

EPA's approach to appeals against sentence

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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 appeals against sentence.

EPA's role in appeals against sentence is limited to recommending an appeal to the Director of Public Prosecutions (DPP), since only the DPP may appeal against a sentence. Note also that the DPP may only appeal:

- if the appeal is 'in the public interest', for example the penalty appears to be 'manifestly inadequate'
- 'in relation to a question of law'
- if 'there is an error in the sentence'.

There is a need for EPA to ensure transparency, consistency and clarity by stating in this policy what criteria EPA will use when deciding whether to recommend an appeal against sentence to the DPP. Those criteria are in essence the criteria in the DPP's own guidelines on sentencing appeals.

2 Relevant Legislation and guidelines

2.1 Scope - Environmental offences and jurisdiction

This policy applies to appeals against any sentence that may be imposed in any prosecution conducted by EPA, for alleged breaches of the *Environment Protection Act 1970* (EP Act), the *Pollution of Waters by Oils and Noxious Substances Act 1986* (POWBONS Act) and relevant subordinate legislation under both those Acts.

The offence provisions in that legislation:

- can apply to both natural persons and corporate entities
- are either summary offences or indictable offences that are triable summarily.¹

Depending on factors such as the seriousness of the alleged offence, prosecutions brought by the EPA may be heard and determined in either the Magistrates' Court or the County Court.² Regardless of which court hears the case and then imposes a sentence, EPA can make a sentence appeal recommendation to the DPP.

2.2 Criminal Procedure Act 2009 (Vic)

Part 6 (sections 254 to 326) of the *Criminal Procedure Act 2009* (Vic) (CP Act), which covers all appeals against sentences, specifies:

- when appeals may be commenced
- the procedure to be followed in commencing an appeal

- orders that may be imposed by the Court hearing the appeal.

2.3 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, POWBONS Act and the associated subordinate legislation under both those Acts, and exercising its compliance and enforcement powers. The C&E Policy also discusses EPA's approach to appeals.

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.

2.4 Guidelines of the Director of Public Prosecutions

As stated above all appeals against sentence may only be brought by the DPP. In deciding whether to make a sentence appeal recommendation to the DPP, on all matters, EPA adopts and is guided by the *Director's Policy in Relation to Director's Appeals Pursuant to s.287 and s.291 of the Criminal Procedure Act 2009*.³ For a copy of the Director's Policy see www.opp.vic.gov.au.

2.5 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, avoid litigation where possible, pay legitimate claims without litigation and keep litigation costs to a minimum.

For a copy of the *Model Litigant Guidelines* see www.justice.vic.gov.au.

3 EPA's Policy position

The C&E Policy articulates EPA's approach to appeals and states as follows:

- EPA may seek to appeal sentences imposed on environmental offenders.
- Appeals against apparently inadequate sentences are brought by the DPP in the public interest, on recommendation by EPA.

¹ For further information about indictable offences that are triable summarily see *EPA Policy - EPA's approach to choice of jurisdiction for indictable offences that are triable summarily*.

² For further information refer to *EPA Policy - EPA's approach to choice of jurisdiction for indictable offences that are triable summarily*.

³ *Policy 11: Appeals by the DPP to the Court of Appeal*, available at: www.opp.vic.gov.au

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- Appeals will only be sought where there is a reasonable prospect of the appeal succeeding, such as where a penalty imposed by a court is considered manifestly inadequate.
- In most cases the DPP will seek the views of EPA.
- EPA will be guided by the principles set out in the DPP's Prosecution Policy and Guidelines.⁴

4 How EPA will apply the policy

As noted above EPA's role in sentence appeals is limited to making recommendations to the DPP, in the following context:

- only the DPP may appeal against a sentence
- the DPP's right to appeal is limited by the CP Act to only certain situations
- the DPP already has policy guidelines to follow in deciding when to appeal.

Accordingly, EPA will only make a recommendation to the DPP to consider commencing an appeal where EPA is of the opinion that a sentence imposed by the original Court was so inadequate that it was outside the range of sentencing options available to that Court, and therefore that an appeal was in the public interest.⁵ Factors considered in assessing the inadequacy of a sentence may include, but is not limited to:

- the penalty imposed
- inconsistency with other sentences
- imposition or non-imposition of a conviction.

For appeals to the Supreme Court against a sentence imposed by the Magistrates' Court, the DPP may commence an appeal on a question of law.⁶

For appeals to the Supreme Court of Appeal against a sentence imposed by an originating Court, the circumstances where an appeal may be commenced include where the DPP is satisfied that:

- there is an error in the sentence imposed and that a different sentence should be imposed
- an appeal should be brought in the public interest.⁷

EPA will seek legal advice in considering potential 'question of law' and 'sentencing error' appeals.

4 In Particular, *Policy 11: Appeals by the DPP to the Court of Appeal*, available at: www.opp.vic.gov.au

5 For a discussion about available sentencing ranges see: *R v MacNeil-Brown; R v Piggott [2008] VSCA 190* (24 September 2008).

6 See *Criminal Procedure Act 2009* (Vic), s.272.

7 See *Criminal Procedure Act 2009* (Vic), s.287 & s.291.