

# Civil penalty system under the Environment Protection Act 1993 and the calculations policy

Updated May 2019

*EPA 656/19: This publication provides information about the civil penalty system in Section 104A of the Environment Protection Act 1993. It also explains the new civil penalty calculation policy which allows the Environment Protection Authority to calculate fair and consistent penalty amounts under this section, balancing the need for deterrence, accountability and equity.*

## Introduction

The *Environment Protection (Miscellaneous) Amendment Act 2005* was proclaimed on 16 June 2005 providing for the introduction of civil penalties on 1 July 2006 in section 104A of the *Environment Protection Act 1993* (the Act).

The introduction of the civil penalty system implemented the SA Government's 2002 election commitment and a recommendation of the Environment, Resources and Development Committee made in 2000.

Civil penalties provide an extra regulatory tool for the Environment Protection Authority (EPA) to respond to less serious contraventions of the Act as an alternative to criminal prosecution. Civil penalties may only be pursued for strict liability offences in the Act while criminal prosecution is used to deal with more serious or recurring offences.

The civil penalty system empowers the EPA to negotiate a civil penalty in respect of a contravention of the Act directly with a person with whom the EPA is satisfied has committed the offence (known as a negotiated civil penalty). Alternatively the EPA may apply to the Environment Resources and Development Court (the Court) for an order that a person pay to the EPA an amount as a civil penalty (known as a court imposed civil penalty).

The court may make a civil penalty order if it is satisfied that a person has contravened the provision of the Act. The 'burden of proof' for a civil penalty requires proof 'on the balance of probabilities' that the person contravened the Act. For a criminal penalty, the burden of proof is higher than a civil penalty and requires proof 'beyond reasonable doubt' that the person committed the offence.

The civil penalty system is voluntary, requiring both the EPA and the person in alleged contravention of the Act to agree to the process. A person may choose not to negotiate a civil penalty with the EPA. Furthermore, in the event that the EPA wishes to apply to the court for a civil penalty, a person may elect to be prosecuted under the higher criminal burden of proof rather than be heard in the civil jurisdiction of the court. It should be noted that negotiating a civil penalty or entering into a Civil Penalty Agreement, does not constitute an admission of guilt or of civil liability; will not be regarded as evidence tending to establish guilt or a civil liability; and cannot be referred to in any report furnished to the Court for the purposes of determining sentence for any offence.

The maximum amount that the EPA will be able to recover as a civil penalty by negotiation in respect of a contravention is the criminal penalty specified by the Act for that offence or \$120,000, whichever is the lesser. The maximum amount that the court may impose as a civil penalty is the criminal penalty specified by the Act for the offence.

A person who contravenes the Act and receives a civil penalty, either through negotiation or court order, will not incur a criminal conviction of guilt.

The level of civil penalty will be determined by negotiations between the alleged offender and the EPA in line with the approved penalty policy, which will be on a case-by-case basis.

## **Civil penalties calculations policy**

During parliamentary debate of the *Environment Protection (Miscellaneous) Amendment Act 2005* the former Minister for Environment and Conservation the Hon John Hill MP indicated that the EPA would introduce a policy to guide civil penalty negotiations.

The civil penalties calculations policy was developed in 2006 and reviewed in July 2013, August 2015 and August 2018 following key stakeholder consultation with amendments based on the outcome of those reviews and consultation phases.

The calculations policy provides a credible and transparent structure for the EPA to determine fair and consistent penalty amounts, balancing the need for deterrence, accountability and equity.

The civil penalty calculation equation consists of four key stages:

- determination of a foundation penalty
- determination of a base penalty
- adjustment of the base penalty to account for mitigating factors
- addition of any economic benefit derived from the contravention.

It is noted that where the EPA, using an established formula, determines the level of public concern to be considerable, the EPA will not commence negotiations and may instead seek other regulatory action such as prosecution.

### **Foundation penalty**

In order to provide consistency with the level of penalty imposed by sentencing courts for lower level contraventions, the policy sets a starting point for calculating a civil penalty as a percentage of the maximum penalty prescribed for the offence. The percentages are:

- 70% of the maximum penalty for offences resulting in actual harm to the environment ('category one')
- 45% of the maximum for those offences resulting in 'potential harm' ('category two')
- 45% of the maximum for those offences resulting in risk of harm to the environment where there are no actual or potential harm, ie administrative breaches ('category three').

### **Base penalty**

Further adjustment to the foundation penalty may then be made with regard to severity of the contravention, ie the nature of the pollutant released, its quantity, toxicity and length of exposure to the environment for category one and two offences, and risk of harm to the environment for category three offences.

- the nature and toxicity of the pollutant
- the quantity or level of the pollutant
- the nature and sensitivity of the receiving environment

- the duration of exposure of the pollutant in the environment.

## Adjusting factors

To assist the EPA and the alleged offender in negotiating an appropriate level of civil penalty, the alleged offender will be entitled to make submissions on a number of 'adjusting factors'. The EPA may consider these submissions and make appropriate reductions to the penalty accordingly. A maximum reduction of up to 70% of the base penalty may occur with regard to the following factors:

- the alleged offender's good compliance record
- the practical measures taken by the alleged offender to prevent the contravention
- the appropriateness and speed of corrective action taken by the alleged offender after the contravention
- the timeliness of notification of an incident
- the degree of cooperation demonstrated by the alleged offender
- the degree of public contrition demonstrated by the alleged offender
- any other relevant factor in specific cases.

In circumstances where the EPA determines a penalty using the calculations formula that is less than the amount of \$1,000 then the negotiated penalty amount offered will be the minimum civil penalty amount of \$1,000. If the minimum civil penalty amount is issued the alleged offender will not have the opportunity to submit to the EPA adjusting criteria to request a penalty reduction as a reduction of the penalty to less than the minimum penalty amount is not permitted.

Again, where the EPA, using an established formula, determines the level of public concern to be considerable, the EPA will not commence negotiations and may instead seek other regulatory action such as prosecution.

## Economic benefit

The EPA will add to a civil penalty the amount of economic benefit that the alleged offender has derived from the contravention.

## Disclaimer

This publication is a guide only and does not necessarily provide adequate information in relation to every situation. This publication seeks to explain your possible obligations in a helpful and accessible way. In doing so, however, some detail may not be captured. It is important, therefore, that you seek information from the EPA itself regarding your possible obligations and, where appropriate, that you seek your own legal advice.

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## Further information

### Legislation

[Online legislation](#) is freely available. Copies of legislation are available for purchase from:

Service SA Government Legislation Outlet  
Adelaide Service SA Centre  
108 North Terrace  
Adelaide SA 5000

Telephone: 13 23 24  
Facsimile: (08) 8204 1909  
Website: <https://shop.service.sa.gov.au>  
Email: [ServiceSAcustomerservice@sa.gov.au](mailto:ServiceSAcustomerservice@sa.gov.au)

## General information

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