

## Executive summary

This study examines environmental protection and planning offences prosecuted in the NSW Land and Environment Court (LEC) within the 15-year period from 2000 to 2015. It is a legal and empirical examination of the cases within that period using detailed quantitative information augmented by a comprehensive qualitative analysis of key offences. The law as it relates to sentencing and legal costs is also extensively reviewed. The study is provided in two parts: **Volume 1** (this part) is the main body of the study, where the findings are detailed and discussed, and **Volume 2** contains **Cases Tables 1, 2 and 3** which detail, respectively, the full complement of pollute waters offences, waste offences and native vegetation offences examined in this study.

The primary data source for the study is the environmental sentencing database which was developed by the Judicial Commission of NSW (the Commission) in collaboration with the LEC. The database records a multitude of objective and subjective factors considered by the LEC in the course of sentencing proceedings.<sup>i</sup>

The study identifies several areas of sentencing practice in the LEC which may require review or reform to further improve transparency and consistency in sentencing.

## Costs and sentencing

The most critical issue is that costs are entwined in the sentencing process. This is not just an issue for the LEC but also for prosecutors bringing matters before the LEC, and for those responsible for setting policy in this area of the law. There is no other court exercising criminal jurisdiction where costs are such an integral issue in sentencing. Given that costs are now accepted in this jurisdiction as an “aspect of punishment”,<sup>ii</sup> it is imperative that all costs are known at sentence, recorded in the judgment, and acknowledged as part of the penalty imposed by the LEC for environmental offences. This would require a change to the law and perhaps a return to the original legislative position where costs orders were quantified for the benefit of the court prior to sentencing.<sup>iii</sup> This study traces the law in relation to costs from the original legislative position to the current law.<sup>iv</sup> Typically, costs are “as agreed or assessed” and there is currently no judicial requirement to specify the quantum of costs at sentence. Determining the extent to which costs (known and unknown) impact upon the sentencing process and the penalty is a focal point of this study.

## Criminal liability

This study explores how criminal liability is framed for environmental offences with reference to the landmark Canadian Supreme Court decision in 1978 of *R v Sault Ste. Marie*,<sup>v</sup> considered by the High Court of Australia in *He Kaw Teh v The Queen*,<sup>vi</sup> and also the leading intermediate appellate court decisions of *EPA v N*,<sup>vii</sup> *NSW Sugar Milling Co-Op Ltd v EPA*<sup>viii</sup> and *EPA v Ampol Ltd*.<sup>ix</sup>

i The objective factors used in this study recorded for the principal offence are: objective seriousness, financial reasons, foreseeability of harm to the environment, practicable measures taken (before and during harm), control over causes, state of mind, level of environmental harm, and complying with supervisor’s orders. The recorded subjective factors are: prior record, co-operation, contrition or remorse, prior good character, plea, and diminished means to pay. The additional factor of whether the totality principle was applied by the court is also a factor used in this study.

ii *EPA v Barnes* [2006] NSWCCA 246 (“*Barnes*”) per Kirby J at [78], [88]; *Harris v Harrison* (2014) 86 NSWLR 422 (“*Harris*”) per Simpson J at [100]–[103]. See also **Appendix D** for a list of 56 NSWLEC cases which specifically apply the sentencing principle relating to costs as expounded in *Barnes* at [78] and [88].

iii See discussion of *Land and Environment Court Act* 1979, s 52 in **Original mandatory requirement to specify costs** at [1.3.1].

iv See **The current law on costs** at [1.3.3].

v [1978] 2 SCR 1299 per Dickson J at 1325–1326. See general discussion at [1.2.3].

vi (1985) 157 CLR 523 per Gibbs CJ (Mason J agreeing) at 533–534, per Dawson J at 592.

vii (1992) 26 NSWLR 352.

viii (1992) 59 A Crim R 6.

ix (1993) 81 LGERA 433. Ampol unsuccessfully appealed in *Ampol v EPA* (unrep, 26/10/95, NSWCCA).

Every environmental offence fits somewhere along a well-defined continuum of criminal liability. The continuum ranges from absolute liability offences through to strict liability (regulatory offences) to Tier 1 offences which require *either* proof of the fault ingredient “negligently” or proof of a guilty mind (mens rea) ingredient, namely, “wilfully”.<sup>x</sup> The *Protection of the Environment Operations Act 1997 (POEO Act)* persists with the mens rea ingredient “wilfully” found in its statutory predecessor.<sup>xi</sup> In the history of the LEC, there has been only one case in which an offender was charged and convicted of *wilfully* committing an environmental offence.<sup>xii</sup> In 1992, well before the enactment of the *POEO Act*, “wilfully” was regarded by the Model Criminal Code Officers Committee (MCCOC) as an antiquated concept and abandoned for the purposes of the Model Criminal Code.<sup>xiii</sup> For these reasons, the existing hierarchical structure of environmental offences is ripe for review, as is the prosecution’s extremely limited charging of Tier 1 offences.

## Charging practices

A Tier 1 environmental offence with the ingredient of “negligently” requires the prosecution to prove that the alleged offender’s conduct was negligent when measured against an objective standard.<sup>xiv</sup> MCCOC recorded and acknowledged a view that NSW courts applied a lesser standard of criminal negligence for environmental offences than the common law offence of manslaughter.<sup>xv</sup> The Committee accepted that the degree of negligence required for conviction is related to the nature of the offence.<sup>xvi</sup> Despite clear statements from the Court of Criminal Appeal (CCA) as to what criminal negligence entails for environmental offences, the dearth of such cases coming before the LEC (only nine in the 15-year study period) demonstrates that it is rarely charged by the prosecution. Instead, prosecuting agencies almost exclusively rely upon strict liability Tier 2 offences under the *POEO Act* to secure a finding of guilt. There are well-recognised benefits of utilising strict liability offences in the area of environmental crime.<sup>xvii</sup> The prosecution’s extensive reliance upon strict liability offences in the LEC avoids any prospect of a costs order against it on the basis that the defendant is acquitted of a Tier 1 offence.<sup>xviii</sup>

Given the “absolute discretion” of the prosecutor, the LEC (like any other criminal court) has no control over the charges brought before it.<sup>xix</sup> Prosecuting agencies bringing criminal matters before the LEC do not have a practice of using Tier 1 and Tier 2 offences as alternative charges. However, the practice of alternative charging is standard in other courts exercising criminal jurisdiction.<sup>xx</sup> Consequently, the existing statutory hierarchy for environmental protection offences, as envisaged by Parliament, effectively, is not being used.

x *Protection of the Environment Operations Act 1997 (POEO Act)*, ss 115–117. Seldom has Parliament created an environmental offence with knowledge as an ingredient. For example, the offence against s 144AA(2) of the *POEO Act* requires proof of knowledge in the supply of false or misleading information about waste and carries a higher maximum penalty. This offence was created on 1 October 2013.

xi *Environmental Offences and Penalties Act 1989 (EOP Act)* (rep), ss 5(1), 6(1), 6(2).

xii *EPA v Gardner* (unrep, 7/11/97, NSWLEC). See **Case study 1** on pp 51–52.

xiii See Criminal Law Officers Committee of the Standing Committee of Attorneys-General (also later known as the Model Criminal Code Officers Committee (MCOCC)), *Model Criminal Code, Chapter 2: General principles of criminal responsibility: final report*, December 1992, p 29. Also see I Leader-Elliot, *The Commonwealth Criminal Code: a guide for practitioners*, December 2002, pp 49 and 203 at [www.ag.gov.au/Publications/Documents/CriminalCodePractitionerGuidelinesMar2002/GuideforPractitioners.pdf](http://www.ag.gov.au/Publications/Documents/CriminalCodePractitionerGuidelinesMar2002/GuideforPractitioners.pdf), accessed 16 May 2017.

xiv *NSW Sugar Milling Co-op Ltd v EPA* (1992) 59 A Crim R 6 per Hunt CJ at CL at 7 and Allen J at 12.

xv See reference to *NSW Sugar Milling Co-op Ltd v EPA* in *Model Criminal Code, Chapter 2: General principles of criminal responsibility*, above n xiii, p 33.

xvi The words “for the offence in issue” were specifically added to the Model Criminal Code, *Model Criminal Code, Chapter 2: General principles of criminal responsibility*, above n xiii, p 22 at 203.4. See also p 33 for commentary on 203.4.

xvii See Australian Law Reform Commission (ALRC), “Chapter 12: Strict and Absolute Liability” in ALRC, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, Issues Paper 46, 2014 at [www.alrc.gov.au/sites/default/files/pdfs/publications/ip46\\_whole.doc\\_2.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/ip46_whole.doc_2.pdf) accessed 16 May 2017.

xviii See **Costs as a sentencing factor** at [1.3].

xix *Maxwell v The Queen* (1996) 184 CLR 501 per Dawson and McHugh JJ at 514, 534; *Likiardopoulos v The Queen* (2012) 247 CLR 265 per French CJ at [1]–[2]; *Elias v The Queen* (2013) 248 CLR 483 per French CJ, Hayne, Kiefel, Bell and Keane JJ at [33].

xx *James v The Queen* (2014) 253 CLR 475 per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at [14].

## Culpability and the De Simoni principle

Another area worthy of review concerns the application of the *De Simoni* principle<sup>xxi</sup> in the sentencing of environmental offenders. It is well-established that, where there is a hierarchy of offences, a court cannot take into consideration a fact or facts which effectively punishes the offender for a more serious crime in the same statute.<sup>xxii</sup> However, the CCA has held that, in sentencing for a strict liability offence, a court is entitled to take into consideration the additional ingredients of negligence, recklessness, knowledge and intent in determining the offender's culpability.<sup>xxiii</sup> This is held to be permissible where there is no "higher" offence in the statute.<sup>xxiv</sup> However, the authors argue that such an inquiry is probably an unnecessary distraction in sentencing for strict liability offences. It ultimately results in an inconsistent approach to the issue of culpability for strict liability offences both within and across environmental statutes.<sup>xxv</sup> The sentencing factors set out in s 241 of the *POEO Act* are sufficient for the purposes of determining culpability specifically for environmental protection offences *without* the need to establish additional ingredients.<sup>xxvi</sup> Nonetheless, the CCA has noted that the precise ambit of the *De Simoni* principle is yet to be determined.<sup>xxvii</sup> The High Court also has held that taking into account an aggravating circumstance that is hypothesised and does *not* exist, while not a breach of the *De Simoni* principle, is irrelevant to the assessment of the seriousness of the offence<sup>xxviii</sup> and "likely to distort the assessment of objective gravity".<sup>xxix</sup>

Similarly, the High Court has made it clear that there is no common law principle requiring a sentencing court to have regard to a less punitive offence that could have encompassed the offending conduct,<sup>xxx</sup> that is, the reverse of the *De Simoni* principle.<sup>xxxi</sup> Requiring a court to sentence by reference to an offence of which the offender has not been convicted, but which it considers the prosecution should have charged, risks compromising the court's impartiality and independence.<sup>xxxii</sup>

xxi *The Queen v De Simoni* (1981) 147 CLR 383 per Gibbs CJ at 389, 392.

xxii *EPA v Tea Garden Farms Pty Ltd* [2012] NSWLEC 89 per Craig J at [101]–[103]; *Warringah Council v Project Corp Aust Pty Ltd* [2015] NSWLEC 141 per Craig J at [219]; *Chief Executive, Office of Environment and Heritage v Orica Pty Ltd*; *EPA v Orica Pty Ltd* [2015] NSWLEC 109 per Preston CJ of the LEC at [110]. See general discussion at [1.2] and [1.2.2].

xxiii The approach can be sourced from *Majury v Sunbeam Corp Ltd* [1974] 1 NSWLR 659 per McClellens CJ at CL at 664, which was referred to and applied in *Camilleri's Stock Feeds Pty Ltd v EPA* (1993) 32 NSWLR 683 at 700.

xxiv *EPA v Lithgow City Council* [2007] NSWLEC 695 per Preston CJ of the LEC at [35]: "A strict liability offence that is committed intentionally or negligently will be objectively more serious than one that is committed unintentionally or non-negligently".

xxv See examples cited in **The De Simoni principle and Tier 1 and Tier 2 offences** at [1.2.1] and **Culpability and strict liability offences** at [1.2.2].

xxvi Section 241(1) of the *POEO Act* provides that in imposing a penalty for an offence, the court is to take into consideration: (a) the extent of the harm caused or likely to be caused to the environment by the commission of the offence; (b) the practical measures that may be taken to prevent, control, abate or mitigate that harm; (c) the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence; (d) the extent to which the person who committed the offence had control over the causes that gave rise to the offence; (e) whether, in committing the offence, the person was complying with orders from an employer or supervising employee. Section 21A(2) of the *Crimes (Sentencing Procedure) Act* 1999 also sets out various aggravating factors that may be considered by the courts for all offences, including environmental offences.

xxvii *R v Overall* (1993) 71 A Crim R 170 per Mahoney JA at 175.

xxviii *Nguyen v The Queen* (2016) 256 CLR 656 per Gageler, Nettle and Gordon JJ at [60]. Bell and Keane JJ at [29] stated: a judge sentencing an offender for [a lower offence within a statutory hierarchy] would err if the judge assessed the seriousness of the offence by taking into account that the offender had not committed [the ingredient for a higher offence] ... The judge would err because, plainly enough, that fact is irrelevant to the assessment of the seriousness.

Also see **Culpability and the De Simoni principle** at [3.6].

xxix *ibid*, Gageler, Nettle and Gordon JJ at [58]. Their Honours held that it was an error at law "because it is likely to result in an assessment of the relative gravity of the subject offence which ill-accords with its objective gravity relative to other instances of offences of that kind".

xxx *Elias v The Queen* (2013) 248 CLR 483 at [5], [25].

xxxi *ibid*.

xxxii *ibid* at [35].

## Jurisdictional ceiling of the Local Court

The jurisdictional maximum of the Local Court to impose a fine under the *POEO Act* was increased from \$22,000 to \$110,000 in 2012. This had two implications. First, the Local Court was able to impose larger fines for environmental offences. Secondly, the Local Court was able to deal with more serious environmental crimes. As a consequence, prosecutors could now bring offences before the Local Court that were previously beyond its jurisdiction.

In 2014, the CCA held that the LEC has to consider whether the prosecution has selected the appropriate forum after having assessed the seriousness of the offence and the jurisdictional limit of the Local Court.<sup>xxxiii</sup> The earlier increase in the Local Court's maximum monetary penalty has acted to cement this as a "live" issue for the LEC and in CCA appeals.

This study identified that almost 87% of fines imposed by the LEC under the current provisions of the *POEO Act*<sup>xxxiv</sup> fell below the jurisdictional limit of the Local Court. The jurisdictional limit of the Local Court is regarded as "a highly significant sentencing factor", particularly where the court assesses the offence as being one of low objective gravity.<sup>xxxv</sup> These factors impact on both the quantum of the fine and the size of any costs order that the offender may be required to pay. This study identified that close to half the fines ordered by the LEC under the current provisions of the *POEO Act* were not only below the jurisdictional ceiling of the Local Court but were imposed for offences assessed by the LEC as being of low objective seriousness.

Notably, the jurisdictional limit of the Local Court relates only to the quantum of a fine (and certain Additional Orders) and makes no reference to the inclusion of prosecutor's costs.<sup>xxxvi</sup>

## The study: lines of inquiry taken

The study examined a total of 502 principal offences<sup>xxxvii</sup> dealt with by the LEC. It initially began as a broad, conventional quantitative sentencing analysis with an emphasis on the distribution of penalties, fine amounts and the use of Additional Orders specific to the LEC, such as orders to remediate the damaged environment. Assessments of environmental harm and objective seriousness, by offence type, were also presented.

It became clear during the early stages of the study that a broad and purely quantitative approach would be inadequate and potentially misleading. A more granular and qualitative examination of the cases was required not only to account for the bulk of the court's work but also those environmental crimes generating challenging issues for the LEC and the appellate courts.<sup>xxxviii</sup>

First, Tier 1 pollution offences, of which there were only nine in the study period, were separated and examined qualitatively in terms of the objective and subjective features of each case. Secondly, the "Top 10" strict liability offences were identified and analysed. These offences made up 88% of the total number of offences before the LEC in the study period. The offence of polluting waters was the most common Tier 2 offence, representing almost one in every

xxxiii *Harris v Harrison* (2014) 86 NSWLR 422. At the time of the commission of the offence, the jurisdictional limit of the Local Court was \$22,000.

xxxiv That is, the *POEO Act* post-*Harris*. The decision date was 15 May 2014.

xxxv *Harris*, above n xxxiii, per Simpson J at [96] and [98]. See **Fines in excess of the Local Court jurisdictional limit and *Harris v Harrison*** at [2.2.6].

xxxvi *POEO Act*, s 215(2).

xxxvii Where there is more than one proven offence, the principal offence is the offence that attracted the most serious penalty. See n 318 at [2.1.1] for the counting rules applied to determine the principal offence.

xxxviii The topical areas include: the definition of waste and the recycling of waste (see, for example, *Shannongrove v EPA* [2013] NSWCCA 179; and, *EPA v Terrace Earthmoving* (2013) 84 NSWLR 679. See also **Unlawfully transport and/or dispose waste** at [2.4.4]); and what constitutes the unlawful clearing of native vegetation (see, for example, *Hudson v Director-General, Dept of Environment, Climate Change and Water* [2012] NSWCCA 92, and *Director-General of the Dept of Environment, Climate Change and Water v Graymarshall Pty Ltd (No 2)* [2011] NSWLEC 149. See also general discussion of native vegetation offences at [2.4.8].

four offences (24%); contravening a licence made up one in every nine offences (11%); and, the unlawful transporting and disposal of waste made up a further 8% of offences. Comparisons were made across the “Top 10” offences on a number of factors including level of environmental harm, objective seriousness, type of offender and penalties imposed. For example, the study found that the offences with the highest levels of serious environmental harm (putting aside Tier 1 offences) were native vegetation offences,<sup>xxxix</sup> waste offences<sup>xl</sup> and offences involving the harming of an endangered or threatened animal, plant or ecological community<sup>xli</sup> (29%, 24% and 22%, respectively). These same Tier 2 offences had the highest levels of objective seriousness (17%, 24% and 22%, respectively). Notably, commercial gain was identified as the principal reason (75%) for the illegal clearing of native vegetation, which was even higher than for Tier 1 pollution offences (67%). Obtaining a financial advantage was also very prominent in the commission of waste offences (64%).

The initial analyses also highlighted the substantial differences between environmental protection and environmental planning offences. Notably, the latter generally involve a “technical” breach of planning regulations and these offences often result in no, or low, levels of environmental harm. In fact, “harm” is ascribed a different meaning by the *Environmental Planning and Assessment Act 1979 (EPA Act)*. The concept of harm that applies to planning offences focuses upon undermining the regulatory system of development controls, subversion of the integrity of the planning system, environmentally “unfriendly” development, and adversely affecting residential amenity.<sup>xlii</sup> In contrast, harm in the context of environmental protection offences is often tangible, more serious and impacts well-beyond regulatory and amenity issues.<sup>xliii</sup> For these and other reasons, this study explored these two broad categories of environmental crime separately.

## A problematic distinction: corporate and individual offenders

Parliament’s binary division of offenders provides for different maximum penalties depending upon whether the environmental offender is charged as a corporation or an individual. The maximum penalty is generally higher for corporations. Individuals, however, may be subject to harsh penalties which impair their personal liberty such as imprisonment and other sanctions such as home detention, intensive correction orders, suspended sentences and community service orders.<sup>xliv</sup>

In many cases, the prosecution has a choice to prosecute the offender as a corporation or as an individual. This study examined the framing of liability by the prosecution. Position holders of companies charged under “special liability” provisions<sup>xlv</sup> and small business owners are prosecuted as “individuals”.<sup>xlvi</sup> Given that these two groups committed their offences in a commercial setting, there is a very strong case to distinguish them from “ordinary Joe” individuals.<sup>xlvii</sup> Categorising offenders in this way allows attention to be turned to whether the offending conduct occurred

xxxix Offences against s 12 of the *Native Vegetation Act 2003 (NV Act)*. The *NV Act* is to be repealed on the commencement of s 3 of the *Local Land Services Amendment Act 2016* which is cognate with the *Biodiversity Conservation Act 2016*.

xl Offences under ss 143, 144, 144AA(1) and 144AA(2) of the *POEO Act*.

xli For instance, offences against s 118A of the *National Parks and Wildlife Act 1974 (NPW Act)*.

xlii For example, see *Mosman Municipal Council v Menai Excavations Pty Ltd* [2002] NSWLEC 132 per Lloyd J at [35]; *Willoughby City Council v Livbuild Pty Ltd* [2015] NSWLEC 34 per Pepper J at [62]; *Sutherland Shire Council v Turner* [2004] NSWLEC 774 per Bignold J at [24].

xliii See, for example s 147 of the *POEO Act*, and general discussion of **Crimes against environmental protection laws** at [1.6.1].

xliv *Crimes (Sentencing Procedure) Act 1999*, Pt 2, Divs 2 and 3. The study found that these custodial alternatives and alternatives to custody are rarely imposed by the LEC. See **General offence and penalty characteristics: what a conventional sentencing analysis would show** at [2.1.2] and **Table 5**.

xlv For example, s 169 of the *POEO Act*.

xlvi *Bankstown City Council v Hanna* [2014] NSWLEC 152 is a good example where the individual, a serial waste dumper, operated a related small business.

xlvii The gender neutral term would be “ordinary Jo/Joe”. For convenience, the term “ordinary Joe” is used in this report as the vast majority of offenders in the LEC are male and it is the label that is commonly used in print media.



in the course of a business activity. This contributes to a better explanation of differences in fine amounts and other aspects of the sentence. Further, it allows more nuanced analyses of offending patterns. For example, corporations were more prominent in terms of pollute waters and contravene licence offences. Small business owners were more involved in the commission of waste offences and development without consent offences. “Ordinary Joe” individuals tended to be involved in breaches of environmental planning laws. Directors prosecuted under current special liability provisions<sup>xlviii</sup> were found to be most prominent in waste offences committed by corporations.

The study also relied upon factual findings in the LEC judgments to ascertain whether financial gain was the motive behind the offence. Where an offence is committed for financial advantage, this is considered an aggravating factor by the court.<sup>xlix</sup> The study found 44% of offences committed by small business owners were assessed by the court as being committed for the purpose of obtaining a financial advantage. The corresponding percentage for “special liability” offenders was 39%. Only 19% of offences committed by corporations were financially motivated – the same proportion as for “ordinary Joe” individuals. Without knowing the sub-classes of offenders that comprise “individuals”, we would be left with the raw, undifferentiated statistic that around 34% of offences committed by individuals were perpetrated for financial gain.

The LEC also has to grapple with the distribution of culpability where the prosecution has charged the corporation and company position holder(s) with the same offence. More complex deliberations and outcomes are framed by the court when a company and company directors/managers are jointly charged and convicted of the offence(s).<sup>i</sup> The LEC has followed the Federal Court’s approach to the imposition of civil penalties for corporations and their directors.<sup>ii</sup> Where the company and the individual (company director) are one and the same offender, otherwise referred to as “a one person company” or the corporation’s “alter ego”, the principle of totality requires the court to make a downward adjustment to the individual sentences to avoid double punishment.<sup>iii</sup> There are also cases where the LEC has ordered a substantial fine on a company director and a nominal fine on the company.<sup>iii</sup>

## Penalties

Although a fine is the most common penalty for each class of offender, there are noticeable differences in the other penalties imposed. Companies and small business owners tend to receive Additional Orders (to acknowledge and make restitution for the environmental harm caused) with, or in lieu of, a fine; whereas “special liability” and “ordinary Joe” offenders received more s 10 orders.<sup>iv</sup> Offending behaviour by corporations and “special liability” directors tended to be treated more sternly by the LEC, especially with regard to monetary penalties. The highest average fines,

xlviii There are similar provisions to s 169 of the *POEO Act* under other NSW environmental protection legislation (eg *NPW Act*, s 175B(1)). Similarly, the *Marine Pollution Act 1987* (rep) imposed liability for criminal acts and omissions on: ship masters (s 8(1)), and ship owners (s 18(1)), the crews of ships (s 8A(1)) and persons involved in marine pollution incidents (s 18A(1)). See *Morrison v Mahon* [2007] NSWLEC 416 per Biscoe J at [45].

xlix It is an aggravating factor under the *Crime (Sentencing Procedure) Act 1999*, s 21A(2)(o).

i Examples include: the pollute waters case of *Fairfield City Council v TT Rubbish Removal Pty Ltd* [2008] NSWLEC 201; the related appeal case of *Ngo v Fairfield City Council* [2009] NSWCCA 241; and, the waste offence cases of: *EPA v Aargus Pty Ltd* [2013] NSWLEC 19; *EPA v Geoff Robinson Pty Ltd* [2011] NSWLEC 14 and *The Hills Shire v Kinnamey Civil & Earthworks Pty Ltd (No 2)* [2012] NSWLEC 95.

ii See n 234 in **Costs and the proportionality principle** at [1.4.1] and **Factoring the type of individual offender into the analysis of sentencing** at [3.9]. The Federal Court cases include *ACCC v ABB Transmission & Distribution Ltd (No 2)* (2002) 190 ALR 169 per Finkelstein J at [45]. Also see *EPA v Alcobell Pty Ltd*, *EPA v Campbell* [2015] NSWLEC 123 per Pain J at [120].

iii *Keir v Sutherland Shire Council* [2004] NSWLEC 754 per McClellan (then) CJ of the LEC at [22]; *The Hills Shire Council v Kinnamey Civil & Earthworks Pty Ltd (No 2)* [2012] NSWLEC 95 per Biscoe J at [39], [42]; *Leichhardt Council v Geitonias Pty Ltd (No 7)* [2015] NSWLEC 79 per Biscoe J at [52]–[63].

iiii For example, in *EPA v Australian Pacific Oil Co Pty Ltd* [2003] NSWLEC 279, two company directors were found liable under the “special executive liability” provisions of s 169 of the *POEO Act* and each received a fine of \$20,000 for the offence against s 143(1)(b) of the Act. The LEC imposed a nominal fine of \$10 on the company for the same offence.

iv See **Table 5** at [2.2.5.2].

around \$44,000 each, were noted for these two groups. By contrast, the average fine for “ordinary Joe” offenders was around half that figure, and the average fine for small business owners was also lower at approximately \$30,000.

Additional Orders, imposed mainly under s 250 of the *POEO Act*, represented three of every 10 penalties for the principal environmental offence. Additional Orders that the LEC can impose may take a number of forms.<sup>lv</sup> An Additional Order may require the offender to take specified action to publicise the offence, the circumstances of the offence, and its environmental consequences. A company also may be required to conduct a specified environmental audit of its activities, or provide targeted training for its employees or contractors. A large proportion of Additional Orders involve the payment of monies by the offender either to fund a specified environmental restoration or enhancement project, or to the Environmental Trust Fund for specific or more general restorative projects.<sup>lvi</sup> Additional Orders involving restorative projects are regularly ordered without or in lieu of a fine (they are less commonly ordered together *with* a fine). The average value of an Additional Order involving an environmental restoration project was just under \$61,000 for a corporation, \$11,000 for a small business owner, and \$10,000 for an “ordinary Joe” individual (special liability offenders did not receive an Additional Order during the study period; or rather it was ordered upon their company).

## Qualitative analysis

The final line of inquiry was a qualitative analysis concentrating on the impact of costs orders on the penalty imposed for the “top five” offences and for native vegetation offences. The latter, predominantly involving unlawful clearing on rural properties, is the focus of much public and political debate, and is a highly contested area of environmental law.<sup>lvii</sup> The qualitative analyses were undertaken because a purely quantitative approach, focusing on the quantum of fines and Additional Orders imposed, presented an incomplete picture of the sentencing process. Furthermore, a sentencing analysis of LEC cases which did not take into account costs orders was not only inadequate but misleading. It was critical to identify and explore, as far as possible, the role and impact of orders for costs — quantified and unquantified — on the sentencing process and, in particular, the determination of the final quantum of any fine or other pecuniary penalty imposed.

## Cases tables

The authors supplemented the quantitative information with a comprehensive case-by-case analysis of sentences and costs across three critical areas of the LEC’s workload: pollute waters offences, waste offences and native vegetation offences.

This information is presented in the report as detailed case tables (see **Cases Tables** in **Volume 2**).

These tables provide highly-relevant sentencing information, ordered in terms of the prevailing sentencing regime (statutory framework) that applied at the time of the offence. The set of cases are also stratified in terms of “like-with-like” cases employing discrete sub-categories such as “Single offence, fined, prosecutor’s costs known”. For each individual case, the following information is provided:

- citation details
- offender type — corporation or individual (separated into special liability offender, small business owner and “ordinary Joe” offender)

lv The Local Court is not authorised to make an order referred to in s 250(1) (c), (d), (e) or (h) of the *POEO Act*. Additional Orders also can be imposed by the Local Court, with similar restrictions, under the following Acts: *NPW Act*, Pt 15 Div 3; *Threatened Species Conservation Act* 1995, Pt 9B Div 3; *Mining Act* 1992, Pt 17A Div 4; *Water Management Act* 2000, Ch 7 Pt 3A; *Pesticides Act* 1999, Pt 10 Div 4.

lvi *POEO Act*, s 250(1)(e); *Environmental Trust Act* 1998.

lvii Notably, the heated debate that preceded the proposed repeal of the *NV Act* 2003 and the Supreme Court trial of farmer Ian Turnbull (*R v Turnbull (No 26)* [2016] NSWSC 847) for the murder of an environmental compliance officer following a long-running dispute over illegal land clearing (see **Case study 2** on pp 132–135).

- Act and section number of the offence(s) committed
- the maximum penalty that applied at the time of offence<sup>lviii</sup>
- the quantum of the fine and/or any Additional Orders
- costs orders (quantified and unquantified) at sentence
- the proportion that costs orders represented of the total pecuniary punishment.

A short factual description of each case is also provided. Where factors critical to the sentencing decision, including costs considerations, were identified in the judgment, these were elaborated upon in the case description using pinpoint references found in the LEC's judgment. Where costs constitute an unusually high or low share of the total "punishment", case law and stated principles are provided to better account for sentencing outcomes. Some sentencing results in the LEC may seem inexplicable unless costs orders and the reasons for the final quantum of monetary penalties are fully exposed.<sup>lix</sup>

## The pervasive influence of costs

It is an incontrovertible fact that costs are a substantial component of punishment in the LEC. The CCA has held that costs are an important aspect of the punishment of environmental offenders and add to the total financial burden or "hit" taken.<sup>lx</sup> This study highlighted the pervasive influence of costs orders on the court's determination of the appropriate fine amount at sentence.

It was found that it is not uncommon for costs orders to be the largest component of the total pecuniary amount — regularly up to 70% or even 80% of the total amount to be paid by the environmental offender. Even in cases where the quantum of costs is not known, the LEC has endeavoured to factor in the likelihood of substantial prosecution costs into the sentencing equation. Costs orders can significantly reduce the capacity of the offender to pay a fine. A downward adjustment may be made to the quantum of the fine imposed. It is not uncommon for the LEC to indicate that it decided to impose a lesser fine to offset the impact of a known costs order or an unknown costs figure predicted to be substantial.<sup>lxi</sup> The proportionality principle requires that the punishment fit the crime. Costs are a critical component of the monetary punishment.

The study analysed the proportion that costs orders represented of the total pecuniary punishment. For a single s 120 pollute waters offence under the current version of the *POEO Act*, it was found that the average fine was \$83,346 where costs were known at time of sentence, but was 48% less, at \$43,333, where costs were unknown. This pattern appears to have also occurred under previous statutory regimes. Under the repealed *Clean Waters Act 1970*, the average fine for a s 16 pollute waters offence where costs were known was just over \$17,000, but where costs were unknown the average fine was below \$11,000. Similarly, under its immediate statutory successor (the *POEO Act*, with lower than current maximum penalties), the average fine

lviii The study period covers existing and preceding legislation. For example, pollute waters offences under the repealed *Clean Waters Act 1970* were examined in addition to such offences under the *POEO Act*. The maximum penalty for a number of offences was increased more than once during the study period. For example, effective from 1 May 2006, the maximum penalty for a s 120 pollute waters offence under the *POEO Act* was quadrupled by Parliament (the previous corresponding maximum penalty under the *POEO Act* being in force from 1 July 1999 to 30 April 2006). Given the maximum penalty is a guidepost for the sentencing court, it is necessary to group the cases for comparative purposes according to the statute and the maximum penalty that applied at the time.

lix For example, Lloyd J commented on the vastly different fine and costs orders he made in *EPA v Cleary Bros (Bombo) Pty Ltd* [2007] NSWLEC 466 compared to those ordered by Preston CJ of the LEC in the associated case of *EPA v Waste Recycling and Processing Corp* (2006) 148 LGERA 299; [2006] NSWLEC 419. Lloyd J noted at [175] that the cases involved "precisely the same offence with precisely the same environmental impact" but resulted in the ordering of very different fines and costs orders because of "vastly different degrees of culpability and vastly different mitigating circumstances" to the offence.

lx *Cumberland Council v Khoury* [2017] NSWLEC 14 per Moore J at [106].

lxi Even before *EPA v Barnes* [2006] NSWCCA 246 per Kirby J at [78] and [88], it was acknowledged by the LEC that costs are a significant impost and act to reduce the size of the monetary penalty (for example, *Director-General of the Dept of Land and Water Conservation v Leverton Pastoral Co Pty Ltd* [2002] NSWLEC 212 per Talbot J at [40]). See general discussion in **Costs as a sentencing factor** at [1.3]. Also **Appendix D** lists the numerous LEC cases that have applied the costs principles espoused in *EPA v Barnes* [2006] NSWCCA 246 at [78] and [88].



for a single pollute waters offence was \$25,190 where costs were known but it was 12% lower, at \$22,169, where costs were unquantified at time of sentencing.

In the period examined, there were 24 convictions for the illegal clearing of native vegetation. These offences normally occur in the context of clearing rural properties of trees and other vegetation to increase agricultural productivity/profitability. The average total pecuniary punishment for a native vegetation offence was close to \$103,000. Prosecutor's costs in native vegetation cases were substantial, averaging at close to \$45,000 (see **Cases Table 3** in **Volume 2**).

## Resolving costs as a sentencing factor

At its inception, the LEC was required to specify the quantum of costs at the time of sentence in accordance with s 52 of the *Land and Environment Court Act* as it applied then. This requirement was removed by the *Courts Legislation Amendment Act 1997* and replaced with a costs assessment process.<sup>lxii</sup> The consequences of this change for sentencing in the LEC were apparently not considered by the Parliament. However, it was an issue which required considerable deliberation. The change effectively removed costs as a known fiscal component in the sentencing process which compromised the LEC's application of sentencing principles, particularly in relation to proportionate sentencing and the offender's capacity to pay. A lack of transparency in the setting of monetary orders beyond fines was one unintended adverse consequence; another was the difficulty in comparing sentences for "like" cases when the costs figure was known in some cases but unknown in others.

The current arrangements — of not requiring all costs to be quantified and disclosed — hinders the court's ability to achieve what has been described as "individualised justice" in sentencing.<sup>lxiii</sup> This is because a substantial and crucial element of the pecuniary punishment is not known by the LEC in a large proportion of cases.

Without factoring costs into the equation, the imposition of what may be perceived as "low" level fines may give the public and legal commentators a false impression of how the LEC punishes environmental offenders. Academic studies in the past have focused predominantly on the quantum of fines imposed by the LEC and the disparity between fine amounts and the available maximum penalties.<sup>lxiv</sup> It is necessary to consider costs in the sentencing result to give a more accurate picture of how environmental offenders are, in fact, punished. This is highly desirable for achieving general deterrence and denunciation<sup>lxv</sup> and to broadcast to the public and "like-minded individuals" of the economic consequences of offending. This approach accords with the statement made by Preston CJ of LEC, in penalising a persistent and recalcitrant waste offender, that "the sentence of the court needs to be of such magnitude as to change the economic calculus of persons in determining whether to comply with or contravene environmental laws".<sup>lxvi</sup>

The quantum of *all* costs as well as the fine amount needs to be disclosed in each judgment when the LEC imposes a sentence. Without this, and on the basis of the fine alone, the court may be unfairly criticised for being too lenient on environmental offenders. Until such time as all costs to be paid by the offender are quantified and available at the time of the determination of the sentence, the LEC risks being exposed to unwarranted criticism for perceived leniency. This study suggests review and legislative reform of costs orders will lead to greater transparency and consistency in sentencing.

lxii See **Removal of requirement to specify costs** at [1.3.2].

lxiii *Elias v The Queen* (2013) 248 CLR 483 at [27]; *R v Whyte* (2002) 55 NSWLR 252 per Spigelman CJ at [147].

lxiv T Poisel, "(Environmental) crime does not pay: the effectiveness of the criminal prosecutions under pollution legislation in NSW" (2013) 18 *Local Government Law Journal* 77 at 81–3; M Hain and C Cocklin, "The effectiveness of the courts in achieving the goals of environment protection legislation" (2001) 18 *EPLJ* 319 at 332.

lxv *Crimes (Sentencing Procedure) Act 1999*, s 3A(b), (f).

lxvi *Bankstown City Council v Hanna* (2014) 205 LGERA 39; [2014] NSWLEC 152 per Preston CJ of the LEC at [152].