



**Australian Government**  
**Australian Pesticides and  
Veterinary Medicines Authority**



## **Enforcement Guidelines**

August 2020

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# 1 INTRODUCTION

The Australian Pesticides and Veterinary Medicines Authority (APVMA) is the independent statutory authority responsible for assessing and registering pesticides and veterinary medicines proposed for supply and use in Australia. The APVMA's functions are set out in Part 2, Section 7 of the *Agricultural and Veterinary Chemicals (Administration) Act 1992*.

The APVMA operates under an Intergovernmental Agreement between the Commonwealth Government and all states and territories. Under this agreement, the APVMA manages regulation in support of the supply of safe and effective agricultural and veterinary chemicals in Australia. The APVMA's regulatory responsibility extends from registration, manufacturing and importation through to the point of sale.

Compliance and monitoring powers in the *Agricultural and Veterinary Chemicals Code Act 1994* provide a mechanism for the APVMA to undertake compliance activities to ensure the continued safety and effectiveness of a registered product and address unregistered products. State and territory governments are responsible for regulating and monitoring how chemicals are used.

To build a culture of compliance—where individuals, business and industry take responsibility for ensuring that their activities do not cause unlawful impacts—the APVMA will sometimes need to take enforcement action. Enforcement action provides a strong deterrent to non-compliance.

The effective protection of human health, animal health, the health of the environment, protection of Australia's trade interests, as well as good regulatory practice, calls for the APVMA to have clear guidelines governing the taking of enforcement action. These Enforcement Guidelines set out the APVMA's approach to its enforcement activities.

To the extent possible in the circumstances, it is the goal of the APVMA's enforcement responses to:

- reinforce legal obligations under legislation
- achieve outcomes consistent with legislation
- deter non-compliant behaviour
- apply consistent and proportionate enforcement action.

The Enforcement Guidelines are intended to contribute to the APVMA meeting its obligations under the Commonwealth Government Regulator Performance Framework.<sup>1</sup>

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<sup>1</sup> [pmc.gov.au/sites/default/files/publications/Regulator-Performance-Framework.docx](http://pmc.gov.au/sites/default/files/publications/Regulator-Performance-Framework.docx)

## 1.1 Purpose

These guidelines assist the APVMA in making decisions about taking enforcement action under legislation administered by the APVMA. The guidelines set out principles of a general nature to provide an understanding of how the APVMA will approach enforcement.

The APVMA publishes its Enforcement Guidelines as part of its commitment to transparency in its compliance activities, and to educate the public about the APVMA's expectations and compliance approach. People and businesses who have specific obligations under legislation administered by the APVMA are encouraged to familiarise themselves with these guidelines.

It is important to note that these are guidelines and not directions. They are designed to assist the making of enforcement decisions to achieve consistency, efficiency, effectiveness and transparency in the administration of legislation by the APVMA.

This guideline outlines objectives that the APVMA will pursue to promote voluntary compliance, change non-compliant behaviour and deter illegal activities affecting the import, manufacture and supply of agricultural and veterinary chemical products.

## 1.2 Procedure

The APVMA will assess all notifications it receives of possible contraventions of its legislation, and based on these assessments and any associated investigations, will make decisions as to the appropriate response. This process is supported by the APVMA Case Categorisation and Prioritisation Model (CCPM).

In some cases, the decision may be to take no action. In some cases, the APVMA may provide advice, guidance, or assistance to help a person comply with the legislation. In other cases, it may be necessary for the APVMA to take enforcement action in response to a contravention of the legislation.

In these guidelines, enforcement action includes any action taken to address a contravention of legislation administered by the APVMA, to deter or prevent a person or persons from committing future contraventions of the legislation, or to require someone to remedy or stop committing a contravention of the legislation.

Enforcement actions do not include measures intended only to inform or educate a person, and do not include investigations into alleged contraventions of legislation although such investigations may be required to inform various enforcement actions.

The range of enforcement actions available to the APVMA in the legislation include:

- formal warnings
- infringement notices
- administrative notices and orders made under legislation
- proceedings for court orders provided for under legislation
- prosecution

- suspension or cancellation of a registration, approval, permit, licence or authority.

Sometimes a number of enforcement actions may be taken in combination.

From time to time, the APVMA becomes aware of matters that are offences against legislation it administers, and which are also offences against legislation administered by another government agency.

In these circumstances, the following principles will apply:

- The APVMA may consult the other agency to determine which agency should lead any investigation, and which agency would be the appropriate agency to take any enforcement action. There may be circumstances in which it is appropriate for a joint investigation to take place, and for each agency to take its own enforcement action.
- The APVMA may be the appropriate agency to lead an investigation or take enforcement action where one or more of the following applies:
  - the subject matter is more closely aligned with the APVMA's portfolio of responsibilities than that of the other agency
  - enforcement action by the APVMA would more effectively prevent or remedy the contravention and its impacts
  - the penalties that apply for the offence under the APVMA's legislation reflect the seriousness of the offence more accurately than the penalties under the other agency's legislation.
- The APVMA will refer a matter to another government agency for investigation or enforcement action where the matter is within the devolved responsibility of that government agency.
- Where dishonesty or other criminal offences are involved, the APVMA may refer the matter to the Australian Federal Police or other authorities as appropriate.

### 1.3 Principles

The following principles guide the APVMA in making decisions about taking enforcement action:

- Enforcement action will be proportionate to the seriousness of the contravention.
- Decisions about enforcement action will be impartial, based on available evidence, and on the strategic objectives of the APVMA.
- Where enforcement action involves litigation, the APVMA is bound by the Model Litigant Principles. The principles ensure that, when conducting litigation, the APVMA meets the community's and the courts' expectations that it will conduct itself in a manner which exemplifies the principles of justice, and that the Commonwealth's power will be used in the public interest.

The APVMA is guided by the overriding principle that enforcement action must not be taken for improper purposes.

A decision on whether or not to take enforcement action will not be influenced by factors such as:

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- the alleged offender's gender, ethnicity, nationality, political associations, religion or beliefs
- an APVMA employee's personal feelings towards the alleged offender or the victim
- possible political advantage or disadvantage to a government or any political group or party
- the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

## 2 WHO ENFORCEMENT ACTION WILL BE TAKEN AGAINST

One of the main aims of parliament in making a contravention of the law a criminal offence is to deter the offenders and others from similar behaviour. By extending criminal liability to many people (for example, directors and managers of corporations), the law generates increased awareness and responsibility for legal obligations within corporate structures and throughout the community.

Situations can arise where a number of people may be responsible for the commission of an offence and may therefore be liable for enforcement action. The APVMA recognises that it may not always be appropriate to take enforcement action against every person who may be liable for an offence.

The following sections set out what the APVMA will consider when determining who enforcement action may be taken against.

### 2.1 Identification of offenders

In determining who was responsible for an offence, the APVMA will take the following considerations into account:

- Who was primarily responsible for the offence, that is:
  - who committed the act
  - who formed the intention (if relevant)
  - who created the material circumstances leading to the alleged offence
  - who benefited from the offence.
- What was the role of each alleged offender (where there is more than one alleged offender).

### 2.2 Notification

The APVMA will also take into account any notification it receives of a contravention by an alleged offender. It will specifically consider whether:

- the alleged offender notified the APVMA of the contravention promptly
- the information assisted in the control or mitigation of any impacts
- the information substantially aided the APVMA's investigation of the incident
- the information was available from other sources
- there was a failure to comply with an obligation to notify the APVMA of the contravention
- the notification occurred prior to the APVMA or any other regulatory body obtaining knowledge of the contravention.

## 2.3 Corporate liability

Corporations as well as individuals can be liable for offences against legislation. Where an offence is committed by employees, agents or officers of a corporation in the course of their employment, proceedings will usually be commenced against the corporation.

Where, however, the offence has occurred because the employee, agent or officer has committed an offence of their own volition, outside the scope of their employment or authority, proceedings may be instituted against the employee, agent or officer and not against the corporation.

Another factor which will be considered is the existence and effective implementation of any training and compliance programs of the corporation.

## 2.4 Liability of employees and contractors

Employees' obligations under the APVMA's legislation cannot be overridden by an instruction from their employer—it is not a defence for an employee to assert that he or she was acting under direction from a supervisor, although this may be a consideration and a mitigating factor in sentencing or choice of appropriate enforcement action. This principle equally applies to contractors. Therefore the guiding principle in deciding whether to pursue an employee or a contractor is their degree of culpability or responsibility.

In addition to the issues set out in section 1.3, factors to be considered in assessing the degree of culpability include:

- whether the employee or contractor knew or should have known that the activity was likely to be illegal or inappropriate
- the seniority of the employee and the scope of their duties
- whether, having regard to the employee's seniority and employment duties or the contractor's contract, the employee or contractor had taken reasonable steps to draw to the attention of the employer or any other relevant person the impropriety of the practice
- whether the employee or contractor has taken reasonable steps to mitigate or prevent any impacts (if it was in the employee's or contractor's power to do so).

## 2.5 Liability of Directors and Executive Officers

Most of the legislation administered by the APVMA contains provisions extending liability for offences committed by a corporation to its Executive Officers.

When determining whether to take enforcement action against an Executive Officer in accordance with such a provision, the key consideration will be whether the person had actual control or influence over the conduct of the corporation in a relevant respect.

As a general policy, the APVMA will take enforcement action under the Executive Officer liability provisions only where evidence links the person with the corporation's illegal activity. That evidence may show, for example, that the Executive Officer:

- intended to engage in the action or omission
- was negligent or reckless with respect to the action or omission
- intended to deceive the APVMA
- failed to monitor or periodically assess and manage risks associated with the corporation's relevant activities or review supporting systems and programs.

The general legislative exceptions to Executive Officer liability are that:

- the Executive Officer was not in a position to influence the corporation's conduct; or
- the Executive Officer took all reasonable steps to ensure that the corporation complied with the law.

The APVMA may take the view that reasonable steps were taken to ensure that the corporation complied with the law where it can be demonstrated the Executive Officer ensured that:

- the corporation had an effective risk management system in place which was aimed at ensuring compliance with relevant legislative requirements
- all staff were aware of the system
- the system had been effectively implemented throughout the corporation
- the system was regularly reviewed and was amended when necessary.

## 2.6 Unlawful suppliers

When determining the appropriate enforcement action against people supplying agricultural or veterinary chemical products without the necessary approvals or registrations ('unlawful suppliers'), the following principles will be considered:

- The APVMA's first priority is to ensure that any risk of harm or impacts from an unlawful supplier is appropriately managed.
- The APVMA will work cooperatively with other regulators who may also have responsibility for regulating the unlawful activity (for example, an unlawful manufacturing site may have failed to obtain a development permit from local government as well as an environmental authority from the APVMA).
- In deciding the appropriate response, the APVMA will take account of the level of competitive advantage enjoyed by the unlawful supplier as one factor for consideration, however in most cases, some type of enforcement action will be taken in response to an unlawful supplier.
- In rare cases, the APVMA may defer enforcement action until an unlawful supplier has had the opportunity to obtain an approval or registration and operate lawfully.

## 2.7 Liability of external administrators

In terms of ensuring compliance with legislation administered by the APVMA, external administrators (including liquidators, receivers and managers and administrators) who are responsible for the management of a corporation, will be subject to the same considerations as other executive officers.

External administrators who assume control of a corporation and become aware of activities or conduct that contravenes legislation administered by the APVMA should ensure that the activity or conduct ceases and that the APVMA is informed of the activity or conduct.

External administrators should also ensure that the company complies with any notices or orders given to the company by the APVMA as far as is possible given the provisions of the *Corporations Act 2001*.

## 2.8 Liability of government agencies

The legislation administered by the APVMA binds all persons, including government agencies. The decision to take enforcement action or alternative regulatory intervention against a government agency will depend on whether to do so is in the public interest. The APVMA acknowledges that:

- legislation administered by the APVMA applies equally to both the private and public sectors, and the public should hold equal expectations that both sectors will comply with legal obligations
- for local governments, it is the community that is served by that local government which bears both the costs of a prosecution and ultimately any penalty imposed upon that public authority
- where regulatory intervention is required, consideration will be given to ensuring ratepayer monies remain in local communities while holding local governments accountable and requiring compliance with the law.

A decision about taking enforcement action against a government agency will consider these factors, together with the other matters set out in these guidelines.

## 3 CHOICE OF ENFORCEMENT ACTION

### 3.1 Determining seriousness of a contravention of legislation

The APVMA determines the seriousness of a contravention of legislation by reference to four general considerations:

1. The objectives of the relevant legislation including the nature of the offence and type of impact the offence provision is designed to deter or prevent.
2. The actual or potential impact of the offence.
3. The level of culpability of the alleged offender.
4. The financial or other benefit received from the contravention.

The seriousness of the contravention of the legislation will inform the decision on the appropriate enforcement action taken in response to the offence. This guideline sets out five levels of seriousness for contraventions of legislation: low, minor, moderate, major, and serious.

Outlined below are some criteria which can be used to assist the APVMA in assessing the level of seriousness of a contravention. The tables below regarding the impacts of the offence and the level of culpability of the alleged offender indicate the seriousness of the offence.

#### Objectives of legislation

The objectives or purpose of any legislation are generally outlined at the beginning of the legislation, and provide context to the following legislative provisions. To determine the purpose of the particular offence provision, often it is useful to refer to both the objectives of the legislation and to other documents such as the explanatory notes or parliamentary speeches.

The seriousness with which the legislature views an offence may often be apparent by maximum penalty or class of offence assigned to it in the legislation. Where legislation designates levels or classes of offence, this will be considered in deciding the appropriate enforcement response.

#### Impact

The impact of an offence can be characterised by reference to the effects or consequences of the offence and also by reference to the act or omission the offence provision has been designed to prevent or deter (see the objectives of the legislation discussed above).

To determine the level of impact, for example for the offence of contravention of a condition of an approval or registration, reference may be made to the level and extent of impact on the safety or health of people, animals, the environment or trade resulting from the contravention.

An offence not involving safety, trade, efficacy or licensing impacts, for example for the offence of providing false or misleading information to the APVMA, may be characterised as an administrative offence. This does not mean

that the offence is not serious. For example, the provision of false or misleading annual returns to the APVMA seriously undermines its ability to effectively administer its legislation. Examples of other administrative offences include:

- failure to comply with the duty to notify
- a contravention that undermines a legislative scheme (eg failure to pay registration or other fees or levies etc)
- the provision of false or misleading statements in relation to analysis, certificates, import information or the origin of chemical product
- the provision of false or misleading statements in applications or other material submitted to the APVMA
- failures in respect of approval or registration conditions that relate to reporting or the keeping of documents. There may be some overlap between administrative and other types of offences.

Five levels of impacts have been developed to assist the APVMA in classifying the seriousness of an alleged offence and inform a decision on the appropriate enforcement response (refer to Table 1—Criteria to be considered in determining impact of contravention). These levels also include the risk or potential impact of an alleged offence.

If an offence satisfies criteria across a range of the impact levels, generally, it will be assigned the highest applicable level. For example, if there is an incident which has caused permanent impacts on the people, animals, the environment or trade (which falls into the serious level), however the level of public concern is low (which falls into the minor level); the matter will be regarded as serious.

### **Culpability**

Culpability refers to the blame and responsibility of the alleged offender for the alleged offence. Three levels of culpability have been developed which, along with the levels of impact, will assist the APVMA in classifying the seriousness of an alleged offence and therefore determine the appropriate enforcement response (refer to Table 2—Criteria to be considered in determining the culpability of alleged offender).

If an alleged offender has satisfied criteria across a range of the levels, the most serious category will be assigned.

Table 1: Criteria to be considered in determining impact of the contravention

Impact	5 Serious impact or risk of impact	4 Major impact or risk of impact	3 Moderate impact or risk of impact	2 Minor impact or risk of impact	1 Low impact or risk of impact
	<ul style="list-style-type: none"> <li>• Permanent, or potential for permanent, long-term impact</li> <li>• Impact is on or potentially on a wide-scale, or of great intensity</li> <li>• Widespread or high level of public concern or impact to public safety, animal safety, the environment or trade</li> <li>• Where offence is of an administrative nature, it severely undermines the legislative scheme or the offender provides false or misleading information</li> </ul>	<ul style="list-style-type: none"> <li>• Medium to long-term impact, or potential impact</li> <li>• Impact is on or potentially on a medium to wide-scale, or of medium to great intensity</li> <li>• High level of public concern or impact to public safety, animal safety, the environment or trade</li> <li>• Where the offence is of an administrative nature, it undermines the legislative scheme or the offender conceals information or avoids liability for fees or taking necessary actions to prevent offence</li> </ul>	<ul style="list-style-type: none"> <li>• Temporary to medium-term impact, or potential impact</li> <li>• Impact is on or potentially on a localised to medium scale, or is of a low to medium intensity</li> <li>• Moderate level of public concern or impact to public safety, animal safety, the environment or trade</li> <li>• Where the offence is of an administrative nature, it has a moderate impact on the legislative scheme, or the offender carelessly fails to comply with administrative requirement</li> </ul>	<ul style="list-style-type: none"> <li>• Transient impact, or potential impact</li> <li>• Impact is on or potentially on a localised scale, or is of a low intensity</li> <li>• Low level of public concern or impact to public safety, animal safety, the environment or trade</li> <li>• Where the offence is of an administrative nature, it has no impact on the legislative scheme or is of an inadvertent nature</li> </ul>	<ul style="list-style-type: none"> <li>• No impact, or potential impact</li> <li>• No public concern or impact to public safety, animal safety, the environment or trade</li> <li>• Where the offence is of an administrative nature, it could not have been prevented</li> </ul>

Table 2: Criteria to be considered in determining culpability of alleged offender

Culpability	3 Serious culpability	2 Moderate culpability	1 Low culpability
	<ul style="list-style-type: none"> <li>• Intentional or wilful acts</li> <li>• Past non-compliances or convictions involving the same or similar legislative provisions</li> <li>• Non-compliances of an ongoing or long duration</li> <li>• No attempt at remedial action undertaken</li> <li>• Motivated by profit or obtained a material benefit from the non-compliance</li> <li>• Involves serious misleading conduct</li> <li>• Failure to notify the APVMA effectively or notification outside of reasonable timeframes</li> <li>• Wilful ignorance of clear directions, warnings or administrative actions (from either employees, consultants, the APVMA, or other government officers) which may have prevented or mitigated the impact</li> <li>• The impact or risk of impact was obvious and/or preventable by implementing or following accepted industry standards</li> </ul>	<ul style="list-style-type: none"> <li>• Careless acts</li> <li>• Isolated prior non-compliances with legislation or similar legislation</li> <li>• Non-compliance of an medium duration</li> <li>• Genuine attempt at remedial action or remedial action partially effective</li> <li>• Attempt at notification of APVMA of incident within reasonable timeframe</li> <li>• May have benefitted from the non-compliance</li> <li>• Was aware of the risk of impact or the impact was foreseeable</li> <li>• The impact or risk of impact may have been prevented by following accepted industry standards</li> </ul>	<ul style="list-style-type: none"> <li>• Inadvertent acts</li> <li>• No prior non-compliances with legislation or similar legislation</li> <li>• Non-compliance of short-term duration</li> <li>• Remediation effective</li> <li>• Notification to APVMA of incident within reasonable timeframe</li> <li>• Did not benefit from the non-compliance</li> <li>• The impact or risk of impact was not foreseeable</li> <li>• The impact or risk of impact was not prevented by high standards of operation (greater than accepted industry standards)</li> </ul>

## 3.2 Application of objectives in legislation, impact and culpability

The APVMA will exercise its discretion to take any enforcement action it considers appropriate in the circumstances, taking into account the seriousness of the contravention of the legislation.

The objective of some enforcement actions may be considered punitive, whilst others may be aimed at preventing, deterring or rectifying impacts of offences. Some enforcement actions do both; for example a prosecution may result in a fine (being punitive or a deterrent) and orders to take remedial action to mitigate any impact.

There are seven general categories of enforcement actions available to the APVMA:

1. Formal warnings.
2. Infringement notices.
3. Administrative notices and orders made under legislation.
4. Proceedings for court orders provided for under legislation.
5. Enforceable undertakings.
6. Prosecution.
7. Suspension or cancellation of approval, registration, permit, licence or authority.

The choice of the enforcement action will be determined by reference to the seriousness of the contravention of legislation and the desired outcome having regard to the facts and circumstances of each matter.

As a guide:

- Warning letters are generally reserved for low or minor contraventions.
- Infringement notices for minor contraventions.
- Administrative notices and orders (with the exception of cancellation of approvals, registrations, licences or permits) for moderate to serious contraventions.
- Enforceable undertakings are considered to be an alternative enforcement action for moderate contraventions.
- Court orders, prosecutions and cancellation of approvals, registrations, permits or licences are generally reserved for major or serious contraventions of legislation.

The taking of a particular administrative action by the APVMA does not preclude it from taking other enforcement action (including other administrative actions). In order to properly and effectively address contraventions of the legislation, a number of enforcement actions may need to be taken either simultaneously or over time as part of a strategy for addressing the offending conduct and achieving the desired regulatory outcome.

For example, it may be appropriate to issue a recall notice to a person to locate and destroy all stocks of unregistered chemical products that they have supplied. However, this administrative action does not prevent the APVMA from prosecuting the person for the unlawful supply of unregistered chemical products. In this example, the recall notice informs the necessary steps to rectify and prevent the further unlawful supply and use of an unregistered product, whilst a prosecution will punish and deter the conduct that resulted in the unlawful supply.

In some situations it may not be appropriate to take more than one enforcement action in response to a situation. When deciding whether to take or not take administrative action, the APVMA will comply with the requirements of the legislation that authorises the action, the principles of natural justice and any other requirements of a lawful administrative decision.

## 4 FORMAL WARNINGS

Formal warnings are provided for in legislation, and represent an enforcement response that the APVMA may take in relation to minor contraventions of legislation. It may be where the imposition of a financial penalty is not considered appropriate, and where a warning that the offender's conduct is a contravention of the legislation is considered a sufficient compliance response based on the circumstances of the matter, for example, a first contravention or one that is easily remedied.

Formal warnings should be used for minor contraventions of the APVMA's legislation, involving little or no impact and where the offender has a low level of culpability. They are not appropriate for ongoing or repeated minor contraventions.

## 5 INFRINGEMENT NOTICES

Infringement notices are a means of dealing with minor contraventions of legislation administered by the APVMA which warrant some form of sanction, but which are generally not serious enough to warrant a prosecution. Such contraventions might include a minor contravention of a licence or permit condition. Infringement notices have the advantage of allowing an offence to be dealt with quickly and without the time and cost involved in a prosecution.

While an infringement notice is issued because a person has committed an offence, payment of the fine is not an admission of guilt (although the APVMA will record the infringement notice against the person's compliance history). If a person fails to pay an infringement notice, it is recoverable as a debt.

In making decisions about issuing an infringement notice, the APVMA will be guided by the following principles:

- Infringement notices should be issued where the contravention is minor and the scale of the impact is known and small.
- An infringement notice will generally not be appropriate where the contravention is ongoing.
- Infringement notices should not be issued for multiple offences arising out of the same course of conduct, unless the offences go to separate and distinct aspects of that conduct.
- Infringement notices should be issued only where the facts of the offence are clear.
- Infringement notices should be issued only where the infringement notice is likely to act as a deterrent. If an infringement notice is not likely to deter the offender from committing a similar offence in the future, consideration should be given to whether prosecution is a more appropriate response. For example, an infringement notice should not be issued where the benefit gained by the commission of the offence is greater than the fine issued.
- Infringement notices should be issued as soon as reasonably possible after the offence comes to the attention of the APVMA.

If a person elects to contest an infringement notice, the APVMA will review the matter, including any submissions made by the person to determine an appropriate outcome. This includes considering commencing civil or criminal proceedings.

If a person who contests an infringement notice is found guilty, the court may impose a penalty higher than the amount of the infringement notice, and may order the payment of costs and the recording of a conviction.

## 6 ADMINISTRATIVE ACTIONS

Administrative actions are enforcement actions that include the range of notices and orders that the APVMA may issue under legislation it administers in order to secure compliance with obligations under that legislation. They are generally used to remedy contraventions of the legislation.

Administrative actions differ from prosecutions and infringement notices as they are usually aimed at preventing or rectifying a contravention, while prosecutions and infringement notices are usually aimed at punishing and/or deterring unlawful conduct.

Some of the administrative actions available to the APVMA include issuing a recall notice, issuing an enforceable direction, and requiring a person to respond to a substantiation notice.

The APVMA may take an administrative action where:

- it is the most effective means of preventing or rectifying breaches of the legislation or regulatory scheme
- it is reasonable and proportionate in light of all of the relevant circumstances.

## 7 CIVIL PROCEEDINGS FOR COURT ORDERS

Most of the legislation administered by the APVMA enables it to apply for civil court orders requiring a person to stop committing an offence, or to remedy or rectify an offence. Applications for court orders are generally appropriate in circumstances where there has been a major or serious contravention of the legislation.

These applications are civil proceedings (governed by civil procedures and burden of proof) as opposed to criminal proceedings as is the case with prosecutions. In commencing and conducting proceedings for court orders, the APVMA will adhere to the Model Litigant Principles.

For example, the APVMA may apply for an injunction to restrain someone from committing an offence against or breaching a civil penalty provision of the legislation it administers, and ask the court to make orders requiring the person to take certain actions.

The APVMA may commence proceedings for such orders where:

- sufficient evidence exists to satisfy the requirements of the legislation under which the proceedings are to be brought
- the APVMA has reasonable prospects of success
- the orders sought by the APVMA will likely address the offending behaviour or the consequences of the offence.

Should a court order be contravened, the APVMA will consider commencing further proceedings in accordance with these guidelines to address the non-compliance.

## 8 ENFORCEABLE UNDERTAKINGS

An enforceable undertaking is a published agreement between the APVMA and a person which can require the person to carry out a wide range of actions to achieve compliance with the *Agricultural and Veterinary Chemicals Code Act 1994*.

It can be initiated by a person where there has been a contravention or contraventions of the *Agricultural and Veterinary Chemicals Code Act 1994*, or to ensure that an offence is not committed.

An enforceable undertaking does not require an admission to be made in relation to a contravention(s).

## 9 PROSECUTION

Prosecution is part of the APVMA's strategy for achieving its legislative and policy objectives, however as outlined in these guidelines it is usually not the only enforcement action available and will be used after careful consideration.

If an alternative to prosecution may be more effective in achieving the objects of the legislation, then that alternative will be considered. Prosecutions may be an appropriate enforcement action in response to major or serious contraventions of the legislation.

### 9.1 The decision to prosecute

The decision to prosecute is generally made by the Chief Executive Officer (CEO) or General Counsel on behalf of the APVMA. The decision is based on:

- whether the available evidence provides reasonable prospects of successfully obtaining a conviction; and
- if so, whether it is in the public interest to exercise the discretion to commence a prosecution.

#### Prospects of success

The determination of prospects of success of a proposed prosecution will consider whether:

- the available evidence is capable of proving each element of the offence beyond reasonable doubt
- the admissibility of evidence
- the credibility of available witnesses
- the availability or strength of any expert evidence required to prove the offence
- any defences that are plainly open to the alleged offender.

#### Public interest considerations

The commencement of a prosecution is discretionary, and the dominant factor in the exercise of that discretion is the public interest. When deciding whether to commence a prosecution the APVMA may take into account the following public interest considerations:

- The seriousness of the offence including the impacts or potential impacts caused by the alleged offence.
- The degree of culpability of the alleged offender including any mitigating or aggravating circumstances (including notification, cooperation or a display of contrition).
- The availability and effectiveness of any alternatives to prosecution.
- The alleged offender's compliance history.
- Whether the alleged contravention is a continuing or subsequent offence.
- The prevalence of the alleged offence and the need for general deterrence.

- The length of time since the alleged offence occurred.
- The age and physical or mental health of the alleged offenders.
- Whether there are counter-productive features of the prosecution.
- In cases involving Aboriginal and Torres Strait Islander peoples use or management of natural resources, the views of the traditional owners of the area.
- The length and expense of any court hearing.
- The likely outcome in the event of a conviction having regard to the sentencing options available to the court.
- Any precedent which may be set by not instituting proceedings.
- Whether the consequences of a prosecution would be unduly harsh or oppressive.
- Whether proceedings are to be instituted against others arising out of the same incident.
- The sentencing principles in the jurisdiction in which the matter would be heard.
- The extent to which the alleged offender cooperates in the investigation or prosecution of other offenders.

In addition to the public interest factors, the decision to commence a prosecution will also take account of the principles in section 1.4 of these guidelines.

Once a decision has been made to prosecute, the APVMA must present the evidence fairly and impartially to the court. The APVMA's only interest in procuring a conviction is to ensure that the right person is convicted, that the truth is known and that justice is done.

## 9.2 Choice of charges

The charges against an alleged offender must reflect the nature and extent of the conduct disclosed by the evidence, with the aim of providing a basis for the court to impose an appropriate penalty and make appropriate orders. There will be occasions where the same conduct is prohibited under separate statutes and involves an offence under each.

In circumstances where it would be inappropriate to lay both charges, the APVMA will consider the legislation and exercise its discretion to commence proceedings for one of the offence provisions taking into account the circumstances of the conduct and the penalties available for each offence provision. Where another prosecuting agency is involved, the APVMA will liaise with the other agency to ensure the most appropriate charge(s) is commenced.

## 10 SUSPENSION OR CANCELLATION OF LICENCE, PERMIT OR AUTHORITY

Legislation administered by the APVMA contains a list of grounds for the suspension or cancellation of approvals, registrations, permits, licences or authorities. These grounds might include a failure to perform administrative requirements such as payment of fees or lodging of returns. They might also include the holder being convicted of an offence under that legislation or not meeting specified suitability criteria for the permit, licence or authority.

Payment of fees and levies due under legislation is a fundamental obligation of someone who holds an approval or registration from the APVMA. Holders who fail to pay fees and levies obtain a commercial advantage over their competitors, and can undermine the legitimacy of the regulatory regime. Where legislation administered by the APVMA permits, the APVMA may suspend or cancel the relevant approval, registration, permit, licence or authority of a registrant with overdue fees or levies.

When deciding whether to cancel or suspend an approval, registration, licence, permit or authority, the requirements of the legislation will be complied with and the APVMA may consider the principles within these Enforcement Guidelines.

The aim of cancellation or suspension of an approval, registration, permit, licence or authority is not punitive; rather it is based on the need to protect the integrity of the legislative regime; protect humans, animals the environment and Australia's trade interests from the impact of unsuitable agricultural and veterinary chemical products.