

Summary of submissions received during consultation on the civil penalty calculations policy proposed amendments February–March 2013



The EPA has undertaken a review of the EPA policy for calculation of civil penalties under the *Environment Protection Act 1993* (calculations policy) and completed consultation of the resulting proposed amendments from key stakeholders. A total of seven submissions were received during consultation between February and March 2013.

This document provides a summary of the submissions and the outcomes resulting from the EPA's consideration of the issues raised. The amended calculations policy have now been finalised and is available on the [EPA website](#).

Submissions received on each proposed amendment

Proposed amendments	No of supporting submissions	No of opposing submissions
\$1,000 floor penalty	2	2
20% increase to the foundation penalty	2	4
Inclusion of new offences such that a greater number of offences may be suitable for civil penalty negotiation	4	2
Separation of the adjusting factor item 7.4 into two factors	3	2
Review the policy again in five years	2	–
Clarification of the process of negotiating a civil penalty and corrections	1	2
General support for the calculations policy	4	–
Other comments:		
• Penalty reduction for financial hardship and remediation works undertaken.	1	–
• Expediting the negotiated penalty process.	1	–
• Environmentally beneficial projects.	1	–

Objectives of the review and consultation

The objectives of the civil penalty policy review were to investigate:

- the consistency between negotiated penalties and court imposed criminal penalties
- the adequacy of the penalties generated by the calculations policy, in particular the foundation penalty and adjusting criteria components of the calculation formula
- whether the EPA should start to negotiate environmentally beneficial projects as an option in the negotiation of civil penalties
- possible improvements to the calculations policy to set out more clearly the principles to be followed when making decisions under section 104A of the Environment Protection Act 1993 (the Act).

The objectives of the consultation were to:

- inform key stakeholders about proposed changes to the calculations policy resulting from the civil penalty policy review
- invite comment about proposed changes to the calculations policy
- ensure key stakeholder understanding of the changes to maintain a transparent process of negotiation.

There are five main areas of proposed amendments:

- increasing the monetary amount of negotiated civil penalties calculated
- the inclusion of new offences in the policy
- clarification of the process of negotiating a civil penalty and corrections
- amendment to the adjusting factors
- requiring the next review of the policy in five years.

Summary of submissions

The EPA received submissions from seven parties.

Comments on the proposed new \$1,000 floor penalty

Proposed amendment	No of supporting submissions	No of opposing submissions
\$1,000 floor penalty	2	2

Feedback was sought on the proposal to create a minimum floor civil penalty amount of \$1,000 such that if the calculation formula generates a penalty of less than \$1,000, a default \$1,000 penalty will be assessed.

Four submissions commented on the proposed new \$1,000 floor penalty. One indicated that they remain neutral to this proposal however ask that the proposal be linked to the increased possible reduction for adjusting factors and would prefer for amendment to the penalty be achieved by amending the maximum penalty in the Act rather than in the calculations policy.

One submission opposed the introduction of the floor penalty stating that the penalty for any particular breach should be levied according to the particular circumstances of that breach, not at a 'convenient minimum tariff for the regulator'. The third and fourth submissions supported a floor penalty however considered a \$1,000 floor penalty to be insufficient and suggested that a \$1,500 to \$2,000 penalty was more appropriate.

Discussion

While noting the submission that the floor penalty should be linked to the increased possible reduction for adjusting factors it is continued to be recommended that the calculations policy contain a \$1,000 floor penalty without the ability for further reduction for adjusting criteria. Allowing submission on adjusting factors would provide the option for a penalty of \$300 (with maximum reduction for all adjusting factors applied) that would not recover the EPA's cost of negotiation. In the event that an alleged offender considers that the penalty does not reflect the details of an incident there are sufficient options in the process for a person to elect to be prosecuted to argue their particular circumstances.

Outcome

Outcome 1: future Act review project to include a proposal to consider an increase of the maximum penalty in the Act for category B offences.

Outcome 2: calculations policy amended to create a \$1,000 floor penalty that does not allow for an alleged offender to make submissions for penalty reduction for adjusting factors.

Comments on proposed 20% increase to the foundation penalty

Proposed amendment	No of supporting submissions	No of opposing submissions
20% increase to the foundation penalty	2	4

Feedback was sought as to whether a proposed 20% increase to the foundation penalty accurately reflects the cost saved by avoiding prosecution and whether the penalty should be increased to reflect this saving.

Six submissions commented on the proposal. Four submissions expressed concern about this proposal. One submission recommended that the increase in the foundation penalty be limited to 10% for a period of two years—and reserving the discretion to increase the foundation penalty to 20% above the original base thereafter. This would allow the EPA to monitor any altered take-up by those approached on the next five to 10 occasions, in turn providing an indication of the capacity of licensees to bear such increases.

Two submissions supported an increase to the foundation penalty of more than 20% and one of those submissions suggested a new model of increased penalties to further distinguish between Category 2 and 3 penalties.

Arguments opposing the proposal:

- 20% represents a significant increase and is not justified or required.
- As the EPA also saves time and money using the civil penalty negotiation option it is unfair to place this cost burden on business.
- A 20% increase to the foundation penalty will lead to more people electing to be subject to court proceedings rather than be a party to a negotiated civil penalty and contrary to the objectives of the policy.
- In the court system, the defendant is given a sentence reduction for pleading guilty. A sentence increase where the alleged offender agrees to negotiate a penalty is inconsistent with this principle.
- Two submissions stated that civil penalty options do not represent considerable savings to business and one indicated that a negotiated civil penalty is likely to be less costly and less time consuming than adversarial legal action.

Arguments supporting the proposal:

- The review of the civil penalty calculations policy has considered the current penalties ordered by the court with a view to ensuring consistency with court determinations. There is concern that the court's determinations may not necessarily reflect Parliament's intentions with respect to the amount of the penalties and accordingly any comparison should be amended to err on the side of an increased penalty.
- The foundation penalty could be increased by a greater percentage as the legal costs that parties save in avoiding court are likely to be considerable, that is, often in the order of tens of thousands of dollars, depending on the nature of the case.
- A higher increase in the foundation penalty could create a better deterrent effect in addition to reflecting the severity of the offence.

Arguments made supporting the proposal to increase the foundation penalty and to further distinguish between Category 2 and 3 penalties:

- The percentage attributed to Category 2 and 3 should be distinguished to reflect the severity of each offence.
- Category 3 relates to administrative offences and therefore should attract a lower percentage of the maximum penalty.

Discussion

The concern raised that this proposal may lead to more people electing to be prosecuted in the court is noted. For the larger penalties (such as for the offence of operating without a licence) an additional 20% to the foundation penalty can represent an increase of about \$10,000 which may persuade an alleged offender to elect to be prosecuted. However, it is anticipated that for the lesser offences (such as for environmental nuisance) that the penalty increase would represent about \$1,500 to \$2,000 which may not be sufficient enough to motivate a person to elect to be prosecuted. Instead it is likely to motivate more parties to seek reductions for adjusting criteria. The increase in the possible reduction for adjusting criteria from 60% to 70% will provide for a greater penalty reduction for timeliness of notification and cooperation with the EPA. Furthermore, the submission that assessed the cost of proceeding to court to be considerable, often in the order of tens of thousands of dollars depending on the nature off the case, supports the argument that an increase in the foundation penalty may not persuade parties to elect to be prosecuted.

The proposal that the increase in the foundation penalty be limited to 10% for a period of two years—and reserving the discretion to increase the foundation penalty to 20% above the original base thereafter is supported. As stated in the submission this approach would allow the EPA to monitor any altered take-up by those approached on the next five to 10 occasions, in turn providing an indication of the capacity of licensees to bear such increases.

The submission is noted that there will be three different foundation penalties for each of the Category 1, 2 and 3 offences. The question was considered whether a different penalty should be calculated for a contravention that created a potential for harm (and will often involve a pollutant release where the resulting harm was mitigated or cannot be accurately measured) than a contravention that created a risk to harm (most often are administrative in nature e.g. failure to comply with licence conditions requiring the submission of an environment improvement program). Offences of administrative nature cause harm to the regulatory system and should attract the same base penalty as offences that pose potential harm. Therefore distinction between the calculation of the foundation penalty for Category 2 and 3 offences is not supported.

Outcome

Outcome 3: foundation penalty increased by adding 10% (the foundation penalty for category one offences has increased from 50% to 60% of the maximum penalty for the offence in the Act and for category two and three offences from 25% to 35%) and a further increase of 10% to be adopted in two years.

Comments on the inclusion of new offences such that a greater number of offences may be suitable for civil penalty negotiation

Proposed amendment	No of supporting submissions	No of opposing submissions
Inclusion of new offences such that a greater number of offences may be suitable for civil penalty negotiation	4	2

Six submissions commented in support of the proposed inclusion of new offences in the calculations policy being:

- the offence of failing to notify of serious or material environmental harm [section 83(1) the Act]
- site contamination offences contained in Part 10A of the Act

- offences in sections 4 and 5 of the *Plastic Shopping Bags (Waste Avoidance) Act 2008*.

Four submissions commented in support, and two expressed concern, to the proposed inclusion of the offence of serious environmental harm [section 79(2) in the calculations policy.

Arguments made supporting the proposal to include the new offences in the calculations policy:

- The additional offences are deemed suitable for civil penalty negotiations.
- Parliament's intention in drafting section 104A was that any 'strict liability' offence under the Act should be capable of being resolved via the civil penalty process.
- A blanket exclusion of particular strict liability offences from being capable of resolution via the civil penalty process, by way of EPA policy, and without requiring consideration of individual circumstances, would unfairly fetter the EPA's discretion and restrict the intended operation of section 104A.
- This proposal would provide all parties with greater flexibility to consider sanctions that are non-criminal in nature and avoid prosecution where that is appropriate.

Arguments made in opposition to the inclusion of the offence of serious environmental harm [section 79(2):

- Inclusion of the serious environmental harm offence in the calculations policy could diminish the seriousness of this offence.
- Noise pollution caused by a concert or similar could come within the ambit of other offences currently dealt with under the policy such as causing material environmental harm under section 80(2) or causing environmental nuisance under section 82(2).
- The inclusion of the offences of serious environmental harm and failure to notify within the application of the calculations policy is of concern as these offences are of a serious nature and their inclusion within the policy may portray a message to the public which is contrary to this seriousness of the offence.
- If these offences are to be included within the application of the policy, then it is recommended that Attachment D of the policy be worded so as to clarify the fact that the calculations policy is only dealing with occasions on which these offences would attract a penalty of up to \$120,000 as opposed to the higher penalties these offences may attract.

Discussion

The two submissions expressing concern about the inclusion of the offence of serious environmental harm are noted however the submission that stated 'the Parliament's intention in drafting section 104A in these terms was that any 'strict liability' offence under the Act should be capable of being resolved via the civil penalty process' – is supported.

There could be an offence that was more serious than environmental nuisance in section 82(2) that would be more suitable to be addressed as an offence of serious environmental harm that could be the subject of a negotiated civil penalty. The submission that 'Attachment D of the policy be worded so as to clarify the fact that the calculations policy is only dealing with occasions on which these offences would attract a penalty of up to \$120,000 as opposed to the higher penalties these offences may attract' is supported, and amendment to the calculations policy to clarify this is recommended.

Outcome

Outcome 4: amendment to the calculations policy made to add the list of new offences to Attachment D of the policy and amendments worded so as to clarify the fact that the calculations policy is only dealing with occasions on which these offences would attract a penalty of up to \$120,000.

Comments on the separation of the adjusting factor item 7.4

This refers to the timeliness of notification of an incident and the degree of cooperation demonstrated by the alleged offender' into two factors and the maximum penalty reduction for the adjusting factors increased from 60% to 70%.

Proposed amendment	No of supporting submissions	No of opposing submissions
Separation of the adjusting factor item 7.4 into two factors	3	2

Five submissions commented on this proposal. Three submissions were in support of the proposed increased in the maximum penalty reduction for the adjusting factors from 60% to 70% by separating item 7.4 into to factors. Two submissions opposed the proposal.

Arguments made supporting the proposal:

- The new 10% reduction for each of the timeliness notification factor and the cooperation factor is appropriate as it encourages and rewards businesses who voluntarily advise the regulator of any incident.
- This is a sound decision, which is likely to only increase the degree of cooperation demonstrated by an alleged offender, which will lead to a better environmental outcome.

Arguments made opposing the proposal:

- The objective of the calculations policy is to attain a balance between fairness and deterrence. If the maximum attainable adjustment is 70% this would unreasonably diminish any desired deterrent effect.
- While there is merit in this suggestion given the importance of both factors, it is of concern that this may result in penalties of little or no dollar value and that this may reduce the gravity of any offence and the effectiveness of the Act in the eyes of the offending party.

Discussion

The support for the proposed increase in the maximum penalty reduction is noted.

The concern expressed that the increase in the maximum possible penalty adjustment may decrease deterrence is noted, and the increase in the foundation penalty addresses this issue.

The EPA continues to support the separation of item 7.4 into two factors of equal 10% reduction capacity to reflect the importance of such actions.

Outcome

Outcome 5: the maximum penalty reduction for the adjusting factors increased from 60% to 70% by separating item 7.4 into two factors.

Comments on whether the calculations policy be reviewed again in five years

Proposed amendment	No of supporting submissions	No of opposing submissions
Review the policy again in five years	2	–

The issue of whether the calculations policy should be reviewed again in five years was raised by two of the submissions that supported the proposal.

Arguments made supporting the proposal:

- It is best practice to review policies in a timely manner.
- It is appropriate for policies such as this to be reviewed after five years of operation, or at an earlier time if the policy is demonstrated to require remedial consideration to remain effective (subject to stakeholder consultation).

Discussion

The support for the proposed review of the policy in five years is noted.

Outcome

Outcome 6: the calculations policy has been amended to state that it will be reviewed again in five years.

Comments on amendments to clarify the process of negotiating a civil penalty and corrections

Proposed amendment	No of supporting submissions	No of opposing submissions
Clarify the process of negotiating a civil penalty and corrections	1	2

Feedback was sought on a proposal to insert an additional factor in item 1 of the policy entitled 'When the EPA will seek to negotiate a civil penalty' to state that before seeking a negotiated civil penalty the EPA will consider the deterrent that a negotiated civil penalty would have on the alleged offender. This amendment would address a concern that large companies who are easily able to pay a civil penalty may find this less of an incentive not to re-offend than a smaller operator who may find it more difficult to pay the amount.

Three submissions were received in response to this proposal, two who opposed and one in support.

Arguments made supporting the proposal:

- Deterrence is an important principle of environmental sentencing.
- The concept that the penalty must be sufficient to encourage companies and individuals to refrain from re-offending and to take proper precautions to ensure that pollution does not occur is endorsed. In support of this principal, Judge Trenordan in Director of Public Prosecutions v Transadelaide [2004] SAERDC 92, referring to Axer Pty Ltd v Environment Protection Authority (1993) 113 LGERA 357, stated: "The fine should be such as will make it worthwhile that the cost of precautions be undertaken".

Argument made opposing the proposal:

- There is enough flexibility in the adjusting factors to take into consideration the relative deterrent in a civil penalty, rather than a distinction between different sized companies.
- By seeking to amend the wording in this way, this measure will impose a subjective element to an otherwise objective system.
- The proposed amendment is superfluous because for a large company, the single greatest deterrent is not the magnitude of the civil penalty but the loss of reputation that is likely to the flow from an adverse finding in relation to environmental harm.
- In a large company, despite the greater resources spent on developing and monitoring the environment, environmental harm can eventuate due to decision making or reckless behaviour at the local level, far removed from the senior management or the company's responsible officer. Compare this situation with a sole trader, who may deliberately or recklessly carry out the deed personally. Notwithstanding the corrective policy or procedural action,

- Deterrence is generally be considered from two perspectives, deterrence specific to the alleged offender (in respect of re offending); and the need to deter others in the community from committing the same or similar breaches of the law. The additional factor proposed appears to only consider the first of the two and with no consideration of the potential for general deterrence. The same provision should be applied with equal consideration of its application for small operators (with a view to making it easier to avoid prosecution), as well as large corporations (where the EPA might be less inclined to offer a negotiated civil penalty).

Discussion

Section 104A(2) states when the EPA may not pursue a civil penalty and states that when determining whether to initiate criminal proceedings in the court for the offence or take action as a civil penalty the EPA must have regards to the seriousness of the contravention, the previous record of the offender and any other relevant factors.

After consideration of the submissions and the objects of the civil penalty system to create an efficient tool to penalise non-compliance it is recommended that the calculations policy not be amended to require the EPA to discriminate between large and small companies when considering the deterrent that a negotiated civil penalty would have on the alleged offender.

Outcome

Outcome 7: calculations policy is not amended to state that the EPA may have regard to other relevant factors including the deterrent that a negotiated civil penalty would have on the alleged offender.

Minor corrections

One submission supported the clarifications proposed per i, iii and iv and minor corrections in the consultation report at page 15.

Discussion

The support for the proposed corrections is noted.

Outcome

Outcome 8: calculations policy amended to make minor corrections.

General support for the calculations policy and the system of negotiating civil penalties

Proposed amendment	No of supporting submissions	No of opposing submissions
General support for the calculations policy	4	–

General support for the calculations policy and the system of negotiating civil penalty was stated in four submissions.

Submissions made supporting the calculations policy:

- The EPA’s ability to negotiate a civil penalty rather than redress non-compliance by way of costly and protracted legal action, not only because it helps industry but also it assists the EPA in a number of areas is supported. However, most importantly because it allows an offender to quickly recompense and implement policy changes or additional behavioural standards, which will ensure the offence is not repeated.

- Largely, the model is working well and addresses the balance between the regulator and industry, and is a model which should be followed in other areas.
- We strongly support the existence of a published civil penalties calculation policy, in order that negotiation of civil penalties can be guided by a transparent and consistent approach.
- The current calculations policy recognises the businesses interaction and cooperation with the EPA and their compliance record. These factors should remain as the foundation for the new calculations policy to encourage and foster a working relationship between business and the EPA.

Submission made supporting the system of negotiating civil penalties:

- The concept of negotiating certain penalties for minor matters should be endorsed particularly given the commercial sense this demonstrates, provided that the goals of environmental sentencing are achieved in a manner where the environment protection is not compromised.

Discussion

The support for the policy and the negotiated civil penalty system is noted.

Outcome

Outcome 9: the EPA noted the general support for the policy and the negotiated civil penalty system.

Other comments

Penalty reduction for financial hardship and remediation works undertaken

Comments	No of supporting submissions	No of opposing submissions
Penalty reduction for financial hardship and remediation works undertaken	1	–

One submission raised the issue of penalty reduction for financial hardship and remediation works undertaken of any damage or harm caused and stated that both of these factors would be considered by a court if the matter was progressed to trial and submitted that the calculations policy should be amended to consider these issues.

Discussion

The EPA did consider the possible addition to the calculations formula of penalty reductions for financial hardship and remediation works as part of the calculations policy review however recommend that they not form part of the formula.

The review identified that the court has reduced penalty significantly due to the cost of remediation. However, the EPA is not able to ensure that remediation works are completed in all cases which is problematic in determining a penalty reduction due to remediation works. Such a reduction would also require monitoring and expertise in ensuring that the works were undertaken to an appropriate level that would significantly add to the cost of the negotiation for the EPA.

The review noted that while the courts have the discretion to reduce penalties due to the financial situation of the defendant it is not appropriate for the EPA to reduce negotiated civil penalties for this factor as the EPA does not have the powers that the courts do to compel information used to establish financial hardship and to view a person's financial affairs.

It is noted that the calculations policy does have provision for an alleged offender to negotiate with the EPA suitable payment terms in the event that the penalty has the potential to cause financial hardship to an alleged offender.

Outcome

Outcome 10: reductions for financial hardship or remediation works undertaken not included in the civil penalty formula.

Expediting the negotiated penalty process

Comments	No of supporting submissions	No of opposing submissions
Expediting the negotiated penalty process	1	–

One submission made comments about expediting the negotiation process by proceeding with negotiations before full investigation of the matter is undertaken and before receiving legal advice on the matter.

Discussion

The EPA supports investigation of a more streamlined process and more efficient civil penalty negotiation however the EPA must be in a position to take a matter to court if an alleged offender does not wish to negotiate a penalty in the interest of preserving the credibility of the system. Additionally, full investigation of an incident and legal advice ensures the correct offence, offender and penalty is being pursued.

Outcome

Outcome 11: calculations policy not amended to allow for negotiation to occur before evidence and advice is obtained.

Environmentally beneficial projects

Comments	No of supporting submissions	No of opposing submissions
Environmentally beneficial projects	1	–

Two submissions commented on the potential use of environmentally beneficial projects as part of the civil penalty negotiation process.

Submissions made supporting the use of environmentally beneficial projects:

- While there is no precedent in South Australia there are a number of interstate examples. The EPA should strongly consider the use of environmentally beneficial projects in negotiation where appropriate.
- There is benefit in such projects where an offender is impecunious, however were they to be considered, future and ongoing external management or auditing of the projects would also need to be included in any orders to ensure any project is undertaken satisfactorily.

Discussion

The review considered whether the EPA should start to negotiate environmentally beneficial projects as an option in the negotiation of civil penalties. In summary the review recommends that the calculations policy not include this option at this time and that consideration of the possible introduction of such projects be delayed until the courts have imposed orders pursuant to section 133(1).

It is recognised that the inclusion of environmentally beneficial projects in negotiated agreements may address an alleged offender's resource limitations and provide a creative response to incidents; however the following limitations are considered to outweigh the benefits:

- SA courts have not applied section 104 to order such a project, as such there is no precedent in South Australia of this type of project
- The amount of penalty that is generated by the calculations policy would limit the value of the project (the value of environmental service orders in New South Wales and the projects in Victoria have varied widely, and are mostly higher than the amount of negotiated civil penalties that have been settled to date).
- The time and resources added to the negotiations process to negotiate the details of such projects would significantly reduce the efficiency of the negotiated penalty.

Outcome

Outcome 12: option for environmentally beneficial projects to be in negotiated agreements not included in the calculations policy, consideration of the possible introduction of such projects to be delayed until the courts have imposed orders pursuant to section 133(1).