

EPA's approach to choice of jurisdiction for indictable offences that are triable summarily

Policy



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1 Issue dealt with by this policy

This policy sets out EPA's approach to determining whether or not to seek to have an alleged indictable offence that may be heard and determined summarily, against the *Environment Protection Act 1970* (EP Act) or the *Pollution of Waters by Oil and Noxious Substances Act 1988* (POWBONS Act) heard and determined summarily, that is dealt with by the Magistrates' Court. Any person charged with an indictable offence has the right to have the charge heard by a judge and jury in a superior court (usually the County Court). Unless and until the accused exercises that jurisdictional right, EPA should be prepared to assist a Magistrate to determine which level of court is the appropriate jurisdiction.

2 Relevant legislation and guidelines

2.1 Scope

This policy applies to all prosecutions of persons for alleged breaches of the EP Act and POWBONS Act, which are indictable offences that may be tried summarily. The offence provisions in these Acts can apply to both natural persons (individuals) and corporate entities.

An indictable offence is an offence that, if the accused person so chooses, may be heard before a judge and jury in the County Court. Less serious offences, referred to as summary offences, are tried summarily by the Magistrates' Court.

Each and every indictable offence under the EP Act and POWBONS Act is an indictable offence triable summarily (IOTS), or 'indictable triable summarily' offence.¹

This policy does not apply to the prosecution of summary offences under the legislation administered by EPA, including offences under the regulations and the provisions relating to litter and motor vehicle matters in the EP Act, as these offences may only be heard and determined summarily.

2.2 Legislative Context (*Criminal Procedure Act 2009* (Vic))

As set out in the *Criminal Procedure Act 2009* (Vic) (the CP Act) and section 2.7 of the *Guidelines of the Director of Public Prosecutions* (DPP) (Prosecution Guidelines),² some indictable offences are IOTS or indictable triable summarily offences. In accordance with section 28(1) of the CP Act, a charge for any of the following types of indictable offences may be treated as an IOTS and dealt with by the Magistrates' Court:

- an offence listed in schedule 2 of the CP Act
- a level 5 or 6 offence³
- an offence punishable by level 5 or 6 imprisonment or fine or both

- an offence punishable by a term of imprisonment not exceeding 10 years or a fine not exceeding 1200 penalty units or both.

As discussed above, all indictable offences under the EP Act and POWBONS Acts are triable summarily pursuant to the CP Act.⁴

For all IOTS matters the accused has an absolute right to a superior court trial. Before an indictable offence proceeds to a County Court trial, a committal (preliminary) hearing must be conducted in the Magistrates' Court to determine whether there is sufficient evidence on which a jury could make a finding of guilty, with or without conviction. When laying charges EPA may include in the charge-sheet a request for a committal proceeding if it is EPA's view that the matter should be heard in the superior court.⁵

If the accused has not exercised the right to a superior court trial, at any time before the court decides whether or not the matter will proceed summarily⁶, the accused or the prosecution (or both) can apply to have the matter heard summarily, or the court can offer to hear the matter summarily of its own volition⁷. Further, section 30(4) of the CP Act obliges the prosecution (that is EPA), if asked by the Magistrate, to provide relevant information to assist in determining whether the matter should proceed summarily.

Where an accused is charged with an indictable offence under the EP Act or POWBONS Act, unless the contrary intention appears in the CP Act or other relevant legislation, the Magistrates' Court may hear and determine the charge summarily if:

- the court is of the opinion that the charge is appropriate to be determined summarily
- the accused consents to a summary hearing⁸.

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 these Acts, and exercising its 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.

¹ *Criminal Procedure Act 2009* (Vic), schedule 2.

² See: *Policy 2: the Prosecutorial Discretion*, available at www.opp.vic.gov.au

³ As noted in s.28 of the CP Act: a level 5 offence is punishable by a maximum of 10 years imprisonment, while a level 6 offence is punishable by a maximum of 5 years imprisonment, per section 109 of the *Sentencing Act 1991* (Vic).

⁴ *Criminal Procedure Act 2009* (Vic), schedule 2.

⁵ CP Act, s.6(4).

⁶ CP Act, s.30(3).

⁷ CP Act, s.30(1),(2).

⁸ CP Act, s.29(1).

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2.4 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).⁹

In particular, where a comprehensive investigation reveals evidence of a breach of the EP Act, POWBONS Act or relevant associated subordinate legislation, 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.¹⁰

For a copy of the Prosecution Guidelines 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

EPA's policy position in relation to when it will seek to have an IOTS matter heard by a superior court, is directly informed by the DPP's *Prosecution Guidelines*, which state as follows:

- *"The critical issue when deciding whether the prosecution should consent to the indictable matters being heard summarily is when they become too serious to be dealt with in this fashion"...* (at para 2.7.6)
- *"[T]he only coherent and justifiable test of seriousness which can be, and is, applied in determining whether or not the Director of Public Prosecutions will consent to summary determination of an indictable matter triable summarily is: Whether there is any real prospect that if the offender is found guilty a properly informed court may impose a sentence beyond the Magistrates' Court ceiling. In applying this test all matters relevant to penalty are to be carefully considered. If at the end of this process the answer is no, consent to summary jurisdiction [or conversely application for committal proceedings] should be given."* (at para 2.7.9)¹²

In essence, although EPA is entitled to seek a committal proceeding in the Magistrates' Court and a County Court hearing of any IOTS matter, it will only pursue that avenue if, on an assessment of the facts and circumstances of the matter, it is EPA's view that the matter is so serious that the sentencing powers in the Magistrates' Court jurisdiction would be inadequate to deal with the matter.¹³

The Magistrates' Court jurisdictional limit for a natural person (an individual) is currently 500 penalty units¹⁴ or two years imprisonment¹⁵. The maximum cumulative term of imprisonment that may be imposed, in respect of several offences committed at the same time, is five years (unless otherwise provided for by legislation)¹⁶.

Importantly, the Magistrates' Court jurisdictional limit for a body corporate (a company) is 2500 penalty units¹⁷, which is greater than the maximum penalty for nearly all indictable offences under the EP Act (the most common maximum is 2400 penalty units). The two EP Act offence provisions with higher maxima are section 27A(2)(a) (dump/deposit/discard/abandon industrial waste at an unlicensed site) - 5000 penalty units, and section 59E (aggravated pollution) - 10,000 penalty units for a corporation. In general, the Magistrates' Court will almost always have sufficient sentencing power for IOTS matters under the EP Act.

In relation to matters under the POWBONS Act:

- The maximum penalties (for a corporation) for some offences are also 10, 000 penalty units.
- However for an IOTS tried summarily under the POWBONS Act, the maximum penalty that may be imposed by the Magistrates' Court is 500 penalty units, or imprisonment for 2 years, or both.¹⁸

Each matter will be considered on its individual facts and circumstances, and the DPP's test (described in section 3 above), will be applied to each matter. In assessing the seriousness of each matter and matters relevant to penalty, EPA is also informed by the *Prosecution Guidelines* (see discussion in section 4).

4 How EPA will apply the policy

EPA acknowledges that there are several reasons why an accused may prefer to have matters heard in the Magistrates' Court as opposed to the County Court. This is also discussed in paragraph 2.7.2 of the *Prosecution Guidelines*. Many accused parties consent to the jurisdiction of the Magistrates' Court for the following reasons:

- Magistrates' Court cases are heard more quickly than superior court cases because there is no need for a committal hearing beforehand
- Magistrates' Court cases do not last as long because there is no jury that a judge has to explain things to
- the cost of an accused's legal representation is less, partly because there is no committal hearing, the cases do not last as long and partly because the legal fees are generally lower for Magistrates' Court work than for superior court work.

As discussed in section 3 above, in considering the DPP's test *"[w]hether there is any real prospect that if the offender is found guilty a properly informed court may impose a sentence beyond the Magistrates' Court ceiling."*, EPA will consider the jurisdictional limit (that is the sentencing power) of the Magistrates' Court and whether this enables a Magistrate to impose an adequate penalty.

Examples of matters it will take into account include the following:

1. Section 29(2) of the CP Act sets out matters the court should have regard to when determining if an IOTS should be dealt with summarily. Section 2.7.7 of the *Prosecution Guidelines* sets out these matters as follows:
 - a) *the seriousness of the offence (a number of criteria for determining which are also set down in the legislation)*

⁹ In particular, *Policy 2: the Prosecutorial Discretion*, available at www.opp.vic.gov.au

¹⁰ See page 30 of the C&E Policy for more detail on these criteria.

¹¹ See: *Policy 2: the Prosecutorial Discretion*, para 2.7.6 (available at www.opp.vic.gov.au)

¹² See: *Policy 2: the Prosecutorial Discretion*, para 2.7.6 (available at www.opp.vic.gov.au)

¹³ See discussion in section 4 for sentencing options available to the Magistrates' Court.

¹⁴ *Sentencing Act 1991* (Vic), s.112A(1).

¹⁵ *Sentencing Act 1991* (Vic), s.113.

¹⁶ *Sentencing Act 1991* (Vic), s.113B.

¹⁷ *Sentencing Act 1991* (Vic), s.113D(1A).

¹⁸ *Pollution of Waters By Oil and Noxious Substances Act* (Vic), s.24C.

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b) *the adequacy of the available sentencing orders in the Magistrates' Court considering relevant matters, including any previous findings of guilt or convictions of the accused; the maximum penalty which can generally be imposed is two years imprisonment, or five years where the offender is charged with more than one offence*

c) *any decision by the Court as to how a charge of the same offence against a co-accused is to be heard and determined; and*

d) *any other relevant matter.*

2. Examples of other relevant matters EPA may consider include, but are not limited to the following:

- nature of the impact to the environment and community
- duration of the impact
- level of co-operation of the accused party with EPA
- the prevalence of the offence
- the accused party's culpability (that is whether the alleged offending was intentional, negligent or inadvertent).

EPA will apply this policy as follows:

1. apply the *Prosecution Guidelines* to all duty-holders
2. apply the *Prosecution Guidelines* in the context of EPA's principles of compliance and enforcement, as set out in the C&E Policy
3. undertake prosecution proceedings in a manner that avoids unnecessary public expenditure
4. act in accordance with the *Victorian Government's Model Litigant Guidelines*.