

3.3 Penalties and sanctions

In certain circumstances, and in line with the enforcement criteria outlined in section 3.3, EPA may determine that pursuing a sanction or punishment is warranted.

3.3.1 Warning

A warning may be issued where we have evidence of a non-compliance and consider that it was reasonable to expect a duty holder to have known and understood their obligations but where we expect that the duty holder will learn from the experience and improve their compliance performance.

3.3.2 Infringement notice

An infringement notice imposes a financial penalty for breaches of the laws and can be issued by an authorised officer. This allows specific contraventions of the EP Act to be dealt with by payment of a fine, rather than through court proceedings.

3.3.3 Enforceable undertaking

EPA has broad discretion to accept an enforceable undertaking from a person for any matter within our functions or powers. An enforceable undertaking can be a constructive alternative to prosecution, or a civil penalty proceeding and may make a positive contribution to improving a sector's management of certain risks or help deliver restorative justice outcomes where these are needed. Under an enforceable undertaking, an alleged offender voluntarily enters into a binding agreement with EPA to undertake actions in settlement of the alleged contraventions. It may involve taking agreed steps to remedy harm caused to the community or proactively manage the risk of harm.

In general, an enforceable undertaking:

- must help deliver systemic change within the duty holder's activities to prevent future breaches of the law
- must contribute to an improved level of understanding of the risks and means of controlling those risks within the duty holder's sector
- must address any harm caused to the community
- requires the duty holder to take responsibility for the contravention and its impacts.

3.3.4 Civil proceedings and criminal prosecution

In addition to, or as an alternative to initiating criminal proceedings, EPA may commence civil proceedings in the Magistrates', County or Supreme Courts. We can seek the same penalty for a civil pecuniary penalty offence with civil action as we could with criminal prosecution.

We will use the criminal jurisdiction when it is considered the most effective option, including whether a conviction, a fine, or imprisonment, (where available) is appropriate.

We will consider civil penalty action where it is likely to result in a stronger deterrent impact and more effectively encompasses the type and nature of the breach.

3.3.5 Court orders

The EP Act makes a range of orders available to the court to prevent or restore harm or penalise an offence. Court orders are intended to reflect the expectations of the community in relation to environment protection, and may include one or more of the following:

- › A financial penalty – the maximum penalty is the same for criminal prosecutions and civil penalty proceedings.
- › Monetary benefits orders – a penalty that considers the monetary benefit obtained through the offending conduct. This includes a benefit that is acquired by delaying or avoiding compliance.
- › Adverse publicity orders – an order to make the defendant take steps to publicise the offence and its impacts.
- › General restoration and prevention orders – a broad discretion to make any orders to prevent, minimise or remedy any harm etc.
- › Restorative project orders – broad discretion to order a person to carry out a project for the enhancement or restoration of the environment.
- › Environment audit orders – an order to require a person to engage an environmental auditor and conduct an audit.

A court can also adjourn a criminal prosecution and a civil penalty proceeding so that a restorative justice process can take place. A restorative justice process can include any person agreed to by EPA and the defendant. On conclusion of a case, a court can make orders for a restorative project for the public benefit or to enhance the environment. The combination of these provisions ensure that offenders are penalised while also including those impacted in the outcomes of legal proceedings.

Delivering justice for communities and the environment

Justice means that we enforce the law to hold polluters and those who fail to manage their risks to account so that they are appropriately penalised. Justice also means that those who are affected by non-compliance and contraventions of the law have a voice and benefit restoratively through enforcement processes. The new Act provides improved opportunities to achieve multiple outcomes.

Publication of enforcement action

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

Active investigations may also be identified, however specific details may be limited to not compromise an active case.

3.3.6 Suspension and revocation of permission

Suspension or revocation of a permission such as an operating licence, temporarily or permanently, prevents the permission holder from operating under the EP Act.

EPA may suspend or revoke the permission in circumstances such as:

- › we have reasonable grounds to believe that the holder of the permission has contravened the EP Act or Regulations
- › we do not consider the holder of the permission to be a fit and proper person to engage in the permission activity
- › we have been provided with materially incorrect or misleading information by the holder of the permission
- › the holder of the permission has not paid any prescribed fee in relation to the permission.

4. Avenues for review and appeal

The EP Act introduces a range of new compliance and enforcement tools, including increased opportunities to issue a remedial notice in instances where harm has not yet occurred.

In the interests of transparency and accountability, this increased scope for taking remedial action is balanced by a statutory right for recipients of a remedial notice to seek an internal review of an EPA authorised officer's decision to issue or amend a notice.

Internal review is complemented by a further option to seek external review in the Victorian Civil and Administrative Tribunal (VCAT). VCAT reviews provide duty holders and other affected parties with a fully independent avenue for reviewing EPA decisions and hold us accountable for core regulatory decisions affecting duty holders and other affected parties.