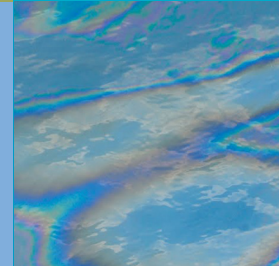
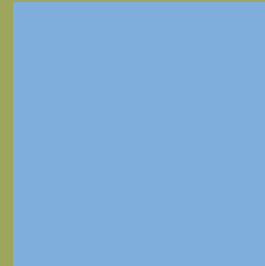
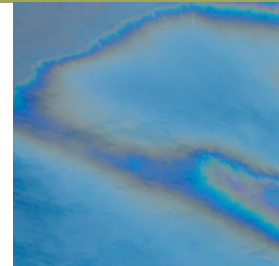
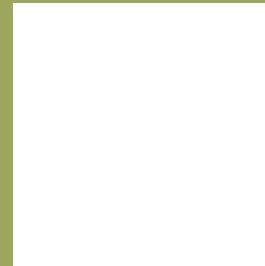
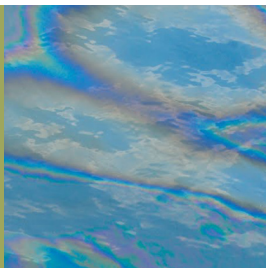


# **Transparent and consistent sentencing**

in the Land and Environment Court of NSW: orders for costs as an aspect of punishment

Volume 1





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### **Volume 1**

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Published in Sydney by the:  
Judicial Commission of NSW  
Level 5, 60 Carrington Street,  
Sydney NSW 2000

DX 886 Sydney

GPO Box 3634  
Sydney NSW 2001  
[www.judcom.nsw.gov.au](http://www.judcom.nsw.gov.au)

National Library of Australia Cataloguing-in-Publication entry  
Creator: Cain, Michael, author.

Title: Transparent and consistent sentencing in the land and environment court of NSW: orders for costs as an aspect of punishment/

Michael Cain, Hugh Donnelly.

ISBN: 9780731356379 (hardback)

Notes: Includes bibliographical references.

Subjects: Environmental protection — New South Wales.

Environmental law — Australia — Cases.

Sentences (Criminal procedure) — New South Wales.

Other Creators/Contributors:

Donnelly, Hugh, 1965- author.

Judicial Commission of New South Wales.

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#### Acknowledgements

The authors would like to thank Amanda Jamieson (Senior Research Officer, Legal) and Ryan Schmidt (Research Officer) for their verification work on the Cases Tables and data checking; the Research Trainees of the Judicial Commission, Amelia Loughland, Alexandra McPherson and Peter Zivkovic for their work checking the details of cases, verifying citations and proofreading earlier drafts; and Veronica Roby (Senior Analyst Programmer) for extracting the data from the Judicial Commission's environmental crime sentencing database.

The authors would also like to thank Pierrette Mizzi (Manager, Research and Sentencing) for her helpful feedback and the work of Maree D'arcy (Librarian) and Stephen Cumines (Manager, Lawcodes) of the Judicial Commission of NSW.

Editor: Phillip Byrne  
Proofreading: Antonia Miller  
Graphic design and typesetting: Lorraine Beal  
Printed by: ASAP Press

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**For Cases Tables 1, 2, and 3 see Volume 2**

## Abbreviations

*Note: all Acts are NSW Acts unless otherwise stated.*

BOCSAR	Bureau of Crime Statistics and Research
CA Act	<i>Clean Air Act 1961 (rep)</i>
CA (MV) Reg	<i>Clean Air (Motor Vehicles and Motor Vehicle Fuels) Regulation 1997 (rep)</i>
CCA	Court of Criminal Appeal (NSW)
CJ of the LEC	Chief Justice of the Land and Environment Court
CLM Act	<i>Contaminated Land Management Act 1997</i>
CP Act	<i>Criminal Procedure Act 1986</i>
CSO	Community service order
CSP Act	<i>Crimes (Sentencing Procedure) Act 1999</i>
Cth	Commonwealth
CW Act	<i>Clean Waters Act 1970 (rep)</i>
DG Act	<i>Dangerous Goods (Road and Rail Transport) Act 2008</i>
EEC	endangered ecological community
EOP Act	<i>Environmental Offences and Penalties Act 1989 (rep)</i>
EPA	Environment Protection Authority
EPA Act	<i>Environmental Planning and Assessment Act 1979</i>
EPL	environment protection licence
ESD	ecologically sustainable development
FM Act	<i>Fisheries Management Act 1994</i>
ICO	Intensive Correction Order
J Act	<i>Justices Act 1902 (rep)</i>
JIRS	Judicial Information Research System
JOB	Judicial Officers' Bulletin
LC	Local Court
LEC	Land and Environment Court (NSW)
MCCOC	Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (also known as the Criminal Law Officers Committee)
MP Act	<i>Marine Pollution Act 1987 (rep)</i>
NPW Act	<i>National Parks and Wildlife Act 1974</i>
NV Act	<i>Native Vegetation Act 2003</i>
NVC Act	<i>Native Vegetation Conservation Act 1997 (rep)</i>
OEH	Office of Environment and Heritage (NSW)
P Act	<i>Pesticides Act 1978 (rep)</i>
Pest. Act	<i>Pesticides Act 1999</i>
P(O) Act	<i>Petroleum (Onshore) Act 1991</i>
PC Act	<i>Pollution Control Act 1970 (rep)</i>
POEO Act	<i>Protection of the Environment Operations Act 1997</i>
POEO(CA) Reg	<i>Protection of the Environment Operations (Clean Air) Regulation 2002 (rep)</i>
RFI Act	<i>Rivers and Foreshores Improvement Act 1948 (rep)</i>
RRT Act	<i>Road and Rail Transport (Dangerous Goods) Act 1997 (rep)</i>
TPO	Tree preservation order
WMM Act	<i>Waste Minimisation and Management Act 1995 (rep)</i>



## 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/CriminalCodePractitionerGuidelinesMarch2002/GuideforPractitioners.pdf](http://www.ag.gov.au/Publications/Documents/CriminalCodePractitionerGuidelinesMarch2002/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>iiii</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 Geitonina 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].

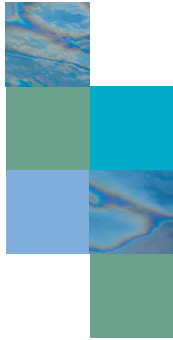
lxiii *Elias v The Queen* (2013) 248 CLR 483 at [27]; *R v Whyte* (2002) 55 NSWLR 252 per Spigelman CJ at [147].

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].





# Transparent and consistent sentencing

## in the Land and Environment Court of NSW: orders for costs as an aspect of punishment<sup>1</sup>

### 1. Introduction

An environmental crime sentencing database was established by the Judicial Commission of NSW (the Commission) in conjunction with the NSW Land and Environment Court (LEC) in 2008.<sup>2</sup> This study utilises the data contained within that database, and employs both qualitative and quantitative research methods to analyse sentences imposed upon environmental offenders by the LEC in the 15-year period from 1 January 2000 to 28 February 2015 (the study period). This study comprises two volumes. **Volume 1** (this part) presents and discusses the main findings of this study. **Volume 2** contains **Cases Tables 1, 2 and 3** that detail the LEC cases relating to pollute waters offences, waste offences and native vegetation offences, respectively.

This study covers all principal offences<sup>3</sup> dealt with by the LEC with a particular focus on sentencing for the five most common offences (“Top 5” offences). Given the public and political interest in how the LEC punishes offenders for the unlawful removal of trees and native vegetation, this study also provides a detailed analysis of the sentences imposed by the LEC for offences committed under the *Native Vegetation Act* 2003 (NV Act)<sup>4</sup> and for breaches of tree preservation orders (TPOs).<sup>5</sup>

This study utilises sentencing judgments delivered by the LEC in addition to coded information from the environmental crime sentencing database. The LEC provides detailed information and reasons for each sentencing decision. A typical decision identifies all the relevant sentencing factors under specific headings. The court addresses each sentencing factor by reference to the facts of the case. In this sense, there is a high degree of transparency in the decision-making process for serious environmental crimes in NSW.

- 1 The views in this Monograph are the views of the individual authors and do not represent any official views of the Judicial Commission of NSW (the Commission), nor are they necessarily shared by all members of the staff of the Commission. While all reasonable care has been taken in the preparation of this publication, no liability is assumed for any errors or omissions. The information in this Monograph is current as at 30 May 2017.
- 2 The environmental crime sentencing database is a record of the NSW Land and Environment Court (LEC) cases that have been coded, entered and verified. It identifies the various objective and subjective factors of each case as well as the sentencing orders made. For more information see B Preston and H Donnelly, *Achieving consistency and transparency in sentencing for environmental offences*, Judicial Commission of NSW, Research Monograph 32, June 2008 (also published in (2008) 32 *Crim LJ* 214). In particular, see the discussion under “Development of the system for environmental offences” at p 23. The then Attorney General (NSW) and Minister for Justice, the Hon J Hatzistorgos, launched the environmental crime sentencing database on 30 April (2008) (see B Preston and H Donnelly, “Environmental crime sentencing database is a world first” (2008) 20(4) *JOB* 1, at [www.judcom.nsw.gov.au/publish/job/vol20/may/article1.html](http://www.judcom.nsw.gov.au/publish/job/vol20/may/article1.html), accessed 16 May 2017).
- 3 Where an offender commits more than one offence, the principal offence is the offence which receives the most severe sentence. Contempt offences dealt with by the LEC were not included.
- 4 The *Native Vegetation Act* 2003 (NV Act) is to be repealed on the commencement of s 3 of the *Local Services Amendment Act* 2016 which is cognate with the *Biodiversity Conservation Act* 2016.
- 5 A tree preservation order (normally abbreviated to “TPO”) is generally part of the environmental planning and protection laws of NSW local councils. For example, *Sutherland Shire Tree and Bushland Preservation Order* 2001 at [www.sutherlandshire.nsw.gov.au/files/assets/website/documents/development/kurnell-dcp-superseded/f-m/landscape-010804\\_1.pdf](http://www.sutherlandshire.nsw.gov.au/files/assets/website/documents/development/kurnell-dcp-superseded/f-m/landscape-010804_1.pdf), accessed 16 May 2017.

This study will illustrate, however, that there are also aspects of the sentencing process that can be improved, particularly in relation to costs. The prosecutor, following the finding of guilt, requests the LEC to make an order that the offender pay its costs.<sup>6</sup> For the purposes of sentencing, the prosecutor's costs are an important aspect of the punishment and can be taken into account in considering the appropriate penalty.<sup>7</sup> This approach to costs in the sentencing exercise sets the LEC apart from other courts exercising criminal jurisdiction.

A focus and theme throughout this study is to inquire how this unique state of affairs impacts upon the sentencing process of the LEC. A conventional analysis of sentencing usually involves focusing purely upon the penalties imposed by a court. However, in the case of the LEC, this approach would be myopic and deficient because fines are by far the most common penalty and costs are an important part of the criminal proceedings and result in an additional financial liability to be borne by the environmental offender.<sup>8</sup>

In order to give an accurate picture of the severity of the overall punishment it has been necessary to have regard to the costs figure as well as the sentence(s) imposed. This study was hampered by the fact that often the costs figure is not known at the time of sentencing,<sup>9</sup> or the court relies upon an estimate of the professional costs<sup>10</sup> given by the prosecution. The systemic lack of information about costs makes it difficult to assess the overall severity or leniency of sentences imposed by the LEC. This study settles on a method which attempts to gauge the role of costs by separating cases where the costs figure is known, from cases where it is not known. It should be noted, that there is no public record of whether the prosecutor actually receives its costs as costs effectively become a private matter between the parties after the sentencing proceedings.

A strong argument can be made to further increase the transparency of the sentencing process in the LEC by ensuring that all monetary costs to be paid by the offender are known to the court at the time of sentencing and are recorded as part of the judgment. This may involve a change in sentencing practices. If the total monetary amount is made known, this would inform the offender, like-minded individuals and the public of the actual economic deterrent of criminal proceedings and the consequent sanctions. As the High Court remarked in the sentencing appeal of *Markarian v The Queen*:<sup>11</sup>

The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public.

One of the key findings of this study is that Tier 1 offences under the *Protection of the Environment Operations Act 1997 (POEO Act)* are very rarely charged. The authors identified only nine Tier 1 offences over the 15-year study period. The *POEO Act* was enacted nearly 20 years ago.<sup>12</sup> It is ripe for review, at least, to ascertain why Tier 1 offences are charged so rarely and why prosecutors also do not plead alternative charges — that is, charge a Tier 1 offence and a Tier 2 offence as an alternative included offence. This is standard practice for other criminal offences.<sup>13</sup> Perhaps consideration could be given to an alternative verdict provision for Tier 1 and 2 offences similar to s 61Q of the *Crimes Act 1900*.

6 *Land and Environment Court Act 1979 (LEC Act)*, s 41 provides that Ch 4, Pt 5 of the *Criminal Procedure Act 1986 (CP Act)* applies to proceedings in Class 5 of the court's jurisdiction. Sections 170(3)(c), 257B and 257G of the *CP Act* provide a statutory power for the LEC to make an order for prosecution costs. Previously, the power existed under s 52 of the *LEC Act*. See Leeming JA's historical discussion in *EPA v Truegrain Pty Ltd* (2013) 85 NSWLR 125 at [81]–[84].

7 *Harris v Harrison* (2014) 86 NSWLR 422 (*Harris*) per Simpson J at [100].

8 A typical costs order is: "The defendant is ordered to pay the reasonable legal costs and disbursements of the prosecutor as agreed or assessed." See for example *Turnbull v Chief Executive of the Office of Environment and Heritage* [2015] NSWCCA 278 per Button J at [96].

9 For example, considering the 41 pollute waters cases dealt with by the LEC under the current sentencing regime, six (almost 15%) did not record a figure or estimate of the prosecutor's costs.

10 As defined in s 117(3) of the *CP Act*, "professional costs" means costs (other than court costs) relating to professional expenses and disbursements (including witnesses' expenses) in respect of proceedings before a court.

11 (2005) 228 CLR 357 per Gleeson CJ, Gummow, Hayne and Callinan JJ at [39].

12 The *Protection of the Environment Operations Act 1997 (POEO Act)* was proclaimed and became operational on 1 July 1999 (GG No 178 of 1998, p 9952).

13 See generally *James v The Queen* (2014) 253 CLR 475 at [14] citing *Brown v The King* (1913) 17 CLR 570 per Isaacs and Powers JJ at 591. At common law the jury could not convict of a misdemeanour if the indictment charged a felony, but was at liberty to convict of a less aggravated felony (or misdemeanour if the indictment charged a misdemeanour) provided the words of the indictment covered the lesser offence.

## 1.1 The Land and Environment Court of NSW

The Land and Environment Court (LEC) is a specialist court established on 1 September 1980 under the *Land and Environment Court Act 1979* (*LEC Act*). The LEC deals with a wide range of environmental and planning matters, which come under the broad domain of environmental law (see **Text Box 1** below). The prime objective of environmental laws is to prohibit, restrict and ideally, reverse environmental damage.

### Text Box 1

*“Environmental law” is the body of law that regulates human impacts on the environment. These laws comprise legal rights, duties, powers and liabilities contained in international treaties, customary international law, domestic legislation, and the Common Law. The extent and exercise of these laws can depend on legislative and administrative objects, policies and principles. Environmental law includes, but is not limited to, traditional categories such as environmental protection, conservation, pollution, mining, fisheries, cultural heritage, environmental impact assessment, and planning and development laws. It is a very wide area of law without precise boundaries ... (As) suggested over a decade ago, the boundaries of environmental law remain indistinct and it is a functional classification [rather than a legalistic one] that defies ordered “pigeon holing”.*

C McGrath “Does environmental law work?” (below n 29, p 10).

The LEC enjoys the benefits of a wide jurisdiction combined in a single court and is “the first specialist environmental, superior court in the world”.<sup>14</sup> The LEC has equal standing with the Supreme Court of NSW.<sup>15</sup> Section 72 of the *LEC Act* permits Class 5 proceedings commenced in the Supreme Court to be transferred by the Supreme Court to the LEC.<sup>16</sup> Civil proceedings may also be transferred between the Supreme Court and the LEC.<sup>17</sup>

The environmental matters examined in this study reflect the LEC’s jurisdiction to deal with Class 5 — environmental planning and protection criminal enforcement — matters which are heard and disposed of summarily.<sup>18</sup> The LEC can only deal with offences covered by particular Acts and sections referred to in the *LEC Act*, although the number of applicable Acts number around two dozen.<sup>19</sup> These Acts play a critical role in managing the environmental and health impacts of human development and pollution on natural habitats, flora and fauna and human communities. Class 5 summary criminal enforcement proceedings typically involve action taken by government authorities to prosecute offences against environmental protection or planning laws.<sup>20</sup>

14 Judicial Commission of NSW, *Land and Environment Court of NSW Commissioners’ Handbook*, 2010-, “The court and its members” at [1-000].

15 Judges of the LEC have the same rank, title, status and precedence as judges of the Supreme Court, and are eligible to act as judges of the Supreme Court (the reverse applies as well), *ibid*, [1-200].

16 *LEC Act*, s 72.

17 *Civil Procedure Act 2005*, s 149B.

18 *LEC Act*, s 21; and *CP Act*, s 245(1) and (2).

19 *ibid* s 21. This section is provided in full at **Appendix A**.

20 According to the LEC website, 41% of the prosecutions commenced in 2014 were brought before the LEC by the Environment Protection Authority (EPA) or the NSW Office of Environment and Heritage, 51% by Local Councils and 8% by the Division of Planning and Infrastructure. (See [www.lec.justice.nsw.gov.au/Pages/types\\_of\\_disputes/class\\_5/class\\_5.aspx](http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_5/class_5.aspx), accessed 16 May 2017.)

Criminal matters before the LEC are heard and disposed of before a single judge without a jury,<sup>21</sup> with strict rules of evidence that apply in criminal trials. The *Evidence Act* 1995 does not apply to sentencing proceedings “only if the court directs that the law of evidence applies in the proceeding” or applies “only in relation to specified matters”.<sup>22</sup> Fact finding is a critical aspect of sentencing proceedings. Matters which are adverse to an offender must be established beyond reasonable doubt by the prosecution and matters in mitigation must be proved by the offender on the balance of probabilities.<sup>23</sup>

The penalty or penalties and other orders available to the LEC depend upon the relevant offence provisions and specific statutes. For offences which carry a maximum of full-time imprisonment, such as Tier 1 offences under the *POEO Act*, all the penalties under the *Crimes (Sentencing Procedure) Act* 1999 (*CSP Act*) are available to the LEC,<sup>24</sup> including a fine.<sup>25</sup> However, for Tier 2 offences, which have a fine as the maximum penalty, neither full-time imprisonment, nor the alternatives to imprisonment (ie an intensive correction order, suspended sentence, home detention), are available sentencing options. In the LEC, fines are the most common penalty. The LEC can also make Additional Orders based on restorative justice principles, such as a direction for the offender to repair the environmental damage caused, or to make payment to an environmental project to allow specific or general regeneration work to be performed;<sup>26</sup> alternately, the court may order that the offender pay a specified amount to the Environmental Trust for general environmental purposes.<sup>27</sup>

It is important to note that the LEC is still a relatively new jurisdiction and its jurisprudence, compared with that of the more long-standing higher courts, is also relatively new and evolving. As B Preston noted: “Environmental law is a burgeoning field”.<sup>28</sup> More recently, in 2010, this idea was further deliberated:

Environmental legal systems continue to evolve rapidly. The question can now be meaningfully asked: why are environmental legal systems constantly evolving? The major reason environmental legal systems continue to evolve and should be expected to continue to do so in the future is that they deal with complex, difficult policy problems that are themselves changing in nature and scale and for which there are often large gaps in knowledge and information.<sup>29</sup>

The two most prominent statutes for the LEC are the *POEO Act* and the *Environmental Planning and Assessment Act* 1979 (*EPA Act*). The *POEO Act* is the principal statute dealing with environmental pollution. It defines criminal offences in relation to air, water, land and noise pollution.<sup>30</sup> The *EPA Act* regulates competing land use in NSW and deals with development applications and other planning-related issues, including breaches of environmental planning laws.<sup>31</sup>

21 *LEC Act*, s 6.

22 *Evidence Act* 1995, s 4(2).

23 *Filippou v The Queen* (2015) 256 CLR 47 per French CJ, Bell, Keane and Nettle JJ at [64].

24 This includes bonds imposed under ss 9 and 10 of the *Crimes (Sentencing Procedure) Act* 1999 (*CSP Act*), a conviction order under s 10A, full-time imprisonment, home detention, intensive correction orders (ICOs), community service orders (CSOs) and suspended sentences.

25 *Fines Act* 1996.

26 Under the *POEO Act* where the court finds an offence against the Act or regulations proved, it may make Additional Orders “in addition to any penalty that may be imposed” (s 244(2)) or “regardless of whether any penalty is imposed, or other action taken, in relation to the offence” (s 244(3)). These Additional Orders are set out under Pt 8.3 of the Act headed “Court orders in connection with offences”. Similarly, s 126(3)(a) of the *EPA Act* permits the court to make an Additional Order “to plant new trees and vegetation and maintain those trees and vegetation to a mature growth”. This order can be made “in addition to or in substitution for any pecuniary penalty imposed”: s 126(3). There are similar powers under the *National Parks and Wildlife Act* 1974 (*NPW Act*), the *Threatened Species Conservation Act* 1995, the *Mining Act* 1992, the *Water Management Act* 2000 and the *Pesticides Act* 1999.

27 *POEO Act*, s 250(1)(e). The Environmental Trust was established under the *Environmental Trust Act* 1998.

28 B Preston, “Principled sentencing for environmental offences — Part 1: Purposes of sentencing”, (2007) 31(2) *Crim LJ* 91 at 91.

29 C McGrath, *Does environmental law work? How to evaluate the effectiveness of an environmental legal system*, Lambert Academic Publishing, 2010, p 13.

30 *POEO Act*, Ch 5.

31 For example, ss 76A, 76B and 125 of the *EPA Act*.



The *POEO Act* created a three-tiered system of offences with differential levels of jurisdictional responsibility and associated penalties.<sup>32</sup> Tier 1 offences are the most serious of environmental offences, involving wilful or negligent conduct that causes, or is likely to cause, harm to the environment.<sup>33</sup> Proceedings for a Tier 1 offence may be dealt with either summarily before the LEC in its summary jurisdiction, or on indictment before the Supreme Court.<sup>34</sup> Tier 1 offences cannot be dealt with by the Local Court.<sup>35</sup>

Tier 1 offences attract the highest maximum penalties, currently:

- in the case of a *corporation* — to a penalty not exceeding \$5 million for an offence that is committed wilfully or \$2 million for an offence that is committed negligently, or
- in the case of an *individual* — to a penalty not exceeding \$1 million or 7 years' imprisonment, or both, for an offence that is committed wilfully or \$500,000 or 4 years' imprisonment, or both, for an offence that is committed negligently.

However, if Tier 1 proceedings are brought in the LEC, the maximum period of imprisonment that may be imposed is two years.<sup>36</sup> The *POEO Act* contains a general defence for Tier 1 offences. It is established if the alleged offender had a lawful authority to do the act or that the offence was due to causes over which the person had no control and he/she took reasonable precautions and exercised due diligence to prevent the commission of the offence.<sup>37</sup> Where the prosecution relies on special liability of a director (etc) of a corporation, it is a defence that the position holder "used all due diligence to prevent the contravention by the corporation".<sup>38</sup>

Over the course of the study period, there were only nine Tier 1 offences under the *POEO Act*.<sup>39</sup> This may be due in part to the manner in which the offence provision has been cast. As stated above, for a Tier 1 offence the prosecution must prove beyond reasonable doubt wilful or negligent conduct by the accused that causes, or is likely to cause, harm to the environment. Wilful and negligent conduct are quite separate and different forms of criminal liability. Wilfulness requires the prosecution to prove beyond reasonable doubt that the accused committed an act in a manner which harmed, or was likely to harm, the environment, which he or she either intended or, if intention cannot be proved, was aware of the consequences or likely consequences of the act.<sup>40</sup>

A Tier 1 offence based upon wilful conduct has only been established once.<sup>41</sup> In terms of modern legislative drafting, "wilful" (conduct) is an antiquated 19th century expression. It was disregarded by the Model Criminal Code Officers Committee (MCCOC) in its 1992 Report<sup>42</sup> and in the

32 See **Appendix B** (Part 1) for an overview of the jurisdictional responsibilities and overlaps with regard to the *POEO Act*.

33 *POEO Act*, ss 16(2), 115(1), 116(1), 117(1). See also the use of "wilfully" in s 112(1) for the offence of "wilfully delays or obstructs" a person who is carrying out any action in compliance with an environment protection notice in s 112.

34 *POEO Act*, s 214. As at date of publication, not a single environmental offence has been dealt with on indictment to the Supreme Court of NSW.

35 *ibid*. The maximum penalty for Tier 1 offences (s 119) exceeds the jurisdictional limit of the Local Court. The maximum monetary penalty that the Local Court may impose for any offence under the *POEO Act* is 1,000 penalty units (\$110,000): s 215(2).

36 *POEO Act*, s 214(2). This limit is set for the LEC "despite any other provision of this Act".

37 *POEO Act*, s 118.

38 For example, see s 169(1)(c) of the *POEO Act*. G Bates (ed), *Environmental Law in Australia*, 6th edn, LexisNexis, 2006, [9.16] at p 245, described the notion of "due diligence" as "taking sufficient precautions to avoid environmental harm such that a court could conclude that the defendant was not at fault", but goes on to say that while "[t]he concept is well understood in areas such as corporations and trade practices law ... there is still considerable uncertainty over what may be involved in environmental due diligence". [Citations removed.]

39 Or under its predecessor, the *Environmental Offences and Penalties Act 1989 (EOP Act)* (rep).

40 In *EPA v N* (1992) 26 NSWLR 352, the court held for a materially similar offence under s 5(1) of the *EOP Act* (rep) which had wilful as an ingredient that "the prosecution must establish that the defendant wilfully (or deliberately) disposed of waste in a manner which harmed or was likely to harm the environment either intending or with an awareness of such consequences or likely consequences of his action": Hunt CJ at CL at 359 (Enderby and Allen JJ agreeing).

41 *EPA v Gardner* (unrep, 7/11/97, NSWLEC). This case preceded the 15-year study period.

42 The Criminal Law Officers Committee of the Standing Committee of the Attorneys-General (also later known as the Model Criminal Code Officers Committee (MCCOC)), *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*, 2002, p 49, at [www.ag.gov.au/Publications/Documents/CriminalCodePractitionerGuidelinesMarch2002/GuideforPractitioners.pdf](http://www.ag.gov.au/Publications/Documents/CriminalCodePractitionerGuidelinesMarch2002/GuideforPractitioners.pdf), accessed 16 May 2017. See **Case study 1** on pp 51–52.

subsequent Criminal Code.<sup>43</sup> Under the Code, a fault element for a particular offence may only be intention, knowledge, recklessness or negligence. The use of “wilfully” by the NSW Parliament in the *POEO Act* in 1997 — taken from the repealed *Clean Waters Act* 1970<sup>44</sup> (*CW Act*)— did not reflect prevailing views at the time concerning criminal liability. Given the approach of the MCCOC perhaps the concepts of intention or recklessness would have been more appropriate standards of mens rea than “wilfully”.

Recklessness<sup>45</sup> at common law is established if the fact finder is satisfied beyond reasonable doubt that the damage is caused recklessly: ie the accused realised that some damage may possibly result by his/her actions yet he/she went ahead and acted as he/she did. It is not necessary that the accused realised the degree of damage that was in fact caused provided that he/she realised that some damage of that type would possibly occur. The prosecution must show the accused turned his or her mind to the consequences of his/her act and at least realised the possibility of some damage of that type occurring.

A Tier 1 offence based on negligence, on the other hand, requires the application of an objective test similar to the crime of manslaughter. The prosecution must prove that the risk of environmental harm was foreseeable to the reasonable person in the position of the defendant.<sup>46</sup> The prosecution is not required to prove “whether the defendant subjectively foresaw the risk.”<sup>47</sup> Negligence was the basis of the charges for all nine Tier 1 offences reported in this study.

It should be noted that apart from abuse of process, the LEC has no control over which charge is brought by the prosecution.<sup>48</sup> The selection of the charge is within the “absolute discretion” of the prosecutor.<sup>49</sup> The rationale for this is to maintain “the separation of the executive power in relation to prosecutorial decisions and the judicial power to hear and determine criminal proceedings”<sup>50</sup> or, put another way, “the independence and impartiality of the judicial process would be compromised if courts were perceived to be in any way concerned with who is to be prosecuted and for what.”<sup>51</sup>

In assessing whether criminal legislation enacted for environmental crime is effective, it is necessary to take into account the prosecutor’s charging practices. It is well established that the prosecutor’s selection of the charge has a real bearing on the sentence.<sup>52</sup>

43 The Model Criminal Code was prepared by the Parliamentary Counsel but the Criminal Code itself is a collation of draft provisions in various separate reports.

44 The *Clean Waters Act* 1970 (*CW Act*) was repealed by Sch 3 to the *Protection of the Environment Operations Act* 1997 No 156 with effect from 1 July 1999.

45 See generally *Aubrey v The Queen* [2017] HCA 18 at [46] approving: *R v Coleman* (1990) 19 NSWLR 467 per Hunt J at 475; *R v Stokes and Difford* (1990) 51 A Crim R 25 per Hunt J at 40–41; *Pengilly v The Queen* [2006] NSWCCA 163 per McColl JA at [45]; *Chen v The Queen* [2013] NSWCCA 116 per Button J at [65]. Also see Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2nd edn, 2002–, “Suggested direction — recklessness” at [4-085].

46 *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. As to manslaughter, see *R v Lavender* (2005) 222 CLR 67 at [60]; *Patel v The Queen* (2012) 247 CLR 531 per French CJ, Hayne, Kiefel and Bell JJ at [88].

47 *EPA v N* (1992) 26 NSWLR 352 per Hunt CJ at CL at 359.

48 *Maxwell v The Queen* (1996) 184 CLR 501 per Dawson and McHugh JJ at 514 and Gaudron and Gummow JJ at 534. In that case, the trial judge had rejected a plea to a charge of manslaughter on the basis that a murder charge was more appropriate. The High Court held that the judge had no power to reject the plea.

49 *Elias v The Queen* (2013) 248 CLR 483 per French CJ, Hayne, Kiefel, Bell and Keane JJ at [33].

50 *Likiardopoulos v The Queen* (2012) 247 CLR 265 per French CJ at [2].

51 *ibid* per Gummow, Hayne, Crennan, Keifel and Bell JJ at [37].

52 *Elias v The Queen* (2013) 248 CLR 483 per French CJ, Hayne, Kiefel, Bell and Keane JJ at [34].



Proceedings for a Tier 2 offence are dealt with summarily either before the LEC or the Local Court.<sup>53</sup> Tier 2 offences are often, but not always, strict liability offences.<sup>54</sup> The prosecution does not have to prove as part of the ingredients of the offence that the defendant was negligent, reckless or intended to commit the offence.<sup>55</sup> However, a person is not criminally liable for an act or omission if he or she holds an honest and reasonable belief in a state of facts, which, if true, would make the act or omission innocent.<sup>56</sup> The defendant must discharge an evidential onus and then the prosecution must prove he or she did not have a honest and reasonable mistaken belief about facts, which if true, would render his/her actions innocent.<sup>57</sup>

Tier 3 offences are “tier 2 offences that may be dealt with under Part 8.2 of the *POEO Act* by way of penalty notice”.<sup>58</sup> They are commonly referred to as “penalty notice offences”.<sup>59</sup> Payment of the penalty notice amount is not regarded as an admission of criminal liability.<sup>60</sup>

## 1.2 The sentencing task

As a general observation, sentencing is regarded as one of the most difficult and controversial tasks performed by the courts. In the foreword to the Commission’s *Sentencing Bench Book*, Spigelman CJ opined:

The reason why debate about sentencing will know no rest is because the sentencing task has always been, and will continue to be, a process of balancing overlapping, contradictory and incommensurable objectives. The preservation of a broad sentencing discretion is critical to the ability of the criminal justice system to ensure justice is served in all of the extraordinary variety of circumstances of individual offences and individual offenders. The ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives, including deterrence, retribution and rehabilitation. These objectives do not always point in the same direction. The requirements of justice and the requirements of mercy are often in conflict, but we live in a society which values both justice and mercy.<sup>61</sup>

The High Court has described sentencing as:

a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment usually expressed in time or money.<sup>62</sup>

53 *POEO Act*, s 215(2). If any such proceedings are brought in the Local Court, the maximum monetary penalty that the court may impose for the offence is 1,000 penalty units, despite any other provision of this Act.

54 For example, in *EPA v Bulga Coal Management Pty Ltd* [2014] NSWLEC 5, it was held that the offence under s 148(2) of the *POEO Act* (Pollution incidents causing or threatening material harm to be notified) “is not a strict liability offence ... the prosecutor must prove as a subjective fact that the defendant was aware of a pollution incident which caused or threatened material harm which it failed to notify as soon as practicable”: Pain J at [95].

55 “The sole question for the trier of fact is whether the defendant committed the proscribed act” cited in L Levenson, “Good faith defenses: reshaping strict liability crimes” (1993) 78(3) *Cornell L Rev* 401 at 420.

56 *CTM v The Queen* (2008) 236 CLR 440 per Gleeson CJ, Gummow, Crennan and Kiefel JJ at [8].

57 *He Kaw Teh v The Queen* (1985) 157 CLR 523, cited in *EPA v Bulga Coal Management Pty Ltd* [2014] NSWLEC 5 per Pain J at [59] and *EPA v Shannongrove Pty Ltd* [2010] NSWLEC 162 per Craig J at [148].

58 *POEO Act*, s 114(3).

59 *POEO Act*, s 222: a “penalty notice offence” is an offence against this Act or the regulations that is prescribed by the regulations for the purposes of this Division, other than an offence arising under Pt 5.2 (Tier 1 offences). Column 1 of Sch 6 of the *Protection of the Environment Operations (General) Regulation* 2009 sets out the offences under the *POEO Act* that can be dealt with by way of penalty notices.

60 *POEO Act*, s 225. Payment of the penalty notice amount is not regarded as an admission of liability for the purpose of, and does not in any way affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence. Where the penalty notice amount is paid, the person is not liable to any further proceedings for the alleged offence: s 225(2).

61 See [www.judcom.nsw.gov.au/benchbks/sentencing/foreword.html](http://www.judcom.nsw.gov.au/benchbks/sentencing/foreword.html), accessed 16 May 2017.

62 *Weininger v The Queen* (2003) 212 CLR 629 per Gleeson CJ, McHugh, Gummow and Hayne JJ at [24].

In *Markarian v The Queen*<sup>63</sup>, the court explained that, ordinarily, there is no single route that a sentencer must take in arriving at an appropriate sentence:

The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence [*Pearce v The Queen* (1998) 194 CLR 610 at [46]]. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies [*Johnson v The Queen* (2004) 78 ALJR 616 per Gleeson CJ at [5], per Gummow, Callinan and Heydon JJ at [26]].<sup>64</sup>

More recently, in 2015, the High Court has described the sentencing task as a process of weighing the relevant considerations and applying settled sentencing principles:

in criminal proceedings the imposition of punishment is a uniquely judicial exercise of intuitive or instinctive synthesis of the sentencing facts as found by the sentencing judge ... and the judge's relative weighting and application of relevant sentencing considerations in accordance with established sentencing principle. [Footnote omitted].<sup>65</sup>

It is not sufficient for a judge to simply state the general sentencing principles without explaining how the principles are applied in the case.<sup>66</sup> These principles have to be applied to achieve what the High Court describes as “individualised justice”:

The administration of the criminal law involves individualised justice, the attainment of which is acknowledged to involve the exercise of a wide sentencing discretion.<sup>67</sup>

In a series of judgments<sup>68</sup> and extra judicial articles,<sup>69</sup> the Chief Judge of the LEC articulated the sentencing considerations and principles that apply to environmental offences. These sentencing principles are routinely set out by the court. As declared in *EPA v Straits (Hillgrove) Gold Pty Ltd*,<sup>70</sup> and set out in full with regard to pollute waters offences, “these principles emerge from the legislation and the authorities” including a recent English Court of Appeal decision.<sup>71</sup> The principled, consistent and transparent sentencing of environmental offences is recognised both as a difficult process of decision-making and a highly desired outcome for the LEC.<sup>72</sup> In the course of aiming to achieve individualised justice,<sup>73</sup> the court must “balance often incommensurable factors and

63 (2005) 228 CLR 357 per Gleeson CJ, Gummow, Hayne and Callinan JJ at [27].

64 *ibid.*

65 *Commonwealth of Aust v Director, Fair Work Building Industry Inspectorate; CFMEU v Director, Fair Work Building Industry Inspectorate* (2015) 90 ALJR 113, per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [56].

66 *R v Van Ryn* [2016] NSWCCA 1 per RA Hulme J at [123].

67 *Elias v The Queen* (2013) 248 CLR 483 per French CJ, Hayne, Kiefel, Bell and Keane JJ at [27].

68 *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 235; [2006] NSWLEC 34; *EPA v Waste Recycling and Processing Corp* (2006) 148 LGERA 299; [2006] NSWLEC 419; *EPA v Snowy Hydro Pty Ltd* (2008) 162 LGERA 273; [2008] NSWLEC 264; *Director-General of the Dept of Environment and Climate Change v Rae* (2009) 168 LGERA 121; [2009] NSWLEC 137; *EPA v Ghossayn* [2009] NSWLEC 181; *EPA v Transpacific Industries Pty Ltd* [2010] NSWLEC 85; and, *EPA v Hanna* [2010] NSWLEC 98.

69 B Preston, “Principled sentencing for environmental offences — Part 2: Sentencing considerations and options” (2007) 31(3) *Crim LJ* 142; for a summary see, B Preston, “Sentencing for environmental crime”, 2006 18(6) *JOB* 1.

70 (2010) 174 LGERA 314; [2010] NSWLEC 114 per Biscoe J at [60].

71 *ibid.* Biscoe J at [59] reports:

Authorities in this Court reviewing sentencing principles and the appellate decisions include *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34, 145 LGERA 235; *EPA v Waste Recycling and Processing Corporation* [2006] NSWLEC 419, 148 LGERA 299; *EPA v Snowy Hydro Pty Ltd* [2008] NSWLEC 264, 162 LGERA 273; *Director-General of the Dept of Environment and Climate Change v Rae* [2009] NSWLEC 137, 168 LGERA 121; *EPA v Ghossayn* [2009] NSWLEC 181; *EPA v Transpacific Industries Pty Ltd* [2010] NSWLEC 85; and *EPA v Hanna* [2010] NSWLEC 98.

Also referred to by his Honour at [60] is the English Court of Appeal case of *R v Thames Water Utilities Ltd* [2010] EWCA Crim 202; 3 All ER 47 per Sweeney J at 55–57.

72 B Preston and H Donnelly 2013, “Principled sentencing for environmental offences: structure, statistics, trends and challenges”, 2013 AELERT Conference, 13 November 2013, Melbourne Australia, pp 1–2.

73 *Elias v The Queen* (2013) 248 CLR 483 per French CJ, Hayne, Kiefel, Bell and Keane JJ at [27].

to arrive at a sentence that is just in all of the circumstances”.<sup>74</sup> A detailed discussion of relevant objective and subjective sentencing factors as applied by the LEC to environmental protection and environmental planning offences is set out elsewhere in this Monograph.<sup>75</sup>

In the case of offences under the *POEO Act*, s 241 sets out what may be described as overarching sentencing considerations, as that term is used in *Markarian* quoted above.<sup>76</sup> Section 241(1) of the *POEO Act* provides the following matters that a court “is to” take into consideration when imposing a penalty for an offence against that Act (so far as they are relevant):

- (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.

In addition, s 241(2) states that the court may take into consideration other matters that it considers relevant. The stated objects of the statute, common law sentencing principles and the provisions of the *CSP Act* are relevant matters. Sections 3A (“Purposes of sentencing”), 21A (“Aggravating, mitigating and other factors in sentencing”) and 22 (“Guilty plea to be taken into account”) of the *CSP Act* are also relevant. The sentencing discretion allows the court to select the most appropriate penalty from a range of options available under the specific provisions of the statute creating the offence. In addition, the *CSP Act* contains further penalty options for the court. Penalties differ in type and quantum.<sup>77</sup> The maximum penalty being generally set by the particular statute or regulation creating the offence.<sup>78</sup>

It is recognised that decisions made by intermediate courts of appeal provide the most useful guidance to a sentencing judge in dealing with comparable cases.<sup>79</sup> An appellate court’s reasons reveal the mix of factors that were taken into account and will usually involve consideration of the appropriateness of the sentence imposed at first instance.<sup>80</sup>

### 1.2.1 The De Simoni principle and Tier 1 and Tier 2 offences

Fact finding concerning culpability and the interaction between Tier 1 and Tier 2 offences has been the subject of controversy in the LEC. Where an offender has pleaded guilty to a Tier 2 offence under the *POEO Act*, it is an error of law to take into account facts which effectively punish an offender for the more serious Tier 1 offence. This principle was established by the High Court in *The Queen v De Simoni*<sup>81</sup> and is commonly referred to as “the *De Simoni* principle”:

where the Crown has charged the offender with, or has accepted a plea of guilty to, an offence less serious than the facts warrant, it cannot rely, or ask the judge to rely, on the facts that would have rendered the offender liable to a more serious penalty.<sup>82</sup>

<sup>74</sup> *ibid.*

<sup>75</sup> With regard to **Environmental protection offences**, see **Objective factors** at [2.3.1.1] and **Subjective factors** at [2.3.1.2]; and, with regard to **Environmental planning offences**, see **Objective factors** at [2.3.2.1] and **Subjective factors** at [2.3.2.2].

<sup>76</sup> *Markarian v The Queen* (2005) 228 CLR 357.

<sup>77</sup> *Crimes (Sentencing Procedure) Act* 1999 (*CSP Act*), Pt 2.

<sup>78</sup> Preston and Donnelly, above n 72, p 9.

<sup>79</sup> *R v Pham* (2015) 256 CLR 550 per Bell and Gageler JJ at [50].

<sup>80</sup> *ibid* at [50].

<sup>81</sup> (1981) 147 CLR 383 (*De Simoni*) per Gibbs CJ at 389, 392.

<sup>82</sup> *ibid* per Gibbs CJ at 392.

In 2016, the High Court reaffirmed the principle in *Nguyen v The Queen*:

the *De Simoni* principle operates for the benefit of the offender and does not apply to preclude a sentencing court from taking into account the absence of a factor which, if present, may have rendered the offender guilty of a more serious offence. This is because the *De Simoni* principle is an aspect of the fundamental principle that no one should be punished for an offence of which the person has not been convicted.<sup>83</sup>

Nonetheless, the CCA has said “the precise ambit” of the [*De Simoni*] principle is yet to be determined in assessing the objective seriousness of an offence where the difference between the offence charged and a higher offence (whether hypothetical or not) is a matter of degree.<sup>84</sup>

This application of the *De Simoni* principle is equally relevant in environmental protection cases as it is for commonly-committed offences. On occasions, the prosecuting agency in Tier 2 pollution offences has sought to have the LEC take into account the ingredients of a Tier 1 offence. For example, in *EPA v Snowy Hydro Ltd*,<sup>85</sup> the offender pleaded guilty to a charge under s 120 of the *POEO Act*. The sentencing judge, Biscoe J, described the prosecutor’s submissions at [143] as follows:

the prosecutor submits that, as a matter of statutory construction, in sentencing for an offence under s 120 of the *POEO Act*, the Court may take into account that the offender’s conduct was negligent, even where it could arguably constitute conduct satisfying the elements of the more serious offence under s 116(1).

His Honour then rejected the submission:

On the basis of the *De Simoni* principle, I do not propose to entertain the question whether the conduct of Snowy Hydro was negligent.<sup>86</sup>

For offences under s 120 of the *POEO Act*, it is a clear breach of the *De Simoni* principle to take into account the fact that the offender was reckless. This is because the state of mind of recklessness falls somewhere between wilful and negligent conduct used for the Tier 1 offence. Craig J explained in *EPA v Tea Garden Farms Pty Ltd*:

While the provisions of s 116 of the *POEO Act* proscribe, in terms, conduct that “wilfully or negligently causes any substance to leak, spill or otherwise escape”, it seems to me that “recklessly” causing a substance to escape is also conduct that is proscribed by the section. I would regard reckless conduct to involve a lower order of fault than “wilful” but to involve an equivalent, if not higher order of fault than “negligent” conduct. As conduct involving fault of the latter kind engages the provisions of s 116, it would make no sense to interpret the section as being inapplicable to conduct that was “reckless” (cf *State Pollution Control Commission v Hunt* (1990) 72 LGRA 316 [per Bignold J] at 325).<sup>87</sup>

In *EPA v Queanbeyan City Council (No 3)*, Pepper J found that there was no intent by the council that committed the offence to pollute waters:

I accept that the operation of the *De Simoni* principle prevents me from considering whether the council acted wilfully or negligently in committing the offence in contravention of s 120 of the Act by reason of the more serious offence of wilfully or negligently causing any substance to leak, spill or otherwise escape contained in s 116 of the Act.<sup>88</sup>

83 (2016) 256 CLR 656 per Bell and Keane JJ at [29].

84 *R v Overall* (1993) 71 A Crim R 170 Mahoney JA, at 175, Allen J agreeing. See the Judicial Commission of NSW, *Sentencing Bench Book*, 2006-, for a discussion of the application of the *De Simoni* principle in relation to: Break and enter offences at [17-060]; Sexual offences against children at [17-450]; Dangerous driving at [18-370]; Public justice offences at [20-150]; Robbery at [20-210], [20-220], [20-250], [20-260], [20-280]; Sexual assault at [20-650]; Assault, wounding and related offences at [50-030], [50-050]–[50-090], [50-120]; Damage by fire and related offences at [63-015].

85 (2008) 162 LGERA 273; [2008] NSWLEC 264.

86 *ibid* per Biscoe J at [151].

87 [2012] NSWLEC 89 at [102], [142]–[150] approving *EPA v Snowy Hydro Ltd* (2008) 162 LGERA 273; [2008] NSWLEC 264.

88 (2012) 225 A Crim R 113 at [178].

In *Chief Executive, Office of Environment and Heritage v Orica Pty Ltd; EPA v Orica Pty Ltd*, the prosecutor had to concede that it could not submit that Orica acted negligently in committing an offence under s 120(1) of the *POEO Act*. This is because s 116 of the *POEO Act* was a more serious offence which involved the aggravating factor of wilfully or negligently causing any substance to leak, and Orica had not been charged with that offence.<sup>89</sup>

The *De Simoni* principle also has been applied to waste offences under the *POEO Act*. In *The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd (No 2)* Biscoe J, in relation to an offender charged with the Tier 2, s 143(1) offence of unlawfully transporting or depositing waste, held that:

The defendants should not be sentenced for an offence with which they have not been charged. Therefore, since s 115(1) of the *POEO Act* creates another offence of wilfully or negligently disposing of waste in a manner that harms or is likely to harm the environment, negligently (to the criminal degree) or wilfully disposing of waste should not be attributed to them.<sup>90</sup>

Although there is a decision with obiter dictum to the contrary,<sup>91</sup> the restriction referred to by Biscoe J would extend to factual findings concerning intention for s 143(1) waste offences committed from the date of the creation of s 115 with the commencement of the *POEO Act* on 1 July 1999. The *De Simoni* principle applies regardless of the date of commission of the s 143(1) offence because the s 115 offence always co-existed with the lesser s 143 offence.

Alternative offences are established under s 114(2) of the *POEO Act* with each alternative carrying a different level of offence seriousness, and attendant levels of punishment and maximum penalties. Tier 2 offences carry lower maximum penalties than Tier 1 offences<sup>92</sup> but, being strict liability offences, permit the conviction of a defendant in the absence of proving mental culpability.<sup>93</sup>

### 1.2.2 Culpability and strict liability offences

Generally, a strict liability offence is characterised by the absence of a requirement for the prosecution to prove mens rea or the guilty mind of the accused.<sup>94</sup> The offence is established if the prosecution proves beyond reasonable doubt the act proscribed. The prosecution is not required to prove the offender committed the act wilfully or intentionally, or was reckless or negligent.

89 [2015] NSWLEC 109 per Preston CJ of the LEC at [110].

90 [2012] NSWLEC 95 at [36].

91 *EPA v Terrace Earthmoving Pty Ltd* [2016] NSWLEC 158 where Robson J said at [75]: “Whilst intention is not necessary to obtain a guilty verdict in a prosecution brought pursuant to s 143(1) of the *POEO Act*, the state of mind of the defendants can be taken into account when undertaking the sentencing process.” His Honour then cited Preston CJ of the LEC in the native vegetation case of *Plath v Rawson* (2009) 170 LGERA 253; [2009] NSWLEC 178 at [98]. Robson J found at [77] that the waste offences were committed unintentionally. The defendants were charged with two s 143(1) offences, one of which occurred prior to 1 May 2006 when a lower maximum penalty applied.

92 For example, Tier 1 land, water and air pollution offences (ss 115, 116 and 117) carry a maximum penalty of \$5 million for corporations and \$1 million for individuals. Respectively, these amounts are five times and four times the maximum penalties for corporations (\$1 million) and individuals (\$250,000) convicted of a Tier 2 equivalent offence.

93 L Levenson, “Good faith defenses: reshaping strict liability crimes” (1993) 78 (3) *Cornell L Rev* 401 at 403–404. Levenson argued that intent is “often the most difficult issue to prove” and “must be shown indirectly from a defendant’s statements and conduct.” Levenson goes on to say that “[a]pplication of criminal strict liability relieves the state of this burden”.

94 The accused can raise the defence of honest and reasonable mistake of fact and if the accused discharges the evidential burden, the prosecution must then negative the defence beyond reasonable doubt. There are extensive discussions of strict liability offences and mens rea in *R v Sault Ste. Marie* [1978] 2 SCR 1299 per Dickinson J at 1326, a Canadian Supreme Court decision; and *He Kaw Teh v The Queen* (1985) 157 CLR 523 per Gibbs CJ at 533. His Honour (at 535) did not agree with Dickinson J’s view that the defence may only be “raised in the case of regulatory offences”. Brennan J (at 565) explains the concept of mens rea by reference to Stephen J in *The Queen v O’Connor* (1980) 146 CLR 64 at 96–97.



Where there is a hierarchy of offences in a statute — ranging from those which require the prosecution to prove mens rea ingredients (such as “wilful”, “intention”, “knowingly” or “negligently”) to strict liability offences — the *De Simoni* principle has an important role to play. It operates to limit the factual findings the court can make about the offender’s culpability for strict liability offences. In such cases, the court:

is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.<sup>95</sup>

In assessing an offender’s culpability for a strict liability offence, the sentencing court cannot make findings that effectively punish the offender for the more serious offence with mens rea ingredients.

Where an offender commits a strict liability offence and the statute does not have a higher and more serious offence, the LEC is often asked by the prosecutor to find that the offender committed the act intentionally, or was reckless, or negligent. The legal issue can be framed as a set of questions:

- Is a sentencing court entitled to assign a higher degree of culpability than the ingredients of a strict liability offence?
- For a strict liability offence, is it irrelevant to ask whether the offender committed the act intentionally, recklessly or negligently? Or, at least, is it an unnecessary distraction from the sentencing task?
- Is it an attempt by the prosecution to have the offender sentenced for a hypothetical offence different and more serious from the charge?
- Does such an approach breach the proportionality principle that “a sentence not exceed what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence”<sup>96</sup>?

In the case of strict liability offences under the *POEO Act*, it is arguable that the court should limit its factual findings on the issue of culpability to the specific ingredients of the charge and then proceed to take into consideration the relevant matters set out in s 241 of the *POEO Act*,<sup>97</sup> s 21A of the *CSP Act*,<sup>98</sup> and common law sentencing principles. The High Court has not directly addressed the point. It did, however, say in *Cheung v The Queen* in the context of fact finding following a jury verdict:

[T]he decision as to the degree of culpability of the offender’s conduct, save to the extent to which it constitutes an element of the offence charged, is for the sentencing judge.<sup>99</sup>

The court has also objected to judicial attempts to reduce an offender’s culpability at sentence to a level below the charge. It has held that there is no common law principle that a court is required to take into account, as a matter in mitigation, a lesser offence (with a lower maximum penalty) that the prosecution could have proceeded upon.<sup>100</sup> The High Court disapproved of a practice in the Victorian courts of reducing a sentence for an offence to take account of a lesser maximum

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

96 *R v Nasogaluak*, 2010 SCC 6; [2010] 1 SCR 206 per LeBel J at [42] on behalf of the Supreme Court of Canada expounding the common law proportionality principle.

97 The matters include the extent of the harm caused or likely to be caused to the environment by the commission of the offence; the practical measures that may be taken to prevent, control, abate or mitigate that harm; 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; the extent to which the person who committed the offence had control over the causes that gave rise to the offence; whether, in committing the offence, the person was complying with orders from an employer or supervising employee; and, any other matters that the court considers relevant. These matters were previously found in s 9 of the *EOP Act* (rep).

98 Particularly, “the aggravating factors to be taken into account in determining the appropriate sentence for an offence” listed in s 21A(2), such as “the offence was committed without regard for public safety”: s 21A(2)(i); and, “the offence was committed for financial gain”: s 21A(2)(o) which may, respectively, demonstrate recklessness and motivation.

99 (2001) 209 CLR 1 per Gleeson CJ, Gummow and Hayne JJ at [5].

100 *Elias v The Queen* (2013) 248 CLR 483 per French CJ, Hayne, Kiefel, Bell and Keane JJ at [5], [25].

penalty for a different offence that could have been charged on the grounds that it “does not promote consistency” in sentencing for an offence, and is inconsistent with the separation of the prosecutorial and judicial functions.<sup>101</sup>

There is no direct authority which prohibits an enquiry as to whether the offender committed the act intentionally, or was reckless or negligent. On the contrary, there is a line of authority which holds that such an enquiry is permissible for strict liability offences. The genesis of this approach to culpability appears to be the 1974 Supreme Court decision in *Majury v Sunbeam Corp Ltd*.<sup>102</sup> The defendant was convicted of the strict liability offence of “cause ... waters to be polluted” under s 16 of the *CW Act* (rep). This statute did not contain a more serious offence with mens rea ingredients or negligence. In the course of sentencing, McClemens CJ at CL said: “Were there any solid grounds for finding negligence or impropriety, the fine would be much heavier.”<sup>103</sup> *Majury v Sunbeam Corp Ltd* was applied by the CCA in *Camilleri's Stock Feeds Pty Ltd v EPA*.<sup>104</sup> The latter case was a sentencing appeal (rehearing) for three strict liability offences of “emitting foul odours into air” under s 15A of the *Clean Air Act 1961* (CA Act) (rep). Again, the statute did not contain a more serious offence with mens rea ingredients or negligence. Kirby P (as his Honour was then) said:

The offences were not “unforeseen non-negligent and unintended accident[s]”: *Majury v Sunbeam Corporation Ltd* [1974] 1 NSWLR 659 (SC) at 664. Indeed, the evidence indicates that the offences were foreseen, to some extent negligent and, in part, the consequence of conduct which was intended.<sup>105</sup>

Earlier in the judgment, His Honour expressly acknowledged the *De Simoni* principle:

While the offender can only be sentenced for the offence for which it has been convicted, the court is “bound to take into consideration the circumstances surrounding the offence of which the prisoner has been convicted, so long as those circumstances are not inconsistent with the plea or verdict”: *The Queen v De Simoni* (1981) 147 CLR 383 at 396.<sup>106</sup>

The CCA in *Hardt v EPA*, without reference to *Majury v Sunbeam Corp Ltd* or *Camilleri's Stock Feeds v EPA*, stated that:

Subject to *The Queen v De Simoni* (1981) 147 CLR 383 considerations, it is relevant to sentence for a strict liability offence or an offence with a mental element less than intention to commit the offence to consider with what intention and appreciation of the offence it was committed. Depending on the intention, the offence may be regarded as more serious.<sup>107</sup>

The CCA rejected a submission that the sentencing judge was not entitled to make factual findings concerning the offender's intention in the context of the offence of “permitting land to be used as a waste facility” under s 144(1) (rep) of the *POEO Act*.<sup>108</sup>

The LEC is bound by the decisions of *Camilleri's Stock Feeds v EPA* and *Hardt v EPA*. The LEC has held repeatedly that a strict liability offence that is committed intentionally, negligently or recklessly is objectively more serious than one that is not.<sup>109</sup> Preston CJ of the LEC explained:

101 *ibid* per French CJ, Hayne, Kiefel, Bell and Keane JJ at [29], [33], [34].

102 [1974] 1 NSWLR 659.

103 *ibid* per McClemens CJ at CL at 664.

104 (1993) 32 NSWLR 683 at 700.

105 *ibid*.

106 *ibid* per Kirby P at 699.

107 (2007) 156 LGERA 337; [2007] NSWCCA 338 per Giles JA at [53].

108 *ibid* at [49]–[53].

109 The following cases expressly apply *Majury v Sunbeam Corp Ltd* [1974] 1 NSWLR 659 per McClemens CJ at CL at 664 and *Camilleri's Stock Feeds Pty Ltd v EPA* (1993) 32 NSWLR 683 per Kirby P at 700: *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 234; [2006] NSWLEC 34 per Preston CJ of the LEC at [229]; *Pittwater Council v Scahill* (2009) 165 LGERA 289; [2009] NSWLEC 12 per Preston CJ of the LEC at [69]; *Gittany Constructions Pty Ltd v Sutherland Shire Council* (2006) 145 LGERA 189; [2006] NSWLEC 242 per Preston CJ of the LEC at [123]; *Hardt v EPA* (2007) 156 LGERA 337; [2007] NSWCCA 338 per Giles JA at [53]; and *Garrett v Freeman (No 5)* (2009) 164 LGERA 287; [2009] NSWLEC 1 per Lloyd J at [68], [356]. See also *EPA v Lithgow City Council* [2007] NSWLEC 695 per Preston CJ of the LEC at [35]; *EPA v Ravensworth Operations Pty Ltd* [2012] NSWLEC 222 per Pain J at [40] and the cases cited therein; and, *EPA v Terrace Earthmoving Pty Ltd* [2016] NSWLEC 158 per Robson J at [75].

The more culpable state of mind, the more severe the punishment ought to be: *Majury v Sunbeam Corp Ltd* [1974] 1 NSWLR 659 at 664. Culpability turns on the offender's purpose, the extent of the offender's knowledge of the circumstances surrounding the conduct, the conduct itself, its results and the reason for the offender's behaviour.<sup>110</sup>

The consequence is that, for some strict liability offences, a factual enquiry as to whether the offender committed the act intentionally or was negligent is permissible, but for others such an enquiry is prohibited. For strict liability offences, such as under s 64 ("Failure to comply with condition of licence"),<sup>111</sup> of the *POEO Act* offences under s 118A(2) ("Harming or picking threatened species, endangered populations or endangered ecological communities")<sup>112</sup> of the *National Parks and Wildlife Act 1974 (NPW Act)* and s 91(5) ("Not comply with a clean-up notice")<sup>113</sup> of the *POEO Act* the court is entitled to enquire whether the offender committed the act intentionally, or was reckless or negligent.

However, with regard to offences concerning false or misleading information about waste, the *De Simoni* principle applies because Parliament has created a strict liability offence and a mens rea offence. The *De Simoni* principle prevents a court, sentencing for the offence of supplying false or misleading information about waste (under s 144AA(1) of the *POEO Act*), from finding that the offender knowingly supplied false or misleading information about waste. This is because the offence of "Knowingly supplying false or misleading information about waste" under s 144AA(2) is a more serious offence.<sup>114</sup>

Similarly, where an offender has committed a pollute waters offence under s 120 of the *POEO Act*, the prosecutor cannot ask the court to find that the offender committed the act wilfully or negligently. Such an approach is prohibited given those ingredients constitute the more serious offence under s 116. For offences previously under s 125(1) of the *EPA Act*, it was permissible to find that the offender committed the act intentionally.<sup>115</sup> However, such an enquiry is now prohibited by the *De Simoni* principle for conduct caught by the recently-enacted s 125A<sup>116</sup> of the *EPA Act*.

In sentencing proceedings for strict liability offences under the *Occupational Health and Safety Act 2000*, fact finding concerning the objective seriousness of the offence has been restricted to the ingredients of the offence without taking into account higher forms of culpability such as intention, recklessness and negligence.<sup>117</sup>

110 *EPA v Lithgow City Council* [2007] NSWLEC 695 per Preston CJ of the LEC at [35].

111 *EPA v Morgan Cement International Pty Ltd* [2016] NSWLEC 140 per Pepper J at [113].

112 *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 234; [2006] NSWLEC 34 per Preston CJ of the LEC at [229].

113 *EPA v Terrace Earthmoving Pty Ltd* [2016] NSWLEC 158 per Robson J at [75].

114 *EPA v Complete Asbestos Removal Pty Ltd; EPA v Endacott* [2016] NSWLEC 167 per Preston CJ of the LEC at [63]–[65].

115 *Leichhardt Council v Geitonia Pty Ltd (No 7)* [2015] NSWLEC 79 per Biscoe J at [26]: "The defendants demolished the southern façade intentionally without first applying for modification of the existing development consent or for a new development consent to enable it to be done lawfully: conviction judgment [*Leichhardt Council v Geitonia Pty Ltd (No 6)*] [2015] NSWLEC 51] at [168]".

116 Enacted 31 July 2015. Section 125A(1) of the *EPA Act* is headed "Maximum penalties for offences against Act: Tier 1". Inter alia, it provides:

This section applies to an offence against this Act under section 125(1) if the prosecution establishes (to the criminal standard of proof):

- (a) that the offence was committed intentionally, and
- (b) that the offence:
  - (i) caused or was likely to cause significant harm to the environment, or
  - (ii) caused the death of or serious injury or illness to a person.

117 See, for example, *Inspector Williams v H P Woods (Holding) Pty Ltd* [2011] NSWIRComm 114 at [28], [44] citing *WorkCover Authority (NSW) Inspector Howard v Baulderstone Hornibrook Pty Ltd* [2009] NSWIRComm 92; (2009) 186 IR 125 at [191] (i), (ii) and (iii).



### 1.2.3 Strict liability offences generally

It has been said that a conviction for a strict liability offence is “nearly guaranteed”.<sup>118</sup> Another professed benefit of strict liability offences is “the costs of prosecution are low”; this is in addition to the chances of conviction being high.<sup>119</sup> Levenson further argues:

because the funding and prestige of prosecution offices is often based upon the number of cases handled and the prosecution’s win-loss record, the pursuit of strict liability crimes can often assure the prosecutor of an impressive conviction box score.<sup>120</sup>

Overall, the various benefits place pressure on the legislature to “enact more strict liability crimes.”<sup>121</sup> The Australian Law Reform Commission set out the policy rationale and economic and other benefits of strict and absolute liability offences in its *Traditional rights and freedoms — encroachments by Commonwealth laws* report.<sup>122</sup>

The Canadian Supreme Court articulated the policy rationale for strict liability environmental offences in *R v Sault Ste. Marie*:

The correct approach in public welfare offences is to relieve the Crown of the burden of proving mens rea ... and to the virtual impossibility in most regulatory cases of proving wrongful intention, and also, in rejecting absolute liability, admitting the defence of reasonable care.<sup>123</sup>

The “gamble” for the prosecuting authority in preferring a Tier 1 charge, that carries a heavier sentence over a lesser Tier 2 strict liability charge, was noted by Biscoe J in *EPA v Snowy Hydro Ltd*:

Obviously, in considering whether to plead guilty or not guilty, the maximum and the likely penalty to which the accused is exposed is in the forefront of the mind of the accused and of those advising him or her. Had the accused been charged with the *higher* offence, carrying the heavier penalty, a plea of not guilty might have been entered. The Crown might then have been put to the proof, with the chance that the accused would walk away without conviction or penalty at all. It is that chance which the accused surrendered by pleading guilty to the *lesser* offence with the lower maximum punishment. Similarly, the Crown forfeits the chance of securing a conviction of an aggravated offence, carrying a heavier penalty, by electing to present an indictment with a count, or to prosecute a charge, of a lesser offence carrying a lower maximum punishment.<sup>124</sup>

Notably, there is no history of a practice in the LEC of a prosecutor charging Tier 1 and Tier 2 offences in the alternative.<sup>125</sup>

<sup>118</sup> Levenson, above n 93 at p 404. This proposition is supported by evidence from this study. There were 36 alleged offenders who pleaded not guilty to the principal offence (in all cases a Tier 2 offence). This represented 7.3% of the 493 Tier 2 offences. In all 36 cases, the offence was proven. In three cases, the LEC ordered the dismissal of charges without proceeding to record a conviction (s 10 dismissal); in one case, the court convicted the offender but disposed of the proceedings without imposing any other penalty (s 10A) in relation to an offence under the *NV Act*. The three s 10 dismissals were ordered in relation to offences under the *EPA Act*: s 76A offence (once) and s 125 offences (twice).

<sup>119</sup> *ibid.* Levenson at p 468.

<sup>120</sup> *ibid* p 433.

<sup>121</sup> *ibid* p 468.

<sup>122</sup> Australian Law Reform Commission, *Traditional rights and freedoms — encroachments by Commonwealth laws*, Report No 129 at [www.alrc.gov.au/publications/laws-impose-strict-or-absolute-liability](http://www.alrc.gov.au/publications/laws-impose-strict-or-absolute-liability), accessed 16 May 2017.

<sup>123</sup> [1978] 2 SCR 1299 at 1300 (text of headnote).

<sup>124</sup> (2008) 162 LGERA 273; [2008] NSWLEC 264 at [146] citing the appellate authority of Kirby P in *R v Booth* (unrep, 12/11/93, NSWCCA).

<sup>125</sup> See **Charging practices** at [3.4].

## 1.3 Costs as a sentencing factor

A focus throughout this study is to ascertain the role and impact of costs on the sentencing exercise. The discussion is informed by reference to the common law and the history of s 52 of the *LEC Act*. In 2016, Meagher JA said in *DAO v R (No 3)*:

It is a long established common law rule that the Crown neither receives nor pays costs, particularly in criminal proceedings.<sup>126</sup>

His Honour noted, however, that the common law rule was altered by the enactment of s 81 of the *Justices Act 1902* (rep) and the *Costs in Criminal Cases Act 1967*.

### 1.3.1 Original mandatory requirement to specify costs

From its establishment, the LEC has had a statutory power to order costs in criminal matters for the prosecutor or the defendant under the *LEC Act*.<sup>127</sup> Under the first enacted version of the now repealed s 52, the LEC ordered “such costs as to the Judge seem just and reasonable” (s 52(1)). Section 52(2) required the LEC to specify the amount. It provided:

The amount so ordered to be paid for costs shall in all cases be specified in the conviction or order.<sup>128</sup>

The CCA in *Caltex Refining Co Pty Ltd v Maritime Services Board NSW*<sup>129</sup> held it was permissible for the judge to direct the taxation<sup>130</sup> of a bill of costs by the registrar as a prelude to the making of a costs order, but the judge and no-one else would make the final order:

It is not permissible for the Judge to make an unquantified order for costs, leaving it to some other or others, whether the parties by agreement or the registrar on taxation, to fix the quantum of the order.<sup>131</sup>

Furthermore, the court held that it was imperative that:

The Judge must specify the quantum of the costs order in the conviction or order.<sup>132</sup>

### 1.3.2 Removal of requirement to specify costs

The requirement for the LEC to specify the quantum of costs in the order (at the time of the conviction or order) in s 52 of the *LEC Act* was removed by the *Courts Legislation Amendment Act 1997*. Schedule 4[1] omitted “such costs as to the Judge seem just and reasonable” and replaced the text with:

“costs of such amount as are specified in the conviction or order, or if the conviction or order so directs, as may be determined under subsection (2)”.

Schedule 4[2] omitted s 52(2) and inserted a new 52(2) which provided costs “are to be determined”: (a) by agreement or (b) “if no such agreement can be reached, in accordance with the regulations”.

The amendments made by the *Courts Legislation Amendment Act* had unintended consequences for sentencing in the LEC. Suddenly, the quantum of costs specified in the court orders were no longer part of the sentencing judgment on the public record. The penalty imposed was separated from costs orders whether it was to be later “agreed” or determined by the regulations. The previous procedure articulated by Sully J in *Caltex Refining Co Pty Ltd*, which had far greater transparency, no longer applied:

<sup>126</sup> [2016] NSWCCA 282 at [1].

<sup>127</sup> Section 52.

<sup>128</sup> See first enacted version of the *LEC Act*, s 52 at [www.legislation.nsw.gov.au/acts/1979-204.pdf](http://www.legislation.nsw.gov.au/acts/1979-204.pdf), accessed 16 May 2017.

<sup>129</sup> (1995) 36 NSWLR 552.

<sup>130</sup> “Taxation” is a term used in the law for the purposes of assessing and quantifying legal costs.

<sup>131</sup> (1995) 36 NSWLR 552 per Sully J at 564.

<sup>132</sup> *ibid*.

to take the present matter as an example, [the sentencing judge] could have found the offence proved; have heard argument as to penalty; sought the assistance of a taxation by the Registrar, or received properly qualified expert evidence as to what costs order would be reasonable; have heard argument upon the form of a final costs order; and then reached a final decision as to penalty and costs, expressing that decision in the form of orders of conviction, of penalty by way of fine, and for the payment by the appellant to the respondent of a quantified sum by way of costs.<sup>133</sup>

Section 52 was further amended a year later by the *Courts Legislation Amendment Act 1998* to make clear that in determining costs the regulations made under s 52 could adopt provisions of the *Legal Profession Act 1987*.

### 1.3.3 The current law on costs

How then are costs relevant to the determination of an appropriate sentence in the LEC? First, it is important to note that the law in this area changed during the period covered by this study. Secondly, there was a level of uncertainty regarding whether or not the LEC could take into account professional costs in determining the sentence. It is now established and accepted that costs are “an important aspect of the punishment”<sup>134</sup> or, as put more directly by the CCA in *Harris*, “in considering the appropriate penalty, it [is] legitimate to take into account the associated costs”.<sup>135</sup>

Routinely, the prosecution obtains an order for legal costs and investigation costs (where the statute permits the latter) “reasonably incurred” in investigating and proceeding with the criminal charges.<sup>136</sup> Unlike in most other criminal courts, costs represent an important sentencing factor that must be taken into account by the LEC in determining the penalty. Costs order are made even where the prosecutor does not agree with the defendant’s proposed agreed facts.<sup>137</sup>

Courts conducting criminal hearings, including those such as the LEC exercising summary jurisdictions are empowered to order an offender to pay the prosecutor’s legal costs of the proceedings.<sup>138</sup> In the LEC, cost orders are usually made at the same time as the imposition of the penalty. Citing the appellate authority of *EPA v Barnes (Barnes)*,<sup>139</sup> Preston CJ of the LEC made it clear in *EPA v Causmag Ore Pty Ltd* that the LEC has the discretion to consider other monetary orders in determining an appropriate penalty:

The fine may be only part of the penalty imposed on an offender. Consideration can also be given to other monetary amounts the offender may be ordered to pay, including the prosecutor’s legal costs of the proceedings and investigation costs.<sup>140</sup>

Elsewhere, his Honour, applying these CCA decisions, has emphasised that the amount of these “costs” are relevant to the determination of the quantum of any fine or, for that matter, the level of any prison term being considered.<sup>141</sup> There are LEC decisions prior to *Harris v Harrison* which held costs were “irrelevant to the determination of an appropriate sentence to be imposed.”<sup>142</sup> However, now it is accepted that costs are “factored into the determination of the appropriate penalty.”<sup>143</sup>

133 (1995) 36 NSWLR 552 at 564.

134 *EPA v Barnes* [2006] NSWCCA 246 per Kirby J at [78].

135 (2014) 86 NSWLR 422 per Simpson J at [100].

136 Unlike the *POEO Act*, the *NV Act* (rep) did not allow a court to make an order for investigation costs: see *Turnbull v Chief Executive of the Office of Environment and Heritage* [2015] NSWCCA 278 per Button J at [93].

137 *Newcastle City Council v Pace Farm Egg Products Pty Ltd* [2002] NSWLEC 66 per Lloyd J at [61]–[62].

138 *CP Act* 1986, ss 257B and 257G. An offender may be ordered to pay costs upon conviction for a criminal offence: s 275B(a); or given an order under s 10 of the *CSP Act* in respect of an offence: s 275B(b). A s 10 order involves the dismissal of the relevant criminal charge following a finding of guilt — no conviction is recorded against the offender.

139 [2006] NSWCCA 246 at [78] and [88]. B Preston, above n 69, ((2007) 31(3) *Crim LJ* 142 at 160), also noted, in citing *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at 505, that: “[T]he amount of these cost orders will be relevant in determining the level of any term of imprisonment or the level of any fine”.

140 *EPA v Causmag Ore Co Pty Ltd* [2015] NSWLEC 58 at [123].

141 B Preston, above n 139, citing *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at 505.

142 *Port Macquarie-Hastings Council v Notley (No 2)* [2013] NSWLEC 220 per Pepper J at [94].

143 *EPA v Environmental Treatment Solutions Pty Ltd* [2015] NSWLEC 160 per Pepper J at [108]; *Chief Executive, Office of Environment and Heritage v Fish (No 2)* [2014] NSWLEC 67 per Pain J at [48].

Under s 248 of the *POEO Act*, an offender may be ordered to pay the prosecuting agency's costs where "reasonably incurred" through the investigative process. The costs relating to the investigation of the offence:

means the costs and expenses:

- (a) in taking any sample or conducting any inspection, test, measurement or analysis, or
- (b) of transporting, storing or disposing of evidence.<sup>144</sup>

The professional and other costs payable are determined under s 275G of the *Criminal Procedure Act 1986 (CP Act)* either: by agreement between the prosecutor and accused person; or, if no such agreement can be reached, in accordance with the current legal costs legislation.<sup>145</sup>

An overarching legal principle laid down by the High Court in making an order to recover legal costs is that the order is made to compensate the successful party, not punish the unsuccessful party.<sup>146</sup> This legal principle is also adhered to and applied in the LEC:

Although costs orders are compensatory rather than punitive ... they should be seen as an element of the overall penalty imposed, and can affect the amount of a fine.<sup>147</sup>

### 1.3.4 The LEC's application of costs principles

It has been noted in the LEC that costs orders are "routinely made" and that "payment of the prosecutor's costs is a constant aspect of punishment such that it is embedded in the general pattern of sentencing for all offences".<sup>148</sup> The total penalty that is imposed upon an offender takes into account any order against the defendant for the payment of the prosecutor's legal costs.<sup>149</sup> As Pepper J said in *Wingecarribee Shire Council v O'Shanassy (No 6)*:

The payment of a prosecutor's costs is viewed as an aspect of punishment and should be considered in the determination of the appropriate penalty as a factor that *acts to reduce the penalty*.<sup>150</sup> [Emphasis added.]

This reflects the often cited sentencing decision by the LEC that "[h]ad the costs not been so great" then "a much higher penalty" would have been imposed.<sup>151</sup>

Other costs borne by the defendant are also viewed as an aspect of punishment, whether they be part of the sentence imposed, such as the ordering of a publication order,<sup>152</sup> or suffered as a result of the commission of the offence in the form of extra-curial punishment.<sup>153</sup> Liability for the prosecutor's

<sup>144</sup> *POEO Act*, s 248(3).

<sup>145</sup> Legal costs legislation "as defined in section 3A of the *Legal Profession Uniform Law Application Act 2014* (with or without modifications prescribed by the regulations)": s 257G(b) of the *CP Act*, see n 18. See *Legal Profession Uniform Law Application Act 2014*, Pt 7.

<sup>146</sup> *Latoudis v Casey* (1990) 170 CLR 534; *Oshlack v Richmond River Council* (1998) 193 CLR 72 per Gaudron and Gummow JJ at [40].

<sup>147</sup> *Chief Executive, Office of Environment and Heritage, Dept of Premier and Cabinet v Powell* [2012] NSWLEC 129 per Shehan J at [147] citing *Latoudis v Casey*, *ibid*, *Director-General, Dept of Environment and Climate Change v Calman Australia Pty Ltd* [2009] NSWLEC 182 and *EPA v Barnes* [2006] NSWCCA 246.

<sup>148</sup> *Liverpool City Council v Leppington Pastoral Co Pty Ltd* [2010] NSWLEC 170 per Biscoe J at [50].

<sup>149</sup> *EPA v Hardt* [2007] NSWLEC 284 per Preston CJ of the LEC at [66].

<sup>150</sup> [2015] NSWLEC 138 at [226] citing *EPA v Barnes* [2006] NSWCCA 246 at [78] and [88]; *EPA v Queanbeyan City Council (No 3)* (2012) 225 A Crim R 113; [2012] NSWLEC 220 at [248] and *Director-General of the Dept of Environment and Climate Change v Rae* (2009) 168 LGERA 121; [2009] NSWLEC 137 at [68]. See also *Cessnock City Council v Bimbadgen Estate Pty Ltd (No 2)* [2011] NSWLEC 140 at [50].

<sup>151</sup> *EPA v Barnes* [2006] NSWCCA 246 per Pain J at [53].

<sup>152</sup> In *Eurobodalla Shire Council v Tip It Today Broulee Pty Ltd* [2007] NSWLEC 274 at [35], Pain J completed her considerations by noting that: "Finally the Defendant's counsel argued I should consider the imposition of a publication order as a relevant factor in setting the amount of penalty as part of the 'weighing up' exercise the Court must undertake. I agree".

<sup>153</sup> In *Director-General, Dept of Environment and Climate Change v Hudson (No 2)* [2015] NSWLEC 110 at [194], Pepper J found that the negative publicity and hate mail received by the defendant was a form of extra-curial punishment. Similarly, in *Garrett on behalf of the Director-General of the Dept of Conservation and Environment v House* [2006] NSWLEC 492 at [60]–[61], Pain J accepted that negative publicity had adversely affected the defendant's business and personal life, which contributed to a substantial discount in the fine ultimately ordered.

costs in cases involving serious environmental crimes can be considerable and may even comprise the greater part of the total pecuniary penalty incurred by the offender. Pepper J recognised this in *Harrison v Harris*:

Costs orders for environmental prosecutions can be substantial, and are often greater than the penalty imposed ... A costs order is equally capable of acting as a deterrent to others where the quantum of the costs are publicised, whether that be within the judgment or elsewhere.<sup>154</sup>

Some further examples illustrate the point. In *Wingecarribee Shire Council v O'Shanassy (No 6)*, the Council's costs were estimated to be \$300,000 and the offender was fined \$93,500.<sup>155</sup> In *The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd*<sup>156</sup> the prosecutor's costs were estimated at roughly \$200,000, to be paid jointly by the responsible corporation which was fined \$50,000 and the company director who was separately fined \$30,000. In *EPA v Queanbeyan City Council (No 3)*, the LEC utilised the provisions of s 250(1)(e) of the *POEO Act* to assign a monetary penalty of \$80,000 for the purpose of financing a local environmental project.<sup>157</sup> In this case, the total prosecutor's legal and investigative costs ran to over \$344,000.<sup>158</sup> The sentencing judge also noted that the monetary penalty was reduced as a result of "the considerable quantum of costs" that the council agreed to pay.<sup>159</sup> In *EPA v Alcobell Pty Ltd*<sup>160</sup> the prosecutor's legal costs were estimated "to exceed \$210,000" and the investigation costs were \$23,409, while the fines imposed on the offending company and company director totalled \$87,000.<sup>161</sup> In *Leichhardt Council v Geitonia Pty Ltd (No 7)*, a corporation, its "sole shareholder, director and alter ego", and a project management company in liquidation were fined \$250,000, with costs estimated to be around \$500,000. Biscoe J said:

It is common ground that payment by the defendants of the prosecutor's costs is an aspect of punishment and should be taken into account when considering the penalty to be imposed: *EPA v Barnes* [2006] NSWCCA 246 at [78]. In the present case there was a three week trial, with the prosecutor represented by senior and junior counsel. The prosecutor estimates that its costs are in the vicinity of \$500,000.<sup>162</sup>

The impact of a costs order as part of the overall punishment is also illustrated by *Garrett v Williams*.<sup>163</sup> The offender was the sole director and secretary of a small mining company who destroyed Aboriginal objects and excavated across the boundary of a declared Aboriginal place. The conduct constituted three offences under s 90(1) of the *NPW Act*. The offender was the first person to participate in a LEC recommended restorative justice conference. Representatives from the local Aboriginal community (who were considered victims of the offence) participated in the conference that also used a court-appointed conference facilitator. Following the conference, the offender agreed to establish a heritage trust for the affected Aboriginal community and donate a four-wheel drive truck (to the value of \$20,000), a trailer (to the value of \$3,000), a quad bike (to the value of \$8,000) and a fuel card (to the value of \$1,200). The fines imposed for the three offences — \$750, \$200 and \$450, respectively — were set taking into account, inter alia, the offender's participation in the conference and the prosecutor's as yet assessed costs. Preston CJ of the LEC noted:

I take into account the defendant's participation in the restorative justice conference and the significant costs that the defendant has incurred in and as a result of that conference. I take into account the defendant's offers, both monetary and equipment, to the Aboriginal people of the area that are an outcome of the conference process. I also take into account that the defendant has

154 *Harrison v Harris* (2013) 195 LGERA 79; [2013] NSWLEC 105 per Pepper J at [171].

155 *Wingecarribee Shire Council v O'Shanassy (No 6)* [2015] NSWLEC 138 per Pepper J at [227].

156 *The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd (No 2)* [2012] NSWLEC 95 per Biscoe J at [42].

157 *EPA v Queanbeyan City Council (No 3)* [2012] NSWLEC 220 per Pepper J at [281]–[284].

158 *ibid*.

159 *ibid* at [280].

160 [2015] NSWLEC 123 per Pain J at [119].

161 *ibid* at [124].

162 [2015] NSWLEC 79 at [64].

163 [2007] NSWLEC 96.



offered to pay the prosecutor's costs of the proceedings, which may be substantial. All of these can be seen to be part of the overall punishment of the defendant: see *Environment Protection Authority v Barnes* [2006] NSWCCA 246 (17 August 2006) at [78], [84].<sup>164</sup>

Even where the actual level of the prosecutor's costs is not quantified, but described as "reasonably substantial", the court will take the relevant costs into consideration in determining an appropriate financial penalty.<sup>165</sup> As Preston CJ of the LEC articulated in considering the appropriate fine in sentencing the defendant in *Corbyn v Walker Corp Pty Ltd*:

I also take into account that Walker will be ordered to pay the prosecutor's costs, which are likely to be substantial. Payment of the prosecutor's costs is an aspect of the financial burden that will be suffered by Walker as a result of the offence.<sup>166</sup>

Furthermore, under s 248(1) of the *POEO Act*, the court can make an order that the prosecutor be paid the costs and expenses it reasonably incurred during the investigation of the offence, including *before* the prosecution of the offence has commenced.<sup>167</sup> Where the statute which creates the offence does not empower the court to order that the prosecutor be paid such costs and expenses, s 122 (headed "Payment of share of fine to prosecutor") of the *Fines Act* 1996 permits the court to order the payment of a moiety in the fine to the prosecuting agency. The prosecutor is compensated for the costs and expenses incurred during the *full course* of the investigation of the offence.<sup>168</sup> The court has a discretion as to the portion of the fine that it may direct be paid but it can only order up to one-half of the fine imposed to be paid to the prosecutor.<sup>169</sup>

An issue has arisen as to whether the LEC has power to reduce or limit the quantum of the prosecutor's costs because of perceived excessiveness. During the time that (the now repealed) s 52(2) of the *LEC Act* applied to costs orders,<sup>170</sup> the LEC held that it did not have the power to make an order limiting the quantum of costs in Class 5 proceedings. Consequently, the LEC could not have regard to the offender's means to pay<sup>171</sup> because of the expression used in s 52(2) that costs: "are to be determined".<sup>172</sup> Section 257B of the *CP Act* appears to be more flexible than the repealed s 52(2) because it uses the expression:

such costs as *the court specifies* or, if the conviction or order directs, as may be determined under section 257G. [Emphasis added.]

The discretionary power to reduce costs under s 257B can be illustrated by the Ballina Local Court case of *EPA v Feodoroff*.<sup>173</sup> The offender pleaded guilty to two environmental waste offences but disputed both the need for the sizeable penalty (\$22,000) sought by the Environment Protection Authority (EPA) and the professional and other costs (totalling \$26,777) that the EPA was claiming as the prosecuting authority.<sup>174</sup> A submission from the offender's legal counsel<sup>175</sup> argued, *inter alia*, that:

164 *ibid* at [117].

165 *EPA v Environmental Treatment Solutions Pty Ltd* [2015] NSWLEC 160 per Pepper J at [108]–[109]; *Chief Executive, Office of Environment and Heritage v Rummary* [2012] NSWLEC 271 per Pepper J at [192].

166 [2012] NSWLEC 75 at [64].

167 Such a provision does not exist under the *EPA Act* or, for that matter, under the repealed *NV Act*: see *Turnbull v Chief Executive of the Office of Environment and Heritage* [2015] NSWCCA 278 at [93].

168 *Fines Act* 1996, s 122. The prosecutor cannot be a police officer: s 122(1)(a).

169 *ibid*, s 122(2). For example, see *Secretary, Dept of Planning and Environment v Boggabri Coal Pty Ltd* [2014] NSWLEC 154 at [58]–[63].

170 Sections 41–55 of the *LEC Act* were repealed by the *Justices Legislation Repeal and Amendment Act* 2001, Sch 1, 2.132. The new s 41 of the *LEC Act* states that Pt 5 of Ch 4 of the *CP Act* applies to proceedings in Class 5 of the court's jurisdiction.

171 In *Carter v Wall* [2003] NSWLEC 94 per Cowdroy J at [25]. See also *EPA v Collis* [2003] NSWLEC 190 per Pain J at [80]–[82].

172 Section 52(2) (rep) of the *LEC Act* previously stated: "The costs payable by a prosecutor or defendant in accordance with a direction under this section *are to be determined*: (a) by agreement between the prosecutor and defendant, or (b) if no such agreement can be reached, in accordance with the regulations". [Emphasis added.]

173 Unreported. Information on this case is available at the Environmental Law Australia website at <http://envlaw.com.au/epa-v-feodoroff/>, accessed 16 May 2017.

174 *ibid*.

175 C McGrath (counsel), "Ballina Local Court, Environmental Protection Agency v Feodoroff: plea in mitigation and submission on costs", 26 June 2008 at <http://envlaw.com.au/wp-content/uploads/feodoroff7.pdf>, accessed 16 May 2017.

- the offender had “very limited means to pay a fine”: at [10], [16]–[17]
- the EPA’s investigation costs sought under s 248 of the *POEO Act*, and representing over \$12,294, were excessive, unfair and unreasonable: at [24]
- the EPA’s “professional costs” sought under s 215(1)(a) of the *CPA Act*, and which total over \$10,382 were unreasonable: at [26]
- the relatively minor nature of the offence should limit the prosecuting authority’s professional and investigation costs to below \$3,000: at [27]
- as the proceedings were brought summarily in the Local Court (rather than the LEC), s 215 of the *POEO Act* fixed a ceiling of \$22,000 at the time on any monetary penalty: at [21].

The Local Court accepted the submissions of the offender’s legal counsel and imposed a fine of \$3,000 and ordered the offender to pay the EPA a total of \$3,500<sup>176</sup> — representing just 13% of the legal and investigative costs the EPA originally sought to claim.

In a number of appeal cases, the grounds of appeal were the asserted excessiveness or unreasonableness of the financial imposition on the offender.<sup>177</sup> A finding of manifest excess can be made in the context of the overall monetary penalty:

- being considered disproportionate to the seriousness of the offence (or the culpability of the offender)
- containing high, unreasonable and excessive prosecutor’s costs
- exceeding the offender’s capacity to pay (the “means to pay” principle).

### 1.3.5 Costs and the correct forum

The offence in *Harris v Harrison*,<sup>178</sup> which was assessed by the sentencing judge to be of low objective gravity, could have been disposed of either in the Local Court or the LEC.<sup>179</sup> It was, however, prosecuted in the LEC. The CCA asserted that the offence should have been dealt with in the Local Court, and that the jurisdictional limit of the Local Court (\$22,000 at the time) should have been brought to the sentencing judge’s attention given its significance as a sentencing factor.<sup>180</sup> As stated in *R v Doan*:

The question arises whether when dealing with a matter in a higher court, cognisance should be taken of a circumstance that the offence was within lower court jurisdiction and could have been dealt with there. In a number of cases the circumstance that a matter could have been dealt with in a Local Court has been referred to as a matter of sentence mitigation.<sup>181</sup>

At first instance in *Harris v Harrison*, the LEC imposed a \$28,000 fine — well above the jurisdictional limit of the Local Court — but by proceeding in the LEC the defendant was exposed to a maximum penalty that was 50 times greater than the Local Court could have lawfully imposed.<sup>182</sup> The CCA was of the view that “the jurisdictional limit of the Local Court ought to have been regarded as a highly-significant sentencing factor”; the court was also “satisfied that the total sentence imposed ought *not to have exceeded* the jurisdictional limit of the Local Court, \$22,000”.<sup>183</sup> Yet on top of the \$28,000

176 Environmental Law Australia website at <http://envlaw.com.au/epa-v-feodoroff/>, accessed 16 May 2017.

177 See for example *Turnbull v Chief Executive of the Office of Environment and Heritage* [2015] NSWCCA 278 and the defence submissions in *EPA v Barnes* [2006] NSWCCA 246 at [62]–[63].

178 (2014) 86 NSWLR 422; (2014) 201 LGERA 277.

179 *Water Management Act* 2000, ss 91K(1), 364(1). At the time, the offence under s 91K(1) of tampering with water metering equipment attracted a maximum penalty of \$1.1 million, while the maximum penalty which could be imposed by the Local Court was \$22,000: s 364(6). The LEC judge imposed a \$28,000 fine and ordered the offender to publish a notice in the local paper and also pay the prosecutor’s legal costs.

180 (2014) 86 NSWLR 422; 201 LGERA 277 at [96]–[97].

181 (2000) 50 NSWLR 115 per Grove J at [37]; Spigelman CJ and Kirby J agreeing.

182 *Harris v Harrison* (2014) 201 LGERA 277; (2014) 86 NSWLR 422 per Simpson J at [95].

183 *ibid* at [98]. Emphasis added.

fine, at first instance, the offender was also ordered to pay the prosecutor's legal costs, which the sentencing judge anticipated would be "substantial" (at [100]). These costs were subsequently estimated at \$75,000.<sup>184</sup> The court held that the appellant's liability for costs should be assessed as if the proceedings were brought in the Local Court:

In any event, any costs for which the respondent is liable should be assessed on the basis that the proceedings were brought in the Local Court and should exclude so much of the hearing time, and preparation, as was taken up with those issues [including issues that were grounds for the successful appeal].<sup>185</sup>

The appellate court's approach to the assessment of monetary penalties and costs in *Harris v Harrison*<sup>186</sup> is, without doubt, a relevant consideration for prosecuting entities given the discretion afforded to them in selecting the jurisdictional forum where a legitimate choice exists. Costs will generally be much higher for matters dealt with by the LEC because of the use of barristers, the evidence being more complex and rigorously contested. Prosecuting matters in the LEC also exposes defendants to much higher maximum penalties. For environmental offences of low objective seriousness, the monetary penalties (fines, remediation costs and payment of prosecutor's costs) ordered by the LEC may exceed the jurisdictional limit of the Local Court.

The limits of the principles need to be recognised. A court can only take into account as a mitigating factor the possibility that an offence could have been disposed of summarily in "rare and exceptional" circumstances.<sup>187</sup> It must be clear that the offence ought to, or would have, been prosecuted in the Local Court.<sup>188</sup> The sentencing court can only expect that an offender's legal representatives would recognise, as a factor in mitigation, the possibility of summary disposal in a court with a "more confined jurisdiction".<sup>189</sup> Where this consideration has been completely overlooked or ignored by a sentencing judge, "it may properly justify the granting of leave to appeal".<sup>190</sup> More recent CCA decisions<sup>191</sup> appear to have questioned and confined the application of the principle. The CCA in *Baines v R*<sup>192</sup> doubted whether it was "a rule of law" and in *SM v R*<sup>193</sup> it was said:

there has been little explanation in the case law as to precisely how the possibility that the matter could have been dealt with in the Local Court should be taken into account.

The CCA held in *SM v R* that there is no obligation to indicate in any arithmetical sense how it affected the sentence imposed.<sup>194</sup> In the event that the principle applies, the court can impose a sentence above the Local Court jurisdictional maximum regardless of the stance of the prosecutor.<sup>195</sup>

In a lengthy contested hearing involving a prosecution for the alleged offence of unlawful clearing of native vegetation, Pain J in *Director General, Dept of the Environment and Climate Change v Olmwood Pty Ltd (No 2)* made the point that the "making of a costs order is a matter determined in the Court's discretion".<sup>196</sup> Her Honour went on to say:

While I am not precluded from considering the amount of costs incurred by a prosecutor in determining the level of penalty nor am I bound to do so. As submitted by the Prosecutor the

184 *ibid* at [3]. The offender was also ordered to pay for a notice in the local paper to publicise the offence (including the circumstances of the offence) and its environmental and other consequences, and any other orders made against the offender under s 353G(1)(a)) of the *Water Management Act 2000*.

185 *ibid* at [102].

186 *ibid* at [91]–[103]. In short, the CCA set aside the original fine and overturned the cost order.

187 *Zreika v R* (2012) 223 A Crim R 460 per Johnson J at [83].

188 *ibid* at [83], [109].

189 *Harris v Harrison* (2014) 201 LGERA 277; (2014) 86 NSWLR 422 per Simpson J at [94].

190 *R v Crombie* [1999] NSWCCA 297 at [16].

191 *Baines v R* [2016] NSWCCA 132; and, *SM v R* [2016] NSWCCA 171.

192 *Baines v R*, *ibid*, per Basten JA at [12].

193 *SM v R* [2016] NSWCCA 171 per Basten JA at [26].

194 *ibid* at [24].

195 *ibid*.

196 *Director General, Dept of the Environment and Climate Change v Olmwood Pty Ltd (No 2)* (2010) 173 LGERA 366; [2010] NSWLEC 100 per Pain J at [75].



purpose of the costs order is to compensate it for the costs it has been put to in pursuing this prosecution. The fact alone that there is likely to be a large impost on this Defendant because of the contested hearing resulting from this Defendant's plea of not guilty is not a relevant factor in relation to costs in this matter. The appropriate order I will make is that the Defendant must pay the Prosecutor's costs as agreed or assessed.<sup>197</sup>

In *Port Macquarie Hastings Council v Notley (No 2)*, the LEC convicted the defendant of the offence of carrying out development without consent contrary to s 76A(1)(a) of the *EPA Act*. Pepper J ordered the defendant to pay a fine of \$28,000 and the council's costs of the proceedings which, at the time of sentencing had not been assessed, although her Honour stated that they were "likely to be not insubstantial given its procedural history".<sup>198</sup> The offence was assessed as being of low objective seriousness and as causing no actual environmental harm.<sup>199</sup> These factors alone, on face value, should have entitled the matter to be dealt with in the Local Court consistent with the CCA's ruling in *Harris v Harrison*.<sup>200</sup> However, in disposing of the case in the LEC, Notley was exposed to a maximum penalty (\$1.1 million) that was manifestly greater than the jurisdictional limit of the Local Court at the time (\$110,000).<sup>201</sup> This was an issue that had not escaped the defence counsel's attention. The defendant had submitted that a factor in mitigation should be the Council's decision to prosecute the matter in the LEC rather than in the Local Court — "thereby escalating the costs payable by him"<sup>202</sup> — the presumption being that the prosecutor's costs would be reduced overall in reflecting reduced preparation and hearing time.<sup>203</sup> While her Honour acknowledged the appellate authority of *Barnes* in recognising that the payment of the prosecution's costs can be considered by the court when fixing an appropriate monetary penalty<sup>204</sup> she also viewed this factor as "irrelevant to the determination of an appropriate sentence."<sup>205</sup> This was despite a submission from Notley's lawyers that the substantial costs<sup>206</sup> "should be taken into account [as per *Barnes*] in fixing an appropriate penalty."<sup>207</sup> Also, as it was in *Barnes* where that "defendant had limited means to pay a substantial fine (and costs)",<sup>208</sup> Notley's capacity to pay was also identified by the defence as an important consideration in the determination of an appropriate penalty.<sup>209</sup>

197 *Dept of the Environment and Climate Change v Olmwood Pty Ltd* [2010] NSWLEC 15 and *Director General, Dept of the Environment and Climate Change v Olmwood Pty Ltd (No 2)*, *ibid*.

198 *Port Macquarie Hastings Council v Notley (No 2)* [2013] NSWLEC 220 per Pepper J at [93].

199 *ibid*. The prosecuting council conceded that there was no evidence of actual harm to the environment by the commission of the offence (at [63]), only harm to "the integrity of the planning system" which is, nonetheless, regarded as an element of environmental harm (at [63]). Furthermore, the unlawful structure was demolished prior to the sentencing hearing [64]. Her Honour also found the offence to be of low objective gravity (at [76]).

200 *Harris v Harrison* (2014) 201 LGERA 277; (2014) 86 NSWLR 422 per Simpson J at [92].

201 *ibid* at [95]–[98]. Pepper J presided over the first instance hearing of *Harrison v Harris* [2013] NSWLEC 105. The defendant appealed against the orders made at first instance. The appeal was successful and the original orders overturned, with the NSWCCA making new determinations.

202 *Port Macquarie-Hastings Council v Notley (No 2)* [2013] NSWLEC 220 per Pepper J at [94].

203 *Harris v Harrison* (2014) 201 LGERA 277; (2014) 86 NSWLR 422 per Simpson J at [102].

204 *Port Macquarie-Hastings Council v Notley (No 2)* [2013] NSWLEC 220 per Pepper J at [92] citing *EPA v Barnes* [2006] NSWCCA 246 per Kirby J at [78] and [88].

205 *Port Macquarie-Hastings Council v Notley (No 2)*, *ibid* at [94].

206 The total monetary value of payments ordered in *Port Macquarie-Hastings Council v Notley (No 2)* by the LEC cannot be determined as the actual prosecutor's costs were unknown. However, the findings of this study may be used to estimate the total fiscal cost to the defendant for the offence being sentenced in the LEC at between \$32,000 and \$37,000. As mentioned, prosecutor's costs for this offence if dealt with by a local court, would have been substantially lower. Using the decision of the Local Court in *EPA v Feodoroff*, above n 173, to reduce by 87% the prosecutor's costs payable by the defendant as a guide, an estimate of the total monetary payments imposed by a local court — had the proceedings been dealt with in that forum — may be calculated. The total monetary — "hit" to the defendant would be in the vicinity of \$15,000 or \$16,000, being the fine of \$12,000 plus an estimated \$3,250 in prosecutor's costs. This speculative figure represents half the total pecuniary penalty that the defendant actually paid. The reasons for the "more substantial" actual total: firstly, the prosecutor decided to proceed with the charge in the higher jurisdiction LEC; and, secondly, Pepper J believed the escalated costs of a LEC hearing irrelevant in determining the appropriate sentence (*ibid* at [94]).

207 *ibid*.

208 *EPA v Barnes* [2006] NSWCCA 246 per Kirby J at [70].

209 *Port Macquarie-Hastings Council v Notley (No 2)* [2013] NSWLEC 220 per Pepper J at [95]–[97].

## 1.4 Costs and means to pay

Section 6 of the *Fines Act* 1996 provides that:

In the exercise by a court of a discretion to fix the amount of any fine, the court is required to consider:

- (a) such information regarding the means of the accused as is reasonably and practicably available to the court for consideration, and
- (b) such other matters as, in the opinion of the court, are relevant to that fixing of the amount.

Section 6 is materially similar to s 16C(1) of the *Crimes Act* 1914 (Cth) and the approach taken at common law.<sup>210</sup> The expression “is required to” in s 6 indicates that the court must have regard to the issue, that is, it is a mandatory consideration.<sup>211</sup> It has been held in the context of applying s 16C(1) to Commonwealth offences that although the means of an offender to pay is a mandatory consideration it is not a decisive factor.<sup>212</sup> Other considerations that are relevant in determining the amount of a fine include the seriousness of the offence, its prevalence and deterrence.<sup>213</sup> In some cases, consideration of the financial circumstances of an offender may increase, rather than decrease, a fine in order for it to be a deterrent.<sup>214</sup>

A serious offence demands a serious punishment including, where appropriate, the imposition of a large fine. Preventing environmental offences is especially important<sup>215</sup> and, therefore, a fine that is perceived to be substantial increases its effectiveness as a deterrent.<sup>216</sup> A fine may be only part of the penalty imposed on the offender, and consideration needs to be given to other monetary amounts the offender may be ordered to pay, including the prosecutor’s legal costs of the proceedings.<sup>217</sup> The position after *Barnes* is that costs are an important aspect of punishment and are taken into account by the court. In some cases it is considered with the “means to pay” principle provided in the *Fines Act* 1996.<sup>218</sup> Simply speaking, a court should not impose a fine where the offender has limited or no means to pay:

The imposition of a large fine does involve a number of considerations. It is trite to say that a court generally should not impose a fine which the offender does not have the means to pay, even though these days failure to pay a fine does not lead to imprisonment but to a civil execution for its non-payment.

... It is clear I think that what is required where the court is contemplating the imposition of a financial penalty is a decision on whether or not the appellant has the means.<sup>219</sup>

In *Chief Executive, Office of Environment and Heritage v Fish (No 2)*,<sup>220</sup> Pain J, after quoting *R v Rahme* above, said: “I accept that the Defendant has a limited financial capacity to pay a large fine and will take that factor into account in sentencing”. Later in the judgment, her Honour said:

I will take the same approach as I took in *Barnes* at first instance and take into account that the Defendant is liable for reasonably substantial legal costs in circumstances where he has limited means to pay.<sup>221</sup>

210 *Flego v Lanham* (1983) 32 SASR 361 per Wells J at 365–367.

211 *Retsos v R* [2006] NSWCCA 85 per Sully J at [14]. The sentencing judge erred because there was no credible evidence which established that the applicant had the capacity to pay fines totalling \$80,000.

212 *Jahandideh v R* [2014] NSWCCA 178 per Rothman J at [16]–[17].

213 *ibid* per Rothman J, at [16]–[17]; *Darter v Diden* (2006) 94 SASR 505 at [20]; *Smith v R* (1991) 25 NSWLR 1 at 17–18.

214 *Jahandideh v R*, *ibid* at [17].

215 B Preston, “Principled sentencing for environmental offences — Part 2: Sentencing considerations and options”, (2007) 31(2) *Crim LJ* 142 at 164.

216 In *Darter v Diden* (2006) 94 SASR 505 at [29], Doyle CJ said: “A substantial fine was called for because, in particular, of the seriousness of the offence and its prevalence. Deterrence remains a factor, even if it is attenuated by the unlikelihood of recovery of the fine in future like cases”.

217 *EPA v Barnes* [2006] NSWCCA 246 per Kirby J at [78] and [88].

218 *Fines Act* 1996, s 6.

219 *R v Rahme* (1989) 43 A Crim R 81 per Finlay J at 86–89.

220 (2014) 202 LGERA 18; [2014] NSWLEC 67 per Pain J at [44].

221 *ibid* at [49].

Nonetheless, there have been instances where this sentencing principle has been seen to clash with other sentencing objectives, such as denunciation of the crime, general and specific deterrence and the punishment being proportionate to the gravity of the crime.<sup>222</sup> For example, in the LEC case of *EPA v Causmag Ore Co Pty Ltd*,<sup>223</sup> Pain J stated at [68]:

If the gravity of the offence is serious a lack of capacity to pay a fine is not the most important factor, rather that is the need for deterrence and punishment, per *Environment Protection Authority v Douglass (No 2)* [2002] NSWLEC 94 per Lloyd J at [15]–[16].”

In the Court of Appeal contempt case of *Smith v R*,<sup>224</sup> opinion was divided on the appropriateness of a substantial fine imposed on an appellant with extremely limited means to discharge the fine.<sup>225</sup> While Kirby J (at 21) found the fine excessive, Mahoney JA upheld the fine noting (at 24) its place as “the best of the available alternatives” and its value to deter other possible offenders, even though it was recognised “that in the end the fine may not be able to be collected”. Meagher JA (at 24) strongly disagreed with Kirby J, arguing that if the appellant “was rich enough to commit” the (contempt) offence then “he was rich enough to bear the consequences”.

Any and all costs should be taken into account in considering an offender’s capacity to pay,<sup>226</sup> and the court may reduce the amount of the fine (or the “total” monetary imposition) in awareness of the offender’s modest means and impecuniosity.<sup>227</sup> Conversely, where it has been assessed that the offender does have the means to pay, the court may decide that a reduction in the fine amount is not justified, even where the person is “cash poor” but “asset rich”.<sup>228</sup>

Of course, information on the offender’s capacity to pay must be reasonably and practically made available to the court.<sup>229</sup> Where it is not, the court is under no obligation to reduce the monetary punishment.<sup>230</sup> Appellate authority has made it clear that the sentencing court cannot independently investigate financial circumstances or call evidence; this leaves a sentencing judge relying upon the materials tendered to the court during the course of sentencing proceedings.<sup>231</sup> There is also a realistic expectation that an offender’s legal counsel will, at first instance, draw to the sentencing judge’s attention particular factors, such as adverse financial circumstances, which should be taken into account in mitigation.<sup>232</sup>

222 *Veen v The Queen (No 2)* (1988) 164 CLR 465, per Mason CJ, Brennan, Dawson and Toohey JJ at 472; *Hoare v R* (1989) 167 CLR 348 per Mason CJ, Deane, Dawson, Toohey and McHugh JJ at 354.

223 [2009] NSWLEC 164.

224 (1991) 25 NSWLR 1.

225 The appellant was already serving life imprisonment for murder and, as Mahoney JA noted (at [23]), a further period of imprisonment for a blatant and wilful contempt offence would serve no purpose: it would “be seen by others as derisory”.

226 *Blue Mountains City Council v Carlon* [2008] NSWLEC 296 per Biscoe J at [60], citing *EPA v Barnes* per Kirby J at [88] (Mason P and Hoeben J agreeing); *Hornsby Shire Council v Devaney* [2007] NSWLEC 199 per Biscoe J at [84].

227 *EPA v Causmag Ore Co Pty Ltd* [2015] NSWLEC 58 per Preston CJ of the LEC at [122].

228 *EPA v Hardt* [2007] NSWLEC 284 per Preston CJ of the LEC at [67]. In this case, the offender was on an invalid pension and his “wealth” was in the form of two residential properties both of which were mortgaged: at [4], [9].

229 B Preston, “Principled sentencing for environmental offences”, paper presented at the 4th International IUCN Academy of Environmental Law Colloquium, Compliance and enforcement: toward more effective implementation of environmental law, 18 October 2006, White Plains, New York, p 27.

230 In *Simpson v Office of Environment and Heritage* (2014) 205 LGERA 17; [2014] NSWLEC 34 at [53], Pain J found that there was no basis for reducing the amount of penalties imposed because of the amount of agreed costs in the Local Court given that he was not provided with any evidence of the appellant’s means. Her Honour also commented that “the agreed costs were sizeable no doubt because the Appellant did not plead guilty until the end of the first day of hearing”. It may be argued that Simpson’s counsel should not have run the argument it did without evidence of his means to pay. To ask a court to apply *Barnes* but then offer no evidence as to means or the fiscal impact on him was a mistake.

231 *Jahandideh v R* [2014] NSWCCA 178 per Rothman J at [31].

232 *Zreika v R* (2012) 223 A Crim R 460 per Johnson J at [80], citing *Edwards v R* [2009] NSWCCA 199 per Johnson J at [11] and *Dyer v R* [2011] NSWCCA 185 per Johnson J at [49].

In cases where the LEC is dealing with a corporation rather than an individual offender, the financial circumstances of the corporation, even where construed as “largely indefinite” — such as the business no longer operating, is in liquidation or, more generally, when the company’s liabilities substantially outnumber its assets — should not be used by the court to mitigate the fine to an appreciable extent.<sup>233</sup> Although in dealing with corporate offenders, the court needs to give consideration to “avoiding double punishment”, particularly in circumstances where the company’s operations relies on a sole director.<sup>234</sup> In such instances, the same source of money would be expended by the corporate offender and its “guiding mind” to pay the fines and other monetary orders imposed by the court.<sup>235</sup> As was the case in *EPA v Alcobell Pty Ltd; EPA v Campbell*, the sole director’s personal circumstances, including limited finances and the need to avoid “double punishment” are relevant to sentencing and can lead the court to impose a substantially lower financial penalty than otherwise would have been the case, had such factors, including the recovery of substantial investigation and legal costs, not come into play.<sup>236</sup>

### 1.4.1 Costs and the proportionality principle

The common law has long recognised that the punishment must fit the crime. In *Veen v The Queen (No 2)*, the High Court declared:

The principle of proportionality is now firmly established in this country.<sup>237</sup>

The principle requires that a sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances.<sup>238</sup> The principle of proportionality finds statutory expression in s 3A of the *CSP Act* through one of the purposes of punishment — “to ensure that an offender is adequately punished”.

Given that a fine is the overwhelming sentencing option in the LEC, it is arguable that costs orders impede the court’s capacity to apply the proportionality principle. Put another way, the fine, on its own, does not reflect the seriousness of the crime because it is determined with regard to the costs order which itself is a component of the “overall punishment”. For the proportionality principle to operate effectively in this jurisdiction, it would require an extension beyond the fine imposed to include professional costs and other financial orders made by the court.

<sup>233</sup> B Preston, above n 229, citing *EPA v Capdate Pty Ltd* (1993) 78 LGERA 349 per Stein J at 353; *EPA v Coe Drilling Aust Pty Ltd* [2005] NSWLEC 719 per Preston CJ of the LEC at [191], [195]; *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 234; [2006] NSWLEC 34 per Preston CJ of the LEC at [275].

<sup>234</sup> *Leichhardt Council v Geitonia Pty Ltd (No 7)* [2015] NSWLEC 79 per Biscoe J at [52]–[63]. Biscoe J applied the approach by the Federal Court in *ACCC v ABB Transmission and Distribution Ltd (No 2)* (2002) 190 ALR 169 per Finkelstein J at [45] and *Minister for the Environment and Heritage v Greentree (No 3)* (2004) 136 LGERA 89; [2004] FCA 1317 per Sackville J at [78] and referred to his own decision in *The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd (No 2)* [2012] NSWLEC 95 at [39], [42]. His Honour also noted that the Supreme Court decision of *Palfrey v Spiteri; Palfrey v South Penrith Sand & Soil Pty Ltd; Palfrey v Roberts* [2014] NSWSC 842 had applied *Greentree* and *Kinnarney*. His Honour concluded at [63]:

[The] avoidance of a double penalty is to be taken into account with other considerations, and that other considerations such as the sentencing objectives of deterrence, denunciation and punishment still require more than a nominal fine to also be imposed on the one man company.

<sup>235</sup> *EPA v Alcobell Pty Ltd; EPA v Campbell* [2015] NSWLEC 123 per Pain J at [120], [121].

<sup>236</sup> *ibid* at [114]–[123].

<sup>237</sup> (1988) 164 CLR 465 at 472, per Mason CJ, Brennan, Dawson and Toohey JJ at 472.

<sup>238</sup> *Veen v The Queen (No 2)* (1988) 164 CLR 465 per Mason CJ, Brennan, Dawson and Toohey JJ at 472; *Hoare v R* (1989) 167 CLR 348 per Mason CJ, Deane, Dawson, Toohey and McHugh JJ at 354; *R v Dodd* (1991) 57 A Crim R 349 at 354; and, *R v Whyte* (2002) 55 NSWLR 252 per Spigelman CJ at [156]–[158].

## 1.5 Penalties

In the LEC, a fine is by far the most common penalty imposed upon an environmental offender following conviction for a Tier 1 or Tier 2 offence under the *POEO Act*.<sup>239</sup> Fines for the more common Tier 2 pollution offences in the LEC range up to \$1 million for a corporation (plus \$120,000 each day for a continuing offence) and up to \$250,000 for an individual (plus \$60,000 each day for a continuing offence).<sup>240</sup>

Preston CJ of the LEC made the following statements in relation to the use of a monetary penalty in sentencing environmental offenders:

Courts have repeatedly stated when sentencing for environmental crime that the sentence of the court needs to be of such magnitude as to change the economic calculus ... It should not be cheaper to offend than to prevent the commission of the offence ... Environmental crime will remain profitable until the financial cost to offenders outweighs the likely gains ... The amount of the fine needs to be such as will make it worthwhile that the cost of precautions be undertaken ... The amount of the fine must be substantial enough so as not to appear as a mere licence fee for illegal activity.<sup>241</sup>

In determining an appropriate penalty for an environmental offence, the LEC (and the Supreme Court) may impose an Additional Order (or Additional Orders) together with a fine or in lieu of a fine under the:

- *POEO Act*<sup>242</sup>
- *NPW Act*<sup>243</sup>
- *Threatened Species Conservation Act 1995*<sup>244</sup>
- *Mining Act 1992*<sup>245</sup>
- *Water Management Act 2000*<sup>246</sup>
- *Pesticides Act 1999*.<sup>247</sup>

A commonly-used Additional Order imposed by the LEC is to order the convicted environmental offender to publicise the offence, the circumstances of the offence, its environmental consequences and the court's sentencing decisions in one or more (local) newspapers.<sup>248</sup> Annual reports and other notices to shareholders of a company may also be used by the court as a suitable vehicle to "name and shame" convicted offenders and to increase community awareness of unlawful conduct that adversely affects the environment.<sup>249</sup>

239 With regard to penalties for environmental offences in the Local Court, H Donnelly, Z Baghizadeh and P Poletti, "Environmental planning and protection offences prosecuted in the NSW Local Court", *Sentencing Trends & Issues*, No 43, Judicial Commission of NSW, p 14, found that:

Overwhelmingly, a fine was the most common penalty for the principal offence for both individuals (80.5%) and corporations (81.3%). This is not surprising given that fines are almost invariably the maximum sentence that a [local] court is entitled to impose.

Particularly for the more common Tier 2 offences and their "equivalents", a fine is the maximum penalty that the LEC is entitled to impose under the *POEO Act*, the *EPA Act* and other relevant Acts and regulations.

240 In the Local Court, the maximum monetary penalty that may be imposed for a Tier 2 offence under the *POEO Act* is \$110,000 despite any other provisions of this Act: *POEO Act*, s 215(2).

241 *EPA v Waste Recycling & Processing Corp* (2006) 148 LGERA 299; [2006] NSWLEC 419 per Preston CJ of the LEC at [229].

242 *POEO Act*, s 250(1)(a)–(h).

243 *NPW Act*, s 205(1)(a)–(f).

244 *Threatened Species Conservation Act 1995*, s 141N(1)(a)–(c).

245 *Mining Act 1992*, s 378ZE(1)(a)–(i).

246 *Water Management Act 2000*, s 353G(1)(a)–(c).

247 *Pesticides Act 1999*, s 99(1)(a)–(d).

248 For example, under s 250(1)(a) of the *POEO Act*.

249 *POEO Act*, s 250(1)(b). Emphasising the importance of shame in criminal punishment and restorative justice (J Braithwaite, *Crime, Shame and Reintegration*, Cambridge University Press, 1989), "naming and shaming" may also be used as a form of punishment for a range of "crimes": from sex offenders to small businesses in breach of food safety regulations. The introduction of such measures typically accompanies a "get tough" stance to procedural justice: R Lincoln and S Otto, "To name and shame or not" (2007) 13(1) *The National Legal Eagle* 3 at <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1105&context=nle>, accessed 16 May 2017.



The Local Court is restricted in the types of Additional Orders it may make, whereas the LEC is not. For example, under s 250(1) of the *POEO Act*, the Local Court is not authorised to make an order that involves: environmental restoration or enhancement projects; environmental audits of activities; payments to the Environmental Trust; and, a financial assurance paid to the EPA for environmental purposes.<sup>250</sup> The Local Court is also prevented from making an order for any “restorative justice activity” that the LEC is authorised to make under s 250(1A) of the *POEO Act*. Provisions preventing the Local Court from making Additional Orders along these same lines — and the occasional additional jurisdictional restriction<sup>251</sup> — are found in other pieces of environmental protection legislation.

While the *EPA Act* is primarily concerned with environmental development and planning offences, s 126(3) provides for “revegetation” orders, which are more consistent with environmental protection instruments and the principles of environmental rejuvenation where unlawful damage has occurred:

Where a person is guilty of an offence involving the destruction of or damage to a tree or vegetation, the court dealing with the offence may, in addition to or in substitution for any pecuniary penalty imposed or liable to be imposed, direct that person:

- (a) to plant new trees and vegetation and maintain those trees and vegetation to a mature growth, and
- (b) to provide security for the performance of any obligation imposed under paragraph (a).

More detailed information on the Additional Orders available under each of the relevant Acts is provided in the section headed **Additional Orders** at [2.2.7].

Amendments to the *EPA Act*, in mid-2015, also introduced a three-tiered system to the categorisation and enforcement of environmental planning offences,<sup>252</sup> although this Act allocates jurisdictional responsibilities to the courts very differently to the *POEO Act*.<sup>253</sup> The Supreme Court is not authorised to exercise jurisdiction in respect to offences against the *EPA Act*<sup>254</sup> — regardless of whether the offence is categorised as a Tier 1, Tier 2 or Tier 3 offence — and this has always been the case.<sup>255</sup>

In contrast with Tier 1 offences under the *POEO Act*, proceedings for Tier 1 offences under the amended *EPA Act* (s 125A) may only be heard by the Local Court or by the LEC in its summary jurisdiction: s 127(1). This is despite the Tier 1 *EPA Act* offences:

- including “intent” as an aggravating factor to the commission of the alleged offence (paralleling the “wilful” commission of Tier 1 offences under the *POEO Act*)
- carrying the additional aggravating factors of either:
  - caused or was likely to cause significant harm to the environment (s 125A(1)(b)(i))
  - or
  - caused the death of or serious injury or illness to a person (s 125A(1)(b)(ii))
- carrying the same maximum *monetary* penalties as the Tier 1 *POEO Act* offences,<sup>256</sup> but without the option of imposing a custodial sentence (in addition to, or instead of a monetary penalty).

250 Under the provisions of s 250(1)(c), (d), (e) and (h) of the *POEO Act*.

251 For example, under the *Water Management Act* 2000, the Local Court is not authorised to make an Additional Order under s 353G(1)(c), that is “order the offender to attend, or cause an employee or employees or a contractor or contractors of the offender to attend, a training or other course specified by the court”.

252 Changes to the *EPA Act*, introduced by the *Environmental Planning and Assessment Amendment Act* 2014, also created a three-tiered system of penalties for development and planning offences, classified according to the seriousness of the offence and the culpability of the offender. New maximum penalties applied to each “tier”. In contrast with Tier 1 offences under the *POEO Act*, proceedings for Tier 1 offences under the amended *EPA Act* (s 125A) may be taken before the Local Court (as well as the LEC in its summary jurisdiction): s 127(1). The commencement date for these and other changes was 31 July 2015. See **Environmental planning offences** at [2.3.2] for further details.

253 See **Appendix B** (Part 2) for an overview of the jurisdictional responsibilities and overlaps with regard to the *EPA Act*.

254 *EPA Act*, s 127.

255 The inaugural *EPA Act*, which received assent on 21 December 1979, directed under s 127(1) that: “Proceedings for an offence against this act may be taken before a court of petty sessions held before a stipendiary magistrate sitting alone or before the court in its summary jurisdiction”. Under s 4(1) [Interpretations] of that Act, “court” means the Land and Environment Court.

256 Reflecting the maximum available tariff of the principal component of the monetary penalty: being a fine of \$5 million where the “wilful” offender is a corporation, and a fine of \$1 million where the “wilful” offender is an individual: *POEO Act*, s 119.



This last point is perplexing and worthy of further discussion. A possible aggravating feature of a Tier 1 *EPA Act* offence is where the offender's conduct may have caused the death, serious injury or illness of a person. Tier 1 pollution offences do not specify this as an aggravating factor, but the sentence for such offences can include a term of imprisonment. Sentences for Tier 1 *EPA Act* offences cannot include a custodial component, even though their objective seriousness may be assessed as considerably higher because of the possibility of serious or deadly harm inflicted on another person as a result of the offender's conduct.<sup>257</sup> The Supreme Court should be conferred jurisdiction to deal with the more serious Tier 1 *EPA Act* offences. This appears to be a legislative oversight considering that court's jurisdiction to deal with Tier 1 pollution offences.

While s 242 of the *POEO Act* provides for penalties for continuing offences, this does not apply to Tier 1 pollution offences (s 119) as the maximum monetary penalties for those offences do not carry an additional daily maximum monetary penalty for ongoing damage to the environment. By contrast, the maximum penalties for the Tier 2 "equivalents" of Tier 1 pollution offences do incorporate an additional fine amount for continuing offences (ss 123, 132 and 142A). In this regard, Tier 1 offences against the *EPA Act* share a common feature with Tier 2 offences under the *POEO Act* — a feature which is absent for Tier 1 pollution offences under the *POEO Act*.

Where the offender is a corporation, the LEC is able to impose a fine of up to \$5 million for a Tier 1 *EPA Act* offence, up to \$2 million for a Tier 2 *EPA Act* offence, and up to \$1 million for a Tier 1 *EPA Act* offence. For a continuing offence, the LEC may also impose a cumulative daily fine of \$50,000, \$20,000 and \$10,000 respectively for Tier 1, 2 and 3 offences. No upper limit, constraining the size of the total fine payable by a corporation, is set out in the *EPA Act*.

Where the offender is an individual, the LEC can impose a fine of up to \$5 million for a Tier 1 *EPA Act* offence, up to \$2 million for a Tier 2 *EPA Act* offence, and up to \$1 million for a Tier 1 *EPA Act* offence. For a continuing offence, the LEC may also impose on the individual a cumulative daily fine of \$10,000, \$5,000 and \$2,500 respectively for Tier 1, 2 and 3 offences. Again, there is no "ceiling" in the legislation placed on the total fine amount payable by an individual convicted of a Tier 2 *EPA Act* offence.<sup>258</sup>

In both summary jurisdictions, Tier 3 *EPA Act* offences can be dealt with by the court, not just by way of penalty notice. Section 125C(1)(a) of the *EPA Act* defines a Tier 3 offence as a "certificate-related offence",<sup>259</sup> which is an offence under s 125 arising under certain designated building, compliance and certification provisions of that Act.<sup>260</sup> If proceedings in respect of a Tier 3 *EPA Act* offence are brought in the Local Court, the maximum monetary penalty is again limited to \$110,000 or the maximum monetary penalty provided by that Act in respect of the offence, whichever is the lesser. In general, Sch 5 of the *Environmental Planning and Assessment Regulation 2000* caps the fine amount by penalty notice at \$15,000 for corporations and \$7,500 for individuals.<sup>261</sup>

257 In putting into perspective Tier 1 *EPA Act* offences, where an aggravating factor was the death of another person, it may be noted that offences involving homicide usually carry a maximum penalty of imprisonment under the *Crimes Act 1900*: at the "low" end, a maximum penalty of 10 years' imprisonment for the offence of "Dangerous driving occasioning death" (s 52A(1)), and at the "high" end, life imprisonment for murder (s 19A) and 25 years for manslaughter (s 24). A person convicted of "Assault causing death" (s 25A(1)) is liable to imprisonment for a maximum of 20 years.

258 For any offence against the *EPA Act*, the Local Court is restricted in the size of the maximum monetary penalty it may impose. The jurisdictional limit for a fine issued in the Local Court, in any instance, is capped at \$110,000: *EPA Act*, s 127(3). The Act specifies the maximum monetary penalty for each particular offence and, for a very large number of offences, the maximum amount is far less than \$110,000.

259 Or any other offence against this Act under s 125(1) for which a Tier 3 maximum penalty is declared by the *EPA Act* to apply: s 125C(1)(b).

260 In shortened form, the Tier 3 "certificate-related" offences under the *EPA Act* are against: s 81A(2) — Commencing erection of building without giving notice required by development consent; s 81A(4) — Commencing subdivision work without giving notice required by development consent; s 85A(10A) — Supplying complying development certificate without payment of long service levy; s 85A(11) — Failure to give proper notice of outcome of application for complying development certificate; s 86(1) — Commencing erection of building without giving notice required by complying development certificate; s 86(2) — Commencing subdivision work without giving notice required by complying development certificate; s 109D — Issuing a Pt 4A certificate without being a proper certifying authority; s 109E(3)(d) — Failure of principal certifying authority to ensure inspections carried out before issuing occupation or subdivision certificate; s 109E(3)(e) — Failure of principal certifying authority to ensure preconditions met before issuing occupation or subdivision certificate; s 109F — Failure to comply with restrictions on issuing construction certificate; s 109G — Failure to comply with restrictions on issuing compliance certificate; s 109H — Failure to comply with restrictions on issuing occupation certificate; and, s 109J — Failure to comply with restrictions on issuing subdivision certificate.

261 According to the EPA Connect Newsletter at [www.epa.nsw.gov.au/epaconnect/Issue2Sept2014.htm](http://www.epa.nsw.gov.au/epaconnect/Issue2Sept2014.htm), accessed 16 May 2017, the increased penalty amounts, which came into effect on 31 July 2015, made them "the highest penalty notice fines in Australia". In some cases, there was "a ten-fold increase in fines for the most serious environmental offences". These increased penalty notice amounts were introduced to "better reflect community expectations and provide a deterrent to reoffending".

## 1.6 Environmental offences

Class 5 matters are environmental crimes dealt with by the LEC in its summary criminal enforcement jurisdiction. The LEC deals with offences and other breaches of law under a large number of diverse legislations (see **Appendix A**). In short, however, the LEC deals with two broad categories of offending:

- Crimes against environmental protection laws
- Crimes against environmental planning laws.

### 1.6.1 Crimes against environmental protection laws

Human activity can have adverse — and often incrementally adverse — effects on the natural environment (see **Text Box 2** below).

#### Text Box 2

*One of the crucial issues of our time is how to avoid serious, and perhaps cataclysmic, damage to the natural environment. The causes of such damage are both complex and controversial, and arise from a wide variety of social and economic pressures. The results, however, are more readily apparent. The evidence that pollution, land degradation, deforestation, ozone depletion, climate change, and the loss of biological diversity are inflicting serious and in some cases irreversible damage to the planet which sustains us, is increasingly compelling.*

N Gunningham and P Grabosky, *Smart regulation: designing environmental policy*, 1998, p 3.

Environmental law, or “environmental and natural resources law”, seeks to address the short- and long-term effects of human activity on the natural environment. The core concern of environmental law is environmental degradation caused by pollution. The body of local, national and international treaties, statutes, regulations and common laws exist to address, control and regulate environmental pollution, and to manage valuable and often fragile natural resources such as forests and native vegetation, wildlife habitats and species, waterways and fisheries, even the air that we breathe. However:

environmental law in reality is not so much about blanket protection of “the environment”, as about enabling decisions to be made that reflect a balance between the different environments that are the concern of government.<sup>262</sup>

Seeking a reasonable balance between competing environmental “tensions” is fundamental to the work of the court in the application of environmental laws:

Environmental laws typically prohibit or restrict the use or exploitation of the environment, including the consumption of natural resources, but then enable that prohibition or restriction to be lifted by a person applying for and a regulatory authority granting some form of approval to use or exploit the environment. Hence, natural resource laws prohibit but then enable the consumption of natural resources, such as mining of coal or metalliferous reserves, logging of forest for timber, and extraction of ground or surface water, by the granting of a mining, timber or water licence.

<sup>262</sup> G Bates (ed), *Environmental law in Australia*, 6th edn, LexisNexis, 2006, pp 3–4, who then went on to say: “[These] environments include: the natural environment, the built or urban environment, the cultural environment and the economic, social, health and work environments. Inevitably these environments overlap, and so environmental laws may serve more than one function”.

Native vegetation and wildlife laws prohibit but then enable the clearing of native vegetation or the picking of plants or the harming of animals of threatened species, populations or ecological communities and their habitat by the granting of a clearing approval or a threatened species licence. Planning laws restrict but then enable the carrying out of development such as the use of land and its resources by the granting of a development consent. Pollution laws restrict but then enable the pollution of public resources — the commons — such as the air, rivers, harbours and seashores by the grant of a pollution licence.<sup>263</sup>

The resolution of competing and often adversarial uses of the environment is commonly reflected in the decisions of the LEC, such as in the merits-review appeal case of *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd*, where a “greater good” was at the heart of a decision to allow the “insertion of wind turbines into a non-industrial landscape” to the detriment of the rural setting and the local inhabitants — both human and non-human.<sup>264</sup> For Preston CJ of the LEC, a greater societal good would be achieved in allowing the construction of a wind farm that would have dramatic and permanent impacts on an otherwise pristine rural environment. That greater good was expressed as “confronting carbon emissions and global warming” and providing “an opportunity to shift from societal dependence on high-emission fossil fuels to renewable energy sources”, representing “one much needed step in policy settings confronting carbon emissions and global warming”.<sup>265</sup> It is a sobering truth to acknowledge that, at times, environmental stewardship has to give way to ecologically sustainable development.<sup>266</sup>

### 1.6.1.1 Defining environmental harm

Under Pt 5.7 of the *POEO Act*, in particular, s 147(1) provides:

- (a) harm to the environment is material if:
  - (i) it involves actual or potential harm to the health or safety of human beings or to ecosystems that is not trivial, or
  - (ii) it results in actual or potential loss or property damage of an amount, or amounts in aggregate, exceeding \$10,000 (or such other amount as is prescribed by the regulations), and
- (b) loss includes the reasonable costs and expenses that would be incurred in taking all reasonable and practicable measures to prevent, mitigate or make good harm to the environment.<sup>267</sup>

Clearly, the concept of harm is broad: environmental harmfulness needs to be considered not only in terms of actual harm; the potential or risk of harm must also be taken into account.<sup>268</sup>

263 The Hon Justice B Preston, “The effectiveness of the law in providing access to environmental justice: an introduction”, paper presented at the 11th IUNC Academy of Environmental Law Colloquium, 28 June 2013, Hamilton, New Zealand.

264 *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* (2007) 161 LGERA 1; [2007] NSWLEC 59 per Preston CJ of the LEC at [1].

265 *ibid* at [1]–[2].

266 As defined in the Ecologically Sustainable Development Steering Committee’s *National strategy for ecologically sustainable development — Part 1*, 1992 at [www.environment.gov.au/about-us/esd/publications/national-esd-strategy-part1#WIESD](http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy-part1#WIESD), accessed 16 May 2017, “ecologically sustainable development” refers to “using, conserving and enhancing the community’s resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased”. One of the key principles of ecologically sustainable development is that “decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations”.

267 *POEO Act*, s 147(1)(a) and (b).

268 As Pepper J stated in *Director-General, Dept of Environment, Climate Change and Water v Forestry Commission of NSW* [2011] NSWLEC 102 at [66]: “The harm to the environment must not only be considered in terms of actual harm, but must include the potential risk of harm” citing *EPA v Waste Recycling & Processing Corp* [2006] NSWLEC 419; (2006) 148 LGERA 299 per Preston CJ of the LEC at [145]–[147].

The environmental harm caused by the commission of an environmental offence is a fundamental consideration when determining the objective seriousness of that offence.<sup>269</sup> In *EPA v Waste Recycling and Processing Corp*, Preston CJ of the LEC recorded the principles for assessing the objective harmfulness of an environmental offence:<sup>270</sup>

- Harmfulness needs to not only be considered in terms of actual harm, the potential or risk of harm should also be taken into account ... Harm should not be limited to measurable harm such as actual harm to human health. It can also include a broader notion of the quality of life.<sup>271</sup>
- Harm can include harm to the environment and its ecology. Harm to an animal or plant not only adversely affects that animal or plant, it also affects other biota that have ecological relationships to that animal or plant.<sup>272</sup>
- Harm can be direct or indirect, individual or cumulative. Activities that contribute incrementally to the gradual deterioration of the environment, even when they cause no discernible direct harm to human interest, should also be treated seriously.<sup>273</sup>
- The culpability of the defendant depends in part on the seriousness of the environmental harm. Sentencing courts have exercised their discretion in relation to penalty on the principle that the more serious the lasting environmental harm involved, the more serious the offence and, ordinarily, the higher the penalty<sup>274</sup> ... If the harm is substantial, this objective circumstance is an aggravating factor: s 21A(2)(g) of the *CSP Act* 1999.
- The fact that the environment harmed by the offender's conduct was already disturbed or modified is not a mitigating factor.<sup>275</sup>

These comprehensive principles are fundamental to the concept of environmental harm, and are regularly found reaffirmed in the sentencing remarks of other LEC judges in determining an appropriate penalty for an offence — across all manner of environmental protection laws and very different types of environmental crime, including:

- **Pollute waters** (s 120 of the *POEO Act*):
  - *EPA v Orica Aust Pty Ltd* (the *Nitric Acid Air Lift Incident*) — release of nitric acid into the environment, contaminating groundwater and a major waterway.<sup>276</sup>
  - *EPA v Coal and Allied Operations Pty Ltd* — offender failed to have in place adequate sediment and erosion control measures to prevent sediment caused by heavy rain running off into local tributary.<sup>277</sup>
  - *EPA v M A Roche Group Pty Ltd*; *EPA v Roche* — unintentional discharge of polluted water into the dry bed of an unnamed watercourse which flowed into a local creek.<sup>278</sup>

269 *Director-General, Dept of Environment and Climate Change v Hudson (No 2)* [2015] NSWLEC 110.

270 (2006) 18 LGERA 299; [2006] NSWLEC 419 at [145]–[149].

271 *EPA v Waste Recycling & Processing Corp* (2006) 18 LGERA 299; [2006] NSWLEC 419 per Preston CJ of the LEC at [145] citing *Axer Pty Ltd v EPA* (1993) 113 LGERA 357 per Badgery-Parker J at 366 and *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 234; [2006] NSWLEC 34 per Preston CJ of the LEC at [175].

272 *EPA v Waste Recycling & Processing Corp*, *ibid* at [146] per Preston CJ of the LEC citing *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 at [174].

273 *EPA v Waste Recycling & Processing Corp*, *ibid* at [147].

274 *EPA v Waste Recycling & Processing Corp*, *ibid* at [148] citing *Camilleri's Stock Feeds Pty Ltd v EPA* (1993) 32 NSWLR 683 at [701].

275 *EPA v Waste Recycling & Processing Corp*, *ibid* at [149] citing *State Pollution Control Commission v White Wings Ltd* (unrep, 1/11/91, NSWLEC) per Bignold J at 4; *EPA v Ecolab Pty Ltd* [2002] NSWLEC 206; (2002) 123 LGERA 269 per Cowdery J at [14]; *EPA v Coggins* (2003) 126 LGERA 219; [2003] NSWLEC 111 per Cowdery J at [18]; *EPA v Abigroup Contractors Pty Ltd* [2003] NSWLEC 342 per Lloyd J at [24]; *EPA v Arenco Pty Ltd* [2006] NSWLEC 244 per Pain J at [26].

276 (2014) 206 LGERA 239; [2014] NSWLEC 103 at [125]. Pepper J found that the offences caused environmental harm at “the lower end of the spectrum”.

277 [2013] NSWLEC 134 at [103]. Biscoe J assessed the environmental harm as “low”.

278 [2013] NSWLEC 191 at [21]. Pain J found that the environmental harm and “the more serious ‘likely to cause’ harm ... was for a limited time and in a limited geographical area. The extent of environmental harm is low in these circumstances”.

- **Marine pollution** (s 8(1) of the *Marine Pollution Act 1987*):
  - *Newcastle Port Corp v MS Magdalene Schiffahrtsgesellschaft MBH* — discharged oil from ship into State waters (Newcastle Harbour).<sup>279</sup>
- **Land pollution/unlawful disposal of waste** (s 142A and s 143 of the *POEO Act*):
  - *Bankstown City Council v Hanna* — disposal of building waste materials unlawfully on vacant private land and on a public park to avoid paying tipping fees at an approved waste facility.<sup>280</sup>
- **Air pollution** (s 128(2) of the *POEO Act*):
  - *EPA v Unomedical Pty Ltd (No 4)* — failed to conduct activity on premises by such practicable means as to prevent or minimise air pollution.<sup>281</sup>
- **Unlawful clearing of native vegetation** (s 12 of the *NV Act*):
  - *Chief Executive, Office of Environment and Heritage v Rummery* — cleared native vegetation on rural property without development consent and without a property vegetation plan. Approximately, 18,000 to 20,000 trees were cleared across 248 hectares.<sup>282</sup>
- **Harming an endangered ecological community** (s 118A(2) of the *NPW Act*):
  - *Chief Executive, Office of Environment and Heritage v Kyluk Pty Ltd (No 4)* — illegally cleared land, which amounted to picking plants that were part of an endangered ecological community (EEC).<sup>283</sup>
- **Contravening a condition of a threatened species licence** (s 175(1)(a) of the *NPW Act*):
  - *Director-General, Dept of Environment, Climate Change and Water v Forestry Commission of NSW* — NSW Forestry Commission carried out a specified forest activity, namely a bush fire hazard reduction burning, in an exclusion zone, breaching a condition of its threatened species licence and affecting a key habitat of a nationally endangered species.<sup>284</sup>
- **Breach of conditions of Environment Protection Licence** (s 64(1) of the *POEO Act*):
  - *EPA v Wyanga Holdings Pty Ltd; EPA v Cauchi* — deliberate disregard of licence conditions in operating a quarry; exceeding prescribed output and failure to report exceedances.<sup>285</sup>

279 [2013] NSWLEC 210 at [253]. Sheahan J found that the environmental harm caused by the oil spill “was substantial and significant, but, fortunately, neither long-lasting, nor permanent”.

280 (2014) 205 LGERA 39; [2014] NSWLEC 152 at [24]–[27]. Preston CJ of the LEC at [69] found that “the harm to the environment and human health and the financial loss to the owners of the lands caused by commission of the offences are ‘substantial’ and an aggravating factor under s 21A(2)(g) of the *Sentencing Act*”. Note: The *Sentencing Act* 1989 was repealed by the *Crimes Legislation Amendment (Sentencing) Act* 1999 with effect from 3 April 2000.

281 [2011] NSWLEC 131 at [111]. Pepper J found that the level of environmental harm caused by the offence was “not substantial”.

282 (2012) 192 LGERA 314; [2012] NSWLEC 271 per Pepper J at [1], [85]. After considering considerable expert evidence from both parties, Pepper J concluded at [120] that “the commission of the offence caused moderate to substantial environmental harm, although not as substantial as the prosecutor posited ... in these circumstances the harm is to be considered as an aggravating factor”.

283 (2014) 212 LGERA 1; [2014] NSWLEC 74. Pain J at [52] considered the interpretation of “harm” in *POEO Act* prosecutions should apply to *NPW Act* prosecutions. Her Honour noted “the similarity in wording between s 194(1)(a) [of the *NPW Act*] and s 241(1)(a) [of the *POEO Act*] ... with the former introduced as part of Pt 15 to make offences under the *NPW Act* ‘broadly consistent’ with Pt 8 of the *POEO Act* (according to the explanatory notes for the National Parks and Wildlife Amendment Bill 2010)”. The level of environmental harm was considered by Pain J at [60] as “substantial” and “ongoing but will diminish over the next fifteen years if the regeneration of the EEC [forming a Shale/Sandstone Transition Forest] continues successfully given the estimation of up to twenty years being required for complete regeneration to occur”.

284 [2011] NSWLEC 102. Pepper J at [75] held: “having regard to, in particular, the endangered nature of the [impacted] species and the sizable area (approximately 90%) of habitat affected by the burn” found that “the environmental harm caused by the commission of the offence to be in the low to moderate range”.

285 [2015] NSWLEC 78. Although it was conceded by the prosecutor that there was “no actual environmental harm” at [111], Sheahan J stated at [126] that “the prosecutor has satisfied me beyond reasonable doubt that there was a ‘potential’ for harm to arise, at a general level. Increasing the intensity of an activity for which an EPL is issued, contrary to that EPL, must, generally, give rise to a potential risk of harm to the environment”.



## 1.6.2 Crimes against environmental planning laws

The set of offences that involve breaches of environmental planning laws are manifestly different to crimes against environmental protection laws. The bulk of such offences dealt with by the LEC — as is the case in the Local Court — involve a failure to receive consent (or apply for a permit) to carry out a development under various sections of the *EPA Act*, including:

- carry out development without consent, *EPA Act*, s 76A(1)(a)
- carry out development not in accordance with consent, *EPA Act*, s 76A(1)(b),

and the more general:

- do things forbidden under the *EPA Act*, s 125(1).

It is a criminal offence to develop without consent or to breach the conditions of development consent.<sup>286</sup> Offenders may be individuals or corporations. Typically, local councils are the regulatory authority which prosecutes for breaches of environmental planning laws.

### 1.6.2.1 Harm in the context of economically sustainable development

Ecologically sustainable development (ESD) has been embraced by international, national, state and local governments as the best strategy for managing the ongoing tension between environmental protection and economic growth. It has been claimed that “(t)he shift from unsustainable to sustainable growth patterns has been identified as probably the most complex agenda facing governments today”,<sup>287</sup> and “(a)t a practical level, the vast majority of governments in industrialized countries ... will continue to depend on regulatory policy to achieve specific environmental objectives”.<sup>288</sup>

Environmental planning laws in NSW operate within a context of economically sustainable development, fundamentally through regulatory policies and legislation using a “command and control” approach.<sup>289</sup> Legal governance reinforced by criminal sanction is used to regulate and punish undesirable building activities that negatively impact on the natural environment and/or the built environment.<sup>290</sup>

286 Carrying out a development without consent and breaching the terms of a development consent are offences under the *EPA Act* (see s 127(7)). Proceedings to remedy or restrain a breach “are more frequently dealt with by civil enforcement proceedings rather than prosecutions. A criminal conviction for these offences cannot be made while the same matter is the subject of civil enforcement proceedings, or after an order has been made in civil enforcement proceedings.” Environmental Defenders Office NSW (ed), *Environmental law toolkit – NSW – a community guide to environmental law in New South Wales*, Federation Press, 5th edn, 2005, pp 46–47.

287 N Gunningham and P Grabosky, *Smart regulation: designing environmental policy*, Clarendon Press, 1998, p 30 citing S Dovers, “Information, sustainability and policy” (1995) 2(3) *Australian Journal of Environmental Management* 142.

288 Gunningham and Grabosky, *ibid*, p 30. In *Garrett v Freeman (No 5)* (2009) 164 LGERA 287; [2009] NSWLEC 1, Lloyd J at [58] stated:

It is beyond dispute that the purpose of the system of planning and development control is to promote the proper management of resources or land for the economic, social and environmental welfare of the community: *Power v Penthill House Pty Ltd* (1993) 80 LGERA 247 at 252 per Stein J.

289 Gunningham and Grabosky, *ibid*, fn 3 at p 4, where it was stated: “command and control” is a conventional and common approach to environmental regulation. “The term ‘command and control’ refers to the prescriptive nature of the regulation (the command) supported by the imposition of some negative sanction (the control)”.

290 The term “built environment” refers to the man-made surroundings that provide the spatial setting for human activities, that include erected structures such as houses, offices, shops and shopping centres, schools, churches, business centres and industrial areas. Playing fields, parks and other green spaces are also considered an integral part of the built environment. Transport means (roads, railways, etc), energy networks and water supply form part of the supporting infrastructure. More broadly defined, “the built environment is the human-made space in which people live, work, and recreate on a day-to-day basis”: K Roof and N Oleru, “Public health: Seattle and King County’s push for the built environment” (2008) 71(1) *Journal of Environmental Health* 24.



Environmental standards are cemented in place through environmental planning instruments, regulatory permits and licences, and land use controls and prohibitions. The provisions of environmental planning instruments are legally binding on both government and developers.<sup>291</sup> As Preston CJ of the LEC stated in *Telstra Corp Ltd v Hornsby Shire Council*,<sup>292</sup> when a Class 1 appeal was brought pursuant to s 97(1) of the *EPA Act*:<sup>293</sup>

Ecologically sustainable development, in its most basic formulation, is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”: World Commission on Environment and Development, *Our Common Future*, Oxford, Oxford University Press 1987 at p 44 (also known as the *Brundtland Report*) ...

...

The principles of ecologically sustainable development are to be applied when decisions are being made under any legislative enactment or instrument which adopts the principles ...<sup>294</sup>

The [*EPA Act*] is one such legislative enactment. It expressly states that one of the objects of the [*EPA Act*] is to encourage ecologically sustainable development: s 5(a)(vii). The Act defines ecologically sustainable development as having the same meaning as it has in s 6(2) of the *Protection of the Environment Administration Act* 1991.

The LEC has held that, even where provisions of the *EPA Act* do not expressly refer to ecologically sustainable development, government and regulatory decision makers need to embrace the principles of ecologically sustainable development under the broader doctrine of “the public interest”.<sup>295</sup> Notably, there is a statutory obligation in s 79C(1)(e) of the *EPA Act* to consider the public interest. Preston CJ of the LEC made it clear in *Telstra*, that:

The consideration of the public interest is ample enough, having regard to the subject matter, scope and purpose of the [*EPA Act*], to embrace ecologically sustainable development.<sup>296</sup>

With regard to the judicial view that a consent authority must have due regard to ESD principles, Hodgson JA, in *Minister for Planning v Walker*, hypothesised on the likely outcome of an appeal, should the LEC have identified issues relevant to the principles of ESD in a s 79C decision, but declined to have regard to those principles:

that would be an error of law that could support an appeal to this Court. If the Land and Environment Court did not have regard to the principles of ESD because it did not consider that issues relevant to those principles arose, when on a correct view such issues did arise, then this would be at least an error of fact, if not an error of law.<sup>297</sup>

291 Environmental Defenders Office NSW, above n 286, p 9.

292 (2006) 67 NSWLR 256. This was an appeal where an applicant was dissatisfied with the determination of a consent authority with respect to the applicant’s development application.

293 *ibid* at [108], [121], [122].

294 *ibid* at [121] citing *Murrumbidgee Ground-Water Preservation Assoc v Minister for Natural Resources* [2004] NSWLEC 122 per McClellan (then) CJ of the LEC at [178] and *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 per Preston CJ of the LEC at [57].

295 In *Minister for Planning v Walker* (2008) 161 LGERA 423; [2008] NSWCA 224, Hodgson JA opined at [39]:  
it is a condition of validity that the Minister consider the public interest. Although that requirement is not explicitly stated in the EPA Act, it is so central to the task of a Minister fulfilling functions under a statute like the EPA Act that, in my opinion, it goes without saying.  
Any attempt to exercise powers in which a Minister did not have regard to the public interest could not, in my opinion, be a bona fide attempt to exercise his or her powers. [Campbell JA agreeing; Bell JA preferring not to express a view.]

In *Aldous v Greater Taree City Council* (2009) 167 LGERA 13; [2009] NSWLEC 17, Biscoe J had to consider whether a development consent was invalid because the consent authority (the local council) failed to take into account principles of ecologically sustainable development, in particular, the effect of climate change induced coastal erosion on a beachfront development.

296 *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256 per Preston CJ of the LEC at [123]. Concerning judicial decisions being made under any legislative enactment or instrument which adopts the principles, Preston CJ of the LEC at [121] cited *Murrumbidgee Ground-Water Preservation Assoc v Minister for Natural Resources* [2004] NSWLEC 122 per McClellan (then) CJ of the LEC at [178] and *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 234; [2006] NSWLEC 34 per Preston CJ of the LEC at [57]. On consent authorities in relevant cases having regard to the principles of ecologically sustainable development, his Honour at [124] cited *Carstens v Pittwater Council* (1999) 111 LGERA 1; [1999] NSWLEC 249 per Lloyd J at 25; *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237; [2004] NSWLEC 399 per McClellan (then) CJ of the LEC at [113]; and, *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426 per Talbot J at [54].

297 (2008) 161 LGERA 423; [2008] NSWCA 224 at [43]. Preston CJ of the LEC provides a detailed discussion of six highlighted ESD principles in *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256 at [109]–[119].

In decisions made by the LEC, the “harm” caused by conduct that breaches environmental planning laws has been described variously as:

- thwarting the attainment of the objects of the *EPA Act*<sup>298</sup>
- the undermining of the regulatory system of development control<sup>299</sup>
- the risk of unregulated and environmentally “unfriendly” development<sup>300</sup>
- adverse amenity impacts, including the effects on “residential” amenity and adjoining and neighbouring land.<sup>301</sup>

Needless to say, the “harm” resulting from environmental planning breaches may also constitute actual damage to the environment as well as the potential for damage, particularly where hazardous building materials such as asbestos are involved, although there is authority that an environmental planning offence does not require actual harm to the environment as an essential ingredient of the offence.<sup>302</sup>

298 *Council of the City of Sydney v Adams* [2015] NSWLEC 206 per Preston CJ of the LEC at [38]; *Mackenzie Architects International Pty Ltd v Ku-ring-gai Council* [2015] NSWLEC 1353 per Commissioners at [45]; *Willoughby Council v Vlahos* [2013] NSWLEC 71 per Craig J at [31]; *Simpson v Wakool Shire Council* (2012) 190 LGERA 143; [2012] NSWLEC 163 per Preston CJ of the LEC at [102].

299 In *Warringah Council v ProjectCorp Aust Pty Ltd* [2015] NSWLEC 141 at [180], Craig J offered this view on the matter:  
When earlier describing the nature of the offence against s 125(1) of the EPA Act, I have identified it as being one that undermines the integrity of the system of planning and development control in this State. That consequence is an element of environmental harm (*Cessnock City Council v Bimbadgen Estate Pty Ltd (No 2)* [2011] NSWLEC 140 [per Pepper J] at [62]).

Also see *Council of the City of Sydney v Adams* [2015] NSWLEC 206 per Preston CJ of the LEC at [38]–[41]; *Warringah Council v ProjectCorp Aust Pty Ltd* at [165]; *Sutherland Shire Council v Sud* [2015] NSWLEC 44; *Gittany Constructions Pty Ltd v Sutherland Shire Council* (2006) 145 LGERA 189; [2006] NSWLEC 242 per Preston CJ of the LEC at [103].

300 *Telstra Corp Ltd v Coffs Harbour City Council* [2014] NSWLEC 1254 per Brown C at [13], [60]–[61].

301 *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 per Preston CJ of the LEC at [34]; *Blackington Pty Ltd v Tweed Shire Council* (2006) 145 LGERA 160; [2006] NSWLEC 158 per Jagot J at [79]; and, *Architects Becerra v Council of the City of Sydney* [2014] NSWLEC 1250 per Fakes C at [16].

302 In *Willoughby City Council v Livbuild Pty Ltd* [2015] NSWLEC 34 at [62], Pepper J commented that:

[t]he legislative scheme enshrined in the [EPA Act] requires that the integrity of the system of planning is not subverted, irrespective of any actual physical environmental harm occasioned by a given offence. Citing (*Pittwater Council v Scahill* [2009] NSWLEC 12; (2009) 165 LGERA 289 per Preston CJ of the LEC at [46] and *Gittany Constructions Pty Ltd v Sutherland Shire Council* (2006) 145 LGERA 189; [2006] NSWLEC 242 per Preston CJ of the LEC at [104]–[105]).

A later section in this study discusses the assessed level of environmental damage resulting from breaches of environmental planning laws: see “Environmental harm” under **Objective factors** at [2.3.2.1].

## 2. Findings

### 2.1 The approach taken in this study

The findings on LEC offences presented in this study differ from those provided in *Sentencing Trends & Issues* Number 43 (November 2014) which examined environmental planning and protection offences dealt with by the NSW Local Court.<sup>303</sup>

There are good reasons for taking a somewhat different approach in this study. First, the LEC is manifestly a different jurisdiction to the Local Court. The LEC is a “boutique” jurisdiction that has been established as a specialist court to deal specifically with environmental matters.<sup>304</sup> The Local Court, on the other hand, “deals with environmental crimes infrequently, at least compared to other more common crimes”.<sup>305</sup> The NSW Bureau of Crime Statistics and Research (BOCSAR) report, *NSW Criminal Courts Statistics 2014*, clearly shows this, with charges for environmental offences being not much more than a rarity in the Local Court. Of the criminal cases finalised in the Local Court in 2014, only 194 charges of a grand total of 255,387 related to environmental offences,<sup>306</sup> there were also 389 charges for breaches of environmental regulations.<sup>307</sup> Together, environmental matters made up less than one-quarter of one per cent (0.23%) of all criminal charges finalised in the Local Court in 2014.

Providing similar information, the Commission’s study of environmental planning and protection offences prosecuted in the Local Court reported that, within the five-year period from 1 January 2009 to 31 December 2013, there were 2,413 offenders sentenced for at least one environmental offence in the Local Court for a total of 3,052 environmental offences.<sup>308</sup> Again, this equates to around 600 environmental offences before the Local Court each year.

Secondly, the LEC deals with far fewer cases of environmental offences than the Local Court. Capturing all such offences — principal offences and non-principal offences — the LEC dealt with 882 environmental offences across the 15-year study period from 1 January 2000 to 28 February 2015. This equates to around 60 environmental offences every year (or just one-tenth of the annual environmental matters handled by the Local Court).<sup>309</sup> Considering only principal offences, there were fewer than 550 principal environmental offences before the LEC in the 15-year period: an average of just 37 per year.

303 H Donnelly, Z Baghizadeh and P Poletti, “Environmental planning and protection offences prosecuted in the NSW Local Court”, *Sentencing Trends & Issues*, No 43, Judicial Commission of NSW, 2014, p 1.

304 *Land and Environment Court Act* 1979.

305 Above n 303.

306 NSW Bureau of Crime Statistics and Research (BOCSAR), *NSW Criminal Courts Statistics 2014*, 2015, p 20, at [www.bocsar.nsw.gov.au/Documents/CCS-Annual/ccs2014.pdf](http://www.bocsar.nsw.gov.au/Documents/CCS-Annual/ccs2014.pdf), accessed 16 May 2017. According to BOCSAR, there were: 16 water pollution offences, 26 noise pollution offences, one air pollution offence, five soil pollution offences, and 146 offences categorised as “environmental pollution, other”.

307 *ibid* p 23.

308 H Donnelly et al, above n 303, p 13. Local Court sentencing data are initially collected on behalf of BOCSAR by court registry staff. The data are supplied to the Commission for use in studies and for publication on the statistics component of the Judicial Information Research System (JIRS).

309 This study examined all NSW LEC cases involving Class 5 summary criminal enforcement matters recorded in the Commission’s environmental crime sentencing database in the period from 1 January 2000 to 28 February 2015. In total, 882 offences were dealt with by the LEC in this period (or 60 offences per year). These offences included both principal and secondary environmental planning and pollution offences (for the various definitions, see n 317 and n 318); they also included 70 contempt offences. For the offences examined, the order dates spanned more than 15 years from 14/2/2000 to 24/3/2015. In terms of offence start date, the earliest offence examined was committed on 11/11/1989 and the latest on 25/9/2013. Two cases had missing offence start dates.

Thirdly, the LEC deals with more serious environmental offences than the Local Court.<sup>310</sup> The fact that these offences are objectively more serious, and the sentencing proceedings more complex, is another reason for adopting a different approach. There is added forensic value in providing qualitative information which supplements the quantitative statistics. The analysis is more robust when the facts underlying the commission of serious Tier 1 and Tier 2 offences (including whether the offence is committed recklessly or negligently)<sup>311</sup> are disclosed.

Fourthly, while the majority of environmental offenders prosecuted in the Local Court were individuals (individuals: 79.4%; corporations: 20.6%),<sup>312</sup> this is not the case in the LEC. Corporations<sup>313</sup> represented the majority of environmental offenders prosecuted by the LEC (corporations: 58.8%; individuals: 41.2%).<sup>314</sup> In general, the maximum penalty for a corporation convicted of an environmental offence is higher than the corresponding maximum penalty for an individual.<sup>315</sup>

A further consideration is that while persons appearing before the Local Court for environmental offences may represent the “average” citizen, individuals prosecuted by the LEC are often company directors or other executives involved in the management of a corporation held accountable for the environmental offence. Therefore, such persons are subject to the provisions of “special executive liability” offences under s 169 of the *POEO Act* and, thus, potentially harsher penalties than individuals would otherwise receive,<sup>316</sup> because they are the directing mind of the corporate “offender” and environmental damage (and the potential for damage) is often on a larger scale.

310 Tier 1 offences under the *POEO Act* must be determined either summarily before the LEC in its summary jurisdiction or on indictment before the Supreme Court: s 214(1) of the *POEO Act*. The prosecuting agency, whether that is the EPA, local council or shire, police, water supply or marine authorities (etc), decides in which jurisdiction the matter will be heard. In State of NSW and NSW Environment Protection Authority, *EPA prosecution guidelines*, 2013, at [www.epa.nsw.gov.au/legislation/20130141EPAProsGuide.htm](http://www.epa.nsw.gov.au/legislation/20130141EPAProsGuide.htm), accessed 16 May 2017, it is stated at (6.1.2), that the choice of venue rests solely with the prosecutor:

The general principle adopted by the EPA is that the Tier 1 prosecutions will be instituted in the Land and Environment Court except where the EPA intends to submit to the Court that the appropriate penalty, given all the circumstances surrounding the offence, will exceed a period of two years imprisonment.

The above principle recognises a number of additional factors including: the LEC has been established as a specialist court to hear environmental matters; the lengthy process of proceeding by indictment; corporate offenders are not subject to a loss of liberty; and, Tier 1 and Tier 2 matters may be adjudicated together in the LEC, saving public resources. In choosing the venue for a summary hearing, the EPA must, inter alia, pay heed to the jurisdictional limits of the Local Court and the possible application for orders that the Local Court is not authorised to make (for instance, Additional Orders under s 250(1)(c), (d), (e) or (h) of the *POEO Act*).

311 As stated in *EPA v Wyanga Holdings Pty Ltd* [2015] NSWLEC 78 per Sheahan J at [195]: an offence committed “recklessly” or “negligently” will be more objectively serious than one committed accidentally.

312 H Donnelly et al, above n 303, pp 13–14.

313 “Corporation” has the meaning given by s 57A of the *Corporations Act* 2001 (Cth).

314 Parliament’s “binary” division of environmental offenders is in terms of the generic categories “corporation” and “individual” (see eg s 119 of the *POEO Act*). This division was re-examined in this study to provide a more detailed analysis of offenders, offences and objective seriousness. The constructed variable, “class of offender”, provides four offender categories: “corporation”, “special liability” offender, “small business owner” and “(ordinary Joe) individual”. These are based on information provided in each judgment. Of the 502 environmental offences examined in this study, 295 were committed by corporations (see **Table 4**).

315 The maximum penalty for an *individual* convicted of Tier 1 offences under the *POEO Act* does include the possibility of a term of imprisonment. Section 119(b) provides: “in the case of an individual — to a penalty not exceeding \$1,000,000 or 7 years’ imprisonment, or both, for an offence that is committed wilfully or \$500,000 or 4 years’ imprisonment, or both, for an offence that is committed negligently”.

316 *POEO Act*, ss 169, 169A–169C (including “state of mind” considerations).

## 2.1.1 The quantitative data: the principal environmental offence

In this study, environmental planning and protection offences<sup>317</sup> that were the *principal* offence<sup>318</sup> were examined for the purposes of the quantitative analysis. The period covered was January 2000 to February 2015. During the 15-year study period, the LEC dealt with 548 principal environmental offences. However, as 46 principal offences were “contempt” matters, these were excluded from further analysis. This left 502 principal environmental offences, of which nine cases (1.8%) involved Tier 1 offences – these matters are discussed separately.<sup>319</sup> Tier 2 offences (or similarly-rated offences under different Acts, current and repealed) make up the remaining 493 (98.2%) environmental offences. Tier 2 offences are ordinarily “strict liability” offences, meaning that the prosecutor only has to prove that the offender’s act or omission caused the offence — “the commission of the prohibited act is all that must be proved”.<sup>320</sup> Of the 493 Tier 2 offences, 437 offences (88.6%) fell into one of 10 common categories of environmental offences — these are discussed in “**Top 10** environmental offences at [2.2.2]. **Appendix C** provides a breakdown of the full set of principal environmental offences examined in this study.

## 2.1.2 General offence and penalty characteristics: what a conventional sentencing analysis would show

### 2.1.2.1 Level of environmental harm

**Figure 1** provides information, for all primary offences (n=502) before the LEC in the study period, on the level of environmental harm resulting from the commission of the offence. The level of environmental harm is a finding of fact determined by the court. The finding is based on submissions from the prosecution of the actual and potential damage to the environment. The prosecuting agency’s assessment of the nature and level of environmental harm typically relies on professional assessments undertaken by environmental consultants, ecologists and other environmental experts and scientists.<sup>321</sup>

In the study period, 11% of all environmental offences (n=55) involved a “serious” level of environmental harm and a further 17.9% (n=90) involved a “medium” level of harm. Notably, over 70% of all primary offences before the LEC in the study period involved either “low” levels of environmental harm (40.8%) or “no environmental harm” (30.3%). Nonetheless, it should be acknowledged that many environmental offences, particularly those involving the release of chemicals and other pollutants into waterways and the illegal dumping of toxic waste such as

317 For the purposes of this study, an offence involves a Class 5 matter dealt with summarily by the NSW LEC (contempt offences excluded). Environmental protection offences cover a broad range of offences under various Acts and regulations, but typically the offence involves intentional or careless conduct that causes or risks harm to the environment, such as through acts of pollution, the destruction of protected flora and fauna and Aboriginal objects, licence breaches and nuisance activities (eg noise pollution). Environmental planning offences involves conduct contrary to environmental planning legislation, typically involving building without development consent or contrary to development approval. It also includes conduct that violates heritage protections.

318 Where an offender was sentenced for multiple offences in a single finalised court appearance, only the offence that attracted the highest penalty is included in the analysis. Where the highest penalty was a fine, and the offender received multiple fines, the highest individual fine was included in the analysis. Offenders sentenced by the LEC on different occasions (ie distinct finalised court appearances) during the study period will have a separate count for each principal offence and penalty.

319 Under various current and repealed Acts, there may have been offences that may be deemed similarly “equivalent” to “Tier 1” offences. For example, an offence under s 6(1)(a) of the *Environmental Offences and Penalties Act* 1989 (repealed on 1 July 1999) appears to be a precursor to s 116(1)(a) of the *POEO Act*. Section 6(1)(a) (rep) provided: “If a person, without lawful authority, wilfully or negligently causes any substance to leak, spill ... in a manner which harms or is likely to harm the environment”. For example, see *EPA v CSR Ltd t/a CSR Woodpanels* [2001] NSWLEC 267. All attempts have been made to identify and include “Tier 1” type offences in the analyses.

320 Environmental Defenders Office NSW, above n 286, p 95. The prosecutor need not show that the offender intended to commit the act or acted negligently. Strict liability still allows the defence of honest and reasonable mistake of fact.

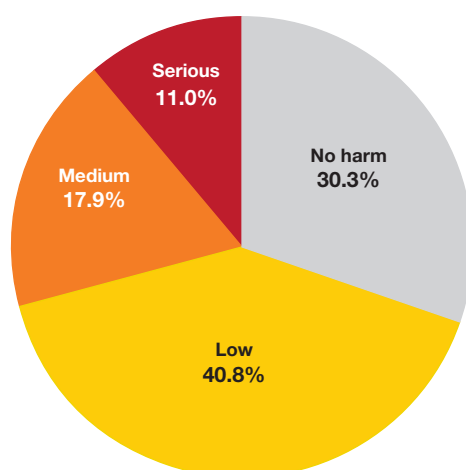
321 For example, see *EPA v BMG Environmental Group Pty Ltd* (2012) 188 LGERA 324; [2012] NSWLEC 69 and *EPA v Wattke*; *EPA v Geerdink* [2010] NSWLEC 24.



asbestos, have the potential to cause serious harm. This includes degradation of the environment and catastrophic health risks to humans, even though no actual harm to the environment may have occurred. For example, in *Kogarah City Council v Man Ho Wong*,<sup>322</sup> Craig J noted at [22]:

In the present case there is no evidence of actual harm. Nonetheless, the potential for harm for any offence against s 143 hardly calls for detailed exploration. The statutory controls directed to waste disposal are themselves a recognition of the potential for harm. So much more is that potential likely to be realised when the material in question, as in the present case, contains asbestos, notorious for its impacts or potential impacts on human health and the environment. That potential for harm must be recognised in any penalty imposed even if it be the case that the existence of asbestos in the material that the defendant placed around the streets in [a heavily populated suburban area] was not appreciated by him.

**Figure 1: Level of environmental harm for environmental planning and protection offences in the LEC – 2000 to 2015 (principal offence only)**



### 2.1.2.2 Objective seriousness

The sentence imposed by the LEC for an environmental offence must reflect the objective seriousness (or gravity) of the offence and the personal or subjective circumstances of the offender.<sup>323</sup> As stated by Preston CJ of the LEC:

The objective circumstances of the offences of relevance are: the nature of the offences; the maximum penalties for the offences; the environmental harm; the foreseeability of the risk of environmental harm; the practical measures to prevent environmental harm; the control over the causes giving rise to the offences; and whether the offences were committed with any heightened state of mind or for financial gain.<sup>324</sup>

The court's findings concerning objective seriousness have a significant bearing on the penalty imposed. **Figure 2** details the objective seriousness of all 502 principal offences dealt with by the LEC in the study period. More than half (54.5%, n=274) the environmental offences were

<sup>322</sup> [2013] NSWLEC 187.

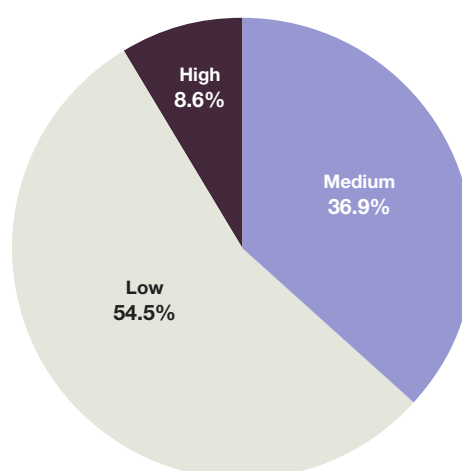
<sup>323</sup> B Preston, above n 69, p 142; *Veen v The Queen* (1979) 143 CLR 458 per Jacobs J at 490; *Veen v The Queen (No 2)* (1988) 164 CLR 465 per Mason CJ, Brennan, Dawson and Toohey JJ at 472; *R v Scott* [2005] NSWCCA 152 at [15].

<sup>324</sup> *Chief Executive, Office of Environment and Heritage v Orica Pty Ltd* [2015] NSWLEC 109 per Preston CJ of the LEC at [58].



considered by the court to be of low objective seriousness and greater than one-third (36.9%, n=185) were considered to be of medium objective seriousness. Almost 9% (n=43) of all principal environmental offences dealt with by the LEC in the study period were grave enough to be judged as of “high” objective seriousness.

**Figure 2: Objective seriousness of environmental planning and protection offences in the LEC – 2000 to 2015 (principal offence only)**



### 2.1.3 Maximum penalties

In any given case, the *CSP Act*, the *Fines Act* 1996, the common law and the statute creating the specific environmental offence provide the framework within which a court determines the sentence to be imposed. The *CSP Act* sets out various penalty options for the courts. The various environmental planning and protection Acts, including the *POEO Act* and the *EPA Act*, set out the maximum penalties for each proven offence.

In a recent LEC case involving pollute waters offences, Moore J made the following points on the consideration of “the maximum penalty” as an objective factor:<sup>325</sup>

- maximum penalties change and offenders may be exposed to significantly increased financial penalties than previous offenders convicted of the same offence
- where a penalty is increased, “it does not follow that there is assumed to be some automatic multiplier applied to the penalty imposed reflecting the rate of increase in the maximum penalties in the statute”<sup>326</sup>
- the increase in the maximum available penalty reflects the “legislature’s understanding ... of contemporary community standards concerning the offences involved”<sup>327</sup>
- at the macro level, the maximum penalty is significant in determining the objective seriousness of the offence and the seriousness with which the offence charged is viewed<sup>328</sup>
- the size of the penalty also “indicates the gravity of the offence as perceived by the community”<sup>329</sup>
- given changes in the maximum penalty over time, caution needs to be exercised in examining sentencing information, particularly where it applies to a previous sentencing regime.

<sup>325</sup> *EPA v Hunter Water Corp* [2016] NSWLEC 76 at [57]–[62].

<sup>326</sup> *ibid*, citing *Morrison v Defence Maritime Services Pty Ltd* [2007] NSWLEC 421 per Biscoe J at [60].

<sup>327</sup> *ibid*, citing *EPA v Timber Industries Ltd* [2001] NSWLEC 25 per Pearlman J at [33].

<sup>328</sup> *ibid*, citing *Plath v Rawson* [2009] NSWLEC 178 per Preston CJ of the LEC at [57] and *Camilleri’s Stock Feeds Pty Ltd v EPA* (1993) 32 NSWLR 683 per Kirby P at 698.

<sup>329</sup> *ibid*, citing *Camilleri’s Stock Feeds Pty Ltd v EPA*.

### 2.1.3.1 Overall picture of penalties imposed by the LEC

**Figure 3** outlines the distribution of penalties for environmental offences in the LEC for the study period.<sup>330</sup> A fine was the most common penalty imposed (n=321) for the principal environmental offence.<sup>331</sup> That is, almost 64% of primary penalties for principal offences in the LEC were monetary fines.

A further 19.1% of principal offences (n=96) received a fine *plus Additional Order(s)* (for instance, under ss 245–250 of the *POEO Act* and under s 126(3) of the *EPA Act*). A major difference between the LEC and the Local Court is that a fine is almost invariably the maximum penalty that the Local Court is entitled to impose for an environmental offence,<sup>332</sup> whereas the LEC is not subject to such a constraint, at least in relation to Tier 1 offences. However, the LEC, has a jurisdictional ceiling of two years' imprisonment for a Tier 1 offence.<sup>333</sup>

Other penalties imposed on offenders<sup>334</sup> where an offence was proved in the LEC were (note: references to sections below relate to the *CSP Act*):

- s 10 dismissal (offence proven without recording a conviction) was imposed for 23 offenders (4.6%)
- s 10 bond (offence proven without conviction but with conditions during the bond period) was imposed for five offenders (1.0%)
- s 10A conviction with no other penalty was imposed for just three offenders (0.6%)
- s 8 community service order (CSO) was imposed for seven offenders (1.4%)<sup>335</sup>
- s 12 suspended sentence or s 7 intensive correction order (ICO) — despite their availability as penalties — were not imposed on any offender during the study period
- full-time imprisonment under ss 5, 44–46, was not imposed on any offender during the study period — despite its availability as a punishment.<sup>336</sup>

330 H Donnelly et al, above n 303, provides information on the distribution of penalties for environmental offences in the Local Court across a four-year period from 2009 to 2013. In that jurisdiction, individual environmental offenders outnumbered corporate offenders four to one. In the Local Court, fines were the most common penalty imposed for both individuals (80.5%) and corporations (81.3%) and no conviction/no penalty orders represented around 19% of orders for both individuals and corporations. Of the remaining penalties, two individual environmental offenders received full-time imprisonment, one individual received a CSO, another an ICO and a third received a suspended sentence; and six individuals received a bond without supervision.

331 This analysis of penalties in the LEC examines only primary penalties, with the exception of “fine plus Additional Order”.

332 See H Donnelly et al, above n 303, p 14 (Figure 1: Distribution of penalties for environmental offences in the [NSW] Local Court for the study period). Furthermore, s 215(2) of the *POEO Act* states: “If any such proceedings are brought in the Local Court, the maximum monetary penalty that the Court may impose for the offence is 1,000 penalty units, despite any other provision of this Act”.

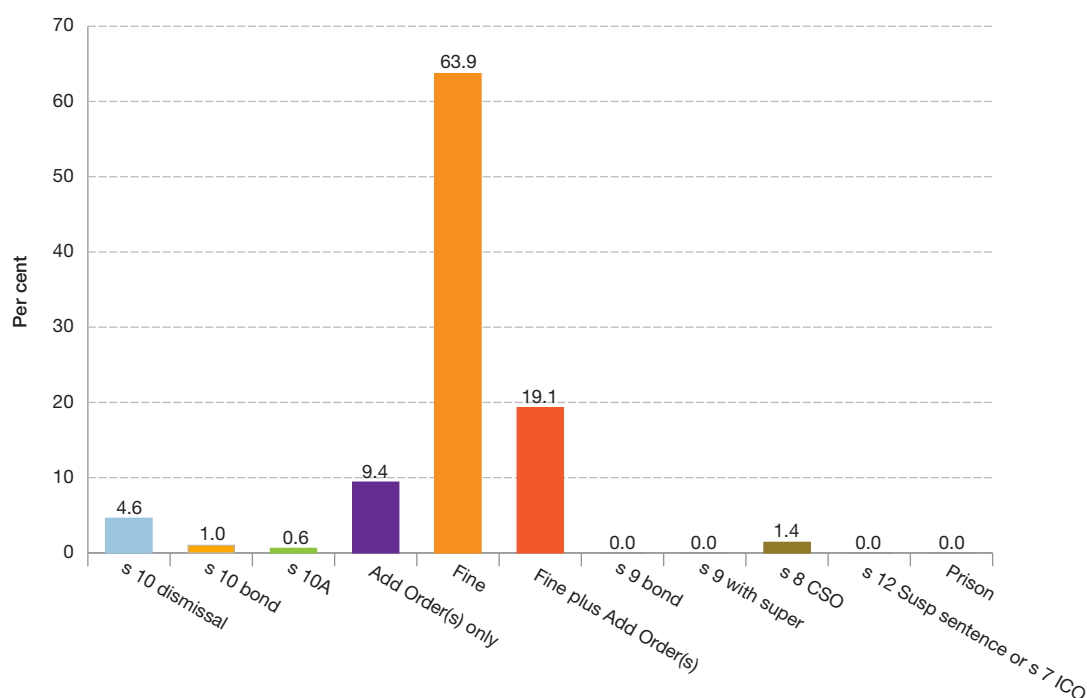
333 Section 214(2), with regard to Tier 1 offences, provides: “If any such proceedings are brought in the Land and Environment Court, the maximum period of imprisonment that the Court may impose for the offence is 2 years, despite any other provision of this Act”.

334 An offender may be a corporation or an individual. Notably, persons prosecuted as an individual — and subject to the maximum penalties for individuals — may be subject to the “special executive liability” provisions of s 169 of the *POEO Act* given their capacity as a company director or other “alter ego” of the corporation responsible for the environmental offence, where that person was involved in the management of the corporation and the legislative notes in respect of each of ss 115, 116 and 117.

335 These CSOs are to be distinguished from Additional Orders made under s 250(1) of the *POEO Act*. Under the *CSP Act*, a CSO is typically used as an alternative to imprisonment. The LEC is not necessarily restricted in its use of a CSO as an alternative to imprisonment. Although s 8 opens with the words “[I]nstead of imposing a sentence of imprisonment”, it has been held that this does not confine the availability of CSOs to cases which would otherwise result in a sentence of imprisonment: *R v El Masri* [2005] NSWCCA 167 per Johnson J at [32]. Apart from the statutory provisions restricting the availability of CSOs, they remain available as a non-custodial alternative: *R v El Masri* per Johnson J at [32]–[33].

336 A court cannot impose imprisonment or an alternative form of imprisonment such as home detention, a suspended sentence or an ICO unless s 5(1) of the *CSP Act* applies. The section provides: “A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate”.

**Figure 3: Distribution of penalty types for environmental planning and protection offences in the LEC – 2000 to 2015 (principal offence only)**



### 2.1.3.2 Overall level of fines imposed

**Table 1** provides an overview of the fines that were imposed for environmental offences in the study period. Overall, 417 offenders received a fine for their principal offence. The average fine was \$38,099 and the median fine was \$22,000. The most common fine amount was \$20,000 (n=26). The next most common fine imposed by the LEC was \$30,000 (n=25). The largest fine imposed was \$1.2 million for the offence of “Discharge as owner oily mixture from ship into State waters” under s 8(1) of the repealed *Marine Pollution Act* 1987.<sup>337</sup> The smallest recorded fine amount was \$10, which was imposed as part of a larger sentencing exercise in *EPA v Aust Pacific Oil Co Pty Ltd*.<sup>338</sup> In that case, 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 under s 143(1)(b). The LEC imposed a nominal fine on the company for the same offence and, thus, the \$10 nominal penalty may be viewed as a statistical outlier. The next smallest fine imposed by the LEC was \$200.

**Table 1** also shows the fines imposed by the LEC on corporations and individuals for environmental planning and protection offences. The mean fine for corporations (\$43,683) was almost 50% higher than the average fine for individual offenders (\$29,823). The median fine for corporations (\$25,000) was two-thirds higher than the median fine for individuals (\$15,000).

<sup>337</sup> *Newcastle Port Corp v MS Magdalene Schiffahrtsgesellschaft MBH* [2013] NSWLEC 210. The *Marine Pollution Act* 1987 was repealed on 1 September 2014.

<sup>338</sup> [2003] NSWLEC 279.

As previously indicated, from January 2000 to February 2015, the highest fine for a corporation was \$1.2 million, for an individual it was \$510,000.<sup>339</sup> The LEC ordered environmental offenders to pay just under \$16 million in fines in the study period: with almost \$11 million of the total to be paid by corporations, and around \$5 million to be paid by individuals.

**Table 1: Fines imposed for environmental planning and protection offences in the LEC: Corporations and Individuals – 2000 to 2015 (principal offence only)**

	Corporation	Individual	Overall
Offenders fined (n)	249	168	417
(%)*	84.4%	81.2%	83.1%
Mean	\$43,683	\$29,823	\$38,099
Median	\$25,000	\$15,000	\$22,000
Middle 50% range	\$15,000–\$50,000	\$7,500–\$35,000	\$10,000–\$40,000
Lowest	\$500 <sup>a</sup>	\$200	\$200 <sup>a</sup>
Highest	\$1,200,000	\$510,000	\$1,200,000
Most common	equal \$20,000 equal \$25,000 equal \$30,000	equal \$5,000 equal \$20,000	\$20,000
Next most common	\$15,000	\$30,000	\$30,000
Sum	\$10,887,018	\$5,010,240	\$15,887,258

\* Fines (including fines plus Additional Orders) as a percentage of all penalties for that class of offender.

a The lowest recorded fine amount was \$10. In this case (*EPA v Australian Pacific Oil Company Pty Ltd* [2003] NSWLEC 279), two company directors were found liable under the “special executive liability” provisions of s 169 and each received a fine of \$20,000 for the offence against s 143(1)(b) of the *POEO Act*. At the same time, the court decided to impose a nominal fine of \$10 on the company for the same offence.

## 2.2 A more refined analysis of offences and offenders dealt with by the LEC

Up to this point in the examination of monetary penalties, consistent with a conventional approach to sentencing statistics, the analysis has not taken into consideration whether the fine amount was reduced or moderated because of associated prosecution costs, investigation costs, restorative orders or other financial considerations (such as lost earnings, compensation to affected parties, etc). However, as B Preston noted “the amount of these cost orders will be relevant in determining the level of any term of imprisonment or the level of any fine”.<sup>340</sup> The approach that is now adopted and progressed in this study acknowledges that the order for costs is an “aspect of punishment” factored into the determination of the appropriate penalty. Such costs act to reduce the quantum of the fine or other pecuniary penalty.<sup>341</sup> These principles, as expounded in *Barnes*, are firmly entrenched in the LEC’s sentencing considerations.<sup>342</sup>

339 In *Filipowski v Fratelli D’Amato S.r.l* (2000) 108 LGERA 88; [2000] NSWLEC 50, a penalty of \$510,000 was imposed on the overseas owner of an Italian tanker involved in the discharge of oil into the waters of Sydney Harbour. Outside of pollution offences, in *Cowra Shire Council v Fuller* [2015] NSWLEC 13, the defendant, a rural property owner, was fined \$175,000 for carrying out development without development consent, that being the deliberate and planned unlawful demolition of a building with potential for local heritage significance. In committing the offence, Pain J found at [23] that the defendant:

was well aware of his legal obligation to make a development application (DA) for demolition and chose not to abide by that requirement in the EPA Act. There was nothing inadvertent or accidental about his actions which gave rise to the offence in the circumstances of planning the demolition.

340 B Preston, above n 69, p 160 citing *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 per Barker and Williams JJ at 505. Also see earlier section, **Costs as a sentencing factor** at [1.3].

341 *EPA v Barnes* [2006] NSWCCA 246 at [78] and [88]; *EPA v Queanbeyan City Council (No 3)* (2012) 192 LGERA 415; [2012] NSWLEC 220 at [248] and *Director-General of the Dept of Environment and Climate Change v Rae* (2009) 168 LGERA 121; [2009] NSWLEC 137 at [68].

342 See **Appendix D** for a list of 56 NSWLEC cases which specifically apply the sentencing principles relating to costs as expounded in *Barnes* at [78] and [88].

The nature of environmental matters dealt with by the LEC is diverse and non-homogenous in a number of ways, including:

- the distinction between environmental protection offences and environmental planning offences
- the number and variety of applicable legislation
- the perceived gravity of different offences, distinguished by the legislature in terms of variability in maximum penalties (such as the three-tiered regimes of the *POEO Act* and the *EPA Act*)<sup>343</sup>
- the various authorities that monitor and police environmental offenders and bring environmental offenders to prosecution.

The following sections re-examine environmental harm and objective seriousness in terms of the different types of offences, including the “Top 10” offences. A more nuanced breakdown of environmental offences is also provided, based on the type of offender and, in particular, the different “classes” of offenders prosecuted as “individuals”.

### 2.2.1 Tier 1 offences

The following discussion should be read with the observations made concerning Tier 1 offences in the **Introduction** at [1.1]. Offences against ss 115–117 of the *POEO Act* are considered by the legislature to be within the tier of the “most serious” environmental offences. This is reflected by the prescribed maximum penalties for a proven Tier 1 offence pursuant to s 119:

- (a) in the case of a corporation — to a penalty not exceeding \$5,000,000 for an offence that is committed wilfully or \$2,000,000 for an offence that is committed negligently, or
- (b) in the case of an individual — to a penalty not exceeding \$1,000,000 or 7 years’ imprisonment, or both, for an offence that is committed wilfully or \$500,000 or 4 years’ imprisonment, or both, for an offence that is committed negligently.

A feature of Tier 1 offences is the determination that the *wilful* or *negligent* actions of the offender — individual or corporation — caused the environmental harm (or potential for environmental harm).<sup>344</sup> Recklessness, although not an ingredient of a Tier 1 offence, was considered by the court to fall somewhere between wilful and negligent.<sup>345</sup> The utility of introducing recklessness is arguably a distraction for the court and a technical breach of the *De Simoni* principle if the Tier 1 charge is based on negligence.<sup>346</sup>

343 In the case of the *EPA Act*, changes to s 125(1) (commenced on 31 July 2015) created a three-tiered approach to prosecuting offenders for breaches of environmental planning provisions. For more detailed information see “Recent changes to the *EPA Act*” under **Environmental Planning Offences** at [2.3.2].

344 Wilful and negligent were elements of an equivalent offence under ss 5 and 6 of the repealed *Environmental Offences and Penalties Act* 1989. In the *CW Act* (rep), s 16(3) provided that “a person shall not cause any waters to be polluted, whether intentionally or not”.

345 In *Warringah Council v Project Corp Aust Pty Ltd* [2015] NSWLEC 141, Craig J opined at [220] that recklessly causing pollution is also conduct proscribed by the Tier 1 provisions of the *POEO Act*:  
I would regard reckless conduct to include a lower order of fault than “wilful” but to involve an equivalent, if not higher order of fault than “negligent” conduct. As conduct involving fault of that kind engages the provisions of s 116, it would make no sense to interpret the section as being inapplicable to conduct that was “reckless” (cf *State Pollution Control Commission v Hunt* (1990) 72 LGR 316 at 325).  
Craig J repeated the statement in *EPA v Tea Garden Farms Pty Ltd* [2012] NSWLEC 89 at [102].

346 See **The De Simoni principle and Tier 1 and Tier 2 offences** at [1.2.1]. In short, the *De Simoni* principle is a fundamental aspect of the common law principle that no one should be punished for an offence of which the person has not been convicted.

The Hon Paul Stein AM, widely regarded as a pioneer in environmental jurisprudence in Australia,<sup>347</sup> expressed the view prior to *EPA v Ampol Ltd*<sup>348</sup> that:

the word “wilfully” applied to the act of disposal and the likelihood of harm to the environment ... Achieving convictions for Tier 1 offences is consequently rendered more difficult for the prosecutor.<sup>349</sup>

This is because, as the NSW Court of Criminal Appeal held in the often cited *EPA v N*:

the prosecution must establish that the person charged with this [Tier 1] offence pursuant to s 5(1) of the [Environmental Offences and Penalties] Act either intended or was aware that the waste which he was disposing of would or was likely to harm the environment.<sup>350</sup>

Putting aside the textual differences between Tier 1 negligence offences under the *POEO Act* and s 6 of the repealed *Environmental Offences and Penalties Act* 1989, the decision of *EPA v Ampol Ltd* remains helpful in setting out what is required of a court faced with determining a charge of negligence:

It is necessary to show beyond reasonable doubt that they resulted from the act or omission of the company. And it must appear that, intentional acts aside, that which constituted the contribution was something which, having regard to the purpose and intention of the legislation, the company ought not to have done. If these things are established and the matter be of a moment sufficient to attract criminal sanction, the evidence would, in my opinion, allow the conclusion that the offence had been committed.<sup>351</sup>

A further feature of Tier 1 offences is that such offences, where committed by a corporation, attract “special executive liability” for a director or other person involved in the management of the corporation: (see s 169 of the *POEO Act*, and the end notes of ss 115, 116 and 117).<sup>352</sup>

Furthermore, s 169(2) states that a person who is a director of the corporation or who is concerned in the management of the corporation “may be proceeded against and convicted under a provision” even in cases where the corporation has not been proceeded against or been convicted under the same provision.<sup>353</sup> In dealing with such matters, the LEC often gives consideration to “avoiding double punishment” particularly in circumstances where the sole

347 Law Council of Australia, *The future of environmental law: a symposium to mark the contribution of Paul Stein in the field of environmental and planning law*, symposium held by the Australian Environment and Planning Law Group, Legal Practice Section, 10 December 2009 at [www.nswbar.asn.au/circulars/2009/oct09/environment.pdf](http://www.nswbar.asn.au/circulars/2009/oct09/environment.pdf), accessed 16 May 2017.

348 (1993) 81 LGERA 433. Pearlman (then) CJ of the LEC later convicted Ampol of negligence in *EPA v Ampol Ltd* (unrep, 18/3/94, NSWLEC). Ampol unsuccessfully appealed that conviction in *Ampol v EPA* (unrep, 26/10/95, NSWCCA).

349 P Stein, *The role of the NSW Land and Environment Court in environmental crime*, 1993, p 5 at [www.aic.gov.au/media\\_library/publications/proceedings/26/stein.pdf](http://www.aic.gov.au/media_library/publications/proceedings/26/stein.pdf), accessed 16 May 2017.

350 (1992) 26 NSWLR 352 per Hunt CJ at CL at 356 (Enderby and Allen JJ agreeing).

351 (1993) 81 LGERA 433 per Mahoney JA at 438 (Finlay and Badgery-Parker JJ agreeing).

352 There are similar provisions to s 169 of the *POEO Act* under other NSW environmental protection legislation. For example, with regard to s 175B(1) of the *NPW Act*, see *Chief Executive of the Office of Environment and Heritage v Rinaldo (Nino) Lani* [2012] NSWLEC 115. Lloyd AJ at [1] held that:

if a corporation contravenes any provision of the Act, each person who is a director of the corporation, or who is concerned in the management of the corporation, is (subject to certain statutory defences which are not presently relevant) taken to have contravened the same provision.

The provisions of other statutes expressly impose similar liability for acts and omissions: s 10 of the *Environmental Offences and Penalties Act* 1989 (rep); s 53 of the *Environmentally Hazardous Chemicals Act* 1985; s 130 of the *Marine Safety Act* 1998; s 112 of the *Pesticides Act* 1999. In a similar vein, the *Marine Pollution Act* 1987 (rep) imposed liability for criminal acts and omissions on: ship masters and ship owners: ss 8(1) and 18(1); and the crews of ships: ss 8A(1) and 18A(1) involved in marine pollution incidents (see *Morrison v Mahon* [2007] NSWLEC 416 per Biscoe J at [45]).

353 In *EPA v SJ Perry* (2004) 135 LGERA 431; [2004] NSWLEC 715, it was noted by Bignold J at [14] that: “the Defendant’s liability to the present charge is a status liability in that it is a liability imposed upon him as a director of the corporation that contravened the PEO Act”. It was further noted at [15]: “that the present charge was brought in circumstances where no charge has been brought against the corporation KP Recycling Pty Ltd (presumably because that company went into liquidation soon after the commission of the offence in the middle of 2001)”.



director is the “alter ego” of the company.<sup>354</sup> The rationale for this principle is that the effective cost of the penalty imposed on the corporation is borne by the individual. Put another way, the same source of money would be used to pay the fines imposed on both the corporate and individual defendants.<sup>355</sup>

In the study period, there were only nine offenders prosecuted for Tier 1 offences (*POEO Act*, Pt 5.2 and s 114). The nine Tier 1 offences are summarised in **Table 2**. Every one of the nine were prosecuted on the basis of negligence, *not* wilfulness. This supports the claim that proving both elements of a Tier 1 pollution offence were *wilfully* committed makes it extremely difficult for the prosecutor to secure a conviction. In fact, following *EPA v N*,<sup>356</sup> there has only been one conviction for the wilful Tier 1 offence, and that was secured in 1997 in *EPA v Gardner*<sup>357</sup> (discussed below and in **Case study 1**). *Gardner* was the last case before the LEC where a charge of *wilfully* pollute was laid by a prosecutor.<sup>358</sup>

Six of the nine Tier 1 matters involved prosecutions for offences under s 115(1): the *negligent* disposal of waste in a manner that harms or is likely to harm the environment. The remaining three prosecutions involved offences under s 116(2) or the provisions of a preceding Act:<sup>359</sup> *negligently* causes a substance to leak, spill or otherwise escape in a manner that harms or is likely to harm the environment. The commission of each of the Tier 1 waste offences was financially motivated — largely, to save money by avoiding the cost of lawfully disposing of the waste through a licensed waste facility.<sup>360</sup> This can be contrasted with the Tier 1 *pollute waters* offences, where it was ascertained for both offences that there was no financial motive and no financial gain.

There were two Tier 1 offences that directly relate to “corporations”. However, of the remaining six offences, five involved the prosecution of directors, principals or managers of various corporations. Thus, of the *individual* defendants charged and prosecuted for Tier 1 pollution offences, only one was an “ordinary Joe” individual who was not a director of a corporation (or other position holder) held responsible for the company’s commission of the environmental offence (in **Table 2**, the case involving the sole individual is colour-coded).

From **Table 2**, it also may be seen that:

- one Tier 1 pollution offence proceeded by way of prosecuting the corporation *and* the company director (or other position holder) liable for the environmental offence under the “special executive liability” provisions of s 169 (case pair 1a and 1b)
- another Tier 1 offence proceeded by way of separately but jointly prosecuting the Director and operational Manager of the company under the “special executive liability” provisions of section 169 (case pair 4a and 4b)
- a third Tier 1 offence involved the prosecution of a corporation (Warringah Golf Club Ltd) and one of its employees (the golf course superintendent), held jointly (but not equally) responsible for a serious water pollution offence (case pair 5a and 5b).

354 *Leichhardt Council v Geitonia Pty Ltd (No 7)* [2015] NSWLEC 79 per Biscoe J at [52]–[63] citing the Federal Court decisions of *ACCC v ABB Transmission & Distribution Ltd (No 2)* [2002] FCA 559; (2002) 190 ALR 169 per Finkelstein J at [45] and *Minister for the Environment and Heritage v Greentree (No 3)* (2004) 136 LGERA 89; [2004] FCA 1317; and *The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd (No 2)* [2012] NSWLEC 95. In *Palfrey v Spiteri* [2014] NSWSC 842, Garling J expounded the principle and cited *Greentree* and *Kinnarney* with approval.

355 *EPA v Alcobell Pty Ltd, EPA v Campbell* [2015] NSWLEC 123 per Pain J at [120], [121].

356 (1992) 26 NSWLR 352.

357 *EPA v Gardner* (unrep, 7/11/97, NSWLEC).

358 The environmental crime sentencing database did not disclose any further cases. For prudence, targeted searches of LEC judgments on the Commission’s JIRS employing the search term “wilfully” were also conducted which also did not uncover any additional offences.

359 Two of the three cases involved prosecutions for offences under s 116 of the *POEO Act*. The other was an offence under s 6(1)(a) of the *EOP Act* (rep).

360 The specific text in each judgment in which the court describes the financial motivation to each offence is provided in **Table 2**.

Table 2: Tier 1 offences under the POEO Act<sup>a</sup> in the LEC – 2000 to 2015 (principal offence only)

Offence	Citation	Offender type	Fine	Additional penalty/ order	Prosecutor's costs	Environmental offence and damage
<b>s115: Wilfully or negligently dispose of waste</b>						
1a	<i>EPA v BMG Environmental Group Pty Ltd &amp; Barnes</i> [2012] NSWLEC 69	Corporation	\$100,000	None	\$87,500	POEO Act, s 115(1). Negligently disposed of over a million litres of untreated septic tank waste and untreated grease trap waste on Greenbank farm: [1], [10]. BMG obtained considerable financial gain by disposing of waste at Greenbank rather than paying fees at licensed facilities readily available to BMG. Such savings gave BMG a competitive advantage in being able to undercut competitors who did not engage in such conduct: [73], [74], [107]. The financial benefit BMG could have obtained was assessed at approximately \$227,000: [74].
1b	<i>EPA v BMG Environmental Group Pty Ltd &amp; Barnes</i> [2012] NSWLEC 69 (Individual)	s 169 Special executive liability (Director)	\$100,000	None	\$87,500	
2	<i>EPA v Pal</i> (No 2) [2009] NSWLEC 60 (Individual) (Also see <i>EPA v Pal</i> [2009] NSWLEC 35) [source of citations]	s 169 Special executive liability (Principal and co-director)	\$45,000	CSO: 450hrs	As assessed or agreed	POEO Act, s 115(1) (2 counts). Negligently disposed of a total of 62,000 cubic metres of "inert (building) waste" [on large urban/rural residential property and a chicken farm]: [2], [8], [10]. The defendant had a commercial purpose and made commercial gains: [107]. A conservative figure advanced by the prosecution as to the cost of disposing of this material at a waste collection facility, rather than through the defendant, would be around \$1.7M: [106].
3	<i>EPA v S J Perry</i> [2004] NSWLEC 715 (Individual)	s 169 Special executive liability (Director)	\$30,000		\$65,000	POEO Act, s 115(1). Negligently disposed of 3,000 tonnes of used tyres (unlawfully abandoned on rural property): [2(c) and (d)]. Adverse business vicissitudes; failed business venture [financially motivated]: [29].
4a	<i>EPA v Wattke; EPA v Geerdink</i> [2010] NSWLEC 24 (Individual 1)	s 169 Special executive liability (Director)	\$50,000	CSO: 460hrs	As assessed or agreed	POEO Act, s 115(1). Negligently disposed of 750,000 litres of untreated grease trap waste on a rural property: [1], [12(62)].
4b	<i>EPA v Wattke; EPA v Geerdink</i> [2010] NSWLEC 24 (Individual 2)	s 169 Special executive liability (Manager – company operations)	\$50,000	CSO: 460hrs	As assessed or agreed	Offence committed for the purpose of obtaining financial benefit in the company's operations of the collection and disposal of waste: [50].
<b>s116: Wilfully or negligently cause leak, spill (etc)</b>						
5a	<i>EPA v Warringah Golf Club Ltd</i> (No 2) [2003] NSWLEC 222	Corporation (Golf club)	\$250,000	ss 246 and 248: \$50,500 re councils' clean-up costs: [24] plus 2 Additional Orders: [58]	\$190,000	POEO Act, s 116(2). Negligently caused substance to escape in a manner that harmed or was likely to harm the environment. Poisonous substance hosed off, entered storm water drain and then local creek and lagoon. Approximately 10,000 fish, numerous ducks and other wildlife killed: [2003] NSW LEC 222 at [4]–[5]. No financial motive: offenders did not profit from the offence: [16].
5b	<i>EPA v Coggins</i> [2003] NSWLEC 111	Individual (Employee – golf course superintendent)	\$0	CSO: 250hrs plus \$1,236 disbursements: [52]	As assessed	
6 <sup>a</sup>	<i>EPA v CSR Ltd trading as CSR Woodpanels</i> [2001] NSWLEC 267	Corporation	\$240,000	None	\$100,000	EOP Act, s 6(1)(a) (rep): Negligently caused substance to escape in a manner that harmed or was likely to harm the environment. Leaking of effluent into the groundwater resulting in contamination of spring water, harm to aquatic invertebrates, die back of riparian vegetation, and loss of habitat and grazing land: [12]. [No financial motive reported.]

a Includes one offence under the *Environmental Offences and Penalties Act 1989* (rep), (EOP Act), which the POEO Act replaced. See Case No 6 (*EPA v CSR Ltd trading as CSR Woodpanels* [2001] NSWLEC 267) in the Table above. Note: Case No 5b is colour-coded as it represents the only individual (as opposed to company director, etc) prosecuted for a Tier 1 pollution offence.

Comparing the penalties for the “individuals” convicted of Tier 1 offences, only those subject to “special executive liability” received a fine in combination with a CSO. The fines imposed on the “directors” of companies responsible for serious environmental offences ranged from \$30,000 to \$100,000. In addition, the hours of community service work ordered to be performed by the culpable “directors” (ie 450; 460, 460 hours, respectively) were manifestly higher than the hours ordered to be performed by the “individual”, the golf club’s employee (ie 250 hours). It should also be noted that the LEC penalised the Warringah Golf Club with a \$250,000 fine — a monetary penalty much higher than that imposed for a Tier 1 offence on the other corporation (ie \$100,000) or, for that matter, imposed on any company “alter ego” for a Tier 1 offence.

*EPA v Gardner*, three years prior to the earliest LEC case recorded on the Commission’s Judicial Information Research System (JIRS),<sup>361</sup> involved the wilful disposal of waste in a manner which was likely to harm the environment, contrary to s 5(1) of the repealed *EOP Act* (see **Case study 1**). This offence was the precursor and equivalent to the Tier 1, s 115 offence, under the *POEO Act*. The offence attracted a maximum penalty of \$250,000 or seven years’ imprisonment or both, although the maximum penalty that could be imposed at the time by the LEC (which dealt with the case) was a penalty of \$250,000 or two years’ imprisonment or both. This is the only known case dealt with by the LEC where an environmental offender received a prison term upon conviction and sentencing.<sup>362</sup>

## 2.2.2 “Top 10” environmental offences

**Table 3** shows the 10 most common environmental offences in the LEC. These offences comprised 88.0% (442 cases) of environmental offences dealt with by the LEC in the period from 2000 to 2015. The “Top 10” offence categories include both environmental *protection* offences and *environmental planning* offences.

The majority of environmental protection and environmental planning offences before the LEC were prosecuted under the *POEO Act* (50.9%) or the *EPA Act* (29.5%). Notably, the *POEO Act* deals largely with environmental pollution offences, whereas the *EPA Act* deals predominantly with environmental planning offences. Based on this distinction, these fundamentally different types of environmental offences are treated separately in this study, following a more general discussion of the most common offences dealt with by the LEC.

Pollute waters offences (primarily s 120 of the *POEO Act*)<sup>363</sup> was the most common environmental offence over the 15-year period examined. There were 118 cases (23.5%) where pollute waters represented the principal offence. Carrying out development without (or not in accordance with) a development consent (s 76A(1)(a) and (b) of the *EPA Act*) was the second most common offence (15.5%) with 78 offences. Contravene any condition of a licence (s 64(1) of the *POEO Act*) was the third most common environmental offence (11.0%) with 55 cases. Waste offences filled the fourth

361 *Judicial Commission of NSW, Judicial Information Research System, Sentencing Statistics*. JIRS sentencing statistics form one component of the JIRS database. They provide a guide to the pattern of sentences imposed by the courts for criminal offences. The Statistics together with the Principles and Practice, Case Summaries and Judgments of the various courts form a package of information intended to assist the courts in achieving consistency in imposing sentences.

The High Court decisions of *The Queen v Pham* (2015) 256 CLR 550 (see *Judicial Commission of NSW, Sentencing Bench Book 2006-*, Special Bulletin 10 — December 2015) and *Barbaro v The Queen* (2014) 253 CLR 58 per French CJ, Hayne, Kiefel and Bell JJ at [40]–[41] address how a sentencing court should use comparable cases and statistics. A general discussion about the utility of JIRS statistics, including the relevant appellate authorities on the subject, can also be found in *Sentencing Bench Book* at [10-020]ff, where it is addressed as a topic with regard to achieving sentencing consistency for particular offences.

362 For an offence contrary to s 5(1) of the *EOP Act* (rep), the maximum penalty the Supreme Court could order was \$250,000 or a term of imprisonment of seven years, or both. Whereas, in the LEC, the maximum penalty was \$250,000, or two years’ imprisonment or both. Excluding contempt matters in relation to orders made for environmental planning and protection offences, this is the only known case in the LEC where a convicted environmental offender received a prison term. There is, however, the appeal case of *Betland v EPA* (2010) 175 LGERA 317; [2010] NSWLEC 183 where the LEC upheld a severity appeal against a custodial sentence of four months imposed by the Local Court for an offence against s 110 of the *NPW Act*. Pepper J at [4] held that the sentence was “manifestly excessive and totally unwarranted” and (at [72]) imposed a fine of \$2,500 in lieu thereof.

363 Also includes 14 cases of pollute waters under the *CW Act*, which was repealed on 30 June 2006.

place with 42 offences (8.4%), while offend against direction or prohibition (s 125(1) of the *EPA Act*) filled the fifth spot with 40 offences (8.0%) in the 15-year study period.

Rounding out the “Top 10” environmental offences were: discharge offences under the repealed *Marine Pollution Act* (39 offences); harm endangered/threatened species (plant, animal or ecological community) under the *NPW Act* (27 offences); clear native vegetation contrary to the *NV Act* (24 offences); air pollution offences (10 offences); and, erect building without construction certificate under s 81(2)(a) of the *EPA Act* (9 offences).

**Table 3: “Top 10” environmental planning and pollution offences convicted in the LEC — 2000 to 2015 (principal offence only)**

Rank	Offence category	Legislation	Number	%
1	Pollute water offences <sup>a</sup>	<i>POEO Act</i> , Pt 5.3, s 120	118	23.5
2	Carry out development without consent/not in accordance with consent <sup>b</sup>	<i>EPA Act</i> , s 76A(1)	78	15.5
3	Contravene any condition of licence <sup>c</sup>	<i>POEO Act</i> , s 64(1)	55	11.0
4	Unlawfully transport and/or dispose waste <sup>d</sup>	<i>POEO Act</i> , ss 143 and 144	42	8.4
5	Offend against direction or prohibition (“s 125 offences”) <sup>e</sup>	<i>EPA Act</i> , s 125(1)	40	8.0
6	Discharge oil/liquid/prohibited substance from ship into State waters <sup>f</sup>	<i>Marine Pollution Act</i> (rep), s 8(1)	39	7.8
7	Harm endangered/threatened species (plant, animal or ecological community) <sup>g</sup>	<i>NPW Act</i> , s 118A	27	5.4
8	Clear native vegetation contrary to Act <sup>h</sup>	<i>NV Act</i> , s 12	24	4.8
9	Air pollution offences <sup>i</sup>	<i>POEO Act</i> , Pt 5.4	10	2.0
10	Erect building without construction certificate	<i>EPA Act</i> , s 81A(2)(a)	9	1.8
Total for “Top 10” environmental offences in LEC			442	88.0
Tier 1 offences			9	1.8
All remaining environmental offences in LEC			51	10.2
Total number of cases in LEC			502	100.0

a Includes 14 cases of pollute waters under the *CW Act* (rep) which was repealed on 30 June 2006.

b Includes one case under s 75D(2) of the *EPA Act*: “Fail to comply with conditions of approval”.

c Includes five cases of “Occupier of premises with scheduled activity not hold licence”: s 48(2) of the *POEO Act*.

d Includes 34 cases of waste offences under s 143(1)(a) of the *POEO Act*: “Unlawfully transport waste” (or variants) (16 cases); s 143(1)(b): “Owner of waste transported to unlawful waste facility” (3 cases); s 144(1): “Permit land to be used unlawfully as a waste facility” (11 cases); and, s 144AA(1): “Cause/permit/supply false misleading info re asbestos waste” (4 cases). The remaining eight cases were charged under the *Waste Minimisation and Management Act* 1995 (rep): s 63(1): “Disposing of waste on land without lawful authority” (4 cases); and, s 64(1): “Allow land to be used as waste facility without lawful authority” (4 cases).

e Hereafter referred to as “s 125 offences”. Includes: “Do things forbidden to be done under Act” (19 cases); “Contravene tree preservation order” (15 cases); and, “Fail to do thing directed to be done under Act” (5 cases). Also includes one s 125(2) offence: “Do things forbidden to be done by regulations”. Where s 125(1) of the *EPA Act* was the only offence charged it was counted as a discrete offence.

f The *Marine Pollution Act* 1987 was repealed on 1 September 2014. A number of similar offences, with the same maximum penalties, are grouped under this category: s 8(1) — “Discharge as master oily mixture from ship into State waters” (11 cases), “Discharge as owner oily mixture from ship into State waters” (11 cases); and, “Discharge oil or oily mixture from ship into State waters” (8 cases); s 18(1) — “Crew etc responsible for discharge of oil into State waters” (2 cases); “Owner of ship discharging liquid substance into waters” (1 case); “Person causing discharge of liquid substance from ship” (2 cases); “Master of ship discharging liquid substance into waters” (1 case); and, s 27(1) — “Unlawfully discharge prohibited substance into State waters” (3 cases).

g Also includes five cases of “Offence of damaging reserved land” under s 156A of the *NPW Act*; and, two cases of “Harming protected fauna, other than threatened species, endangered populations or endangered ecological communities” — under s 98(2) of the *NPW Act*.

h Also includes one case of “Contravene Pt 2-clearing native vegetation and land” under s 17(1) of the *NVC Act* (rep); and, four cases of “Clear native vegetation contrary to consent/code of practice” under s 21(2) of the *Native Vegetation Conservation Act* (rep). This Act was repealed on 1 January 1998.

i Also includes two cases of air pollution offences under the *Clean Air Act* 1961 (rep): s 10 — “Scheduled premises to be licensed” (1 case); and, s 14 — “Occupiers to maintain and operate control equipment” (1 case).

## Case study 1

### **EPA v Gardner: “the most serious case of environmental crime”**

*(EPA v Gardner (unrep, 14/8/1997, NSWLEC); EPA v Gardner (unrep, 7/11/1997, NSWLEC)*

The offender owned and operated Karuah Jetty Village, a caravan and relocatable home park. For a period of almost two and a half years, from October 1993 to April 1996, the offender pumped effluent, including human faeces and urine generated by the Village, from a septic tank system into the Karuah River. The effluent pumped into the river averaged 128,710 litres per week.

The effluent was pumped through a system of secret underground pipes and valves previously installed for the purpose. The system of piping and valves and the illegal pumping of effluent was concealed from others including the council authorities and the new owners of the Village. Furthermore, the offender denied using the system for the purpose of pumping effluent from the Village into the river. The illegal pumping of effluent saved the offender between \$852 and \$1,325 per week, which would otherwise have been incurred for the lawful removal of the effluent. The total savings in effluent removal costs over the period was over \$138,000.

The pumping of effluent to the river caused significant harm and degradation to the environment — changing the physical, chemical and biological condition of the waters of the river. The smells emanating from the discharge affected the human surroundings. The sediments near the outlet of the pipe were subject to viral contamination, which posed a grave health risk particularly given that active oyster leases were in the vicinity of the outlet pipe and these were exposed to the viruses contained in the sewage discharge through the river’s tidal movements.

The effluent was pumped into the river wilfully. The offence was committed for financial gain (ie to save money). The offender designed, installed and operated the system of pumps, pipes and valves specifically to pump the effluent from the Village to the river. The offender went to great lengths to hide the effluent disposal system. The offender made numerous self-serving and deceptive statements to the residents of the Village, and to the court in evidence, as to the effluent pumping activities and the purpose which the system served.





### Case study 1 *continued*

The court found, beyond reasonable doubt, that the offender knew that:

- the pumping activities were illegal and would harm or were likely to harm the environment
- putting large quantities of effluent into the river was likely to pose a public health risk
- the effluent contained sewerage and other matter which was likely to be infectious and thus cause harm to the environment, including rendering oysters farmed in the vicinity to be noxious and detrimental to the safety of persons consuming them.

As reported by the court, the case contained a number of aggravating features:

The fact that the offence was committed deliberately, together with your [the defendant's] evidence and attitude during the trial, does not fit comfortably with expressions of remorse or contrition.

Your actions were not an isolated or single act of pollution, as are most cases that come before the Court. It was a deliberate act repeated a number of times a week for the 128 weeks of the offence period. That is to say, I must have regard to the volume of sewage illegally discharged and the period during which it was discharged. It was, as I have said, done for the motive of financial gain. It had the most serious consequences of environmental harm and likely environmental harm imaginable. Moreover, harm to the environment in this instance affects not one or two people but the community as a whole. You were aware that it would cause harm to the environment. You were aware that what you were doing was illegal. You went to a great deal of trouble to conceal what you were doing. [No paragraph numbers.]

At time of sentencing, this particular offence was described by Lloyd J as “the most serious case of environmental crime to have come before this Court”. His Honour went on to state that “I cannot imagine a worse case than this”, and found the offender “fortunate that the prosecutor chose to bring these proceedings in this Court rather than in the Supreme Court, since the penalty scale is lower for proceedings brought in this Court”. The offender was sentenced to 12 months’ imprisonment, consisting of a minimum term of nine months and an additional term of three months. The offender was also fined \$250,000 — the maximum fine available to the LEC at the time for the s 5(1) offence under the *Environmental Offences and Penalties Act 1989* (rep) offence — and ordered to pay the prosecutor’s costs of \$170,000.

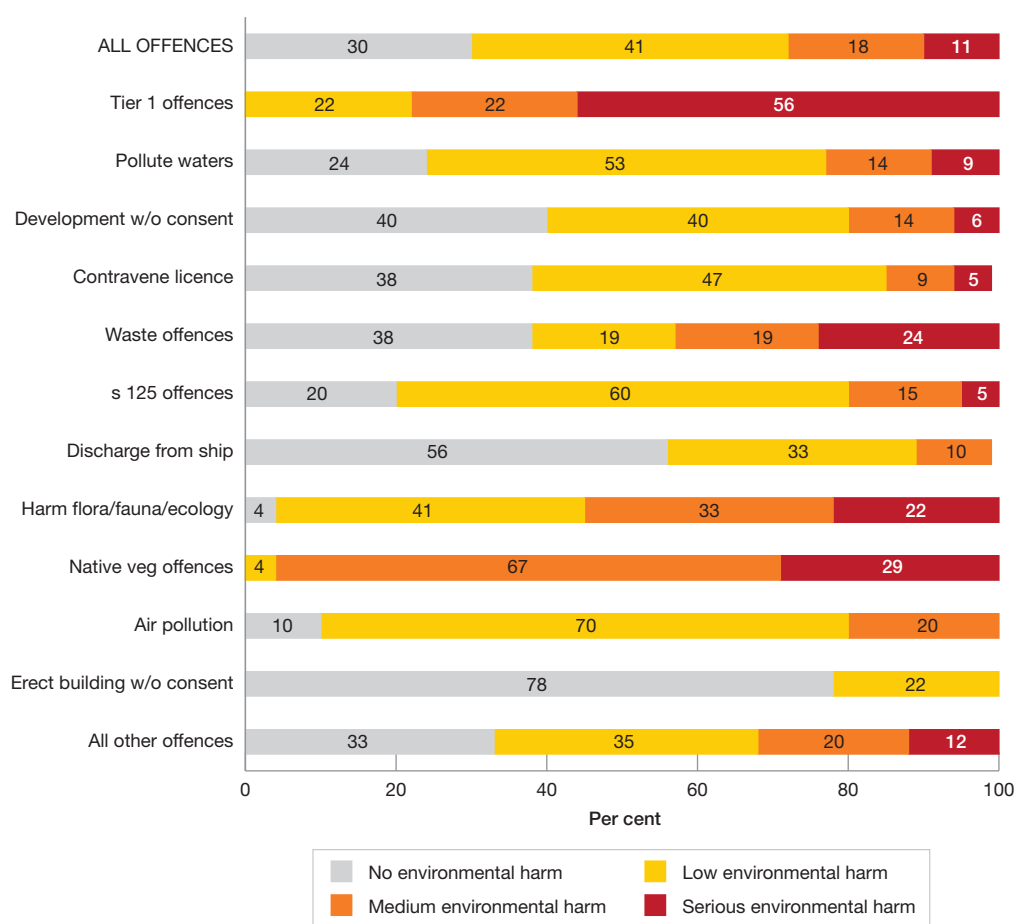


### 2.2.3 Environmental harm by offence type

It is evident from **Figure 4** that there are different levels of environmental harm when this feature of environmental offences are examined in terms of the broad nature of the offence. The breakdown is based primarily on the “Top 10” offences but “Tier 1 offences” and “All other offences” are also included. The profile of environmental harm for “All offences” provides the overall (or average) “picture” of level of harm allowing comparisons to be made with each discrete offence category. Predictably, Tier 1 offences — being the most serious of pollution offences under the *POEO Act* — registered the highest level of serious environmental harm, with almost 56% of all Tier 1 offences involving serious levels of environmental damage.

Native vegetation offences and offences under the *NPW Act* that involved harm to flora/fauna/ecological systems were also characterised by relatively high levels of serious environmental harm: at 29% and 22%, respectively. Similarly, the proportion of waste offences identified as involving a serious level of environmental harm (24%) was more than double that for all offences. Notably, native vegetation offences, offences involving harm to plants, animals and ecosystems, and waste offences also involved significant proportions of environmental harm at the “medium” level (at 67%, 33% and 19%, respectively). In addition, one in every five (20%) air pollution offences were recorded as involving a medium level of environmental harm.

**Figure 4: Level of environmental harm for environmental planning and protection offences in the LEC — 2000 to 2015 (principal offence only; “Top 10” offence categories)**



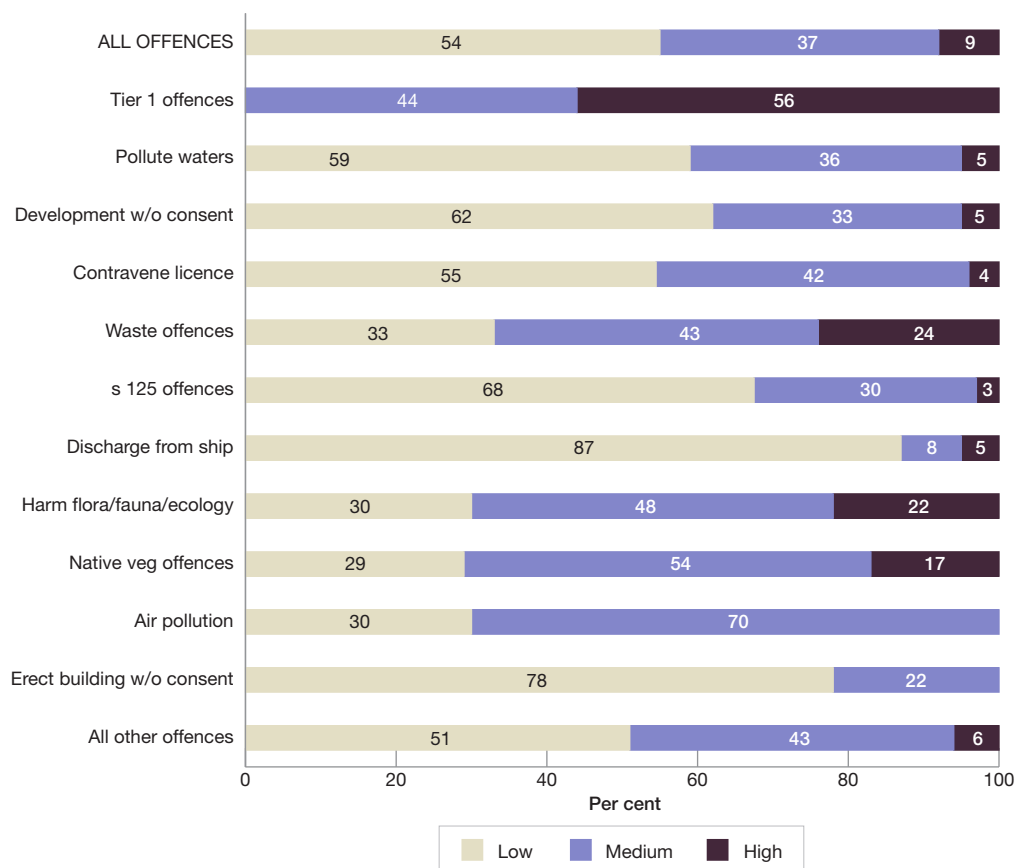
In general, offences against environmental planning laws are characterised by little, if any, environmental damage. For instance, all cases of “Erect building without consent” offences under the *EPA Act* involved either no environmental harm (78%) or low environmental harm (22%). Similarly, 80% of “Offend against direction or prohibition” offences under s 125 of the *EPA Act*, hereafter referred to as “s 125 offences”, involved low levels of harm or no actual environmental harm. The most common breaches of environmental planning laws before the LEC, namely “Carry out development without consent/not in accordance with consent” also recorded notably small levels of “low” harm (40%) or “no” harm (40%). Nonetheless, one in every five (20%) cases within this offence category did cause medium or serious levels of harm to the environment.

## 2.2.4 Objective seriousness by offence type

Given that environmental harm is a major consideration for the LEC in assessing the objective seriousness of an environmental offence, it is not a surprise to see a high degree of concordance between these two factors, especially once the type of environmental offence is taken into account (Figure 5).

For “Tier 1 offences”, “Waste offences”, and “Harm flora/fauna/ecology offences”, the percentage of offences rated as being of *high* objective seriousness directly reflected the proportion of offences (within those offence types) that were assessed by the LEC as having resulted in *serious* environmental harm. Low objective seriousness was a feature of environmental planning offences.

**Figure 5: Objective seriousness of environmental planning and protection offences in the LEC — 2000 to 2015 (principal offence only; “Top 10” offence categories)**



## 2.2.5 The different types of “individual” offenders

**Tables 4, 5 and 6** show a more nuanced breakdown of “individual” offenders sentenced for environmental offences in the study period. In these tables, the generic category “individual” has been separated into the discrete categories of “special liability” offender, “small business owner” and “ordinary Joe” individual offenders.<sup>364</sup> “Corporation” remains as its own category of offender.

The separation of “special liability” offenders is particularly important given that these designated individuals (ie corporation directors and others concerned in the management of the corporation)<sup>365</sup> are dealt with by the LEC under the same provisions as corporations (except that the maximum penalty for individuals not corporations apply), and may be proceeded against and convicted regardless of whether or not the corporation has been proceeded against or has been convicted.<sup>366</sup>

One could also argue, depending on the size of the small business, that individuals who run or manage small businesses would be dealt with more harshly when the environmental offence was committed in the context of the operation of the business, particularly if there was financial motivations underlying the commission of the offence. Small businesses may also need to hold environmental protection licences for scheduled activities,<sup>367</sup> unlike the “ordinary Joe” individual offender. Generally, penalties for offences where an environmental protection licence is held by an offender, are likely (and expected) to be more severe than penalties imposed on an offender who is not required to hold such a licence.

“Special liability” offenders represented 10.4% of all offenders in the study period, and one-quarter (25.1%) of individual offenders. Small business owners made up just under 17% of all offenders and some 41% all individual offenders. “Ordinary Joe” individuals made up around one in seven offenders (13.9%), and over one-third of all individual offenders.

### 2.2.5.1 Offences committed

**Table 4** shows that there are major differences in the types of environmental offences committed by each class of offender. Firstly, corporations are highly prominent in terms of environmental pollution offences, notably:

- 91.5% (108 of 118) of all pollute water offences in the study period involved a corporate offender. Furthermore, pollute waters offences represented around 37% of all principal offences committed by corporations
- 92.7% (51 of 55) of all contravene licence offences were committed by a corporation
- 90.0% (nine of 10) of air pollution offences were committed by a corporation.

364 “Corporation” remained as its own category. The sub-categories of the original offender type, “Individual”, namely “special liability” offender, “small business owner” and “ordinary Joe” individual, were created through running a sophisticated search program to identify LEC judgments which contained targeted “search” terms. The target search terms included: “s 169” (and its variants, eg, “section 169”, “ss 169”, etc), “special executive liability”, “director”, “manager” and “company”. The pattern of search “hits” was used to determine which sub-category each non-corporation offender was placed. The judgments of all cases assigned to each sub-category of “Individual” were checked to validate the sub-classification of individual offenders to the new categories and, where necessary, cases were re-assigned to the correct sub-category. In referring to individuals under this new classification system, the term “ordinary Joe” is also used in the text. The gender neutral term would be “ordinary Jo/Joe”. Also see above n xlvii in the **Executive Summary**.

365 In *EPA v Alcobell Pty Ltd*, *EPA v Campbell* [2015] NSWLEC 123, Pain J at [120]–[121] referred to the co-defendant, the sole director and shareholder in the company, as “the guiding mind”. The EPA describes directors and managers of corporations as “the directing mind and will of the corporation [who] control its activities” (*EPA prosecution guidelines*, above n 310, p 8). Ample authority exists for the proposition that a defendant company charged with a pollution offence can be found liable for that offence based on vicarious liability for the conduct of its employees: *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715. The issue of vicarious liability was also considered by the CCA in *Director-General of the Dept of Land and Water Conservation v Greentree* (2003) 140 A Crim R 25 at [84]. In this case, it was determined in a unanimous decision at [108] that there were “common elements in the counts against [the applicant] personally and those against him as a director. The differences are that in the count against [the applicant] personally it is alleged that he cleared the native vegetation, whereas in the counts against him in his capacity as a director it is alleged that the corporation cleared the native vegetation and that he was a director of the corporation”.

366 *POEO Act*, s 169(1)–(2).

367 See *POEO Act*, Ch 3.

Directors and other persons involved in the management of companies, who were prosecuted under “special liability” provisions, were prominent in terms of:

- Tier 1 offences (*POEO Act*, s 169): 44.4% (four of nine offences)
- Discharge from ship (*Marine Pollution Act*, s 8 (rep): 53.8% (21 of 39 offences)
- Waste offences: 28.8% (15 of 42 offences).

**Table 4: Environmental planning and protection offences in the LEC by Class of Offender — 2000 to 2015 (principal offence only)**

Environmental offence	Class of offender				Total
	Corporation	Individual			
		Special liability offender	Small business owner	“Ordinary Joe”	
Pollute waters					
N	108	2	7	1	118
%	36.6	3.8	8.2	1.4	23.5
Development without consent					
N	26	0	24	28	78
%	8.8	0.0	28.2	40.0	15.5
Contravene licence					
N	51	3	1	0	55
%	17.3	5.8	1.2	0.0	11.0
Waste offences					
N	12	15	8	7	42
%	4.1	28.8	9.4	10.0	8.4
s 125 offences					
N	15	0	7	18	40
%	5.1	0.0	8.2	25.7	8.0
Discharge from ship					
N	18	21	0	0	39
%	6.1	40.4	0.0	0.0	7.8
Harm flora/fauna/ecology					
N	12	4	7	4	27
%	4.1	7.7	8.2	5.7	5.4
Native vegetation offences					
N	12	0	11	1	24
%	4.1	0.0	12.9	1.4	4.8
Air pollution					
N	9	1	0	0	10
%	3.1	1.9	0.0	0.0	2.0
Erect building without consent					
N	2	0	4	3	9
%	0.7	0.0	4.7	4.3	1.8
Tier 1 offences					
N	3	4	1	1	9
%	1.0	7.7	1.2	1.4	1.8
All other offences					
N	27	2	15	7	51
%	9.2	3.8	17.6	10.0	10.2
All LEC offences					
N	295	52	85	70	502
%	100.0	100.0	100.0	100.0	100.0

Note: coloured cells represent 10% or more of the principal offences for that class of offender.



For “small business owners”, the most common principal offence was “Development without consent” (28.2%). Offences against the *NV Act* (12.9%) also featured in the offence profile of small business owners, presumably because many farms are registered as rural businesses by landowners.<sup>368</sup> “Ordinary Joe” individuals, on the other hand, were most prominent in terms of environment planning offences under the *EPA Act*:

- Development without consent (s 78A): 28 of the 78 offences (35.9%)
- Offences against direction or prohibition (s 125): 18 of the 40 offences (45.0%).

### 2.2.5.2 Penalties

It is clear that an “ordinary Joe” individual offender is more likely than the other classes of offender to receive the benefit of a “no conviction recorded” s 10 dismissal/s 10 bond (ie conditional discharges) following a finding of guilt for an environmental planning or protection offence in the LEC (**Table 5**).

**Table 5: Penalties imposed for environmental planning and protection offences in the LEC by Class of Offender — 2000 to 2015 (principal offence only)**

Penalty	Class of offender				Total
	Corporation	Individual			
		Special liability offender	Small business owner	“Ordinary Joe”	
s 10 dismissal					
N	1	10	1	11	23
% within row	4.3	43.5	4.3	47.8	100.0
% within column	0.3	19.2	1.2	15.7	4.6
s 10 bond					
N	0	2	0	3	5
% within row	0.0	40.0	0.0	60.0	100.0
% within column	0.0	3.8	0.0	4.3	1.0
s 10A					
N	1	0	2	0	3
% within row	33.3	0.0	66.7	0.0	100.0
% within column	0.3	0.0	2.4	0.0	0.6
Additional Orders only					
N	44	0	2	1	47
% within row	93.6	0.0	4.3	2.1	100.0
% within column	14.9	0.0	2.4	1.4	9.4
Fine					
N	185	27	64	45	321
% within row	57.6	8.4	19.9	14.0	100.0
% within column	62.7	51.9	75.3	64.3	63.9
Fine plus Additional Order					
N	64	10	15	7	96
% within row	66.7	10.4	15.6	7.3	100.0
% within column	21.7	19.2	17.6	10.0	19.1
CSO					
N	0	3	1	3	7
% within row	0.0	42.9	14.3	42.9	100.0
% within column	0.0	5.8	1.2	4.3	1.4
Total					
N	295	52	85	70	502
% within row	58.8	10.4	16.9	13.9	100.0
% within column	100.0	100.0	100.0	100.0	100.0

368 For example, *Director-General of the Dept of Land and Water Conservation v Leverton Pastoral Co Pty Ltd* [2002] NSWLEC 212; *Director-General, Dept of Environment and Climate Change v Calman Aust Pty Ltd; Iroch Pty Ltd; GD & JA Williams Pty Ltd t/a Jerilderie Earthmoving* [2009] NSWLEC 182; and, *Director-General, Dept of Environment and Climate Change v Jack & Bill Issa Pty Ltd (No 6)* [2010] NSWLEC 43.

Half (n=14) of all conditional discharges (ie s 10 dismissals and s 10 bonds), in the study period were imposed on individual offenders who were “ordinary Joe” citizens. Individuals subject to “special liability” provisions also received relatively high numbers of s 10 conditional discharges (n=12). There was only one instance each, in the period examined, where a corporation or “small business owner” received a s 10 dismissal; and no instance where either of these classes of offender received a s 10 bond.

Fines were the most common penalty across all classes of environmental offender, although comparatively speaking, fines represented a higher proportion of penalties for small business owners (75%) and “ordinary Joe” individuals (64%). Fines in combination with Additional Orders were more commonly handed down to corporations (67%) than any other class of offender. This was also the case for Additional Orders imposed without fines: 44 of 47 (94%) were imposed on corporations. Three Additional Orders without a fine — all three involving “restoration or enhancement” projects consistent with the provisions of s 250(1)(c) of the *POEO Act* — were imposed by the LEC: two on offending small business owners and one on an “ordinary Joe” offender.

In the study period, the most serious penalty for an environmental offence was a CSO. Three CSOs were imposed on “special liability” offenders, one was imposed on an individual conducting a small business, and three CSOs were ordered on individuals who did not have a commercial or financial interest/motive for committing the crime: each could be described as an “ordinary Joe”.

**Table 6: Fines imposed for environmental planning and protection offences in the LEC by Class of Offender — 2000 to 2015 (principal offence only)**

	Class of offender				Total
	Corporation	Individual			
		Special liability offender	Small business owner	“Ordinary Joe”	
Offenders fined (n)	249	37	79	52	417
(%)^	59.7	8.9	18.9	12.5	100.0
Fine imposed					
Mean	\$43,682	\$43,087	\$30,249	\$19,737	\$38,099
Median	\$25,000	\$25,000	\$15,000	\$11,625	\$22,000
Middle 50% range	\$15,000–\$50,000	\$10,000–\$38,500	\$8,000–\$40,000	\$5,250–\$25,125	\$10,000–\$40,000
Lowest	\$10 <sup>a</sup>	\$3,000	\$200	\$400	\$10 <sup>a</sup>
Highest	\$1,200,000	\$510,000	\$160,000	\$175,000	\$1,200,000
Most common	equal \$20,000	\$20,000	\$5,000	equal \$3,500	\$20,000
	equal \$25,000			equal \$7,500	
	equal \$30,000			equal \$20,000	
Next most common	\$15,000	\$30,000	equal \$10,000 equal \$15,000	Multiple amounts	\$30,000
Sum	\$10,877,018	\$1,594,250	\$2,389,690	\$1,026,300	\$15,887,258

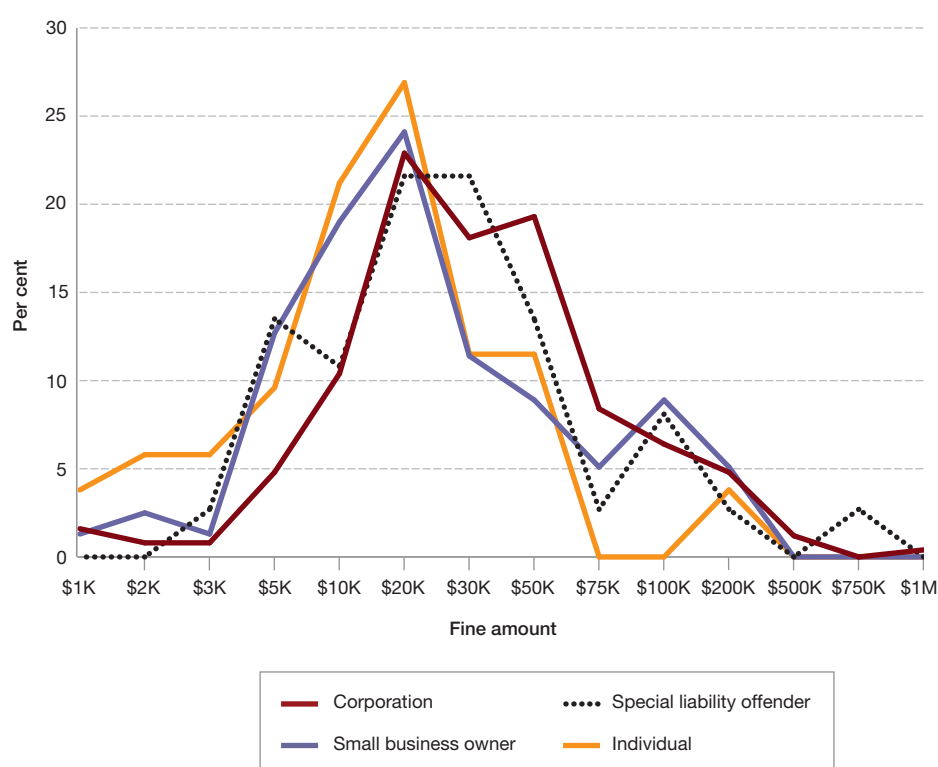
<sup>a</sup> Percentage of the total number of fines (including fines plus Additional Orders) for that class of offender.

a The lowest recorded fine amount was \$10. In this case (*EPA v Australian Pacific Oil Company Pty Ltd* [2003] NSWLEC 279), two company directors were found liable under the “special executive liability” provisions of s 169 and each received a fine of \$20,000 for the offence against s 143(1)(b) of the *POEO Act*. At the same time, the court chose to impose a nominal fine of \$10 on the company for the same offence.

**Table 6** shows that the quantum nature of fines also varied depending on the class of offender. Of the four classes of offenders, corporations incurred the highest average fine (\$43,682), closely followed by “special liability” offenders (\$43,087). The average fine amount for “ordinary Joe” individuals (\$19,737) was less than half that for corporations and “special liability” offenders. The average fine amount for “small business owners” was just over \$30,000. The median fine amounts for “special liability” offenders and corporations was the same at \$25,000; but very different from the median fine amount for small business owners (median: \$15,000) and “ordinary Joe” individuals (median: \$11,625). This demonstrates that those persons involved in the management of a corporation received fine amounts more like those imposed on companies than those imposed on individual environmental offenders.

**Figures 6 and 7** show the distribution of fine amounts for the different classes of environmental offenders. **Figure 6** shows the distribution of fine amounts in terms of percentage of offences and grouped dollar values.<sup>369</sup> Fine amounts for corporations appear to follow a reasonably normal “bell-shaped” distribution, albeit the top of the bell is “dented” reflecting the modal fine amount of \$20,000 and a secondary mode of \$50,000. The distribution of fines for small business owners is less “normal” with a second, smaller, distinct hump corresponding to fines of up to and including \$100,000.

**Figure 6: Distribution of fine amounts for environmental planning and protection offences in the LEC by Class of Offender – 2000 to 2015 (principal offence only)**

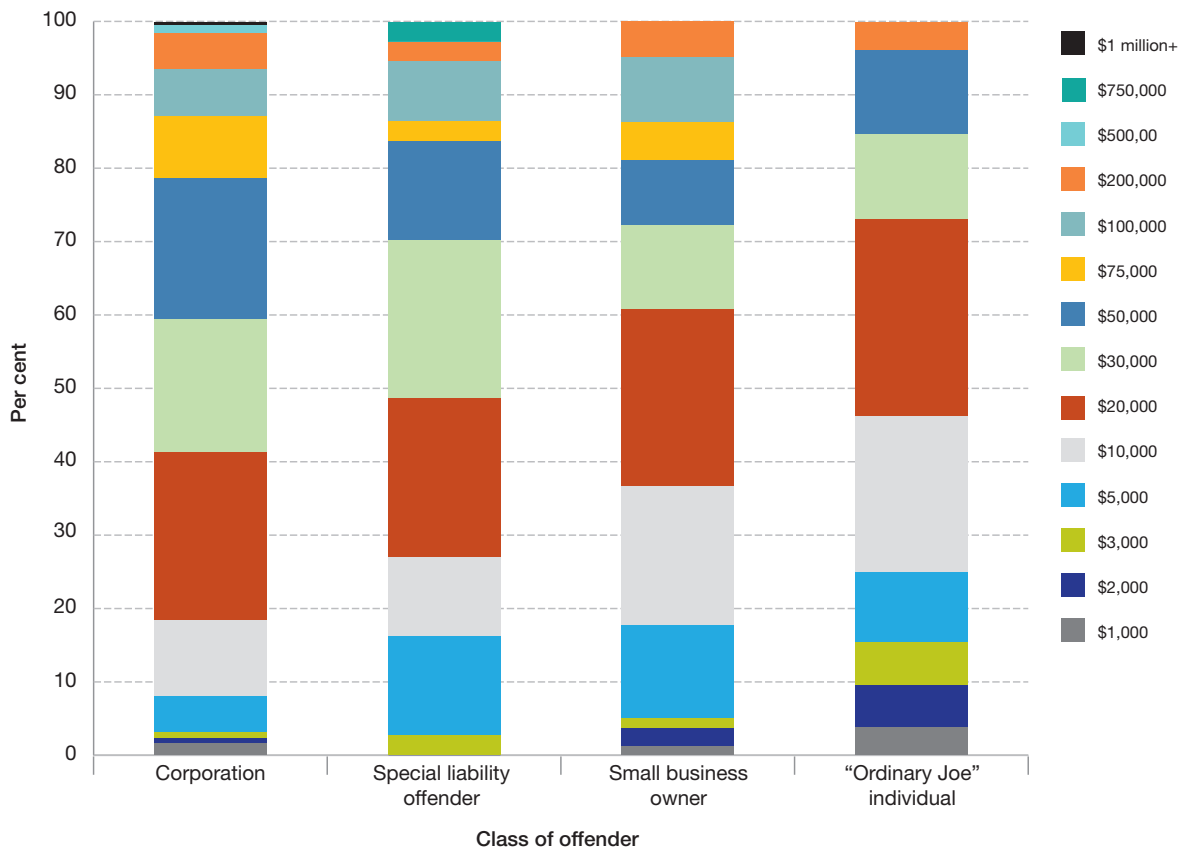


<sup>369</sup> For example, “\$10,000” represents the range of fines from \$5,001 to \$10,000 and includes all fines within that band.

A far less normal distribution is noted in the fines ordered for “special liability” offenders, with a “plateau” corresponding to the dual modes of \$20,000 and \$30,000 and distinct minor “peaks” for the fine values of \$5,000, \$100,000 and \$750,000. The distribution of fine amounts for “ordinary Joe” individual offenders is skewed towards the lower values. Distinct bumps are, however, noted within this distribution corresponding to grouped fine amounts of \$50,000 and \$200,000.<sup>370</sup>

The relative difference between the fine amounts incurred by each class of environmental offender may be better appreciated by examining **Figure 7**. In this the stacked column chart, it is easier to see there is a relatively higher proportion of fines in the \$5,000 to \$20,000 range for “ordinary Joe” offenders than for the other classes of offenders — almost three-quarters (73%) of fines incurred by “ordinary Joe” individual offenders were in that range. While the fine amounts for small business owners show a similar pattern to that of individual offenders, there is also a relatively higher proportion of fines for amounts greater than \$30,000. The fine amounts for “special liability” offenders, on the other hand, are more commonly within the range of \$20,000 to \$50,000. These fine amounts represent almost 60% of all fines imposed on this class of offender. Corporations show an interesting mix of lower and higher fine amounts. Around 40% of fines for corporations were for amounts of \$50,000 or more. Corporations were the only class of offender that received fines of \$1 million or higher.<sup>371</sup>

**Figure 7: Percentage distribution of fine amounts for environmental planning and protection offences in the LEC by Class of Offender — 2000 to 2015 (principal offence only)**



<sup>370</sup> Two individuals, who were neither company directors nor small business owners, received fines of between \$100,000 and \$200,000 in the study period. In *Cowra Shire Council v Fuller* [2015] NSWLEC 13, the offender planned and deliberately demolished a rural homestead of heritage significance to pre-empt the council listing the building as a heritage item. The offender was fined \$175,000. In the case of *Garrett v Williams* [2006] NSWLEC 785, the offender destroyed identified endangered trees and vegetation to remove an impediment to subdividing and developing his rural property. The offender was fined \$130,000.

<sup>371</sup> The reasons for this become more apparent when the objective and subjective characteristics of corporate offenders are taken into consideration in the analysis. This may be the subject of a future publication by the Judicial Commission.

## 2.2.6 Fines in excess of the Local Court jurisdictional limit and *Harris v Harrison*

In February 2012, the NSW Government increased the statutory maximum monetary penalty that the Local Court can impose for an environmental offence from \$22,000 to \$110,000.<sup>372</sup> This five-fold increase in fine amounts has been criticised as “arguably being too high” with the potential to “remove the bulk of cases from the specialised jurisdiction of the LEC”.<sup>373</sup>

**Table 7** shows that, in the period examined, there were 26 cases where the fine ordered by the LEC was greater than the Local Court’s *jurisdictional* limit of \$110,000.<sup>374</sup> In all 26 cases, the maximum penalty for the offence proceeded against in the LEC was above the jurisdictional limit of the Local Court. However, two cases involved Tier 1 offences under the *POEO Act*, which could not be dealt with by the Local Court.<sup>375</sup> Therefore, **Table 7** contains 24 principal offences that were not Tier 1 offences but which received a fine in excess of \$110,000 — greater than the current jurisdictional maximum monetary penalty limit of the Local Court.

In May 2014, the CCA handed down its decision in *Harris v Harrison*<sup>376</sup> (“*Harris*”) which was an appeal to *Harrison v Harris* in the first instance.<sup>377</sup> There were many grounds for appeal, including that the total penalty was manifestly excessive.<sup>378</sup> The CCA found, for a diverse number of reasons,<sup>379</sup> that “this was an offence that should have been treated as one suitable to be prosecuted in the Local Court”:

Given the known circumstances of the offence, and the assessment of the offence as one of low objective gravity, Her Honour’s attention should have been drawn to the fact that the offence could have been prosecuted in the Local Court, and to the maximum penalty available there.<sup>380</sup>

372 *Protection of the Environment Legislation Amendment Act 2011*, Sch 2[14], amended s 215(2) by replacing the reference to “200 penalty units” with “1,000 penalty units” (effective 6 February 2012). Section 215(2) (as amended) provides: “If any such proceedings are brought in the Local Court, the maximum monetary penalty that the Court may impose for the offence is 1,000 penalty units, despite any other provision of this Act”. One penalty unit is \$110: *CSP Act*, s 17.

373 H Donnelly, Z Baghizadeh and P Poletti, “Environmental planning and protection offences prosecuted in the NSW Local Court”, *Sentencing Trends & Issues*, No 43, Judicial Commission of NSW, 2014, p 3.

374 It is extremely unlikely that a prosecutor would prefer to bring a “worst case” environmental offence to the Local Court given the LEC’s specialised jurisdiction. Notably, the LEC “deals with the more serious environmental crimes which often require the reception of complex expert evidence, lengthy conviction and sentence proceedings ... and an in-depth understanding of sentencing principles as they relate to environmental offences”: *ibid*, p 3). Furthermore, A Freiberg and S Krasnostein, “Statistics, damn statistics and sentencing” (2011) 21 *JJA* 73, state that while the statutory maximum penalty sets the legal limit of a sentence’s authority, it also invites comparisons “with the ‘worst possible case falling within the relevant prohibition’”. The maximum penalty therefore serves the purpose of providing a ‘yardstick’ which must be balanced against other factors in a case” [citations omitted] (p 78).

375 Tier 1 offences under the *POEO Act* (and under earlier legislation it replaced) cannot be dealt with by the Local Court (Judicial Commission of NSW, *Local Courts Bench Book 1988-*, “Specific penalties and orders”, at [www.judcom.nsw.gov.au/benchbks/local/Protection\\_of\\_the\\_Environment\\_Operations\\_Act.html](http://www.judcom.nsw.gov.au/benchbks/local/Protection_of_the_Environment_Operations_Act.html)).

376 (2014) 86 NSWLR 422 (*Harris*).

377 [2013] NSWLEC 105.

378 *Harris v Harrison* (2014) 86 NSWLR 422 per Simpson J at [5]. The total penalty at first instance included a fine of \$28,000, an order to pay the prosecutor’s costs recognised as “not insignificant” (at [66]) and in the order of \$75,000 (at [100]), and a newspaper advertisement taken out at the offender’s expense making public the circumstances and outcome of the offence (at [3]).

379 *ibid*. The reasons are articulated per Simpson J in [70]–[96] and concern the sentencing judge’s errors in assessing the objective seriousness of the offence, including the original findings of circumstances of aggravation (ie intent) and a financial motive behind the commission of the offence. The conclusions were identified by the CCA as significant to the assessment of objective seriousness but ultimately unsustainable (per Simpson J at [80]–[90]).

380 *ibid* at [96]–[97]. While the offence against s 91K(1) of the *Water Management Act 2000*, “meter tampering”, is a Tier 1 offence, under this Act it can be disposed of summarily by either the Local Court or the LEC in its summary jurisdiction: s 364. However, the Local Court is limited to a maximum monetary penalty of \$22,000 (ie 200 penalty units) or the maximum monetary penalty specified in respect of the offence, whichever is lesser. In the LEC, for an individual, the maximum penalty for a Tier 1 offence is imprisonment for 2 years or \$1.1 million (ie 10,000 penalty units), or both, and, in the case of a continuing offence, a further penalty of \$132,000 (ie 1,200 penalty units) for each day the offence continues.



**Table 7: Fines greater than \$110,000 imposed by the LEC for environmental offences — 2000 to 2015 (principal offence only)**

No	Citation	Act	Section	Offence description	Offence category ("Top 10")	Offender type	Fine	Max penalty	% of max penalty
1	[2013] NSWLEC 144	<i>Native Vegetation Act 2003</i>	12(2)	Carry out/authorise clearing contrary to s 12	Clear native vegetation contrary to the Act	Small business owner	\$112,000	\$1,100,000	10.2%
2	[2010] NSWLEC 3	<i>Protection of the Environment Operations Act 1997</i>	91(5)	Fail to comply with clean-up notice	Other offence	Corporation	\$112,500	\$1,000,000	11.3%
3	[2012] NSWLEC 80	<i>Protection of the Environment Operations Act 1997</i>	120(1)	Pollute waters	Pollute waters	Corporation	\$112,500	\$1,000,000	11.3%
4	[2003] NSWLEC 142	<i>Protection of the Environment Operations Act 1997</i>	64(1)	Contravene any condition of licence relating to noise	Contravene any condition of licence	Corporation	\$117,000	\$250,000	46.8%
5	[2008] NSWLEC 280	<i>Protection of the Environment Operations Act 1997</i>	120(1)	Pollute any waters	Pollute waters	Corporation	\$120,000	\$1,000,000	12.0%
6	[2012] NSWLEC 129	<i>Native Vegetation Act 2003</i>	12(2)	Carry out/authorise clearing contrary to s 12	Clear native vegetation contrary to the Act	Small business owner	\$120,000	\$1,100,000	10.9%
7	[2014] NSWLEC 104	<i>Protection of the Environment Operations Act 1997</i>	64(1)	Contravene any condition of licence — not noise	Contravene any condition of licence	Corporation	\$122,500	\$1,000,000	12.3%
8	[2006] NSWLEC 685	<i>Protection of the Environment Operations Act 1997</i>	129(3)	Contravene section by emission of odours	Air pollution offences	Corporation	\$125,000	\$250,000	50.0%
9	[2006] NSWLEC 785	<i>National Parks and Wildlife Act 1974</i>	118A(2)	Pick plant of an endangered ecological community	Harm endangered/threatened species (plant, animal or ecological community)	"Ordinary Joe" individual	\$130,000	\$715,000	18.2%
10	[2014] NSWLEC 26	<i>Protection of the Environment Operations Act 1997</i>	120(1)	Pollute any waters	Pollute waters	Corporation	\$130,000	\$1,000,000	13.0%
11	[2004] NSWLEC 498	<i>Marine Pollution Act 1987</i>	18(1)	Owner of ship discharging liquid substance into waters	Discharge oil/liquid/prohibited substance from ship into State waters	Corporation	\$135,000	\$10,000,000	1.4%
12	[2014] NSWLEC 150	<i>Native Vegetation Act 2003</i>	12(2)	Carry out/authorise clearing contrary to s 12	Clear native vegetation contrary to the Act	Small business owner	\$140,000	\$1,100,000	12.7%
13	[2009] NSWLEC 104	<i>Marine Pollution Act 1987</i>	8(1)	Discharge as owner oily mixture from ship into State waters	Discharge oil/liquid/prohibited substance from ship into State waters	Corporation	\$150,000	\$10,000,000	1.5%
14	[2013] NSWLEC 217	<i>Marine Pollution Act 1987</i>	8(1)	Discharge as owner oily mixture from ship into State waters	Discharge oil/liquid/prohibited substance from ship into State waters	Corporation	\$150,000	\$10,000,000	1.5%
15	[2009] NSWLEC 137	<i>Native Vegetation Act 2003</i>	12(2)	Carry out/authorise clearing contrary to s 12	Clear native vegetation contrary to the Act	Small business owner	\$160,000	\$1,100,000	14.6%

Table 7 continued

No	Citation	Act	Section	Offence description	Offence category ("Top 10")	Offender type	Fine	Max penalty	% of max penalty
16	[2014] NSWLEC 106	<i>Protection of the Environment Operations Act 1997</i>	64(1)	Contravene any condition of licence — not noise	Contravene any condition of licence	Corporation	\$175,000	\$1,000,000	17.5%
17	[2014] NSWLEC 107	<i>Protection of the Environment Operations Act 1997</i>	64(1)	Contravene any condition of licence — not noise	Contravene any condition of licence	Corporation	\$175,000	\$1,000,000	17.5%
18	[2015] NSWLEC 13	<i>Environmental Planning and Assessment Act 1979</i>	76A(1)(a)	Development carried out without a development consent	Carry out development without consent/not in accordance with consent	"Ordinary Joe" individual	\$175,000	\$1,100,000	15.9%
19	[2008] NSWLEC 271	<i>Environmental Planning and Assessment Act 1979</i>	75D(2)	Fail to comply with conditions of approval	Carry out development without consent/not in accordance with consent	Corporation	\$200,000	\$1,100,000	18.2%
20	[2011] NSWLEC 119	<i>Native Vegetation Act 2003</i>	12(2)	Carry out/authorise clearing contrary to s 12	Clear native vegetation contrary to the Act	Corporation	\$200,000	\$1,100,000	18.2%
21	[2011] NSWLEC 149	<i>Native Vegetation Act 2003</i>	12(2)	Carry out/authorise clearing contrary to s 12	Clear native vegetation contrary to the Act	Corporation	\$200,000	\$1,100,000	18.2%
22	[2001] NSWLEC 267	<i>Environmental Offences and Penalties Act 1989</i>	6(1)(a)	Cause substance to escape harm/likely to harm environment	Tier 1 offence	Corporation	\$240,000	\$1,000,000	24.0%
23	[2003] NSWLEC 222	<i>Protection of the Environment Operations Act 1997</i>	116(2)(a)	Person in possession of substance harming environment	Tier 1 offence	Corporation	\$250,000	\$1,000,000	25.0%
24	[2008] NSWLEC 224	<i>Protection of the Environment Operations Act 1997</i>	120(1)	Pollute any waters	Pollute waters	Corporation	\$280,000	\$1,000,000	28.0%
25	[2000] NSWLEC 50	<i>Marine Pollution Act 1987</i>	8(1)	Discharge as master oily mixture from ship into State waters	Discharge oil/liquid/prohibited substance from ship into State waters	Special liability offender	\$510,000	\$1,100,000	46.4%
26	[2013] NSWLEC 210	<i>Marine Pollution Act 1987</i>	8(1)	Discharge as owner oily mixture from ship into State waters	Discharge oil/liquid/prohibited substance from ship into State waters	Corporation	\$1,200,000	\$10,000,000	12.0%

a In February 2012, the maximum monetary penalty that the Local Court can impose for an offence increased to \$110,000. Prior to that, in the period studied, the maximum monetary penalty was \$22,000.

Notes: Cases No 22 and 23 (colour coded) involved Tier 1 offences. Tier 1 offences cannot be dealt with in the Local Court: POEO Act, s 214(1).

The convicted offender in the native vegetation Cases No 1, 6, 12 and 15 was an individual landowner operating farming businesses; in Cases No 20 and 21, the corporate landowner was the offender convicted of the native vegetation offence.

It has been made clear by the High Court that “the intermediate appellate courts of appeal provide the most useful guidance to a sentencing judge” and it is through their work that consistency in sentencing is achieved.<sup>381</sup> Whether an offence could have been prosecuted in the Local Court is “a relevant sentencing consideration” that is well established by appellate authority and must be considered in determining an appropriate penalty.<sup>382</sup> In *Harris v Harrison*, while Pepper J judged the seriousness of the offence to be low, the CCA found that her Honour started the assessment of the appropriate monetary penalty at a level that was available to the LEC but well above the Local Court’s jurisdictional limit of \$22,000.<sup>383</sup> The CCA determined, by the prosecutor bringing proceedings before the LEC, that “it exposed the appellant to a maximum penalty 50 times that which could be imposed in the Local Court”.<sup>384</sup> The CCA also held that the total sentence imposed on the appellant “ought not to have exceeded the jurisdictional limit of the Local Court”.<sup>385</sup>

Reflecting on this CCA decision, it is possible to provide some insight into the proportion of principal offences dealt with by the LEC for which proceedings may have commenced, in theory at least, in the Local Court. **Table 8** is divided into three sections, reflecting LEC fines for offences finalised in three distinct sentencing “regimes”:

1. after the jurisdictional limit of the Local Court increased to \$110,000 and post *Harris* (between 15 May 2014 and the end of the study period);
2. after the jurisdictional limit of the Local Court increased to \$110,000 but pre *Harris* (between 6 February 2012 and 15 May 2014);
3. before the jurisdictional limit of the Local Court increased from \$22,000 to \$110,000 and pre *Harris* (between the start of study period 1 January 2000 and 6 February 2012).

Looking first at post-*Harris* offences, where the Local Court operated under a jurisdictional limit of \$110,000, the proportion of principal offences that attracted a fine less than the Local Court’s jurisdictional limit in the LEC was almost 87%.<sup>386</sup> Only two of 15 environmental offences in the study period that followed *Harris v Harrison* resulted in a fine greater than the jurisdictional limit of the Local Court being imposed by the LEC. This would seem to suggest, on face value, that a substantial number of post-*Harris* LEC sentencing decisions could be subject to a similar ground of appeal as upheld in *Harris v Harrison*. Furthermore, “low objective gravity” was identified in *Harris v Harrison* as a factor that makes an offence potentially suitable for prosecution in the Local Court, and to the maximum penalty available in that jurisdiction.<sup>387</sup> Six of the 13 offences (46.2%) in the post-*Harris* period which received fines of less than \$100,000 were assessed by the LEC as being of “low” objective seriousness.<sup>388</sup>

In the pre-*Harris* period, but after the Local Court’s jurisdictional limit was raised to \$110,000, over 89% of offences prosecuted in the LEC resulted in a fine that was less than the Local Court’s jurisdictional limit. Twenty-five of the 49 offences (51.0%) in this period, which received fines of less than \$100,000, were assessed by the LEC as being of “low” objective seriousness and, thus, potentially suitable for prosecution in the Local Court and the lighter maximum penalties available in that jurisdiction.<sup>389</sup>

381 *The Queen v Pham* (2015) 90 ALR 13 per Bell and Gageler JJ at [50]; French CJ, Keane and Nettle JJ at [28].

382 *Harris v Harrison* (2014) 86 NSWLR 422 per Simpson J at [92]–[94] citing *R v Crombie* [1999] NSWCCA 29; *R v Doan* (2000) 50 NSWLR 115; [2000] NSWCCA 317; and *Zreika v R* [2012] NSWCCA 44.

383 [2013] NSWLEC 105 per Pepper J at [174]:

Synthesising the objective circumstances of the commission of the offence, the subjective circumstances of Mr Harris and the general pattern (to the extent that one can be said to exist) of sentencing for offences such as the one committed by Mr Harris, I consider that the imposition of a monetary penalty of \$40,000, discounted by 30% to \$28,000, having regard to the subjective mitigating factors discussed above, and including the payment by Mr Harris of the prosecutor’s costs, is appropriate.

384 *Harris v Harrison* (2014) 86 NSWLR 422 per Simpson J at [95].

385 *ibid* at [98]. The CCA confirmed the conviction but vacated the orders made by Pepper J, including the order that the applicant pay the costs of the prosecution. The new order included a two-year good behaviour bond and the publication of an amended notice.

386 Not included in the calculations are offences dealt with by the LEC that were: (i) Tier 1 offences that could not be disposed of by the Local Court, and (ii) offences where an Additional Order was made by the LEC that could not be ordered by a Local Court (s 250(1) of the *POEO Act*).

387 *Harris v Harrison* (2014) 86 NSWLR 422 per Simpson J at [96]–[97].

388 The fine amounts ranged from \$22,500 to \$82,500. The average fine for these six offences was \$48,208 (median: \$38,375).

389 The fine amounts ranged from \$3,000 to \$80,000. The average fine for these 25 offences was \$21,242 (median: \$15,000).

**Table 8: Proportion of fines greater than the Local Court jurisdictional limit ordered by the LEC for environmental offences (principal offence only) by jurisdictional limit of Local Court: pre- and post-*Harris*<sup>a</sup>**

1. post- <i>Harris</i> (between 15 May 2014 and 28 February 2015) (n=15)					
Fined less than LC jurisdictional limit of \$110,000		Fined more than LC jurisdictional limit of \$110,000		Total <sup>b</sup>	
N	%	N	%	N	%
13	86.7	2	13.3	15	100.0
2. pre- <i>Harris</i> (between 6 February 2012 and 15 May 2014) (n=57)					
Fined less than LC jurisdictional limit of \$110,000		Fined more than LC jurisdictional limit of \$110,000		Total <sup>c</sup>	
N	%	N	%	N	%
49	89.1	6	10.9	55	100.0
3. pre- <i>Harris</i> (between 1 January 2000 and 6 February 2012)					
Fined less than LC jurisdictional limit of \$22,000		Fined more than LC jurisdictional limit of \$22,000		Total <sup>d</sup>	
N	%	N	%	N	%
177	54.6	147	45.4	324	100.0

- a Changes to the maximum monetary limit of the Local Court became effective on 6 February 2012. The decision date for *Harris v Harrison* [2014] NSWCCA 84 (*Harris*) is 15 May 2014.
- b In the post-*Harris* period, there were no principal offences which resulted in a fine plus an Additional Order of the type that the Local Court is not authorised to make under s 250(1) of the *POEO Act* (or similar provision). There were also no Tier 1 offences in this period that resulted in a fine.
- c In this period, there were no principal offences which resulted in a fine plus an Additional Order of the type that the Local Court is not authorised to make. There were two Tier 1 offences in this period which received fines; both resulted in fines of \$100,000 — within the Local Court's jurisdictional limit at that time. However, Tier 1 offences under the *POEO Act* cannot be dealt with by the Local Court. These offences were not included in the count of 49 or the total of 55.
- d Does not include 19 principal offences which resulted in a fine plus an Additional Order of the type that the Local Court is not authorised to make. There were two Tier 1 offences in this period, which received fines: one attracting a fine of \$30,000 and the other a fine of \$240,000 — both fines were above the Local Court's jurisdictional limit at that time. Tier 1 offences under the *POEO Act* cannot be dealt with by the Local Court. These offences were not included in the count of 147 or the total of 324.

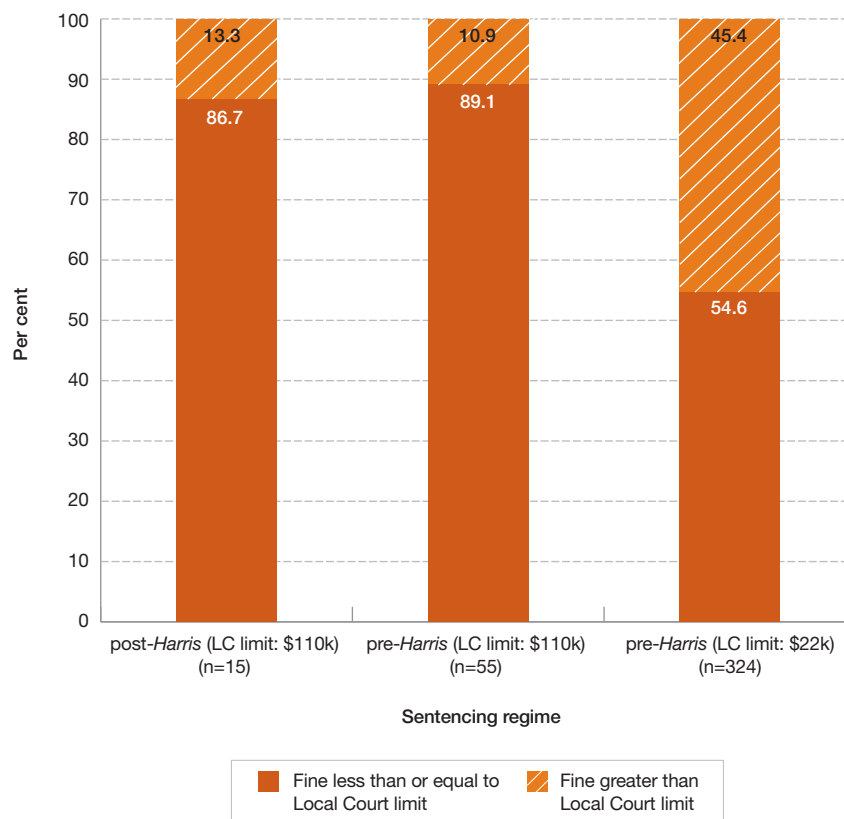
Lastly, in the pre-*Harris* period, at the time when the Local Court's jurisdictional limit was legislated at \$22,000, the proportion of offences dealt with by the LEC which resulted in a fine amount below the Local Court's jurisdictional limit was much lower at less than 55%. A total of 128 of the 177 offences (72.3%) in this period, which received fines of less than \$22,000 were assessed by the LEC as being of "low" objective seriousness and, thus, potentially suitable for prosecution in the Local Court and the lighter maximum penalties available therein.<sup>390</sup>

In total, across the three periods, 239 of the 394 principal environmental offences (60.7%) that resulted in a monetary penalty attracted a fine which was less than the Local Court jurisdictional limit at the time. These data suggest that, historically, as many as six in every 10 offences dealt with by the LEC could have been prosecuted in the Local Court, where *lower* maximum penalties and *reduced* cost orders apply. It is even more likely that the subset of 159 offences (40.4%) assessed as being of low objective seriousness were suitable for disposal in the Local Court rather than in the LEC in line with the CCA's decision in *Harris v Harrison*.

**Figure 8** charts the findings presented in **Table 8**.

390 The fine amounts ranged from \$200 to \$22,000. The average fine for these 128 offences was \$10,445 (median: \$10,000).

**Figure 8: Percentage of fines ordered in the LEC that was less than the jurisdictional limit of the Local Court at the time of sentencing – by sentencing regime – 2000 to 2015 (principal offence only)**



As proceedings for most environmental offences may be commenced in either the Local Court or in the LEC in its summary jurisdiction, *Harris v Harrison* and other sentencing decisions in the LEC<sup>391</sup> suggest that prosecution could have been brought in the Local Court. Where the sentencing judge believes that the matter was capable of being dealt with in the Local Court, that fact may be regarded as a matter in mitigation.<sup>392</sup> Furthermore, where this consideration has been overlooked or ignored by a sentencing judge, it may be viewed as an error in law,<sup>393</sup> and “may properly justify the granting of leave to appeal”.<sup>394</sup> Although, it must be clear that the offence ought to, or would have, been prosecuted in the Local Court.<sup>395</sup>

<sup>391</sup> *Harris v Harrison* (2014) 86 NSWLR 422. In *Council of the City of Shoalhaven v Wilson* [2015] NSWLEC 93, Pain J at [32] noted that the charge could have been brought in the Local Court with a jurisdictional maximum of \$110,000, instead of the maximum penalty of \$1.1 million available to the LEC. The financial penalty was reduced from \$12,000 to \$8,400 in consideration of this and other mitigating factors (at [34]).

<sup>392</sup> *EPA v Barnes* [2006] NSWCCA 246 per Kirby J at [59]. Also see the discussion in **Costs and the correct forum** at [1.3.5].

<sup>393</sup> Although in *R v Jammeh* [2004] NSWCCA 327 at [28], Buddin J contended: “[A] failure by a sentencing judge to mention that a matter could have been dealt with in the Local Court cannot of itself constitute error”. (Wood CJ at CL and Shaw J agreeing.)

<sup>394</sup> *R v Crombie* (1999) NSWCCA 297 per Wood CJ at CL at [16].

<sup>395</sup> *Zreika v R* (2012) 223 A Crim R 460 per Johnson J at [83].

## 2.2.7 Additional Orders

The LEC has sentencing powers beyond those of the Local Court. One major difference is the Additional Orders it may impose under Pt 8.3 of the *POEO Act*.<sup>396</sup> Where the LEC finds an offence against the Act or regulations proved, it may make orders “in addition to any penalty that may be imposed”<sup>397</sup> or “regardless of whether any penalty is imposed, or other action taken, in relation to the offence”.<sup>398</sup> Notwithstanding the increase in the monetary penalties it can impose,<sup>399</sup> the Local Court is constrained in the “Additional Orders” it can make under s 250 of the *POEO Act*.<sup>400</sup> The LEC is not subject to such restrictions, and under s 250(1) is permitted to make a range of orders, including orders that the offender:

- (a) take specified action to publicise the offence (including the circumstances of the offence) and its environmental and other consequences and any other orders made against the person
- (b) take specified action to notify specified persons or classes of persons of the offence (including the circumstances of the offence) and its environmental and other consequences and of any orders made against the person (including, for example, the publication in an annual report or any other notice to shareholders of a company or the notification of persons aggrieved or affected by the offender’s conduct)
- (c) carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit
- (d) carry out a specified environmental audit of activities carried on by the offender
- (e) pay a specified amount to the Environmental Trust established under the *Environmental Trust Act* 1998, or a specified organisation, for the purposes of a specified project for the restoration or enhancement of the environment or for general environmental purposes
- (f) attend, or to cause an employee or employees or a contractor or contractors of the offender to attend, a training or other course specified by the court
- (g) establish, for employees or contractors of the offender, a training course of a kind specified by the court
- (h) if the EPA is a party to the proceedings, provide a financial assurance, of a form and amount specified by the court, to the EPA, if the court orders the offender to carry out a specified work or program for the restoration or enhancement of the environment.

Notably, the Local Court is not authorised to make an order referred to in s 250(1)(c), (d), (e) or (h) above. Furthermore, s 169(1A) states that (without limiting orders made under paragraph (c) above) the LEC may order the offender to carry out any social or community activity for the benefit of the community or persons that are adversely affected by the offence (a “restorative justice activity”) that the offender has agreed to carry out. Again, the Local Court is not authorised to make such an order.

Talbot J in *EPA v Byron Shire Council*,<sup>401</sup> noted that the Attorney General explained the purpose behind s 250 of the *POEO Act* in his second reading speech to the Legislative Council on 5 December 1997:

Court proceedings and sentencing: In addition to doubling the penalty regime for application by the courts, the Bill clarifies who can initiate court proceedings and also gives the courts a wider range of sentencing options. We are working to broaden the options available to the courts. We want changed behaviour and improved environmental performance and are giving the courts an opportunity to teach a salutary lesson to those who have been found guilty. For example, the court can require a guilty party to publicise the facts of their offence in the media or require them to perform an environmental service such as restoring a public place.

<sup>396</sup> Also under s 126(3) of the *EPA Act*.

<sup>397</sup> *POEO Act*, s 244(2).

<sup>398</sup> *POEO Act*, s 244(3). For this reason, “Additional Order(s)” is used as a proper noun (and capitalised) to distinguish these orders from other orders available to the court; and as a specific type of order that is not just an adjunct to a penalty.

<sup>399</sup> Donnelly et al, above n 303, at p 12 reported that “in February 2012, the maximum monetary penalty that the Local Court can impose for an offence under the *POEO Act* increased from \$22,000 to \$110,000”.

<sup>400</sup> *POEO Act*, s 250(1). It may also make, with limited exceptions, other orders under Pt 8.3 (for example, orders for restoration and prevention under s 245). Additional Orders can also 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.

<sup>401</sup> [2002] NSWLEC 128 at [17].



Pearlman CJ, the then Chief Judge of the LEC, in sentencing the corporate offender in *EPA v Simplot Aust Pty Ltd*<sup>402</sup> by imposing the inaugural s 250(1)(c) orders made the following points:

- An important factor in prosecutions of this kind is not so much a monetary penalty but the possibility of making orders that have the effect of enhancing the environment and encouraging its protection, and the avoidance of its degradation.
- Initially, there was some doubt as to whether an “additional” order could be imposed under s 250(1)(c) without having first imposed a penalty under s 123.
- Part 8.3, in which s 250 appears, however, is by s 243(1) expressed to apply where a court finds an offence proved. Section 244(2) provides that orders may be made under Pt 8.3 in *addition* to any penalty that *may* be imposed or any other action that may be taken in relation to the offence.
- This provides the LEC with a wide discretion to make Additional Orders under Pt 8.3.
- Such orders are extremely appropriate where the defendant has signalled its willingness to be bound to orders of the nature of those specified in s 250(1)(c).
- s 251 provides that a person who fails to comply with an order imposed under Pt 8.3 is guilty of an offence.

Similarly, Preston CJ of the LEC lauded the value of the restorative intent of Additional Orders, particularly where they complement “clean up” obligations and other “polluter pays” pecuniary punishments:

Sustainable and economically efficient development of environmental resources requires internalising the costs of preventing and controlling pollution as well as any environmental harm itself. This is the polluter pays principle. The polluter ought to pay for the costs of remedying any on-going environmental harm caused by the polluter’s conduct. This can be done by the polluter cleaning up the pollution and restoring the environment as far as practicable to the condition it was before being polluted. The polluter ought also to make reparation for the irremediable harm caused by the polluter’s conduct such as the death of biota and damage to ecosystem structure and functioning.<sup>403</sup>

In *EPA v Byron Shire Council*,<sup>404</sup> Talbot J was of the opinion that the “issue of the capacity to comply” with an order composed under Pt 8.3 had not previously been raised by the LEC. In the case before him, the defendant was required under the agreed conditions of the Additional Order to remove a weir across a local creek which was considered a significant barrier to fish movements. Planning and environmental approvals were required to undertake this environmental project but, even if obtained, Talbot J was of the opinion that the council was at risk of being exposed to a daily penalty of \$120,000 for a “technical breach” if it wasn’t in the position to remove the weir as directed under the conditions of the order: at [18]–[22]. Due to both real and possible difficulties in completing all conditions of the proposed Additional Order, the proposal was abandoned and instead Byron Shire Council was ordered to pay a monetary fine of \$30,000, which was “the understood cost of removing the weir”,<sup>405</sup> although it was made clear at first hearing that “some other project specified, pursuant to s 250(1)(c)” could have been put in place by the court as an alternative.<sup>406</sup>

402 [2001] NSWLEC 264 at [20]–[26].

403 *EPA v Waste Recycling & Processing Corp* [2006] NSWLEC 419 at [230].

404 [2002] NSWLEC 128 per Talbot J at [19]. The court adjourned the proceedings to allow the convicted offender to assess the viability of a proposed environmental project.

405 *EPA v Byron Shire Council* [2003] NSWLEC 207 at [10]–[11].

406 *ibid* per Talbot J at [21].

### 2.2.7.1 Value of Additional Orders imposed

A large proportion of Additional Orders are made by the LEC pursuant to s 250(1)(c) and (e) of the *POEO Act* and involve the court directing a monetary penalty towards a specified environmental restoration or enhancement project, or to the Environmental Trust for general environmental purposes.<sup>407</sup> Additional Orders can be made with, without, or in lieu of, a fine.<sup>408</sup> The information presented in **Table 9** details the value of Additional Orders imposed by the LEC — *without or in lieu of a fine* — during the period examined.<sup>409</sup> Only those Additional Orders that represented a discrete financial liability to the offender, such as orders made under s 250(1)(c) and (e) of the *POEO Act* are examined here.

**Table 9: Value of Additional Orders<sup>a</sup> imposed for environmental planning and protection offences in the LEC — 2000 to 2015 (principal offence only)**

	Class of offender				
	Corporation	Individual			Overall
		Special liability offender	Small business owner	“Ordinary Joe”	
Additional Orders (n)	44	0	2	1	47
(%)^	93.6	0.0	4.3	2.1	100.0
Mean	\$60,785	n/a	\$11,000	\$10,000	\$57,586
Median	\$50,000	n/a	\$11,000	n/a	\$50,000
Middle 50% range	\$28,000–\$80,000	n/a	n/a	n/a	\$28,000–\$80,000
Lowest	\$5,600	n/a	\$11,000	n/a	\$5,600
Highest	\$175,000	n/a	\$11,000	n/a	\$175,000
Most common	equal \$28,000 equal \$80,000	n/a	\$11,000	n/a	equal \$28,000 equal \$80,000
Next most common	\$50,000	n/a	n/a	n/a	\$50,000
Sum^a	\$2,674,550	n/a	\$22,000	\$10,000	\$2,706,550

<sup>^</sup> Percentage of the total number of “Additional Orders only” for that class of offender.

Note: It is not uncommon in the LEC for an Additional Order to be made in lieu of payment of a fine.

<sup>a</sup> Does not include 24 cases where the order was a “fine plus Additional Order” and the Additional Order was made under s 250(1)(c) or (e) of the *POEO Act*: The value of the Additional Order was identified from the judgment in nine of these 24 cases. The mean value of the Additional Orders in these nine cases was \$183,449 with a median value of \$50,500. The substantially higher mean value is the result of an Additional Order of over \$1.169 million imposed on one offender: *EPA v Douglass [No 2]* [2002] NSWLEC 94 at [18].

407 *POEO Act*, Pt 8.3. It is not an uncommon practice for the LEC to impose a monetary penalty towards a specified environmental restoration project to remediate the environmental damage resulting from the offence. For recent examples see: *EPA v Nulon Products Aust Pty Ltd* [2015] NSWLEC 153 per Moore AJ at [210]; *EPA v Hunter Valley Energy Coal Pty Ltd* [2015] NSWLEC 120 per Pain J at [56]; *EPA v Sydney Water Corp* [2015] NSWLEC 80 per Preston CJ of the LEC at [129]; *EPA v Causmag Ore Co Pty Ltd* [2015] NSWLEC 58 per Preston CJ of the LEC at [131]; *EPA v Big Island Mining Pty Ltd* [2014] NSWLEC 131 per Pain J at [258]; and *EPA v Peak Gold Mines Pty Ltd* [2013] NSWLEC 158 per Preston CJ of the LEC at [31], [35]. The court may also utilise s 250(1)(h) to order a financial assurance to the EPA. As publication orders under s 250(1)(a) are rarely costed these are not included in calculating the value of Additional Orders.

408 Under s 250(1)(e) of the *POEO Act*, the LEC may, in lieu of imposing a fine, order the offender to pay an appropriate amount towards a project for the restoration or enhancement of the environment or for general environmental purposes. For example, see *EPA v Peak Gold Mines Pty Ltd* [2013] NSWLEC 158 per Preston CJ of the LEC at [29].

409 There were 24 cases where the order was a “fine plus Additional Order” and the Additional Order was made under s 250(1)(c) or (e) of the *POEO Act*. Unfortunately, the value of the fines and not the value of these Additional Orders were downloaded to the research database. It was possible to manually obtain information on the value of these Additional Orders, where it was recorded, from the judgments of nine of the 24 cases. The mean value of the Additional Orders for these nine cases was \$183,449 with a median value of \$50,500. The substantially higher mean value is largely the result of an Additional Order of over \$1.169 million imposed on one offender: *EPA v Douglass [No 2]* [2002] NSWLEC 94 per Lloyd J at [18].

Overall, 47 offenders received an Additional Order (without also having to pay a fine) for their principal offence. The average value of an Additional Order was \$57,586 with a median value of \$50,000. The value of the most common Additional Order was equally \$28,000 (n=4) and \$80,000 (n=4). The next most common was \$50,000 (n=3).

The vast majority of offenders (94%) that received a pecuniary Additional Order (without also having to pay a fine) were corporations. The average value of an “Additional Order only” for a corporation was \$60,785 (median: \$50,000). In contrast to the average value for corporations, the mean and median value of an “Additional Order only” was \$11,000 for a small business owner and the mean was \$10,000 for an “ordinary Joe” individual. “Special liability” offenders were not sentenced by way of an “Additional Order only” in the study period.

In dollar terms, the largest Additional Order was \$175,000 imposed on Orica Australia<sup>410</sup> for the offence of “breach of a licence condition ... contrary to s 64(1) of the POEOA, by failing to operate the Ammonia Plant in a proper and efficient manner” (*EPA v Orica Aust Pty Ltd (the Hexavalent Chromium Incident)*).<sup>411</sup> The Additional Order was a financial contribution to a specified environmental project within the affected region:

pursuant to s 250(1)(e) of the Protection of the Environment Operations Act 1997 the defendant is directed to pay to the NSW Office of Environment and Heritage — National Parks and Wildlife Service, within 28 days of this order, the amount of \$175,000, as a contribution to the Stage 2 Restoration of Kooragang Dykes project to address the deterioration of dykes in the Hunter Wetlands National Park.<sup>412</sup>

Orica was ordered to pay another \$175,000 to a specified environmental project for a second offence, which involved a “breach of licence condition ... contrary to s 64(1) of the POEOA, by failing to operate plant and equipment, namely the Ammonium Nitrate Manufacturing Facility ... in a proper and efficient manner (see *EPA v Orica Aust Pty Ltd (the Ammonia Incident)*). In this case, Orica was ordered to contribute monies to another specified environmental project within the affected region:

pursuant to s 250(1)(e) of the *Protection of the Environment Operations Act* 1997 the defendant is to pay to the NSW Office of Environment and Heritage – National Parks and Wildlife Service, within 28 days of this order, the amount of \$175,000 to contribute to the Tomago Wetland Rehabilitation Project to restore the ecological character of this part of the Ramsar Wetland.<sup>413</sup>

In the period from January 2000 to February 2015, the LEC ordered environmental offenders to pay a total of over \$2.7 million to environmental projects and other restorative justice initiatives. This is separate, distinct from, and additional to any clean-up costs that the offender may have had to pay following the commission of the offence.

Given the many and diverse differences between environmental protection (predominantly pollution) offences and environmental planning offences, the rest of the report will separately examine and discuss these broad and distinct categories of environmental offences.

410 Orica Australia Pty Ltd ([www.ora.com](http://www.ora.com)) is an Australian-based multinational corporation that is the largest single supplier of commercial explosives and blasting systems to the mining, quarrying and infrastructure sectors, and a leading global supplier of mineral processing chemicals and services. Orica appeared as the defendant in eight of the 55 (14.5%) cases before the LEC for contravene licence offences across the period studied. In chronological order, the following are the penalties that Orica received for the eight identified contravene licence offences: a fine of \$10,500; and, seven separate Additional Orders involving environmental restoration projects costed at \$70,000, \$122,500, \$87,500, \$175,000, \$175,000, \$35,000 and \$35,000.

411 [2014] NSWLEC 106.

412 *ibid* at [Orders, 51019 of 2011 (2)].

413 [2014] NSWLEC 107 at [Orders, 5110 of 2012 (3)].

## 2.3 The nature of environmental offending

### 2.3.1 Environmental protection offences

#### 2.3.1.1 Objective factors

##### *Objective seriousness*

Between 2000 and 2015, there were 374 principal offences against environmental protection laws dealt with by the LEC. Environmental protection offences outnumber environmental planning offences by around three to one.<sup>414</sup>

**Table 10** shows that only 38 of 374 principal offences involving environmental protection, or just over 10% of cases in the study period, were judged as having *high* objective seriousness.<sup>415</sup> A higher proportion of environmental protection offences committed by “special liability” offenders were of high objective gravity (25%), compared to “ordinary Joe” individuals (20%) and small business owners (16%).<sup>416</sup> Only one in every twenty (5%) environmental protection offences committed by corporations were assessed as being of high objective seriousness.

Corporations had a higher profile in terms of offences of *medium* objective gravity. More than four out of every ten (42.5%) corporate offences were deemed to be of medium seriousness; this was roughly the same percentage as for “ordinary Joe” individuals. The share of offences committed by “special liability” offenders assessed as being of medium objective seriousness offenders was 23%.

The environmental protection offences of both corporations and “special liability” offenders were more likely than not (52%) to be of *low* objective seriousness.

##### *Environmental harm*

The level of environmental harm — or potential harm — caused by the offender is an essential consideration in the sentencing of environmental protection offenders.<sup>417</sup> If the environmental harm is severe, this can be an aggravating factor,<sup>418</sup> which will increase the objective seriousness of the offence:

- Serious environmental harm was recorded against just 48 offenders (around 13% of all environmental protection offences) in the study period. Serious harm was more likely occasioned by small business owners (26% of their offences) and, to a somewhat lesser degree, by “special liability” offenders (15%) and “ordinary Joe” individuals (15%). Low levels of serious harm resulted from the offences perpetrated by corporations (9.5% of their offences).
- Medium environmental harm was recorded against 73 offenders (19.5% of all environmental protection offences). Once more, small business owners were the main culprits with 28% of their offences occasioning medium levels of environmental harm.
- Low environmental harm was recorded against 148 offenders (40% of all environmental protection offences). Corporations (46%), in general, were linked to low levels of environmental harm.

414 In general terms, the vast majority of environmental protection offences involve acts of pollution. For example, the three most common environmental protection offences make up almost 57% of such offences (ie pollute waters offences: 118 offences or 31.6%; contravene any condition of licence: 55 offences or 14.7%; discharge oil (etc) into State waters: 39 offences or 10.4%).

415 See discussion of “objective seriousness” at [2.1.2].

416 Percentages are rounded up or down to the nearest whole percentage, except for half per cents (for example 73.5%).

417 See previous discussion of environmental harm in the context of environmental protection offences in **Crimes against environmental protection laws** at [1.6.1]. Harm is also a consideration outside of environmental protection in **Crimes against environmental planning laws** at [1.6.2].

418 See s 21A(2)(g) of the *CSP Act*. Section 21A of this Act specifies the aggravating and mitigating factors to be taken into account in determining the appropriate sentence for an offence.

**Table 10: Environmental protection offences in the LEC: objective and subjective factors by Class of Offender — 2000 to 2015 (principal offence only)**

Objective and subjective factors		Class of offender				Total
		Corporation	Individual			
			Special liability offender	Small business owner	“Ordinary Joe”	
Objective seriousness						
High	N	13	13	8	4	38
	%	5.2	25.0	16.0	20.0	10.2
Medium	N	107	12	18	8	145
	%	42.5	23.1	36.0	40.0	38.8
Low	N	132	27	24	8	191
	%	52.4	51.9	48.0	40.0	51.1
Environmental harm						
Serious	N	24	8	13	3	48
	%	9.5	15.4	26.0	15.0	12.8
Medium	N	45	8	14	6	73
	%	17.9	15.4	28.0	30.0	19.5
Low	N	116	14	11	7	148
	%	46.0	26.9	22.0	35.0	39.6
None	N	67	22	12	4	105
	%	26.6	42.3	24.0	20.0	28.1
State of mind						
Intentional	N	30	16	21	11	78
	%	11.9	30.8	42.0	55.0	20.9
Negligence	N	84	17	15	5	121
	%	33.3	32.7	30.0	25.0	32.4
Recklessness	N	38	5	4	1	48
	%	15.1	9.6	8.0	5.0	12.8
Financial advantage (Yes)	N	40	20	28	8	96
	%	15.9	38.5	56.0	40.0	25.7
Foreseeability of harm (Yes)	N	220	32	40	13	305
	%	87.3	61.5	80.0	65.0	81.6
Practical measures taken (Yes)	N	127	16	17	9	169
	%	50.4	30.8	34.0	45.0	45.2
Control over causes (Yes)	N	211	33	42	13	299
	%	83.7	63.5	84.0	65.0	79.9
Prior record (Yes)	N	87	9	4	3	103
	%	34.5	17.3	8.0	15.0	27.5
Prior good character (Yes)	N	153	32	36	16	237
	%	60.7	61.5	72.0	80.0	63.4
Not guilty plea	N	15	5	5	1	26
	%	6.0	9.6	10.0	5.0	7.0
Contrition and remorse (Yes)	N	213	35	31	15	294
	%	84.5	67.3	62.0	75.0	78.6
Cooperation (Yes)	N	221	39	35	16	311
	%	87.7	75.0	70.0	80.0	83.2
Costs awarded (Yes)	N	247	42	50	18	357
	%	98.0	80.8	100.0	90.0	95.5
Means to pay (Yes)	N	36	21	22	15	94
	%	14.3	40.4	44.0	75.0	25.1
Totality principle applied (Yes)	N	50	15	13	10	88
	%	19.8	28.8	26.0	50.0	23.5
All LEC offences	N	252	52	50	20	374
	%	100.0	100.0	100.0	100.0	100.0

Note: Percentages reflect the observed proportion of the relevant total sample. For example, with regard to "Objective seriousness", 5.2% (13 of 252) of primary offences committed by corporations were assessed by the LEC as being of "High" objective seriousness.

- No environmental harm was recorded for the offences committed by 105 offenders (28% of all environmental protection offences). Generally, “special liability” offenders (42%) were more commonly linked to environmental protection offences resulting in “no actual damage”. Nonetheless, in all cases where it was assessed that there was no environmental harm, it needs to be remembered that illegal environmental activity was detected, charged and prosecuted. Furthermore, the potential for great harm — even potentially devastating damage to the environment — is not exempt from being included under this category.<sup>419</sup> In particular, where the pollution offence involved carcinogenic materials (eg asbestos) or other substances (eg pesticides) proven to be hazardous to human life,<sup>420</sup> the potential for harm may have been great even though no actual harm to the environment, to persons or to non-human life eventuated.

### State of mind

In *Kempsey Shire Council v Slade*, Biscoe J stated:

The common law concept of causation is concerned with determining whether some breach of a legal norm was so significant that, as a matter of common sense, it should be regarded as a cause of damage. Because the present task is one of statutory construction, the common law concept of causation must yield to the context and the statutory terms or objects ... The context is a statute relating to safeguarding the environment and the public from pollution. It is an example of a strict liability, public welfare law, regulatory in substance, where principles of vicarious liability are readily imposed (other examples are consumer protection and fair trading laws) and there is no need to prove intention, any other mental element or negligence in order to establish liability.<sup>421</sup>

Although mens rea is not an element of many environmental protection offences — because of their strict liability<sup>422</sup> — the state of mind of an offender at the time of the commission of the offence, nonetheless, remains relevant.<sup>423</sup> As stated in *Wingecarribee Shire Council v O’Shanassy (No 6)*, this is because “a strict liability offence that is committed intentionally, negligently or recklessly will be objectively more serious than one committed inadvertently”.<sup>424</sup>

The Chief Judge of the LEC, Preston CJ of the LEC, has elaborated on the elements of a “culpable” mind:

The more culpable the state of mind, the more the severe the punishment ought to be. Culpability turns on the offender’s purpose, the extent of the offender’s knowledge of the circumstances surrounding the conduct, the conduct itself, its results, and the reason for the offender’s behaviour.<sup>425</sup>

Of the environmental protection offences dealt with in the study period, 55% that were committed by “ordinary Joe” individuals were found by the LEC to have been committed intentionally. Similarly, 42% of environmental protection offences committed by small business owners, and almost one-third (31%) committed by “special liability” offenders, were considered to have been “intentional” in nature. In contrast, only 12% of environmental protection offences committed by

419 For example, in *EPA v Obaid* [2005] NSWLEC 171 per Lloyd J at [49]: “Although there is no evidence of actual harm to the environment in this case, the risks created by the stockpiling of large amounts of tyres at all of the sites are obvious and potentially catastrophic”.

420 On the *potential* harm to human health emanating from asbestos waste offences see *EPA v Ashmore* [2014] NSWLEC 136; and on the potential for serious health risks arising from the illegal pesticide use, see *EPA v Mark Peters* (2006) 153 LGERA 238; [2006] NSWLEC 612.

421 [2015] NSWLEC 135 per Biscoe J at [24] (citations removed).

422 B Preston, above n 69, p 147, fn 44. The footnote, in part, reads: “For example, offences against s 125(1) of the *Environmental Planning and Assessment Act 1979* (NSW) and tier 2 offences under the *Protection of the Environment Operations Act 1997* (NSW) [are strict liability offences]”.

423 B Preston, above n 69, pp 147–148.

424 [2015] NSWLEC 138 per Pepper J at [172] (citations removed).

425 *Garrett v Williams* [2006] NSWLEC 785 at [108].



corporations were deemed “intentional”.<sup>426</sup> Negligence contributed to a substantial proportion of environmental protection offences committed by corporations (33%), “special liability” offenders (33%) and small business owners (30%). Negligence did not feature quite as prominently in offences committed by “ordinary Joe” individuals (25%). Recklessness did not feature heavily in the offence profiles of any class of offender (13% overall). Corporations (15%) had a marginally higher proportion of environmental protection offences deemed to have been committed “recklessly”.<sup>427</sup>

This approach to the offender’s state of mind reflects the current approach taken by the LEC to the assessment of the offender’s culpability. However, it is argued elsewhere in this study that such an approach may be an unnecessary distraction and, on one view, a possible breach of the *De Simoni* principle.<sup>428</sup>

### **Financial advantage**

As highlighted by Pepper J in *Director-General, Dept of Environment and Climate Change v Hudson (No 2)*:

One consideration in measuring the criminality of an offence is the reason for its commission. Where an offence is motivated by commercial gain, the objective seriousness of the offence increases.<sup>429</sup>

Financial advantage can be the primary motivation behind the commission of environmental protection offences, particularly pollution offences, and the reduction of business costs is one way by which commercial enterprises — both large and small — may seek to profit from environmental pollution offences. For instance, avoiding the cost of having to pay tip fees at a licensed waste station is often the financial incentive behind the illegal disposal of waste materials.<sup>430</sup> In essence, offenders should *not* profit from their crimes, and a financial incentive to the commission of a crime — including the saving of expenses — increases the objective seriousness of that offence.<sup>431</sup>

Overall, one in every four (26%) environmental protection offences within the period examined were identified as being committed for financial advantage. Small business owners (56%) were more likely than other classes of offenders to commit an environmental offence for profit or other financial advantage. Likewise, substantial proportions of “ordinary Joe” offenders (40%) and “special liability” offenders (39%) were identified as being motivated by the prospect of a monetary profit or other financial advantage. Financial advantage was *not* identified as a key motive to the environmental protection offences committed by corporate offenders (16%).

### **Foreseeability of harm**

Section 241(1)(c) of the *POEO Act* states that 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, should be considered in sentencing. For example, in *EPA v Alcobell Pty Ltd*, *EPA v Campbell*,<sup>432</sup> the prosecutor submitted that harm (or likely harm)

<sup>426</sup> The “state of mind” of a corporate offender is relevant in terms of its business activities. For example, in *The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd (No 2)* [2012] NSWLEC 95, Biscoe J at [28] found that “[t]he offences were committed in the course of running a business”. His Honour also accepted that “the offences were committed [intentionally] as a way of reducing costs”.

<sup>427</sup> One-third of environmental protection cases were missing information on “state of mind”. In the vast majority this was because this factor was recorded in the database as being “Not applicable”.

<sup>428</sup> *The Queen v De Simoni* (1981) 147 CLR 383. See **Culpability and the De Simoni principle** at [3.6].

<sup>429</sup> [2015] NSWLEC 110 at [150] (citations removed).

<sup>430</sup> See *The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd (No 2)* [2012] NSWLEC 95 per Biscoe J at [28]; and, *Bankstown City Council v Hanna* [2014] NSWLEC 152 at [81].

<sup>431</sup> B Preston, above n 69, pp 148, 157. *CSP Act*, s 21A(2)(o): the offence was committed for financial gain.

<sup>432</sup> [2015] NSWLEC 123 at [64]. Pain J did not find that “the Defendants could have reasonably foreseen the harm caused or likely to be caused by the asbestos waste” at [68]. [Emphasis added.]

to the environment as a result of disposing waste containing asbestos was readily foreseeable, given the defendants' commercial experience in the haulage and disposal of hazardous waste materials.

Environment protection licences contain conditions that regulate such matters as water pollution, dust emissions, noise control and hours/conditions of operations. Under the terms of the licence, the licence holder is on "standing notice" that their activities have the potential to cause environmental and amenity issues beyond what is controlled, approved and permissible. Adverse environmental consequences arising from scheduled activities are, therefore, totally foreseeable.<sup>433</sup>

The LEC found, in the majority (82%) of cases involving environmental protection offences that the offender could have reasonably foreseen the harm caused, or the harm that was likely to be caused, through the commission of the offence.<sup>434</sup> Foreseeability of harm was viewed as a particular feature of environmental protection offences committed by corporations (87%) and small business owners (80%). "Ordinary Joe" individuals (65%) were less likely to be seen by the court as having such foresight. Perhaps paradoxically given the special executive liability provisions of s 169 of the *POEO Act* for directors and other persons involved in the management of the offending corporation, "special liability" offenders (61.5%), were identified as having the lowest level of sagacious judgement of any offender group in being able to foresee the environmental consequences of their unlawful actions.<sup>435</sup>

### ***Practical measures taken***<sup>436</sup>

Another factor relevant to the objective seriousness of the offences is the practical measures that may be taken to prevent, control, abate or mitigate the environmental harm caused or likely to be caused by the commission of the offences.<sup>437</sup> As B Preston commented:

An offence is objectively more serious if the commission of the offence and the risk of harm occasioned by the commission of the offence are foreseeable and there are practical measures that could be taken to prevent, control, abate or mitigate the occurrence of the offence or the harm, but those practical measures are not taken.<sup>438</sup>

Overall, practical measures were considered taken in just over 45% of LEC cases involving an environmental protection offence. It was identified that practical measures were less likely to be taken by "special liability" offenders (31%) and small business owners (34%). Corporations (50%) were somewhat more likely to have taken practical measures to prevent or reduce the level of environmental harm, as were "ordinary Joe" individuals (45%).

433 *POEO Act* (Ch 3, ss 43–45). Section 45, in particular, sets out the "Matters to be taken into consideration in licensing functions". For an example of a judicial application of foreseeability of harm in relation to environmental protection licences see *EPA v MA Roche Group Pty Ltd* [2015] NSWLEC 29.

434 Twelve per cent of cases were missing a valid value for the factor "Foreseeability of harm".

435 As previously noted, there are similar provisions to s 169 of the *POEO Act* under other NSW environmental protection legislation including: *NPW Act*, s 175B(1); *Environmental Offences and Penalties Act* 1989 (rep), s 10; *Environmentally Hazardous Chemicals Act* 1985, s 53; *Marine Safety Act* 1998, s 130; *Pesticides Act* 1999, s 112; and, *NV Act*, s 45. Analogous special liability provisions previously existed under the *Marine Pollution Act* 1987 (rep) for ship masters and ship owners (ss 8(1) and 18(1)) and the crews of ships (ss 8A(1) and 18A(1)) involved in marine pollution incidents. In this study, almost 45% of "special liability" offenders were the masters, owners or crew members of ships deemed "specially" liable for illegal discharges from ships.

436 Prior to this study, "Practical measures taken" was actually two separate variables — "Practical measures available" and "Practical measures taken". Both these variables contained high or very high levels of missing information (79% missing in the case of the former, and 39% missing in the case of the latter). These variables were combined using programming logic to derive a single computed variable "Practical measures", for which the valid values became: "Yes, taken", "No, not taken" and "N/A".

437 See *Chief Executive, Office of Environment and Heritage v Orica Pty Ltd*; *EPA v Orica Pty Ltd* [2015] NSWLEC 109. At [101] examples of relevant provisions are given: *NPW Act*, s 194(1)(c) and *POEO Act*, s 241(1)(b).

438 B Preston, above n 69, pp 148–149.

### Control over causes

The offender's extent of control over causes of the environmental protection offence is an important sentencing consideration. For example, s 241(1)(d) of the *POEO Act* states the importance of "the extent to which the person who committed the offence had control over the causes that gave rise to the offence" in imposing a penalty.<sup>439</sup> Culpability will obviously vary depending on whether the offender had no control over causes ranging through to having complete control over the causes of the offence. An offence that is not an isolated incident but continues over a period of time, and/or at different locations, is likely to demonstrate that the offender had control over the causes of the offence(s) but were negligent or reckless in their actions.<sup>440</sup>

Overall, 80% of environmental offenders were assessed by the LEC as being in control over the causes that gave rise to their primary environmental protection offence.<sup>441</sup> Of all classes of offenders, corporations (84%) and small business owners (84%) were identified as having the most control over the causes of their environmental offending. Relatively speaking, "special liability" offenders (64%) and "ordinary Joe" individuals (65%) were identified as being relatively less likely to be in control of the causes of their environmental offending.

### 2.3.1.2 Subjective factors

Within the limits set by the objective seriousness of the offence, the court is required to take into account subjective factors, both favourable and unfavourable to the offender. A number of such factors are identified in ss 21A, 22 and 22A of the *CSP Act* 1999.<sup>442</sup>

#### *Prior criminality (prior record of environmental offences)*

In relation to sentencing in the LEC, prior criminality or a lack of prior criminality needs to be restricted to a record of proven environmental protection and planning offences. An environmental offender's more general criminal conduct (eg proven offences under the *Crimes Act*, etc) should not be taken into account in sentencing an environmental offender — only prior environmental offending is relevant.<sup>443</sup>

439 *ibid* p 149. B Preston states that this "mandatory sentencing consideration ... is relevant to other offences as well". In this regard, see for example, *Harrison v Perdikaris* [2015] NSWLEC 99 per Preston CJ of the LEC at [40] citing s 364A(1)(f) of the *Waste Management Act* 2000; *Council of the City of Sydney v Trico Constructions Pty Ltd* [2015] NSWLEC 56 citing 125(1) of the *EPA Act*; and, *Connell v Santos NSW Pty Ltd* [2014] NSWLEC 1 at [1]–[4] citing offences under s 136A(1) of the *Petroleum (Onshore) Act* 1991.

440 For example, in *Bankstown City Council v Hanna* [2014] NSWLEC 152, it was found that the offender was a serial dumper of hazardous waste materials on vacant private land and in public parks. The offender repeatedly, over a seven-year period, unlawfully transported and dumped building waste, and was issued with at least 29 penalty notices and was prosecuted in courts at least 11 times for offences involving the unlawful transporting and dumping of waste (and related offences).

441 This is likely to be a conservative estimate. For one in every eight (12.3%) environmental protection offences in the study period, "Not applicable" was recorded against the objective factor, "Control over causes". This may be a valid value (as are "Yes" and "No") in some cases but questionable in others. For example, in *Director-General, Dept of Environment and Climate Change v Jack & Bill Issa Pty Ltd (No 6)* [2010] NSWLEC 43, a silent director of a company "had very little involvement or knowledge" of the offence, which was committed by the defendant company solely controlled by another director: at [27]–[28]. Biscoe J held at [33] that "no personal culpability attaches to Mr Issa except for not exercising tighter corporate governance as a director".

442 Section 22 allows the court to consider a guilty plea, particularly an early guilty plea, in reducing a sentence, while s 22A concerns the court's power to reduce penalties where the offender has facilitated the administration of justice.

443 For example, in *Harrison v Perdikaris* [2015] NSWLEC 99 at [89], Preston CJ of the LEC reported that: "(the defendant) does have a record of previous convictions for a variety of offences, which may be characterised as a 'significant' record so that the mitigating factor of absence of a criminal record does not apply: see *CSP Act*, s 21A(3)(e). However, none of the offences are against any environmental legislation. The prosecutor accepted that (the defendant's) previous convictions do not reveal that he has a propensity for the type of offences for which he is presently being sentenced".

A total of 103 offenders (27.5%) before the LEC in the study period for an environmental protection offence had a prior record of environmental crimes.<sup>444</sup> Small business owners (8%) recorded the lowest level of prior environmental offending, whereas corporations (34.5%) recorded the highest. Relevant to this latter finding, B Preston made the following observations years earlier:

Where there is a prior criminal record, its context must be considered. A monopoly corporation (such as State-run water, sewerage and waste corporations) or major industries can run large operations which necessarily and continuously interact with the environment. Accidents are likely to occur. With many environmental offences being strict liability, some prior convictions may be expected. This is not to relieve such corporations of the obligation to take precautions to prevent accidents, but it sets a context for consideration of the culpability of such corporations.<sup>445</sup>

### *Prior good character of offender*

In considering this factor, the LEC may consider an offender's prior criminal record for *non*-environmental offences in the setting of a penalty for an environmental offence.<sup>446</sup> However, it has been claimed that:

Typically, persons who commit environmental offences are of good character. They very rarely have previously engaged in other criminal conduct and mostly do not have any prior convictions for environmental offences.<sup>447</sup>

While this assertion is likely based on long-running observations made by LEC judges, the fact is that it is anecdotal, not a finding based on empirical evidence. It is the role of the prosecutor at sentence to tender an offender's criminal history.<sup>448</sup>

A total of 237 environmental protection offenders (63%) before the LEC in the study period were recorded as having a prior good character. The majority of "ordinary Joe" individuals (80%) and small business owners (72%) were recorded as being of "good character". Smaller proportions of "special liability" offenders (62%) and corporations (61%) were recorded as having prior good character. Preston CJ of the LEC has commented on how corporations can demonstrate their willingness to be "an environmentally responsible corporate citizen":

This will include the extent to which a corporation has sought to comply with environmental laws, including the one breached, the adoption of appropriate in-house corporate environmental principles and the existence and implementation of an internal environmental compliance programme.<sup>449</sup>

444 Eight per cent of cases had "0" recorded against this factor in the database. This value may be interpreted as "No prior record".

445 B Preston, above n 69, p 150. For example, in *EPA v MA Roche Group Pty Ltd* [2013] NSWLEC 191. Pain J at [49] considered the defendant's culpability as low given the circumstance of the incidents were accidental. In this case, his Honour labelled the water pollution offences as "preventable accidents". While the enormity of the operations of certain companies (eg BHP, Orica, Roche, etc) brings an elevated risk of "accidents", the LEC also recognises that: [I]ndustry generally must be persuaded to "adopt preventative measures" (citation removed): *EPA v CSR Building Products Ltd* [2008] NSWLEC 224 at [49]. Sheahan J argued that corporate defendants cannot be excused for operational deficiencies such as "serious system failure", "related human error" and "inadequately trained and supervised employees": at [49].

446 As B Preston, above n 69, p 151, asserts, "a 'morally good' person is less deserving of punishment for a particular offence than a 'morally neutral or bad' person who has committed an identical offence".

447 *ibid.*

448 *R v Gamble* [1983] 3 NSWLR 356 per Street CJ at 359. It is also unclear but probably unlikely that the prosecuting authority (unless it was the police) will investigate and submit the full criminal history of defendants involved in environmental cases brought before the LEC. The "full" criminal history would include any and all proven non-environmental offences as well as any proven environmental offences. Furthermore, it is unlikely that the LEC always would be aware of any and all penalty notice offences (*POEO Act*, Div 3: Penalty notices) issued to the defendant for prior Tier 3 environmental offences or, more broadly, for non-environmental offences processed by penalty notice. Payment of a penalty notice means that the offender is not required to attend court: s 223; but, more so, payment "is not to be regarded as an admission of liability for the purposes of, nor is it in any way to affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence": s 225(2). Therefore, an offender could have committed one or more Tier 3 environmental offences but elected to deal with them by payment of the penalty notice. The absence of prior environmental offences proven in the LEC or a local court does not necessarily mean that the person is a "clean skin" or of good character or, for that matter, an environmentally responsible citizen.

449 B Preston, above n 69, p 151.

Major corporations and industries running large operations that affect or risk affecting the environment are generally subject to “environmental protection licences” and are authorised to carry out certain polluting activities which are strictly controlled by the EPA. These “scheduled activities” include the operations of waste disposal facilities, sewerage treatment system, chemical industries, mines and mineral processing facilities, and petroleum production plants.<sup>450</sup> Compliance with the conditions of environmental protection licences demonstrates that the licenced industry is being conducted in an environmentally responsible manner and that the licence holder is a “good” corporate citizen.<sup>451</sup>

### *Plea of guilty/plea of not guilty*

B Preston has observed that “a large majority” of prosecutions for environmental offences involve a plea of guilty.<sup>452</sup> The majority of environmental offences are strict liability offences<sup>453</sup> and, as such, facilitate a guilty plea,<sup>454</sup> which has utilitarian value in terms of the administration of criminal justice.<sup>455</sup> All other things being equal, the court may impose a lesser penalty than it would otherwise have imposed where the offender has pleaded guilty.<sup>456</sup>

Of the 374 primary environmental protection offences dealt with by the LEC between 2000 and 2015, just under 93% were characterised by a guilty plea. Only 26 offenders (7%) before the LEC pleaded not guilty. The small business owner (10%) and “special liability” offender (10%), more than the other types of offender, entered a “not guilty” plea.

Thus, a plea of guilty “may be a practical expression of the offender’s genuine contrition and remorse”.<sup>457</sup>

450 Environmental Defenders Office NSW, above n 286, p 78.

451 B Preston, “Principled sentencing for environmental offences”, paper presented at the 4th International IUCN Academy of Environmental Law Colloquium, *Compliance and enforcement: toward more effective implementation of environmental law*, 18 October 2006, White Plains, New York, p 23, at [www.lec.justice.nsw.gov.au/Documents/preston\\_principled%20sentencing%20for%20environmental%20offences-newyork%202006.pdf](http://www.lec.justice.nsw.gov.au/Documents/preston_principled%20sentencing%20for%20environmental%20offences-newyork%202006.pdf), accessed 16 May 2017:

For corporations, the extent to which the corporation has endeavoured to be an environmentally responsible corporate citizen is relevant. This will include the extent to which a corporation has sought to comply with environmental laws, including the one breached, the adoption of appropriate in-house corporate environmental principles and the existence and implementation of an internal environmental compliance programme.

452 B Preston, above n 69, p 152.

453 Unlike Tier 1 offences under the *POEO Act*, for which there is a general defence (s 118), the vast majority of Tier 2 offences under the same Act bear strict liability. This is also the case for offences under the *NV Act* (s 12) and the *NPW Act*, although with regard to the latter, specific defences may apply (see eg s 87 concerning harming or desecrating Aboriginal objects or Aboriginal places). Prior to the commencement of the *Environmental Planning and Assessment Amendment Act 2014* on 31 July 2015, and the application of its three-tiered offence regime, all offences under the *EPA Act* were strict liability offences.

454 Similarly, most Acts concerned with the prevention, identification and prosecution of environmental damage grant the prosecutor wide-ranging investigation powers and evidentiary provisions.

455 With respect to LEC matters, B Preston, above n 69, pp 151–152 discusses the utilitarian value of a guilty plea, including avoiding a lengthy or complex trial, reducing the overall cost of a trial, and avoiding the need for assembling evidentiary materials. This utilitarian value has been described by the CCA as including: “the relief of the State from having to call witnesses and, indeed, the reliefs to the various witnesses of the burden of having to give evidence and potentially being cross-examined”: *R v Oinonen* [1999] NSWCCA 310 per Grove J at [16].

456 *CSP Act*, ss 21A(3)(k), 22(1). In the High Court and the CCA, there has been a rich discussion of the utilitarian value of a plea of guilty which matches the crime for which a person is ultimately convicted including the formulation of guidelines for quantifying a discount in sentence following the entering of a plea of guilty (eg see *Siganto v The Queen* (1998) 194 CLR 656 per Gleeson CJ, Gummow, Hayne and Callinan JJ at [22]; *Cameron v The Queen* (2002) 209 CLR 339 at [11]; *R v Thomson* (2000) 49 NSWLR 383 at [160]).

457 B Preston, above n 69, p 152.



### ***Contrition and remorse***

Aside from a guilty plea (and, in particular, an early guilty plea), the court assesses true contrition and remorse through the actions and responses of the offender at the time of, and after the occurrence of, the environmental damage. As “actions speak louder than words”, contrition and remorse for harmful conduct often takes the form of deeds to rectify the environmental damage (curative measures) or minimise the risk (or extent) of it happening again (preventative measures). Specifically, the LEC looks for four “deeds” that would indicate contrite behaviour on the part of the offender:<sup>458</sup>

- directed and timely actions to rectify the harm caused
- voluntary reporting of the offence and the environmental harm to the relevant authorities
- adopting measures — preferably operational measures and controls — to prevent a recurrence of the offence
- the personal appearance of “remorseful” corporate executives so that evidence of their regret and desire to make amends for the offence can be tested at court.

A total of 294 (79%) environmental offenders before the LEC in the study period demonstrated contrition and remorse.<sup>459</sup> The highest level of contrition and remorse was shown by corporations (84.5%). The other offender types demonstrated somewhat lower levels of contrition and remorse (“ordinary Joe” individual: 75%; “special liability” offender: 67%; and, small business owner: 62%).

### ***Cooperation (assistance to authorities)***

The offender’s co-operation with relevant law enforcement and regulatory authorities may influence the LEC to impose a lesser sanction or reduce the size of the penalty (eg order a smaller fine). B Preston identified the nature and extent of the offender’s assistance and “the truthfulness, completeness and reliability of any information provided by an offender” as important aspects of the offender’s level of cooperation when the court is considering a reduction in penalty.<sup>460</sup>

A total of 311 environmental offenders (83%) in the study period were deemed by the LEC to have co-operated with the court and the prosecuting authority.<sup>461</sup> Corporations (88%) recorded the highest level of co-operation and small business owners (70%) the lowest level of co-operation with authorities.<sup>462</sup>

### ***Costs awarded***

Particularly where “strict liability” is involved, where a guilty plea was submitted and where high levels of contrition, remorse and co-operation have been demonstrated, the offender will often “volunteer” or “agree” to pay the prosecutor’s costs, including any investigative expenses, in advance of the LEC determining the appropriate sentence for the offence or offences. Such an assistance to authorities is recognised by the court as a mitigating factor (*CSP Act*, ss 21A(3)(m) and 23).<sup>463</sup> The awarding of costs forms an integral part of the final orders made by the LEC.<sup>464</sup>

458 *EPA v Waste Recycling & Processing Corp* [2006] NSWLEC 419 per Preston CJ of the LEC at [203]–[215].

459 Eight per cent of cases were missing a valid value for this factor.

460 B Preston, above n 69, p 154.

461 A statement of agreed facts between the defendant and the prosecutor is a feature of many LEC judgments and normally indicates a high level of co-operation between the parties.

462 Six per cent of cases were missing a valid value for this factor including case recorded as “Not applicable”.

463 As examples, see *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 [135]; *EPA v Orica Aust Pty Ltd (the Nitric Acid Air Lift Incident)* [2014] NSWLEC 103 per Pepper J at [208]–[210]; and, *EPA v Waste Recycling & Processing Corp* [2006] NSWLEC 419 per Preston CJ of the LEC at [216], [223].

464 *EPA v Barnes* [2006] NSWCCA 246 at [77] and [88].



The vast majority (95.5%) of environmental offenders before the LEC in the study period were ordered to pay the prosecutor's costs and expenses.<sup>465</sup> All small business owners were ordered to pay costs as were practically all corporate offenders (98%). The class of offender least likely to be ordered to pay "costs" was the "special liability" offender (81%), presumably because where the corporation is also charged with the same environmental offence(s), the company — and, therefore, the company's director — will be directed to pay the prosecutor's costs and expenses.<sup>466</sup>

### *Means to pay*

In a discussion of the financial means of the offender and the "means to pay" principle, B Preston cites s 6 of the *Fines Act 1996*:

In the exercise of a discretion to fix the amount of a fine, the court should consider the financial means of the offender to pay a fine from such information as is reasonably and practically available to the court.<sup>467</sup>

Over the course of the period examined, the LEC determined that one-quarter of environmental offenders had the capacity to pay the fine which it decided to order.<sup>468</sup> By far the largest proportion of offenders assessed as having the means to pay were "ordinary Joe" individuals (75%). This may reflect the generally lower fine amounts given to individual offenders.<sup>469</sup> Perhaps paradoxically, a relatively small proportion of corporations (14%) were determined as having the means to pay the fine that the court had fixed.<sup>470</sup>

### *Totality principle applied*<sup>471</sup>

When sentencing an offender for more than one offence, the court must consider the "totality principle".<sup>472</sup> Generally, the totality principle is applied by the court when more than one fine is to be ordered. In applying the totality principle, the court must impose a total fine amount that reflects the offender's overall criminality. Kirby P said in *Camilleri's Stock Feeds Pty Ltd v EPA*:

The principle of totality is applicable where the penalty imposed is by way of fine: see *R v Sgroi* (1989) 40 A Crim R 197 at 203. However, it may be that the principle of totality may not have the same force in the case of the imposition of fines, as opposed to the imposition of imprisonment where it has a special operation: see *R v Brown* (1982) 5 A Crim R 404 at 407.<sup>473</sup>

<sup>465</sup> Two per cent of cases were missing a valid value for this factor.

<sup>466</sup> In *EPA v Fernando* [2003] NSWLEC 281, both the company and the manager of that company were convicted of the pollution offences and ordered to jointly and severally pay the prosecutor's costs in addition to the payment of fines ordered upon the company and the manager at [37]. Also, see discussion on "double punishment" in **Costs and means to pay** at [1.4].

<sup>467</sup> B Preston, above n 69, p 155.

<sup>468</sup> In approximately one-third of cases involving environmental protection offences, "means to pay" was not recorded. The percentage shown is of all cases. Of the valid cases, the percentage with a capacity to pay is higher at around 40%.

<sup>469</sup> The median fine amount for "ordinary Joe" individuals (\$10,000) convicted of *environmental protection offences* in the study period was 39% lower than that for small business owners (\$16,500), and around 60% lower than the median fines for both "special liability" offenders (\$25,000) and corporations (\$25,000).

<sup>470</sup> The size of the fine ordered by the LEC on offenders assessed as *not* having the means to pay the fine may have some bearing on this particular finding. For corporations *without* the means to pay, the average fine amount was just under \$67,500. This is 240% higher than the average fine amount of \$28,000 for individuals *without* the means to pay. Small corporate entities may struggle with paying relatively large fines. It could also be related in some (unexplored) way to the high proportion (37%) of missing values for this factor.

<sup>471</sup> The totality principle is often invoked when an offender is being sentenced at the one time for multiple offences arising out of common or related criminal acts: *EPA v Moolarben Coal Operations Pty Ltd (No 2)* [2012] NSWLEC 80 at [128]. The totality principle is a relevant consideration when determining an aggregate penalty in sentencing for multiple offences: *R v Holder* [1983] 3 NSWLR 245; *Johnson v The Queen* (2004) 78 ALJR 616 per Gummow, Callinan and Heydon JJ at [18]. In *R v Holder*, Street CJ said at [260]:

The principle of totality is a convenient phrase, descriptive of the significant practical consideration confronting a sentencing judge when sentencing for two or more offences. Not infrequently a straight forward arithmetical addition of sentences appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary.

<sup>472</sup> See B Preston, above n 69, pp 156–157 for a detailed discussion of the totality principle.

<sup>473</sup> (1993) 32 NSWLR 683 at 704.

The passage was quoted with approval in *EPA v Barnes*.<sup>474</sup> Unlike terms of imprisonment, fines cannot be made “concurrent”. Each fine which is imposed must be paid separately. The court in *Barnes* suggested that if the sentencer believes that the totality principle requires an adjustment to the fines which may otherwise be appropriate, the amount of each fine should be altered by reducing individual sentences and then aggregating each to determine a total fine amount.<sup>475</sup> It has also been held that the application of the totality principle “will result in a reduction of the aggregate penalty that would otherwise have been imposed had the offences not arisen from common or related criminal acts”.<sup>476</sup>

In less than one-quarter (23.5%) of LEC environmental protection cases was the totality principle applied.<sup>477</sup> One in every two (50%) “ordinary Joe” individual offenders were subject to totality principle considerations. The totality principle was less a feature of environmental protection cases involving corporations (20%).

### 2.3.2 Environmental planning offences

The set of offences that involve breaches of environmental *planning* laws are manifestly different to breaches of environmental *protection* laws. The bulk of such offences dealt with by the LEC — as is the case in the Local Court — involve a failure to receive consent (or apply for a permit) to carry out a development under various sections of the *EPA Act*, including:

- Carry out development without consent: *EPA Act*, s 76A(1)(a)
- Carry out development not in accordance with consent: *EPA Act*, s 76A(1)(b),

and the more general:

- Do things forbidden under the Act: *EPA Act*, s 125(1).

As Preston CJ of the LEC commented:

Development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved.<sup>478</sup>

Offences involving unlawful development and the flagrant disregard of environmental planning laws and standards are a not uncommon type of matter before the LEC. As Pepper J lamented:

Once again before the Court is an application for declaratory relief sought by a council occasioned by the unlawful certification by an accredited certifier of a development that is markedly different to the approval granted by that council. Regrettably this is becoming an all too common occurrence in this Court. It must not be tolerated. It brings the certification system into disrepute and undermines the planning regime in this State.<sup>479</sup>

474 [2006] NSWCCA 246 per Kirby J at [46].

475 *ibid* at [50].

476 *Warringah Council v ProjectCorp Aust Pty Ltd* [2015] NSWLEC 141 per Craig J at [290].

477 In a real sense, this variable in the environmental crime sentencing database is a proxy for counting multiple offences when only primary offences are examined, as was the case in this study.

478 *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [43]. Also cited in *Valen Properties Pty Ltd ATF Valen Properties Trust v Hurstville City Council* [2015] NSWLEC 1045 per Fakes C at [41].

479 *Kogarah City Council v Armstrong Alliance Pty Ltd (No 2)* [2013] NSWLEC 32 at [1].

In general, the “harm” caused by breaches of environmental planning laws has been described by the LEC as including:

- subversion of the integrity of the planning system<sup>480</sup>
- undermining the regulatory system of development control<sup>481</sup>
- undermining the values and standards enshrined in the various planning instruments governing land use and development<sup>482</sup>
- damage to public trust/being contrary to public interest<sup>483</sup>
- the risk of unregulated and environmentally “unfriendly” development.<sup>484</sup>

As McClellan (then) CJ of the LEC detailed in *North Sydney Council v Littlemore*:

The [EPA Act] contains a complex set of provisions designed to control the development of land. If the Act is to work effectively, those who have professional responsibility for carrying out the tasks assigned to them under the structure of the legislation must accept the obligations which fall upon them to obey the statutory provisions and relevant regulations. Because the legislation is complex and because it is designed to ensure that the public interest is adequately protected in the multitude of ways where it interfaces the development process, unless professional people accept their obligations it is likely that the planning system would be unable to effectively function.<sup>485</sup>

It is a criminal offence to develop without consent or to breach the conditions of development consent.<sup>486</sup> Such offences are strict liability offences.<sup>487</sup> Typically, local councils are the regulatory authority which prosecutes for breaches of environmental planning laws. Offenders may be individuals or corporations.

In this study, small business owners and “ordinary Joe” individual offenders were found to be statistically over-represented in environmental planning offences dealt with by the LEC for the period examined.<sup>488</sup>

480 In *Willoughby City Council v Livbuild Pty Ltd* [2015] NSWLEC 34, Pepper J said at [62]: “The legislative scheme enshrined in the [EPA Act] requires that the integrity of the system of planning is not subverted, irrespective of any actual physical environmental harm occasioned by a given offence (*Pittwater Council v Scahill* [2009] NSWLEC 12; (2009) 165 LGERA 289 at [46] and *Gittany Constructions Pty Ltd v Sutherland Shire Council* [2006] NSWLEC 242; (2006) 145 LGERA 189 at [104]–[105])”. Previously, in *Port Macquarie-Hastings Council v Notley (No 2)* [2013] NSWLEC 220, her Honour stated at [63]: “the integrity of the planning system was therefore harmed by the commission of the offence, in accordance with the line of authorities that regard this as an element of environmental harm (*Lane Cove Council v Wu* [2011] NSWLEC 43 at [45]; *Ku-ring-gai Council v Abroon (No 3)* [2012] NSWLEC 12 at [90]; *Cessnock City Council v Bimbardgen Estate Pty Ltd (No 2)* [2002] NSWLEC 140 at [62] and *North Sydney Council v Perini (No 2)* [2013] NSWLEC 91 at [137])”.

481 As Lloyd J remarked in *Mosman Municipal Council v Menai Excavations Pty Ltd* (2002) 122 LGERA 89; [2002] NSWLEC 132 at [35]: “The system of planning control would become somewhat ineffective if persons were to carry out development, including demolition work, without ensuring that necessary development consent has been obtained.” Also see *Leichhardt Council v Geitonia Pty Ltd (No 7)* [2015] NSWLEC 79 per Biscoe J at [16]; and, *Secretary, Dept of Planning and Environment v Boggabri Coal Pty Ltd* [2014] NSWLEC 154 per Preston CJ of the LEC at [18].

482 *Willoughby City Council v Livbuild Pty Ltd* [2015] NSWLEC 34 per Pepper J at [68]. Elsewhere, it was said that “the Court must assume a development standard in a planning instrument has a purpose”: *Haralambis Management Pty Ltd v Council of the City of Sydney* [2013] NSWLEC 1176 per Brown C at [44] citing *Hooker Corp Pty Ltd v Hornsby Shire Council* (1986) 130 LGERA 428.

483 See, for example, *Papaioannou v Marrickville Council* [2015] NSWLEC 1407 per Dixon C at [45]; *Hercules St Developments Pty Ltd v Ashfield Council* [2015] NSWLEC 1378 per Fakes C at [7]; and, *DA & RA Surry Hills Pty Ltd v City of Sydney Council* [2015] NSWLEC 1307 at [14]–[15].

484 As Bignold J noted in *Sutherland Shire Council v Turner* [2004] NSWLEC 774 at [24]: “A number of cases in this Court have emphasised the fact that the requirement that development consent be granted before work is undertaken is an important linchpin of the control on building and development works imposed by the planning laws, which, if not honoured and obeyed, would result in the whole system of planning control being placed in jeopardy”.

485 [2003] NSWLEC 336 at [9].

486 Whereas carrying out a development without consent and breaching the terms of a development consent are offences under the EPA Act, proceedings to remedy or restrain a breach “are more frequently dealt with by civil enforcement proceedings rather than prosecutions. A criminal conviction for these offences cannot be made while the same matter is the subject of civil enforcement proceedings, or after an order has been made in civil enforcement proceedings”: Environmental Defenders Office NSW, above n 286, pp 46–47 (EPA Act, s 127(7)).

487 EPA Act, s 126.

488 Chi squared value = 122.8, df = 3, p = 0.001. The interaction tested was class of offender (Corporation, “Strict liability” offender, Small business owner and “ordinary Joe” individual) by Type of offence (Environmental protection offence and Environmental planning offence). The class of offender, “Special liability” offender, did not appear in any case of environmental planning offences in this study. In **Table 11**, the column for this class of offender has been given zero (0) numbers and zero (0) percentages but retained to allow comparisons between values in this and the corresponding table for environmental protection offences (ie **Table 10**).

By contrast, corporations and company directors (subject to “special executive liability” provisions) were statistically more likely to be the defendant in LEC cases involving environmental protection offences.

### ***Recent changes to the EPA Act***

Whilst this study was being undertaken, the *Environmental Planning and Assessment Amendment Act* 2014 came into force and its purpose was to amend the *EPA Act*. The amendments commenced on 31 July 2015 and, inter alia, introduced a three-tiered offence regime for s 125 environmental planning offences, by inserting new ss 125A, 125B and 125C into the *EPA Act*. This provided the *EPA Act* with an offence (and penalty) hierarchy similar to that of the *POEO Act*. Furthermore, the previous maximum penalty provision (s 126(1)) providing for a maximum penalty of \$1.1 million for all offences contrary to the *EPA Act* was removed.<sup>489</sup>

The new three-tiered regime operates as follows:

- *Tier 1* offences (s 125A): a Tier 1 offence is any offence against the *EPA Act* under s 125(1) committed intentionally which causes, or was likely to cause, significant harm to the environment or death, serious injury or illness to a person. Maximum penalty of \$5 million for a corporation or \$1 million for an individual, with additional daily penalties for continuing offences.
- *Tier 2* offences (s 125B): a Tier 2 offence is any offence against the *EPA Act* under s 125(1), other than a Tier 1 offence under s 125A or a Tier 3 offence under s 125C. Maximum penalty of \$2 million for a corporation or \$500,000 for an individual, with additional daily penalties for continuing offences.
- *Tier 3* offences (s 125C): any certificate-related offence (defined under s 125C(3)), or other offence against the *EPA Act* under s 125(1) for which a Tier 3 maximum penalty is declared by the Act to apply (eg ss 122E, 148). Maximum penalty of \$1 million for a corporation or \$250,000 for an individual, with additional daily penalties for continuing offences.

Section 126(2A) is inserted into the Act to provide that Pt 8.3 of *POEO Act* applies equally to offences against the *EPA Act*. This gives the LEC power to impose alternative orders when dealing with an offence under the Act, such as requiring an offender to publish details of the offence, to carry out a project for the restoration or enhancement of the environment or to pay an additional amount equivalent to the monetary benefit acquired from the commission of the offence (*POEO Act*, ss 250(1)(a), 250(1)(c) and 249 respectively).<sup>490</sup>

Given the recent nature of these legislative amendments, the LEC data captured and analysed for this study did *not* include offences charged, prosecuted and sentenced under the new three-tiered regime of the amended *EPA Act*.

### **2.3.2.1 Objective factors**

#### ***Objective seriousness***

B Preston clearly enunciated that offences which undermine the integrity of the regulatory system are “objectively serious”. He continued by saying that “the use of the criminal law ensures the credibility of the regulatory system”.<sup>491</sup>

489 The *Environmental Planning and Assessment Amendment Act* 2014 also created a separate provision (s 125D) providing for maximum penalties for offences against the *Environmental Planning and Assessment Regulation* 2000, but maintained the existing maximum of \$110,000.

490 Section 250(1) of the *POEO Act* provides the LEC with the authority to order an Additional Order or an Additional Order as specified in s 250(1)(a)–(h). Restrictions are imposed on the type of Additional Orders that the Local Court can make in relation to offences under the *EPA Act*, consistent with the provisions of the *POEO Act*: *EPA Act*, Pt 2A). Part 8.3 of the *POEO Act* applies to an offence against the *EPA Act* or its regulations in the same way as it applies to an offence against the *POEO Act* or its regulations, subject to any modifications prescribed by the regulations under the *EPA Act*.

491 B Preston, above n 69, p 143.

**Table 11** shows that only five of 128 principal offences involving environmental planning, or less than 4% of cases in the study period, were judged as being of high objective seriousness.<sup>492</sup> While, for all classes of offender, environmental planning offences of high objective gravity were rare, the main culprits were “ordinary Joe” individual offenders (three of the five offences).

Corporations had a higher profile in terms of offences of medium objective gravity. More than four out of every ten (42%) planning offences committed by a corporation were deemed by the LEC to be of medium seriousness.

The planning offences of both small business owners (71% of their offences) and “ordinary Joe” individual offenders (70% of their offences) were more likely assessed to be of low objective seriousness. For corporations, too, planning offences of low objective seriousness (53.5%) were more common than not.

### *Environmental harm*

The level of environmental harm (or potential harm) caused by the offender is also a crucial consideration in the sentencing of offenders convicted of environmental *planning* offences and associated breaches of development consent. As Pepper J observed:

Thus, for example, an offence of development without consent against s 76A of the EPAA tends to undermine the planning regime of the State established by the Act by avoiding environmental assessment.

...

Harm can be actual physical damage or it can be potential harm” (*Waste Recycling and Processing Corp* at [147]). It can include intangible forms of harm such as harm to the amenity of a neighbour, the cost of remediation, or the effect on the planning system.<sup>493</sup>

Harm to the environment,<sup>494</sup> especially where assessed as severe, may be considered by the court to be an aggravating factor,<sup>495</sup> increasing the objective seriousness of the environmental planning offence:

- Serious environmental harm was recorded against just seven “development” offences (5.5% of all environmental planning offences) in the study period. Serious harm was more likely occasioned by the unlawful actions of corporations (four of the seven offences).
- Medium environmental harm was recorded against 17 “development” offences (13% of all environmental planning offences). “Ordinary Joe” individuals (18% of their offences) and corporations (14% of their offences) were more prominent than small business owners (6% of their offences) in the commission of planning offences that resulted in medium levels of harm.
- Low environmental harm was recorded against 57 “development” offences (44.5% of all environmental planning offences). Low levels of assessed environmental harm was commonly identified in the environmental planning offences of all three classes of offender: small business owners (49% of their offences), “ordinary Joe” individuals (44%) and corporations (42%).
- No environmental harm was recorded against 47 “development” offences (37% of all environmental planning offences). The proportion of offences that resulted in no actual environmental damage are relatively evenly spread across three classes of offenders — corporations (35%), small business owners (40%) and “ordinary Joe” individuals (36%).

492 A discussion of “objective seriousness” as assessed by the LEC was given at [2.1.2] under that heading.

493 R Pepper, “Criminal Prosecutions in the Land and Environment Court of New South Wales”, paper presented at the NSW Bar Association, CLE, 28 March 2015, Sydney, pp 14–15 [53(a)] and pp 16–17 [53(c)].

494 With regard to planning and development offences, the “environment” harmed/affected can be the natural environment (eg trees, landscape, vista, etc) or the built environment (eg buildings under heritage protection; development adversely impacting on designated heritage conservation areas, etc).

495 *CSP Act*, s 21A(2)(g). Section 21A specifies the aggravating and mitigating factors to be taken into account in determining the appropriate sentence for an offence.



It should be noted, where the court assessed that there was no environmental harm, that unlawful activity was detected, charged and prosecuted. However, unlike, the *potential* for serious environmental harm associated with some environmental protection/pollution offences, breaches of environmental planning laws are “tame” by comparison, and rarely pose a significant threat to the natural environment (or to human life), involving more a technical breach of a planning law or regulation.<sup>496</sup>

### ***State of mind***

Although mens rea is not an element of many environmental planning offences due to their strict liability,<sup>497</sup> the state of mind of an offender at the time of the commission of the offence, nonetheless, remains as a relevant consideration for the LEC.<sup>498</sup> This is because “a strict liability offence that is committed intentionally, negligently or recklessly will be objectively more serious than one committed inadvertently”.<sup>499</sup> The elements of a “culpable” mind extend to ignoring and disregarding environmental planning laws and regulations:

A large measure of premeditation will make the offence more serious if it is committed on the spur of the moment, just as failure to heed advice or warnings, including from regulatory authorities, will be an aggravating feature.<sup>500</sup>

Of all the environmental planning offences dealt with by the LEC in the study period, almost 58% committed by “ordinary Joe” individuals and 56% committed by corporations were considered by the LEC to be “intentional” in nature. On the other hand, only one-third (34%) of planning offences committed by small business owners were deemed “intentional”.

Negligence contributed to a substantial proportion of environmental planning offences committed by small business owners (37%). Negligence did not feature as prominently in the environmental planning offences committed by “ordinary Joe” individuals (12%) or corporations (16%).

Recklessness did not feature heavily in the offence profile of corporations (9%), but was slightly more prominent in the planning offences committed by small business owners (17%) and “ordinary Joe” individual offenders (18%).

### ***Financial advantage***

As with many environmental protection offences, financial advantage may be the primary motivation underlying unlawful development. In the course of operating a building business or undertaking development work, a diverse range of actions taken by the builder or developer may constitute a way of saving money or avoiding costs. Actions such as not submitting a development application, or proceeding with work before consent is given, or not undertaking an environmental assessment, may represent a simple “technical” breach of an environmental planning law, but the reason behind the unlawful conduct is likely to be pecuniary in its nature.<sup>501</sup> Deliberate and calculated attempts at

496 There are numerous cases before the LEC where the offence was no more than a technical breach of an environmental planning law or regulation. The court often recognises, as does the prosecutor and regulatory authority, that there is nothing “prohibited” about the (completed) building work, and that development consent would have been given had the offender proceeded through the approved planning and development assessment process. In such cases, the objective seriousness is often assessed as “low”, and the level of environmental harm recorded as “none”. For example, in *Council of the Municipality of Kiama v Pacific Real Estate (Warilla) Pty Ltd* [2009] NSWLEC 191, it was noted at [56] that “no environmental harm had resulted and ... all of the unauthorised works were subsequently approved by the council”.

497 B Preston, above n 69, p 147, fn 44. The footnote, in part, reads: “For example, offences against s 125(1) of the *Environmental Planning and Assessment Act* 1979 (NSW) and tier 2 offences under the *Protection of the Environment Operations Act* 1997 (NSW)” [are strict liability offences].

498 B Preston, *ibid*, pp 147–148.

499 *Wingecarribee Shire Council v O'Shanassy (No 6)* [2015] NSWLEC 138 per Pepper J at [172].

500 B Preston, above n 69, p 148.

501 For example, in *Council of the Municipality of Kiama v Pacific Real Estate (Warilla) Pty Ltd* [2009] NSWLEC 191 per Pepper J at [82]: “[i]t was not a matter of controversy that a reason for the commission of the offences was commercial motivation”.



**Table 11: Environmental planning offences in the LEC: objective and subjective factors by Class of Offender — 2000 to 2015 (principal offence only)**

Objective and subjective factors		Class of offender				Total
		Corporation	Individual			
			Special liability offender	Small business owner	“Ordinary Joe”	
Objective seriousness						
High	N	2	0	0	3	5
	%	4.7	0.0	0.0	6.0	3.9
Medium	N	18	0	10	12	40
	%	41.9	0.0	28.6	24.0	31.3
Low	N	23	0	25	35	83
	%	53.5	0.0	71.4	70.0	64.8
Environmental harm						
Serious	N	4	0	2	1	7
	%	9.3	0.0	5.7	2.0	5.5
Medium	N	6	0	2	9	17
	%	14.0	0.0	5.7	18.0	13.3
Low	N	18	0	17	22	57
	%	41.9	0.0	48.6	44.0	44.5
None	N	15	0	14	18	47
	%	34.9	0.0	40.0	36.0	36.7
State of mind						
Intentional	N	24	0	12	29	65
	%	55.8	0.0	34.3	58.0	50.8
Negligence	N	7	0	13	6	26
	%	16.3	0.0	37.1	12.0	20.3
Recklessness	N	4	0	6	9	19
	%	9.3	0.0	17.1	18.0	14.8
Financial advantage (Yes)	N	15	0	9	5	29
	%	34.9	0.0	25.7	10.0	22.7
Foreseeability of harm (Yes)	N	26	0	26	32	84
	%	60.5	0.0	74.3	64.0	65.6
Practical measures taken (Yes)	N	7	0	7	9	23
	%	16.3	0.0	20.0	18.0	18.0
Control over causes (Yes)	N	43	0	35	48	126
	%	100.0	0.0	100.0	96.0	98.4
Prior record (Yes)	N	3	0	4	1	8
	%	7.0	0.0	11.4	2.0	6.3
Prior good character (Yes)	N	25	0	26	40	91
	%	58.1	0.0	74.3	80.0	71.1
Not guilty plea	N	3	0	1	5	9
	%	7.0	0.0	2.9	10.0	7.0
Contrition and remorse (Yes)	N	32	0	27	40	99
	%	74.4	0.0	77.1	80.0	77.3
Cooperation (Yes)	N	30	0	26	40	96
	%	69.8	0.0	74.3	80.0	75.0
Costs awarded (Yes)	N	42	0	35	47	124
	%	97.7	0.0	100.0	94.0	96.9
Means to pay (Yes)	N	8	0	13	19	40
	%	18.6	0.0	37.1	38.0	31.3
Totality principle applied (Yes)	N	13	0	7	7	27
	%	30.2	0.0	20.0	14.0	21.1
All LEC offences	N	43	0	35	50	128
	%	100.0	100.0	100.0	100.0	100.0

Note: Percentages reflect the observed proportion of the relevant total sample. For example, with regard to "Objective seriousness", 4.7% (2 of 43) primary offences committed by corporations were considered by the LEC to be of "High" objective seriousness. Also note that the class of offender, "special liability" offender, did not appear in any case of environmental planning offences in this study. The column for this class of offender has been retained in this table but the numbers have been replaced with zero values to allow easier comparisons between values in this table and the corresponding table for environmental protection offences (ie Table 10).

reducing the administrative and operational costs associated with *lawful* development that follows due process has been noted by the LEC.<sup>502</sup> Offenders should not profit from a failure to follow the legally-binding requirements for lawful development as regulated by local, regional and State environmental planning instruments.<sup>503</sup> As noted by McClellan (then) CJ of the LEC, in *Bankstown City Council v Taouk Constructions Pty Ltd*:

It is a very serious matter particularly when an experienced developer decides, for its own financial gain, to proceed to construct part or all of a development knowing that consent is required and also knowing that that consent has not been obtained. If many people were to take that course, the system of development control which has existed in this State now for more than fifty years would be seriously undermined to the disadvantage of the whole community.

...

Those who engage in development as their profession and for financial gain must, above all, be those members of the community who obey the law.<sup>504</sup>

The basic tenet for the LEC is that offenders, including those responsible for environmental planning offences, should not profit from their crimes:

The carrying out of an offence to make a profit, or to save incurring an expense or to avoid the cost of obtaining and implementing a statutory permission, such as a development consent or environment protection licence increases the seriousness of the crime.<sup>505</sup>

Overall, almost 23% of environmental planning offences within the period examined were identified as being committed by the offender with the intent to financially benefit from the act. A substantial proportion of corporations (35%) and small business owners (26%) were identified as having been motivated by the prospect of monetary profit or other financial gain. Financial advantage was not as key a motive in the environmental planning offences of “ordinary Joe” individuals (10%).

### **Foreseeability of harm**

As with s 241(1)(c) of the *POEO Act*, 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, should be considered in sentencing of offenders for other offences, including those crimes against environmental planning laws. For example, development control plans provide both legislative guidance — and warning of the potential for harm — in the context of environmental planning and, more specifically, land usage and permissible development.<sup>506</sup> The LEC considers to be most serious, the flagrant disregard of advice and warnings where provided by authorities regulating, monitoring and policing legal standards of land use and development.<sup>507</sup> In particular, a failure to heed the advice afforded by independent environmental consultants providing professional environmental assessments, forewarning the individual or corporation of the environmental consequences of their proposed actions, increases

502 R Pepper, above n 493, p 17, lists the act of avoiding “the cost of obtaining a licence or consent” as an example of “commercially motivated” offending against environmental planning laws that is “relevant to penalty”. Similarly, in *Fairfield City Council v Cavasinni Constructions Pty Ltd* [2005] NSWLEC 187, Talbot J at [22] stated that “[a]ny delay by the Council in issuing an appropriate certificate is not an excuse [for the commission of the offence]”. The motive for carrying out the work illegally, in that particular case, was identified as “entirely one of self interest in economic terms”.

503 Part 3 of the *Environmental Planning and Assessment Act* 1979 defines the various “environmental planning instruments”.

504 [2004] NSWLEC 402 at [20]–[21].

505 B Preston, above n 69, p 148. In *Garrett v Williams* (2006) 160 LGERA 115; [2006] NSWLEC 785 per Preston CJ of the LEC at [126]: the destruction of identified endangered trees and vegetation “was designed by the defendant to remove a real impediment to his declared intention of carrying out subdivision and development of the land for profit”.

506 *EPA Act*, Div 6, s 74BA.

507 Conventional forms of direct regulation are also referred to as “command and control” regulations, which refers to the prescriptive nature of the regulation (the command) supported by the imposition of some negative sanction (the control). “Command and control” regulations are seen as the “staple diet of many politicians” and have been designed and introduced “to prohibit or restrict environmentally harmful activities”: Gunningham and Grabosky, above n 287, pp 4–5.

the objective gravity of the offence — and an environmental planning offence is not exempt from such sentencing considerations.<sup>508</sup>

Two-thirds (66%) of offenders were identified by the LEC as having reasonably foreseen the environmental harm caused, or potentially caused, by committing the breach of planning laws. Foreseeability of harm was viewed as a particular feature of environmental planning offences committed by small business owners (74%).

### *Practical measures*<sup>509</sup>

The practical measures that may be taken to prevent, control, abate or mitigate the environmental harm caused or likely to be caused by the act is an important consideration in the sentencing of offenders found guilty of environmental planning offences. For instance, in *Garrett v Williams* development consent had not been obtained for a proposed residential subdivision, which involved the clearing of trees which formed part of an endangered ecological community. As it was, development consent was refused. After the first instance of unlawful clearing, the regulatory authority, the local shire council, refused consent to the defendant's application for subdivision. The court found that "refraining from clearing would therefore have had the real practical benefit of not causing any harm to the (endangered ecological community)".<sup>510</sup>

Overall, practical measures were considered taken in 18% of LEC cases involving a principal environmental planning offence. Corporations (16%) were marginally less likely than the other offender classes to have taken practical measures to prevent or reduce the level of environmental harm.

### *Control over causes*

Control over the causes that gave rise to the offence is an important consideration in the sentencing of offenders who have broken environmental planning laws.<sup>511</sup> An assessment by the court that the offender was in complete control over the causes of an offence will increase their culpability. In some cases, control over the causes of the offence is inextricably linked to the offender's state of mind and the financial incentives behind the commission of the offence.<sup>512</sup> In relation to the system of planning and development control, the offender's control over causes extends to taking the necessary steps to obey the law by ascertaining when development consent is required, then obtaining development consent before carrying out development, then carrying out development in accordance with the terms of any development consent obtained.<sup>513</sup> As Preston CJ of the LEC noted in *Council of the City of Sydney v Trico Constructions Pty Ltd*:

508 In *Garrett v Williams* (2006) 160 LGERA 115; [2006] NSWLEC 785, the defendant was provided with both written notice and oral advice of the harm that land clearing, as part of their proposed development, would cause to endangered native vegetation on their property. This included the following independent environmental assessment report: "It is concluded that, based upon the criteria contained in Section 5A of the *Environmental Planning and Assessment Act*, the development as proposed is likely to have a significant effect on the Southern Highlands Shale Woodland Endangered Ecological Community": per Preston CJ of the LEC at [28]. His Honour also found that the failure of the defendant to heed and observe the warnings provided by the National Parks and Wildlife Service and the local shire council represented an "aggravating feature" (at [110]) and provided a serious premeditative aspect to the offence(s), which were committed in blatant disregard of the warnings provided (at [111]).

509 Prior to this study, "Practical measures taken" was actually two separate variables – "Practical measures available" and "Practical measures taken". Both these variables contained high or very high levels of missing information (79% missing in the case of the former, and 39% missing in the case of the latter). These variables were combined using programming logic to derive a single computed variable "Practical measures", for which the valid values became: "Yes, taken", "No, not taken" and "N/A".

510 *Garrett v Williams*, above n 508, per Preston CJ of the LEC at [128].

511 This "mandatory sentencing consideration ... is relevant to other offences as well" (B Preston, above n 69, p 149 and include strict liability offences such as the offence against s 125(1) of the *EPA Act*. See also *Council of the City of Sydney v Trico Constructions Pty Ltd* [2015] NSWLEC 56 per Preston CJ of the LEC at [65]–[69].

512 See, for example, *Garrett v Williams*, above n 508.

513 *Gittany Constructions Pty Ltd v Sutherland Shire Council* (2006) 145 LGERA 189; [2006] NSWLEC 242 per Preston CJ of the LEC at [104], [105].

The sentencing purpose of general deterrence is particularly relevant where the offender is in a business or industry that undertakes development or action that is regulated by the system of planning and development control. Persons and corporations engaged in demolition, excavation, and building and development work need to be warned by the sentence imposed by courts in cases involving unlawful demolition, excavation, and building and development work that all necessary consents must be obtained and complied with.<sup>514</sup>

It was almost always the case (98%), that offenders who committed environmental planning offences and, therefore, also undermined the objectives and integrity of the regulatory system of development control, were rebuked by the LEC as being in control over the causes that gave rise to the offence. Without exception, all corporations and all small business owners convicted of environmental planning offences in the study period were identified as having control over the causes of the offence and thus were answerable for the real or potential environmental harm resulting from the offence. Just two of the 50 “ordinary Joe” individuals tried for environmental planning offences were assessed by the court as *not* being in control of the causes of the offence and, although the offences were proved, no conviction was recorded against either individual.<sup>515</sup>

### 2.3.2.2 Subjective factors

Within the limits set by the objective seriousness of the offence, the court is required to take into account subjective factors, both favourable and unfavourable to the offender. A number of such factors are identified in ss 21A, 22 and 22A of the *CSP Act*<sup>516</sup> and apply to the sentencing considerations of the LEC.

#### *Prior criminality (prior record of environmental offences)*

Within the LEC’s jurisdiction, prior criminality or a lack of prior criminality needs to be restricted to a record of proven environmental protection and planning offences. As discussed earlier,<sup>517</sup> only prior *environmental* offending should be taken into account in sentencing an environmental offender; an environmental offender’s more general criminal conduct is not relevant.

Only eight of the 128 offenders (6%) before the LEC in the study period for an environmental planning offence had a prior record of environmental offences. Small business owners (11%) recorded almost double the average level of prior environmental offending. “Ordinary Joe” individuals (2%) registered the lowest level of prior environmental offending.

#### *Prior good character of offender*

This is where the LEC may consider an offender’s prior criminal record for *non*-environmental offences in the setting of a penalty for an environmental offence or offences.<sup>518</sup>

514 [2015] NSWLEC 56 at [47] (citations removed).

515 Both individuals were sentenced under s 10 of the *CSP Act*. In the case of *Holroyd City Council v El-Khoury* [2008] NSWLEC 83, the defendant had limited involvement in and no control over the building works undertaken by her husband. More so, the defendant made efforts to prevent and rectify the breaches. Similarly, in *Blue Mountains City Council v Tzannes* [2009] NSWLEC 19, there were extenuating circumstances. In short, the defendant was told to clean up the area, which was a fire hazard, by the Rural Fire Service. She was told by the council’s officers that she did not need any written consent to do so, she understood that the work could be done by a machine “like a small bulldozer”. The defendant was not present when the contractor went further than he was asked and pushed over recent regrowth and tree saplings.

516 Section 22 allows the court to consider a guilty plea, particularly an early guilty plea, in reducing a sentence, while s 22A concerns the court’s power to reduce penalties where the offender has facilitated the administration of justice.

517 See “Prior criminality” under **Subjective factors** at [2.3.1.2].

518 *ibid*. See previous discussion, above n 448, regarding this factor and the likelihood of underestimating the level of prior environmental offending, especially for offenders previously dealt with by infringement notices for Tier 3 environmental offences.

A total of 91 environmental planning offenders (71%) before the LEC in the study period were recorded as having a prior good character. Higher proportions of “ordinary Joe” individuals (80%) and small business owners (74%) were recorded as being of “good character”. A smaller proportion of corporations (58%) were recorded as having prior good character.

### ***Plea of guilty/plea of not guilty***

Under the offence regime prior to the July 2015 amendments to the *EPA Act*, all environmental planning offences were “strict liability” offences.<sup>519</sup> As such, they facilitated a guilty plea. Aside from the utilitarian value to the criminal justice system, a guilty plea may earn the offender a reduction to the original penalty.<sup>520</sup>

Of the 128 primary environmental planning offences dealt with by the LEC between 2000 and 2015, 93% were characterised by a guilty plea. Only nine offenders (7%) pleaded not guilty. “Ordinary Joe” individual offenders (10%) were slightly more likely to enter a not guilty plea. Only one small business owner entered a plea of not guilty in relation to their environmental planning offence.

### ***Contrition and remorse***

Contrition and remorse was a general feature of cases involving offenders who breached environmental planning laws. A total of 99 environmental planning offenders (77%) before the LEC in the study period demonstrated contrition and remorse. Of all the classes of offenders, a slightly higher level of contrition and remorse was shown by “ordinary Joe” individuals (80%).

### ***Co-operation (assistance to authorities)***

A total of 96 environmental planning offenders (75%) in the study period were deemed by the LEC to have co-operated with the court and the prosecuting authority.<sup>521</sup> “Ordinary Joe” individual offenders (80%) recorded the highest level of co-operation with authorities with regard to unlawful development.

### ***Costs awarded***

The voluntary payment of the prosecutor’s legal and investigative costs by the offender is as salient a feature of environmental planning offence, as it is generally for environmental protection offences.<sup>522</sup>

The vast majority (97%) of environmental planning offenders before the LEC in the study period were required to pay the prosecutor’s costs and expenses. Without exception, all small business owners (100%) involved in unlawful development were ordered to pay costs. Although it is a marginal difference, the class of offender least likely ordered to pay the “costs” of an environmental planning matter heard by the LEC was the “ordinary Joe” individual (94%).

### ***Means to pay***

In the study period examined, the LEC determined that a total of 40 environmental planning offenders (31%) had the capacity to pay the fine which it decided to order.<sup>523</sup> Slightly higher proportions of “ordinary Joe” individual offenders (38%) and small business owners (37%) were

519 This study does not include any LEC cases involving environmental planning offences stratified in terms of the three-tiered regime introduced by the *Environmental Planning and Assessment Amendment Act 2014*. These amendments commenced on 31 July 2015.

520 B Preston, above n 69, p 151. Preston identifies the guideline judgment as *R v Thomson* (2000) 49 NSWLR 383 which his Honour says “continues to have force and use in New South Wales despite the decisions of the High Court”.

521 A statement of agreed facts between the defendant and the prosecutor is a feature of a great many LEC judgments. Its presence typically indicates a high level of co-operation between the two parties.

522 Refer to the earlier discussion of this factor with regard to environmental protection offences at [2.3.1.2] including the footnotes.

523 In approximately one-third of cases involving environmental planning offences, “means to pay” was not recorded. The percentage shown is of all cases. Of the valid cases, the percentage with a capacity to pay is higher at around 47%.

assessed by the court as having the means to pay. This may (simply) reflect the generally lower fine amounts given to “ordinary Joe” individual offenders and small business owners, compared with corporations.<sup>524</sup> Paradoxically, but consistent with the finding in relation to environmental protection offences, a relatively smaller proportion of corporations (19%) were determined as having the means to pay the court-ordered fine for an environmental planning offence.<sup>525</sup>

### ***Totality principle applied***

Generally, the totality principle is applied by the court when more than one fine is to be ordered. In applying the totality principle, the court must avoid a total fine amount that is disproportionately low or high based on the objective seriousness of the offences.

In just over one-fifth (21%) of LEC environmental planning cases, the totality principle was applied. The application of the totality principle was more a feature of environmental planning cases involving corporations (30%) which, in all likelihood, is indicating that multiple environmental planning offences were more common for corporations than for “ordinary Joe” individuals and small business owners.<sup>526</sup>

## 2.4 “Top 5” offences in the LEC

This next section details the nature and characteristics of the “Top 5” environmental planning and protection offences in the LEC. This analysis is restricted to the “Top 5” offences rather than the “Top 10” offences for the following reasons:

- (a) the offence ranked sixth on the list relates solely to an Act no longer in operation, that being the repealed *Marine Pollution Act 1987*
- (b) cases grouped within the offence categories ranked seven to 10, number 27 or fewer (and ten or less for the offence categories ranked nine and 10), and
- (c) native vegetation offences (ranked eight) are discussed separately.

To summarise, the following environmental offences (and their statutory predecessors, if any) are discussed in detail:

- Pollute waters — *POEO Act*, Pt 5.3, s 120 (n=118), at [2.4.1]
- Carry out development without consent/not in accordance with consent — *EPA Act*, s 76A (n=78), at [2.4.2]
- Contravene any condition of licence — *POEO Act*, s 64(1) (n=55), at [2.4.3]
- Unlawfully transport and/or dispose waste — *POEO Act*, ss 143 and 144 (n=42), at [2.4.4]
- Offend against direction or prohibition — *EPA Act*, s 125(1) (n=40), at [2.4.5].

524 The mean fine amount for “ordinary Joe” individuals (\$19,066) convicted of environmental planning offences in the study period was around 10% lower than the corresponding fine amount for small business owners (\$21,061), and almost 40% lower than that for corporations (\$33,767).

525 The size of the fine ordered by the LEC on offenders assessed as *not* having the means to pay the fine may have some bearing on this particular finding. For individuals convicted of environmental planning offences and assessed as being *without* the means to pay, the average fine amount was around \$28,385. For corporations convicted of environmental planning offences and assessed as being *without* the means to pay, the average fine amount was 60% higher at \$45,639. Nonetheless, one may expect that a registered commercial enterprise would have greater means to pay a fine than an “ordinary Joe” individual, even where that fine was, on average, 60% higher.

526 In a real sense, this variable in the environmental sentencing is a proxy for multiple offences when only primary offences are examined, as was the case in this study.



### 2.4.1 Pollute waters

The *POEO Act* regulates air, water and noise pollution in NSW. The legal definition of “water pollution” is very broad.<sup>527</sup> First, “water” is defined under the *POEO Act* as the whole or any part of:

- (a) any river, stream, lake, lagoon, swamp, wetlands, unconfined surface water, natural or artificial watercourse, dam or tidal waters (including the sea), or
- (b) any water stored in artificial works, any water in water mains, water pipes or water channels, or any underground or artesian water.

Secondly, “water pollution” or “pollution of waters”, in the main, involves (but is not necessarily limited to):

the introduction of any matter — solid, liquid or gas — into waters which changes the physical, chemical or biological condition of the water.<sup>528</sup>

The definition of water pollution “includes the placing of any matter in a position where pollution enters or is *likely* to enter any waters”.<sup>529</sup> This last statement reaffirms the “potential” harm principle of the *POEO Act*.

Thirdly, the act of polluting waters may be lawful but *only* where a pollution licence authorises such pollution and the licence holder has complied with the conditions of the pollution licence.<sup>530</sup> It is an offence to pollute waters without a pollution licence or to breach the conditions of a pollution licence.<sup>531</sup>

There are two sections of the *POEO Act* that explicitly deal with pollute waters offences:<sup>532</sup>

- Tier 1 pollute waters offences: s 116 — “Leaks, spillages and other escapes”
- Tier 2 pollute waters offences: s 120 — “Prohibition of pollution of waters”.

In the case of a Tier 1 pollute waters offence, the onus is on proving that the corporation or individual charged *wilfully* or *negligently* caused any substance to leak, spill or otherwise escape (whether or not from a container) in a manner that harmed or was likely to harm the environment. In the case of a Tier 2 pollute waters offence, it is an “offence of strict liability” and is described as “a result offence”.<sup>533</sup>

**Table 12** identifies the different pieces of legislation applicable to pollute waters offences across the study period. This Table also shows that pollute waters offences have attracted higher and higher maximum penalties over time inline with “community expectation” as to the “appropriate” punishment for polluters of waters. As Craig J noted in *Minister for Planning v Moolarben Coal Mines Pty Ltd*:

[The] maximum penalty is of great relevance in determining the objective gravity of the offence. As observed by Kirby P (Campbell and James JJ agreeing) in *Camilleri’s Stock Feeds Pty Ltd v EPA* (1993) 32 NSWLR 683 at 698:

“the maximum penalty available for an offence reflects the ‘public expression’ by parliament of the seriousness of the offence (citation omitted)”.

An increase in the statutory maximum sentence is a significant matter to take into account when exercising the sentencing discretion as it reflects a change in the community expectation as to the appropriate sentence (*Minister for Planning v Coalpac Pty Ltd* [2008] NSWLEC 271 at [42]).<sup>534</sup>

<sup>527</sup> Environmental Defenders Office NSW, above n 286, p 90.

<sup>528</sup> See the *POEO Act*, Dictionary, “‘water pollution’ or ‘pollution of waters’” [(a) to (e)]. Schedule 3 of the *Protection of the Environment (General) Regulation* 1998 lists the substances and other matters that must not be placed in or near any waters.

<sup>529</sup> Some cases of water pollution involve a discharge into a dry channel or ephemeral stream, which may or may not find its way into an actual waterway: see, for example, *EPA v KBL Mining Ltd* [2014] NSWLEC 178 and *EPA v Moolarben Coal Operations Pty Ltd (No 2)* [2012] NSWLEC 80.

<sup>530</sup> The EPA is empowered to issue pollution licences (“environmental protection licences”) to authorise certain polluting activities (“scheduled activities”) and the conditions of such activities: *POEO Act*, Ch 3.

<sup>531</sup> *POEO Act*, s 122.

<sup>532</sup> Before the study period, s 16 of the *CW Act* also dealt with water pollution offences; however, this Act was repealed on 1 July 1999.

<sup>533</sup> *EPA v Pipeline Drillers Group Pty Ltd* [2012] NSWLEC 18 per Craig J at [44].

<sup>534</sup> [2010] NSWLEC 147 at [49], [50].

Considering specifically a Tier 2 pollute waters offence (and its equivalent under previous legislation), the maximum penalty under the repealed *CW Act* for a corporate offender was \$40,000 and \$20,000 per day for a continuing offence, but this increased over time to \$1 million and \$120,000 per day under the current version of the *POEO Act*. Thus, the set penalty amount increased by 25 times, and the daily penalty amount increased by six times during the course of the 15-year study period.<sup>535</sup>

### **Confusion around “pollute waters” and “cause waters to be polluted” offences**

Section 120 of the first version of the *POEO Act* appears to have generated some degree of confusion. This was because the *POEO Act* which operated between 1 July 1999 and 30 June 2002 — and applied to offences committed during that timeframe — specified not one but *three* different “types” of pollute waters offences. For example, quoting the version of the Act valid at 30 June 2002:

#### **120 Prohibition of pollution of waters**

- (1) **Prohibition on polluting** — a person must not pollute any waters.
- (2) **Prohibition on causing pollution** — a person must not cause any waters to be polluted.
- (3) **Prohibition on permitting pollution** — a person must not permit any waters to be polluted.
- (4) **Offence** — a person who contravenes this section is guilty of an offence.<sup>536</sup>

**Table 12: NSW pollute waters legislation: present and past statutory offences and associated maximum penalties — Tier 2 offences**

Act		Section	Offence	Maximum penalty (Fine)	Penalty date range
<b>Corporations</b>					
Current	<i>POEO Act</i>	120(1)	Pollute waters	\$1,000,000 + \$120,000 per day	01/05/2006–present
Previous (all repealed)	<i>POEO Act</i>	120(1)	Pollute waters	\$250,000 + \$120,000 per day	01/07/2002–30/04/2006
	<i>POEO Act</i>	120(1)	Pollute any waters	\$250,000 + \$120,000 per day	01/07/1999–30/06/2002
	<i>POEO Act</i>	120(2)	Cause any waters to be polluted	\$250,000 + \$120,000 per day	01/07/1999–30/06/2002
	<i>POEO Act</i>	120(3)	Permit any waters to be polluted	\$250,000 + \$120,000 per day	01/07/1999–30/06/2002
	<i>CW Act</i>	16(1)	Pollute any waters	\$125,000 + \$60,000 per day	01/01/1991–30/06/1999
		16(1)	Pollute any waters	\$40,000 + \$20,000 per day	15/01/1988–31/12/1990
<b>Individuals</b>					
Current	<i>POEO Act</i>	120(1)	Pollute waters	\$250,000 + \$60,000 per day	01/05/2006–present
Previous (all repealed)	<i>POEO Act</i>	120(1)	Pollute waters	\$120,000 + \$60,000 per day	01/07/2002–30/04/2006
	<i>POEO Act</i>	120(1)	Pollute any waters	\$120,000 + \$60,000 per day	01/07/1999–30/06/2002
	<i>POEO Act</i>	120(2)	Cause any waters to be polluted	\$120,000 + \$60,000 per day	01/07/1999–30/06/2002
	<i>POEO Act</i>	120(3)	Permit any waters to be polluted	\$120,000 + \$60,000 per day	01/07/1999–30/06/2002
	<i>CW Act</i>	16(1)	Pollute any waters	\$60,000 + \$30,000 per day	01/01/1991–30/06/1999
		16(1)	Pollute any waters	\$20,000 + \$10,000 per day	15/01/1988–31/12/1990

<sup>535</sup> Across the same period, inflation increased by a total amount of 45% (or an average inflation rate of 2.5% over the 15-year period from 1991 to 2006). (Reserve Bank of Australia, *Inflation Calculator* (2015) at [www.rba.gov.au/calculator/annualDecimal.html](http://www.rba.gov.au/calculator/annualDecimal.html), accessed 16 May 2017; and, *RateInflation* (2015) at [www.rateinflation.com/inflation-rate/australia-historical-inflation-rate](http://www.rateinflation.com/inflation-rate/australia-historical-inflation-rate), accessed 16 May 2017. Considering only inflationary increases, the 2006 equivalent of a \$40,000 fine in 1990 would be approximately \$174,000 (not \$1 million) and the 2006 equivalent of a daily fine of \$20,000 fine in 1991 would be approximately \$29,000 (not \$120,000). Expressed another way, retrospectively, the 1991 equivalent of a \$1 million fine would have been around \$690,000 (not \$40,000); and, the 1990 equivalent of the 2006 daily rate of \$120,000 per day would have been in the vicinity of \$83,000 (not \$20,000).

<sup>536</sup> *POEO Act*, Ch 5, Pt 5.3, s 120 (historical version for 14 December – 30 June 2002) at [www.legislation.nsw.gov.au/#/view/act/1997/156/historical2001-12-14/chap5/part5.3/sec120](http://www.legislation.nsw.gov.au/#/view/act/1997/156/historical2001-12-14/chap5/part5.3/sec120), accessed 16 May 2017.

A number of LEC judgments around the time reveal that some LEC judges were not familiar with the legitimate charge of “cause waters to be polluted” under s 120(2) as brought before them by the prosecutor.<sup>537</sup> While it did not affect the judgment or the sentence, s 120(2) charges in at least three separate LEC cases were “converted” to s 120(1) charges and notes to this effect were provided in the judges’ sentencing remarks.<sup>538</sup> The alteration of charges in these instances were unnecessary and constituted a possible error in law.

The rulings of Talbot J in *EPA v Rail Infrastructure Corp*<sup>539</sup> and *EPA v Pancorp Aust Pty Ltd*<sup>540</sup> highlight the distinction between s 120(1) and s 120(2) and show how the two sub-sections were previously able to be legitimately applied to co-offenders (dealt with in separate hearings). The underlying facts in these cases were that Pancorp polluted waters on or about 2 July 2000 and pleaded guilty to three charges under s 120(1) of the *POEO Act*. At the time of the offence, Pancorp was contracted by the Rail Infrastructure Corporation (RIC) to apply herbicides to railway lines and sidings (but not bodies of water) from a hi-rail vehicle owned by Pancorp in accordance with RIC instructions. The proceedings against Pancorp were heard separately and immediately following the proceedings against RIC. RIC also entered a plea of guilty to each of three charges under s 120(2) of the Act (“cause any waters to be polluted”). Both Pancorp and RIC were convicted and each received fines totalling \$32,000 and ordered to pay the legal costs and other expenses of the EPA.

Schedule 2, cl 6 of the *Environment Protection Legislation Amendment Act 2002* removed the previous s 120 and replaced it effectively with what is legislated today (at date of publication) in terms of the prohibition of pollution of waters, namely:

- s 120(1): a person who pollutes any waters is guilty of an offence
- s 120(2): pollute waters includes cause or permit any waters to be polluted.

### *The De Simoni principle and pollute waters offences*

The maximum penalties available to the court for the Tier 1 s 116 offence and the Tier 2 s 120 offence clearly differentiate these offences along a continuum of objective seriousness, with the latter offence considered less serious than the former (see **Table 12**).

The operation of the *De Simoni* principle precludes the consideration of whether a pollute waters offender acted wilfully, negligently or recklessly in committing an offence under s 120. Where charged with a less serious offence, the court must *not* take into account a factor, or factors, that would constitute element(s) of a more serious offence.<sup>541</sup> Furthermore, a finding of wilfulness or recklessness under s 120 “would be tantamount to finding an element of aggravation that would warrant conviction for a more serious offence, namely, an offence against s 116”.<sup>542</sup>

537 A charge of an offence under s 120(3) of the Act (“permit any waters to be polluted”) appears not to have ever been used.

538 Pearlman (then) CJ of the LEC in *EPA v Boral Resources (NSW) Pty Ltd* (2002) 123 LGERA 279; [2002] NSWLEC 232 incorrectly amended a legitimate charge for a s 120(2) offence entered by the prosecutor, stating at [3]:

I have noted that the summons, as filed by the prosecutor, states the charge as being an offence against s 120(2) of the *POEO Act*.

That is not a correct description of the offence. Rather, it is properly described as an offence against s 120(1) which stipulates that a person who pollutes any waters is guilty of an offence. Section 120(2) provides that “pollute waters” includes cause or permit any waters to be polluted.

The offence was committed on, or about, 24 May 2001: that is in the period when a s 120(2) charge could be lawfully laid. Similarly, in *EPA v TransGrid* [2003] NSWLEC 18, Lloyd J stated at [2] that: “[t]he summonses allege offences against s 120(2) of the *PEO Act*. This appears to be a misnomer. There is no offence created by s 120(2)”. Lloyd J also cites *Boral*. The offence by TransGrid also was committed in the period when a s 120(2) “cause” water pollution charge was lawful. In *EPA v Ramsey Food Processing Pty Ltd* [2003] NSWLEC 82 (revised 30/04/2003), Cowdroy J reinforced the error by making reference to Lloyd J in *TransGrid* at [4] and by stating: “[t]he Court notes that no offence arises under s 120(2) of the *POEO Act*. The offence is created by s 120(1) of such Act”. EPA officers investigated this particular pollute waters offence on 3 and 4 October 2001. This again means that a charge under s 120(2) was legitimately put before the LEC. Perhaps surprisingly (or not), the EPA prosecutor in these three cases did not speak up to defend the legitimacy of the original charge laid under s 120(2) of the *POEO Act*.

539 (2002) 19 LGERA 409; [2002] NSWLEC 37.

540 [2002] NSWLEC 38.

541 *ibid* at [220].

542 Furthermore, Craig J stated in *Warringah Council v ProjectCorp Aust Pty Ltd* [2015] NSWLEC 141 at [219], that such an approach “would offend the dictum of Gibbs CJ (Mason and Murphy JJ agreeing) in *De Simoni* at 389”.

Similarly, the court cannot entertain an allegation of negligence in assessing the objective gravity of a s 120 pollute waters offence. In fact, the laying of a charge under s 120 precludes the imposition of a sentence on the basis that the offender acted wilfully, negligently or recklessly — as these are factors that define the more serious s 116 offence.<sup>543</sup> As stated in *EPA v Queanbeyan City Council (No 3)*:

The maximum penalty for an offence against s 116 of the Act in the case of a corporation is \$5,000,000 for an offence that is committed wilfully, or \$2,000,000 for an offence that is committed negligently, whilst the maximum penalty for an offence against s 120 is \$1,000,000. The offence in s 116 is, therefore, a more serious offence than the offence to which the council has pleaded guilty and ... satisfies the pre-condition for application of the De Simoni principle.<sup>544</sup>

The LEC must disregard any claim from the prosecutor that a s 120 offence was committed negligently, recklessly or with intent because a s 120 offence is not a “conduct” offence. To do so, in determining a sentence, would represent a possible error at law.

### Findings

The full set of LEC cases involving Tier 2 pollute waters offences is provided in **Cases Table 1** in **Volume 2**.

In total, there were 118 cases of pollute waters before the LEC between 2000 and 2015.<sup>545</sup> There were 104 cases that involved pollute waters offences under s 120 of the *POEO Act*.<sup>546</sup> There were also 14 “pre-2000” cases which involved offences prosecuted under the *CW Act* (rep).

Section 123 of the *POEO Act* sets the maximum penalty for water pollution offences, which is currently (as at date of publication) at:

- (a) in the case of a corporation — \$1,000,000 and, in the case of a continuing offence, a further penalty of \$120,000 for each day the offence continues, or
- (b) in the case of an individual — \$250,000 and, in the case of a continuing offence, a further penalty of \$60,000 for each day the offence continues.

Note. An offence against subsection (1) committed by a corporation is an offence attracting special executive liability for a director or other person involved in the management of the corporation — see s 169.

In the majority of cases, the pollute waters offence was committed by a corporation (91.5%). In the ten remaining cases, the “individual” offender was a s 169 “special liability” offender (2%, two cases), a small business owner (6%, seven cases) or an “ordinary Joe” individual (1%, one case).

### Financial gain

Only 13 of the 118 pollute waters offences (11%) were identified as being committed for financial advantage.

<sup>543</sup> *ibid*, *Warringah Council v ProjectCorp Aust Pty Ltd* at [221]–[222].

<sup>544</sup> [2012] NSWLEC 220 at [171]–[173] (citations removed).

<sup>545</sup> These are the Tier 2 pollute waters offences (s 120 offences under the *POEO Act*) or equivalent offences under earlier Acts (eg *CW Act*, s 16(1)). Tier 1 offences (eg *POEO Act*, s 116) are not included.

<sup>546</sup> From 1 July 1999 to 30 June 2002, the offences of “cause any waters to be polluted” (s 120(2)) and “permit any waters to be polluted” (s 120(3)) existed under the *POEO Act*, although charges were rarely laid under these sections for offences committed during that period. Section 120 was substituted by Sch 2, cl 6 of the *Environment Protection Legislation Amendment Act 2002*. From 1 July 2002, s 120(1) of the *POEO Act* established the offence of “pollute any waters”, while s 120(2) provided the definition of the act of pollute waters which included “cause or permit any waters to be polluted”. Around the time of these changes, there appears to be some confusion, even in the LEC, that an offence of pollute waters under s 120(2) ever existed. See general discussion at [2.4.1].

### Penalties

In one case, the charge was dismissed under s 10(1)(a) of the *CSP Act*. In 92 cases a fine was ordered, these include 30 cases where an Additional Order was imposed as well as the fine in accordance with provisions under s 250(1) of the *POEO Act* — predominantly, these Additional Orders involved publication orders.<sup>547</sup> In the remaining 23 cases (19.5%), an Additional Order in the form of an environmental payment (or similar) was ordered but in absence of, or in lieu of, a fine: s 250(1)(e) of the *POEO Act*.<sup>548</sup>

### Fine amounts

The following information concerns LEC cases where the prosecutor's costs were known.

For a single pollute waters offence committed under the current provisions of the *POEO Act*, the average fine amount (n=13) was \$83,346 (median: \$58,500). The largest fine imposed under this sentencing regime (and indeed across the study period) was \$280,000 in the case of *EPA v CSR Building Products Ltd*.<sup>549</sup>

Between 1 May 1999 and 30 April 2006, under the lower maximum penalties of \$250,000 for a corporation and \$120,000 for an individual previously under the *POEO Act*, a single pollute waters offence attracted an average fine of \$25,190 (median: \$22,500). Even earlier, under the *CW Act*, a single pollute waters offence (n=8) attracted an average fine of \$17,125 (median: \$15,000).

### Remediation costs

Following a conviction for a single pollute waters offence under the current *POEO Act* (as at publication date), the average s 250(1)(e) payment to an environmental fund or restorative project in lieu of a fine (n=13) was \$74,000 (median: \$75,000). The smallest environmental services order payment in this period for a pollute water offence was \$50,000 (which was also the modal payment) and the largest was \$120,000 in the case of *EPA v Baiada Poultry Pty Ltd*.<sup>550</sup>

Across the study period, there was no instance where the court ordered both a fine *and* a s 250(1)(e) environmental services order payment. That is, where utilised, a s 250(1)(e) environmental services order payment was used in lieu of a fine with the LEC generally referring to the commuting of the fine<sup>551</sup> into this type of restorative justice payment.

547 Pursuant to s 250(1)(a) of the *POEO Act*, the court may “order the offender to take specified action to publicise the offence (including the circumstances of the offence) and its environmental and other consequences and any other orders made against the person”. Rarer Additional Orders were also identified in this study for pollute waters offenders. These include: in *EPA v Ross* (2009) 165 LGERA 42; [2009] NSWLEC 36, where the court accepted the defendant's proposal to lodge an *Adverse Experience Reporting Form* with the Australian Pesticides and Veterinary Medicines Authority consistent with the notification provisions of s 250(1)(b) of the *POEO Act* with the aim of having incorrect usage information on a pesticide warning label amended at [48], [98] and [102]; and, *EPA v Ramsey Food Processing Pty Ltd* (2003) 125 LGERA 369; [2003] NSWLEC 82, where the court exercised its discretion under s 245(c) “to prevent the continuance or recurrence of the offence” by ordering that the defendant “submit a specification for the operation of the defendant's waste disposal system” (at [47]).

548 See, for example, *EPA v Big Island Mining Pty Ltd* [2014] NSWLEC 131 per Pain J at [114]:

The parties have agreed that this is an appropriate matter for an alternative order under s 250(1)(e) which provides that payment be made to a specified organisation for the purposes of a specified project for the restoration or enhancement of the environment. The parties have provided details of a possible project for such an order. I agree with the parties that such an order is appropriate in this matter and can be ordered instead of the imposition of a fine by way of penalty.

549 [2008] NSWLEC 224. Sheahan J directed that, after discounts (at [59]), the defendant should “pay a fine of \$280,000, in the absence of any s 250 order acceptable to the court, plus the ss 246 and 248 amount of \$83,407.09, and legal costs of \$75,000 (pursuant to s 257B of the *Criminal Procedure Act* 1986)”: at [60].

550 (2008) 163 LGERA 71; [2008] NSWLEC 280. Preston CJ of the LEC accepted a submission from the prosecutor and the defendant of making an environmental service order under s 250(1)(e), together with a publication order under s 250(1)(a), instead of imposing a fine. Baiada Poultry was ordered to pay \$120,000 to Tamworth Regional Council to fund the North Bolton's Creek – an extension of the Grassy Box Woodland Conservation Project: at [57].

551 For example, in *EPA v Queanbeyan City Council (No 3)* (2012) 225 A Crim R 113, Pepper J at [282] stated: “[a]n order for such a payment may be made in lieu of the imposition of a fine”. Similarly, in *EPA v Greater Taree City Council* [2014] NSWLEC 88, Sheahan J stated at [53] that the s 250(1)(e) order was made “[b]y way of penalty, and in lieu of a fine”.



### Prosecution costs<sup>552</sup>

In one-third (39 of 118) of cases, prosecutor's costs were not assessed (ie not available) at the time of sentencing. Where known, for a single pollute waters offence under the current *POEO Act* (n=27), the average prosecutor's costs were \$64,666 (median: \$51,000), and ranged from a low of just over \$10,000<sup>553</sup> to a high of \$344,189 in the case of *EPA v Queanbeyan City Council (No 3)*, where the costs paid to the prosecutor represented over 80% of the overall disbursements to be paid by the defendant.<sup>554</sup>

For a single pollute waters offence that was fined with prosecutor's costs known at sentence (n=13), the average cost of the prosecution was \$57,677 (median: \$59,645).

Historically, for a single pollute waters offence prosecuted under the *POEO Act* (fined or receiving an Additional Order, n=58), costs averaged \$40,391 (median: \$28,250) or more than four times greater than the equivalent average prosecutor's costs under the *CW Act* (n=8; mean: \$9,028; median: \$5,375). Before 30 April 2006, the average prosecutor's costs for a single offence under the *POEO Act* (fined or receiving an Additional Order, n=32) was \$22,287 (median: \$16,500) compared with an average of \$62,874 (median: \$46,635) under the *POEO Act* after that date (n=26). Therefore, aside from the statutory maximum penalty substantially increasing under the *POEO Act*,<sup>555</sup> pollute waters offenders were also subject to substantial increases in prosecutor's costs.

### "Total" cost

"Total" cost refers to the sum of the fine amount or the environmental services order payment plus the prosecutor's costs (where known), where two of these monetary orders were made and the amounts were specified in the judgment.<sup>556</sup>

For a single pollute waters offence committed under the current *POEO Act*, the average "total" cost where the penalty was a fine and prosecutor's costs were known (n=13) was \$141,023 (median: \$113,390). The greatest total monetary impost borne by a single offence defendant was again in the case of *EPA v CSR Building Products Ltd*, where the corporate defendant was ordered to pay a total of \$438,407 comprising prosecutor's costs of \$158,407 and a fine of \$280,000.<sup>557</sup>

For a single pollute waters offence committed under the current *POEO Act* where the penalty was *not* a fine but an environmental services order payment (n=13), the average "total" cost — environmental payment plus prosecutor's cost — was \$142,071 (median: \$117,269) and the highest total cost was \$424,189 in the case of *EPA v Queanbeyan City Council (No 3)* comprising an environmental services payment of \$80,000 and costs totalling over \$344,000.<sup>558</sup>

552 Where known, includes all prosecutor's costs and expenses and any investigative costs. In cases, involving more than one convicted offender and the court had ordered that costs be split (for example, in cases where both a corporation and a company director were convicted of the same offence), an equal share of the prosecutor's costs was allocated to each offender unless the court indicated otherwise. For example, in *EPA v Eco Cycle Materials Pty Ltd* [2003] NSWLEC 63 at [28]: "[t]he defendants have agreed to pay the costs of the prosecutor and that is a further matter which counts in their favour in terms of mitigation. The costs that they have jointly agreed to pay are in the sum of \$9,000".

553 *EPA v Nalco Aust Pty Ltd* [2007] NSWLEC 831.

554 [2012] NSWLEC 220. In determining a monetary penalty of \$80,000, which the court directed to a specified environmental project in lieu of a fine, Pepper J took "into account the considerable quantum of costs that the council [the defendant] has agreed to pay": at [280]–[284]. The prosecutor's legal costs were \$343,000 and its investigative costs and expenses were \$1,189: at [286].

555 For a corporation, the maximum penalty for a s 120 offence increased fourfold from \$250,000 to \$1 million. For an individual offender, the maximum penalty for the same offence more than doubled from \$120,000 to \$250,000.

556 "Total" costs does not include other material expenses such as the cost of taking out a publication order pursuant to s 250(1)(a) of the *POEO Act* (or the cost of any other component of the sentence), any extra-curial punishment, or the costs of a clean-up order, whether such costs are specified in the judgment or not.

557 [2008] NSWLEC 224 per Sheahan J at [60]. The "total" cost of \$438,407 was the highest known total cost for any pollute waters offence regardless of regime, whether a fine or environmental payment was ordered, or the number of pollute waters charges and associated offences.

558 (2012) 225 A Crim R 113 at [286]: comprising a s 250(1)(e) environmental services payment of \$80,000 (to be paid to the Murrumbidgee Catchment Management Authority to be used for the Numeralla East Landscape Project), plus prosecutor's legal costs of \$343,000, and the prosecutor's investigative costs and expenses in the sum of \$1,189.



For a single pollute waters offence, prosecutor costs represented, on average, 41% of the “total” cost incurred by pollute waters offenders under the *POEO Act* where a fine was ordered, and 48% where an environment payment was ordered. Prosecutor’s costs ranged from just under 17% of the “total” cost incurred by pollute waters offenders to over 87% in *EPA v Cleary Bros (Bombo) Pty Ltd*. In that case, Lloyd J commented on the apparent disparities in sentencing and outcome in this way:

In the associated case of Waste Recycling and Processing Corporation, Preston J imposed a penalty of \$75,000, ordered the defendant to pay the prosecutor’s costs of \$39,000 and the prosecutor’s investigative costs and expenses of \$7,240, and ordered the defendant to comply with a publication order. This may be contrasted with the present case involving precisely the same offence with precisely the same environmental impact, in which I impose a penalty of \$16,000, an order that the defendant pay the prosecutor’s costs of \$104,000 and the prosecutor’s investigative costs and expenses of \$7,240, and in which I decline to make a publication order ... [a]t first sight [the sentence I impose may] be seen to be somewhat surprising, but it demonstrates that for precisely the same offence there can be vastly different degrees of culpability and vastly different mitigating circumstances.<sup>559</sup>

### *Pollute waters – penalties and costs under the different sentencing regimes*

The legislating of heavier penalties for pollute waters offences demonstrates the seriousness with which these offences are viewed by Parliament and the prominence given to the principle of deterrence to prevent the continuance or recurrence of offending. As noted by the CCA “a sharp upward penalty” is often needed to address a “wilful disregard of statutory obligations”<sup>560</sup> or “a pattern of inadequacy” of sentences.<sup>561</sup>

With the increase in maximum penalty for an offence will come the imposition, in some cases, of higher penalties.<sup>562</sup> With time, the courts will “give effect to the obvious intention of the Legislature” with earlier sentencing patterns being replaced with those more consistent with the new ceiling sentence.<sup>563</sup> The sharper or more sizeable the increase in the maximum penalty for an offence, the more likely the sought after differences in sentencing practices will materialise. However, a doubling of the maximum penalty for a pollute waters offence — as occurred with the repeal of the *CW Act* in July 1999 — should not automatically result in a twofold increase in penalties handed down for *all* water pollution offences. In the same vein, the May 2006 amendments to the *POEO Act* which saw the maximum penalty for corporations quadruple from \$250,000 to \$1 million for a pollute waters offence under s 120, should not effect a 400% increase in the fine amount across all offences.<sup>564</sup> As the CCA proclaimed, this is because, at all times, it is the increased penalty against which the penalty for this particular offence must be measured — offences of low criminality remain offences of low criminality even if the maximum penalty is increased.<sup>565</sup> As the then Chief Judge of the LEC declared in the same year:

the proper approach of the Court must be to assess the relative seriousness of the particular offence in relation to a worst case for which the [new] maximum penalty ... is now provided; that is, the penalty to be imposed is that which correlates upon the scale of penalty set by the legislature from zero to the maximum.<sup>566</sup>

559 [2007] NSWLEC 466 at [175] (citations removed). See **A necessary departure from a conventional sentencing analysis** at [3.1] for further detail.

560 *Cabonne Shire Council v EPA* [2001] NSWCCA 280 per Giles JA at [37] (Hulme and Adams JJ agreeing).

561 *R v Slattery* (1996) 90 A Crim R 519 at 522–523; *R v Jurisic* (1998) 45 NSWLR 209 at 229–230.

562 *ibid*, *R v Slattery* at 524.

563 *ibid*.

564 *Cabonne Shire Council v EPA* [2001] NSWCCA 280 per Giles JA at [37] (Hulme and Adams JJ agreeing). Where a penalty has been increased it is not appropriate to automatically increase any fine by the same proportionate amount: “[Rather,] it remains necessary to address the facts of the particular case, with due regard to the current maximum penalty and the seriousness of the offence and to the need for deterrence thereby indicated together with all other relevant matters.”

565 *ibid*.

566 *EPA v Timber Industries Ltd* [2001] NSWLEC 25 at [33]. Pearlman (then) CJ of the LEC citing *Camilleri’s Stock Feeds Pty Ltd v EPA* (1993) 32 NSWLR 683 at 698.

**Figure 9** shows the average monetary cost to pollute waters offenders based on the sum of the ordered fine amount and prosecutor's costs (where known). These costs are organised by the sentencing regime in force at the time of the commission of the pollute waters offence: between 1991 and 1999, the applicable legislation was the *CW Act*; from 1 July 2002 to the present, the *POEO Act* applied, with increased penalties effective from 1 May 2006.

In the 1990s, under the *CW Act*, the average fine for a single pollute waters offence was around \$17,000 with prosecutor's costs adding, on average, another \$9,000 to the total payment ordered by the court.

In the period from August 1999 to April 2006, when the *POEO Act* operated under lower than the current maximum penalties for pollute water offences (refer to **Table 12**), the average fine amount was almost \$25,200 with prosecutor's costs adding, on average, another \$22,000 to the total payment ordered by the LEC.

The current version of the *POEO Act*, which commenced on 1 May 2006, carries significantly higher fines and monetary costs for water pollution offences. The average fine under this sentencing regime was more than \$83,300 with prosecutor's costs adding, on average, approximately \$57,700. Thus, the average total expense incurred by an offender for a single pollute waters offence under the present sentencing regime, based on cases before the LEC up to 2015 which were sentenced by way of fine, was just over \$141,000.

From the *CW Act* to the earlier version of the *POEO Act*, the average fine increased by almost 150% and mean prosecution costs increased by almost 250%. From the earlier version of the *POEO Act* to its current manifestation (with a fourfold increase in the maximum penalty), average fines more than tripled and mean prosecution costs increased by more than 260%.

Over the 15-year study period, maximum penalties for a Tier 2 pollute waters offence increased substantially: by 800% in the case of an offence committed by a corporation; and by 400% in the case of an offence committed by an individual.<sup>567</sup> At the same time, the average fine has increased by almost 490%, and average prosecutor's costs have increased by close to 640%.

Over the 15-year study period, the average *total* pecuniary payment imposed on a pollute waters offender for a single offence has increased from around \$26,000 to \$141,000 — an increase of 539%.

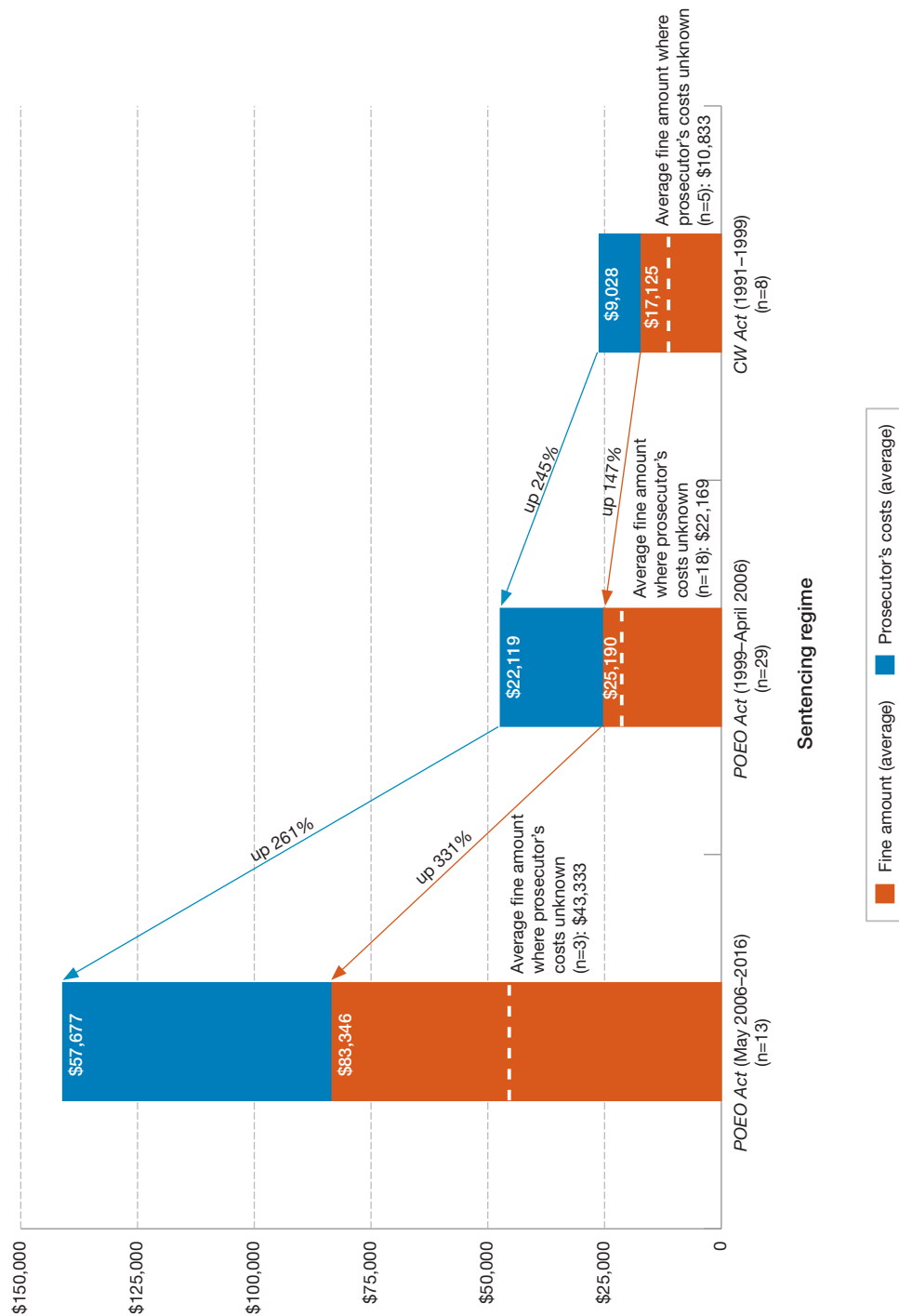
The vexed relationship between the sentence of a fine and the quantum of the prosecutor's costs is further highlighted once the average fine amount is calculated for a pollute waters offence for cases where the prosecutor's costs were *not* available at time of sentencing. Fines were smaller under the *CW Act*, where the prosecutor's costs were unspecified: the average fine with and without the associated costs under the *CW Act* was \$17,125 and \$10,833, respectively. Similarly under the inaugural version of the *POEO Act*, the fine generally tended to be smaller where prosecutor's costs remained unquantified — the average fine where costs were known was \$25,190, and where costs remained unknown was \$22,169. Under the current version of the *POEO Act*, fines were generally lower where costs were unknown: \$43,333, compared with an average fine of \$83,346 where prosecutor's costs were known.

Not having the prosecutor's costs available at time of sentencing would appear to make the LEC more cautious in terms of setting the quantum of a fine, so as to not order a composite pecuniary penalty that is needlessly excessive or out of proportion to the seriousness of the offence. After all, costs can, and do, affect the amount of a fine — even where they are not available to the court — as they are recognised by the court as an “important aspect of the punishment”.<sup>568</sup>

<sup>567</sup> See **Table 12**.

<sup>568</sup> *EPA v Barnes* [2006] NSWCCA 246 at [78] and see **Appendix D** for LEC cases applying *Barnes*.

**Figure 9: Change in fine amounts and quantum of costs orders for pollute waters offences by sentencing regime — single offence, fined, costs specified — 2000 to 2015**



A fine is often converted by the LEC to an environmental services payment utilising the provisions of s 250(1)(e) of the *POEO Act*. As detailed earlier, the average environmental services payment is higher than the average fine for a single pollute waters offence. **Figure 10** shows the corresponding monetary costs to pollute waters offenders reflecting the sum of the environmental services payment order and the prosecutor's costs (where known). Once again, a breakdown is provided by sentencing regime.<sup>569</sup>

In the period when the *CW Act* was operating, the only estimate for an environmental services payment comes from *EPA v Brucic*.<sup>570</sup> In this case, the LEC ordered rectification works estimated in the range of \$7,000 to \$10,000. A \$6,000 fine was also ordered. The reasonable costs of the prosecutor were to be agreed or assessed; a broad estimate of prosecutor's costs under the *CW Act* suggests that another \$9,000 could have been added to the total amount paid by this offender.<sup>571</sup>

In the period when the *POEO Act* operated under maximum penalties lower than those currently in place, the average environmental services payment was \$30,000 with prosecutor's costs adding, on average, another \$22,000 to the total payment ordered on the offender.

The *POEO Act*, operating currently with its significantly higher penalties for water pollution offences, recorded a mean environmental services payment of \$74,000 with prosecutor's costs adding, on average, another \$68,000. Thus, the average total expense incurred by an offender for a single pollute waters offence under the present sentencing regime, based on cases before the LEC up to 2015 where an environmental services payment was ordered in lieu of a fine, was just over \$142,000.

With the repeal of the *CW Act* and its replacement by the first version of the *POEO Act*, the average environmental services payment increased by almost 190% with mean prosecution also up by almost 250%. With the latest version of the *POEO Act* (and its substantially raised maximum penalties), the average environmental services payment continued to rise by around 250%, and prosecution costs, on average, more than tripled.

Over the 15-year study period, the average environmental services payment has increased by an estimated 462%, and prosecutor's costs have increased, on average, by over 700%.<sup>572</sup> Therefore, the total pecuniary payment imposed on an offender convicted of a single pollute waters offence, where the fine was commuted into environmental services payment increased, on average, from an estimated \$25,000 to about \$142,000 — a rise of more than 560%.

## 2.4.2 Carry out development without consent/not in accordance with consent

Where a local environment plan or State environmental planning policy provides that a certain type of development is permissible with consent,<sup>573</sup> approval must be sought and obtained to carry out any such development. It is an offence to do otherwise (s 76A). The maximum penalty for a s 76A offence, applicable to both a corporate offender and an individual offender, during the

569 Whereas it was possible to provide estimates of the average fine amount for a single pollute waters offence under each sentencing regime in cases where the prosecutor's costs were not provided, this was not possible where an environmental services payment was ordered in lieu of a fine. There were simply too few (or no relevant) cases to allow such estimations.

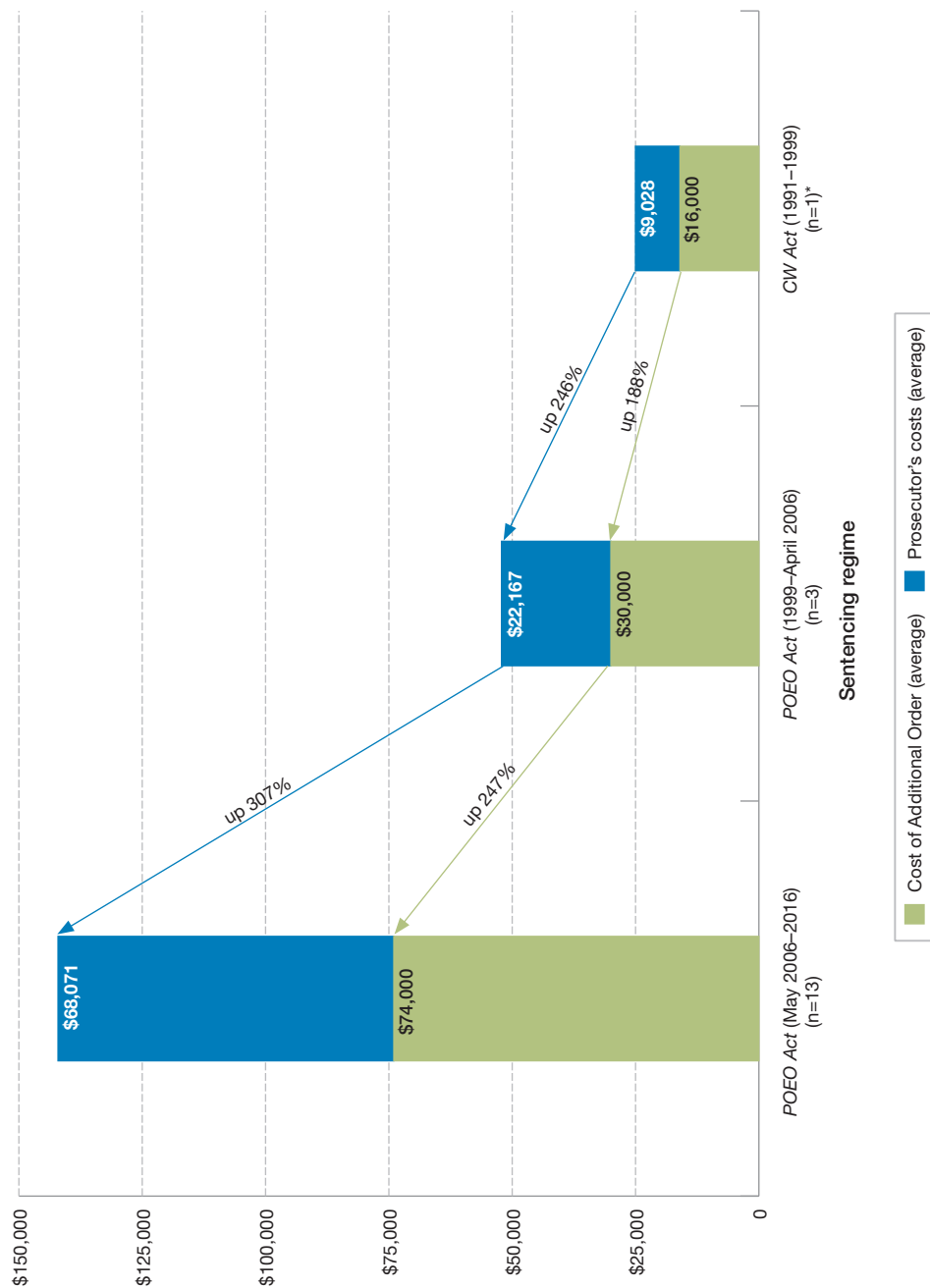
570 [2000] NSWLEC 213. The estimated rectification costs was not in lieu of a fine; a fine was also ordered. The two amounts were combined to better reflect the full quantum of the penalty.

571 For the solitary pollute waters offence under the *CW Act* where an environmental services order was made, the prosecutor's costs was not specified. All disclosed prosecutor's costs for *CW Act* pollute waters were used to create a mean estimate of prosecutor's costs under that Act for this offence.

572 *ibid.*

573 Under the *EPA Act*, two additional broad legislative categories relate to development applications and approvals: development that does not need consent (s 76); and, development that is prohibited (s 76B).

**Figure 10: Change in quantum of Additional Orders and costs orders for pollute waters offences by sentencing regime — single offence, Additional Order in lieu of fine, costs specified — 2000 to 2015**



\* In *EPA v Brusic* [2000] NSWLEC 213, rectification works were estimated to cost between \$7,000 and \$10,000 and the defendant was also fined \$6,000. Unknown costs — average for all other CW Act pollute waters offences used here as an estimate.

study period was 1,000 penalty units, which equates to a maximum fine of \$110,000.<sup>574</sup> The high maximum financial penalty in the legislation indicates Parliament's view of how important it is to comply with, and not undermine, the legislation regulating planning and development.<sup>575</sup>

### Findings

In total, there were 78 principal offences aggregated under this category:

- 50 cases of s 76A(1)(a) offences under the *EPA Act* — “Development carried out without a development consent”
- 25 cases of s 76A(1)(b) offences under the *EPA Act* — “Development not carried out in accordance with consent”, and
- three miscellaneous environmental planning offences under the same Act
  - one case of s 75D(2): “Fail to comply with conditions of approval”,
  - one case of s 121B(1)(14): “Fail to repair or remove a building contrary to order”, and
  - one case of s 121B(1)(19): “Fail to cease specified building work or subdivision work”.

The 78 development without consent offences were committed reasonably equally by corporations (33%), small business owners (31%) and “ordinary Joe” individuals (36%).

### Financial gain

Only one-quarter (24%) of the development without consent offences were identified as being committed for financial advantage. However, a not uncommon feature of these breaches of planning laws was a “personal gain” aspect that did not necessarily translate into a direct financial advantage. For example, in *Cowra Shire Council v Fuller*, the offender's demolition of a rural homestead of heritage significance was “planned and deliberate” to “prevent the Prosecutor from issuing an Interim Heritage Order or listing the building as a heritage item”. This allowed the offender to replace the original building with a new residence.<sup>576</sup>

### Penalties

In 63 cases, a fine was the penalty ordered. In eight cases (10%), an Additional Order — typically for the convicted offender to undertake remediation work — was ordered as well as a fine.

In addition, five defendants were given s 10 dismissals and one was given a s 10 bond. One s 10A conviction without further penalty was imposed. Three of the s 10 dismissals were associated with the defendant also receiving a remediation order of some type.

574 *Protection of the Environment Legislation Amendment Act 2011*, Sch 2, cl [14], amended s 215(2) by replacing the reference to “200 penalty units” with “1,000 penalty units” (effective 6 February 2012). Section 215(2) (as amended) provides: “If any such proceedings are brought in the Local Court, the maximum monetary penalty that the Court may impose for the offence is 1,000 penalty units, despite any other provision of this Act”. One penalty unit is \$110: *CSP Act*, s 17.

575 The regulation of planning and development also includes an emphasis on proper certification and accreditation under ss 81A and 109E of the *EPA Act*; see, for example, *Council of the Municipality of Kiama v Micallef* [2009] NSWLEC 202 per Sheahan J at [13].

576 [2015] NSWLEC 13 per Pain J at [15]. Pain J further noted at [16]: “The reason for committing the offence was to facilitate the construction of a new dwelling on the same property. The construction of that dwelling was not permissible under the 1990 LEP unless the Shiel homestead was demolished. While not direct financial gain there was a significant personal gain to the Defendant (subs (o))”. The Shiel homestead “possessed rare heritage significance at the local level”: at [47]. The defendant was fined \$175,000 plus costs: at [37].



### *Fine amounts*

For a single development without consent offence committed under the provisions of the *EPA Act* that applied during the study period,<sup>577</sup> and where the prosecutor's costs were known, the average fine amount (n=21) was \$33,529 (median: \$17,500). The largest fine imposed (where prosecutor's costs were known or, for that matter, unknown) was \$200,000 in the case of *Minister for Planning v Coalpac Pty Ltd*.<sup>578</sup>

The average fine amount for a single development without consent offence, where costs were unspecified at time of sentencing (n=36), was \$28,181 (median: \$17,000).

### *Remediation costs*

There were 14 cases where, following a conviction for development without consent offence, the offender was ordered to remediate the property affected by the illegal building work. In 10 such cases, the cost of the remediation work was not recorded (or assessed). In the four cases where the dollar value of the remediation work was identified, the most costly remediation work was valued at \$15,000 (two instances; one involving the defendant receiving a s 10 dismissal and agreeing to undertake the reparations), another was costed at \$8,000 (again involving a s 10 dismissal with the defendant agreeing to undertake the reparation work), and the last was recorded with an estimated cost of \$1,200.

### *Prosecution costs*<sup>579</sup>

In the seven cases (9%) where the court did not order a fine, the defendants were not required to pay the prosecutor's costs. Where recorded against a single development without consent offence, the prosecutor's costs averaged at \$25,457 (median: \$20,500), and ranged from a low of \$1,100 to a high of \$80,000.<sup>580</sup>

### *"Total" cost*

There were only four cases where remediation was ordered and an assessment given to the value of such a project. In just one of these four cases, were all three pecuniary payments of fine, value of reparation order and prosecutor's costs recorded.<sup>581</sup>

Overall, the average combined cost to the offender for a conviction made by the LEC for a development without consent offence involving the order of a fine and known prosecutor's costs (n=21) was \$58,986 (median: \$42,500).

Prosecutor costs represented, on average, 43% of the combined monetary payments incurred by offenders prosecuted for a single development without consent offence; and such costs ranged from 6% to almost 86% of the "total" cost incurred by these offenders.

<sup>577</sup> See **Environmental planning offences** at [2.3.2] and above n 574.

<sup>578</sup> [2008] NSWLEC 271. Upon conviction for the s 75D offence under the *EPA Act*, Biscoe J imposed a \$200,000 fine but ordered that half the fine be paid to the prosecutor pursuant to s 122 of the *Fines Act* 1996. This was in addition to prosecutor's costs of \$55,000: at [60]. Similar use of s 122 of the *Fines Act* 1996 was made by his Honour in *Minister for Planning v Hunter Quarries Pty Ltd* [2010] NSWLEC 246 and by Preston CJ of the LEC in *Secretary, Dept of Planning and Environment v Boggabri Coal Pty Ltd* [2014] NSWLEC 154.

<sup>579</sup> Where known, includes all prosecutor's costs and expenses and any investigative costs.

<sup>580</sup> The prosecutor's legal and investigative costs in *Maitland City Council v Link Building Services Pty Ltd* [2008] NSWLEC 71 related to "some forty-five items of building work" to a hotel that "were carried out not pursuant to any consent": at [10]. Lloyd J convicted and fined the defendant \$17,500.

<sup>581</sup> In *Campbelltown City Council v Josevski* [2009] NSWLEC 29, per Biscoe J at [48], the defendant was convicted of the offence and fined \$10,000; the tree planting and maintenance order was costed at approximately \$1,200 (at [45]); and the prosecutor's costs were estimated in the range of \$15,000 to \$20,000: at [44].

### 2.4.3 Contravene any condition of licence

Failure to comply with the conditions of an environmental protection licence is an offence (unless the licence holder establishes a defence under s 64(2) of the *POEO Act*).<sup>582</sup> Contravening the conditions of an environmental protection licence is a serious offence attracting substantial monetary penalties, as specified under s 64(1):

Maximum penalty:

- (a) in the case of a corporation — \$1,000,000 and, in the case of a continuing offence, a further penalty of \$120,000 for each day the offence continues, or
- (b) in the case of an individual — \$250,000 and, in the case of a continuing offence, a further penalty of \$60,000 for each day the offence continues.

Note. An offence against subsection (1) committed by a corporation is an offence attracting special executive liability for a director or other person involved in the management of the corporation — see section 169.<sup>583</sup>

As Bignold J stated in *EPA v Collex Pty Ltd*, the offence is a “status offence”:

in that it imposes liability for a contravention of a condition of licence on “the holder of the licence” in respect of which liability subsection (2) provides a composite statutory defence (to be established by the holder of the licence). The offence is classified as a Tier 2 offence: vide s 114(2) and is an offence of strict liability: cf *State Pollution Control Commission v Broken Hill Prop. Corp Ltd (No 1)* (1991) 74LGRA 351.<sup>584</sup>

### Findings

In total, there were 55 principal offences aggregated under this category: 50 cases of s 64(1) offences under the *POEO Act* — “Failure to comply with condition (of licence)”; and, five cases of “Occupier of premises with scheduled activity not hold licence” (s 48(2) of the *POEO Act*).

In the vast majority of cases, the contravene licence offence was committed by a corporation (51 cases, 93%). In the remaining cases, the “individual” offender was a s 169 “special liability” offender (5.5%, three cases) or a small business owner (2%, one case).

### Financial gain

One in every six (16%) contravene licence offences in the study period were identified as being committed for financial advantage.

### Penalties

In one case, the offender received a s 10 dismissal (no conviction recorded). In 26 cases a fine was the only penalty given. In a further 13 cases an Additional Order (re s 250) was imposed as well as a fine. The remaining 15 cases involved solely an Additional Order under s 250 of the *POEO Act* with no further penalty imposed.

An Additional Order was imposed in a total of 28 cases of contravene licence. In 17 such cases, the court ordered that the offender undertake environmental remediation work: s 250(1)(c). The remaining 11 cases involved the offender having to make public the details of the offence and its environmental consequences by way of a notice published in a newspaper (and/or annual report): s 250(1)(a) and (b).

<sup>582</sup> Environmental Defenders Office NSW, above n 286, p 82.

<sup>583</sup> The maximum penalties and penalty date ranges for pollute waters offences in **Table 12** also apply to failure to comply with conditions (of licence) offences. Prior to 1 May 2006, a legislative distinction in licence contraventions involving noise existed under s 64(1). The maximum penalty for an offence relating exclusively to noise was substantially lower.

<sup>584</sup> (2001) 115 LGERA 337; [2001] NSWLEC 177 per Bignold J at [3].

### *Fine amounts*

For a single contravene licence offence, fined and with known prosecution costs (n=15), the average fine amount for contravene licence offences was \$29,040 (median: \$26,000). The largest fine imposed across the study period for this type of offence was \$90,000<sup>585</sup> and the smallest was \$3,000.<sup>586</sup>

### *Remediation costs*

As indicated, there were 17 cases where, following a conviction for a contravene licence offence, the offender was ordered to undertake work to remediate the environmental damage caused, or to make reparation to the community for the commission of the environmental offence.

In one case, the cost of the environmental work ordered was not given. In another case, the LEC held that the sole director of a licenced waste disposal business was liable for the substantial clean-up relating to the offence and ordered the director to pay the EPA's clean-up costs of approximately \$88,000 plus an additional \$376,000 to the owners of the leased property where the waste disposal business operated also for clean-up costs.<sup>587</sup>

In the 16 cases where the dollar value of the environmental remediation or restoration work was identified, the most expensive remediation/restoration work was costed at \$175,000 (twice, both cases involving Orica Aust Pty Ltd).<sup>588</sup>

The average cost for the environmental remediation/restoration work ordered (n=16) was \$95,083, and the median cost was \$59,500.

### *Prosecution costs*<sup>589</sup>

In 34 of the 55 cases (62%) involving contravene licence offences were prosecutor's costs (or an estimate) recorded in the judgment. Where recorded, the prosecutor's costs averaged at \$26,444 (median: \$20,000), and ranged from a low of \$4,500 to a high of \$79,000 in the case of *EPA v Hochtief AG*, where payments to the prosecutor represented almost 77% of the total monetary payments ordered by the LEC.<sup>590</sup>

For a single offence receiving a fine (n=15), the disclosed prosecutor's costs averaged at \$13,931 (median: \$12,000).

585 *EPA v Incitec Ltd* [2003] NSWLEC 381. Note, in *EPA v HTT Huntley Heritage Pty Ltd* [2003] NSWLEC 142, the defendant was engaged in the rehabilitation of the Huntley Colliery at Avondale and held an environment protection licence in respect of its activities. One condition of the licence limited the nature of waste material that could be brought upon the site to virgin excavated natural material or non-hazardous bulk agricultural or crop waste. It was found that the defendant had accepted approximately 37,000 tonnes of construction and demolition waste materials that included potentially environmentally harmful concentrations of both lead and asbestos. Pearlman J imposed a fine of \$117,000 which included a daily penalty of \$3,000 for each of the 19 days where the defendant continued to accept construction and demolition waste in contravention of its licence: at [33].

586 *EPA v Land Foam Aust Pty Ltd* [2013] NSWLEC 128, Biscoe J detailing at [16]–[28] “the extraordinary circumstances” that led to the offence being committed.

587 *EPA v Buchanan (No 2)* (2002) 165 LGERA 383; [2009] NSWLEC 31.

588 Orica Australia Pty Ltd ([www.orica.com](http://www.orica.com)) is an Australian-based multinational corporation that is the largest single supplier of commercial explosives and blasting systems to the mining, quarrying and infrastructure sectors, and a leading global supplier of mineral processing chemicals and services. Orica appeared as the defendant in eight of the 55 (14.5%) cases before the LEC for contravene licence offences across the study period. In chronological order, the following are the penalties that Orica received for the eight identified contravene licence offences: a fine of \$10,500; and, seven separate environmental restoration projects costed at \$70,000, \$122,500, \$87,500, \$175,000, \$175,000, \$35,000 and \$35,000.

589 Where known, includes all prosecutor's costs and expenses and any investigative costs.

590 *EPA v Hochtief AG* [2006] NSWLEC 200. The percentage (76.7%) was calculated on the basis of the total monetary payment being a fine of \$24,000 for the *principal* offence and prosecutor's costs of \$79,000. An additional fine of \$20,000 was ordered for a second offence.

### “Total” cost

There were only seven cases of contravene licence offences dealt with by the LEC where all costs — fine amount, prosecutor’s cost and remediation/restoration order amount — were recorded in the judgment. For these seven cases, the average “Total” cost was \$117,254 with a median value of \$91,500.

For a single offence, fined, with known costs (n=15), the average total financial “hit” taken by the offender was \$42,971, within a range of \$9,500 to \$110,000. For this set of offences, costs represented between 15% and 64% of the total amount to be paid by the offender.

In those cases (n=7) where the contravene licence offender also bore the cost of an environmental remediation/restoration project, the prosecutor’s cost ran at around 39% of the “Total” monetary payments ordered for a s 64 offence (within a range of 27.3% to 58.8%). In this set of cases, the total monetary payments imposed on the offender ranged from \$65,883 to \$240,627.

## 2.4.4 Unlawfully transport and/or dispose waste

The unlawful waste offences included under this category include the Tier 2 offences under ss 143, 144 and 144AA of the *POEO Act*. Not included are cases of the Tier 1, s 115 offence: “Disposal of waste — harm to environment”, which involves a person or corporation wilfully or negligently disposing of waste in a manner that harms or is likely to harm the environment.<sup>591</sup>

Section 143 of the *POEO Act* refers to the “unlawful transporting or depositing of waste”. Section 144 of the same Act refers to the “Use of place as waste facility without lawful authority” and s 144AA refers to the supply of “False or misleading information about waste”. Also included are ss 63–64 offences under the repealed *Waste Minimisation and Management Act* 1995 (*WMM Act*), which ss 143 and 144 effectively replaced.

Definitions of “waste” and “waste facility” are found in the current version of the *POEO Act*:

“waste” includes:

- (a) any substance (whether solid, liquid or gaseous) that is discharged, emitted or deposited in the environment in such volume, constituency or manner as to cause an alteration in the environment, or
- (b) any discarded, rejected, unwanted, surplus or abandoned substance, or
- (c) any otherwise discarded, rejected, unwanted, surplus or abandoned substance intended for sale or for recycling, processing, recovery or purification by a separate operation from that which produced the substance, or
- (d) any processed, recycled, re-used or recovered substance produced wholly or partly from waste that is applied to land, or used as fuel, but only in the circumstances prescribed by the regulations, or
- (e) any substance prescribed by the regulations to be waste.

A substance is not precluded from being waste for the purposes of this Act merely because it is or may be processed, recycled, re-used or recovered.<sup>592</sup>

Notably, with regard to the operation of the *EPA Act*, its associated regulations provide an interpretation of what constitutes “waste” with similar qualifications around its reuse or “value” for re-purposing:

“waste” includes any matter or thing whether solid, gaseous or liquid or a combination of any solids, gases or liquids that is discarded or is refuse from processes or uses (such as domestic, medical, industrial, mining, agricultural or commercial processes or uses). A substance is

<sup>591</sup> As with s 120 pollute waters offences, the *De Simoni* principle applies to ss 143 and 144 waste offences.

<sup>592</sup> *POEO Act*, Dictionary (Last updated 31 March 2017 — current at 18 May 2017: *JIRS*). Prior to 1 May 2006, the definition of “waste” under s 143(4) of the *POEO Act* was as follows:

‘waste’ includes any unwanted or surplus substance (whether solid, liquid or gaseous). A substance is not precluded from being waste merely because it may be reprocessed, re-used or recycled.

not precluded from being waste for the purposes of this Schedule merely because it can be reprocessed, re-used or recycled or because it is sold or intended for sale.<sup>593</sup>

The CCA was required to determine what constitutes “waste” in two cases — *Shannongrove Pty Ltd v EPA*<sup>594</sup> and *EPA v Terrace Earthmoving Pty Ltd*<sup>595</sup> — heard by that court “as companion cases raising similar issues” with regard to the reuse of discarded matter.<sup>596</sup>

In *Shannongrove*, the CCA considered the conduct of a soil preparation service company which was contracted by the operator of a large waste and recycling facility in Eastern Creek (Western Sydney) to dispose of liquid by-products resulting from its recycling operations. The liquid by-products had “no utility in the operation of the facility” and were discarded by the facility — in fact, the recycling facility paid “for their removal from its site”.<sup>597</sup> The contracted company transported this liquid by-product on multiple occasions to a dairy farming property (that was not licensed to receive waste) where it was injected into the soil as a liquid fertilizer.<sup>598</sup> The CCA found that the correct approach was to consider whether the owner of the material at the time transportation was arranged<sup>599</sup> had a continuing use for the material (which the operator of the recycling facility clearly did not); thus, the liquid material constituted waste, at least until it was applied lawfully (which it was not) to a new use.<sup>600</sup> The *POEO Act* does not preclude a substance from being a waste “merely because it is or may be processed, recycled, re-used or recovered”.<sup>601</sup> The future use, usefulness, value and utility of a substance does not preclude it being recognised as a waste at the time it is unwanted and discarded by its (former) owner.<sup>602</sup> While it was argued by the applicant that the liquid by-products were ‘wanted’ from the moment they were loaded into the tanker until they were accepted by the owner of the farming property and reused as liquid fertiliser, “with the consequence that they did not constitute ‘waste’ at any point during transportation”, the CCA at [34] rejected this submission:

because it cannot stand with the statutory scheme. If correct, it would follow that no material, whilst in transit, was waste, so long as it was transported as part of a business and that the intended recipient accepted it willingly. Nor did it assist to characterise the liquid as having a beneficial use when disposed of on the farmland.<sup>603</sup>

*EPA v Terrace Earthmoving* was decided similarly. In that case, material comprising demolition waste including concrete, metal, bricks, plastic, soil and asbestos were transported by truck by an earthmoving and building-demolition company to a small rural property where it was to be used as road base to construct a new internal access road. There was no development consent to receive the waste nor did the owners of the property hold an environment protection licence to receive the

593 *Environmental Planning and Assessment Regulation* 2000, Sch 3, Pt 4, cl 38 “Definitions”.

594 [2013] NSWCCA 179.

595 [2013] NSWCCA 180; (2013) 84 NSWLR 679.

596 *ibid*, at [4]. The CCA hearing dates for the companion “waste” cases was 16 May 2013; the decision date for both cases was 5 August 2013.

597 *EPA v Shannongrove Pty Ltd* [2010] NSWLEC 162 per Craig J at [2].

598 *ibid* at [3].

599 As stated by Basten ACJ in *Shannongrove* (*ibid* at [12]) in debating what is “any unwanted or surplus substance”, the question to be posed is: “unwanted by whom ... Is the relevant perspective that of the owner of the substance prior to transportation, the transporter, or the person (if any) with whom the substance is to be deposited?” His Honour held that within the definition, “unwanted” and “surplus” designated a characteristic of the substance which demonstrates a state of mind of the owner consistent with not needing or wanting it: at [26], [29].

600 *ibid* per Basten ACJ at [29], [33]–[34] (Hall J and Barr AJ concurring).

601 *POEO Act*, Dictionary.

602 In the NZ Court of Appeal case, *Carter Holt Harvey Ltd v North Shore City Council* [2008] 1 NZLR 744, Wilson J determined at [36] that in the case of used and unwanted paper, left at the kerb for collection or delivered to a recycling centre, has obviously been abandoned by its former owner and, therefore, constitutes “waste”. However, the recycled paper that the paper manufacturer (Carter Holt Harvey) *bought via contract* from various operators has “equally clearly” not been abandoned and is, therefore, not “waste”. It was found that Carter Holt Harvey acquires a second-hand good for consideration rather than collecting discarded and unwanted “waste”.

603 *EPA v Shannongrove Pty Ltd* [2010] NSWLEC 162 per Basten ACJ (Hall J and Barr AJ agreeing) at [34].



transported waste materials.<sup>604</sup> The statutory context required the consideration of whether the owner of material at the time transportation *commenced* had a continuing use for the material, *not* the other parties: not the hauler (who was paid to transport the waste building materials); and, not the landowner of the property to which the substance was transported (who needed the building waste as road base for an internal thoroughfare):

In ordinary parlance, waste refers to unwanted by-products of a process and to an object (or substance) which the owner had, but no longer has, a use for and discards or abandons. In respect of the first category, being unwanted by-products of a process, the question is not whether they are “capable” of being used for some other purpose, nor whether there is a “market” for such material. Similarly, in relation to items for which the owner had, but no longer has, a use, the question is not whether some other person might conceivably want the item.<sup>605</sup>

It would make a mockery of the statutory provisions of s 143 of the *POEO Act* if a waste transport business (or other carrier) licensed to remove “waste” materials could consider the materials it collected and was transporting as “non-waste” simply because the substance had some value or use to another party, including the transporter or the receiver of the waste. As the CCA declared at [28] in *Terrace Earthmoving*: “[i]f that was correct, there would be virtually no case in which an offence would be committed under s 143(1)”.<sup>606</sup>

The community views land pollution and the illegal dumping of waste, particularly if contaminated by hazardous substances such as asbestos, as extremely serious. As stated in *EPA v Hanna*:

the legislature has prescribed a highly regulated scheme for the disposal of waste. This is undoubtedly due to the harm to the environment, including risk to human health, which is, or may potentially be caused by the improper disposal of waste. By reference to the definitions of both “pollution” and “harm” found in the *POEO Act*, disposal of waste other than at a licensed facility is taken, for the purposes of the *POEO Act*, to have caused environmental harm.<sup>607</sup>

The maximum penalty is Parliament’s expression of the seriousness of the offence<sup>608</sup> (see **Table 13** for details of waste offences and maximum penalties under current and previous legislation).

The current maximum penalty for each waste offence is:

Where the offender is a *corporation*:

- s 143 offence – \$1,000,000
- s 144 offence – \$1,000,000 plus \$120,000 per day
- s 144AA(1) offence – \$250,000
- s 144AA(2) offence – \$500,000.

Where the offender is an *individual*:

- s 143 offence – \$250,000
- s 144 offence – \$250,000 plus \$60,000 per day
- s 144AA(1) offence – \$120,000
- s 144AA(2) offence – \$240,000 or 18 months’ imprisonment or both.

604 *EPA v Terrace Earthmoving Pty Ltd* [2012] NSWLEC 216 per Craig J at [12].

605 *ibid* per Basten ACJ at [26].

606 The statutory definition of waste was considered by the LEC in two cases. In *Director-General, Dept of Planning and Infrastructure v Glass Recovery Services Pty Ltd* [2015] NSWLEC 49, Pain J found at [62] that:

the defendant paid for the transport and/or supply of the glass material from a number of [material recovery facilities (MRF)] ... [which] weighs against the proposition that the material was waste at the time the Defendant received it. Rather, it suggests that the Defendant received a resource that had been processed from waste by a MRF ... to bring [it] to the point where [it] become[s] a finished product.

In *EPA v Foxman Environmental Development Services* [2015] NSWLEC 105, the defendants transported recycled building and construction materials between two sites it owned — a recycling plant and a rural property on which a residential home was being built with development consent. While the defendants claimed (at [6]) that the material was “fit for [the defendants’] purpose(s), namely use as fill and road base”, Sheahan J found (at [192]) that “the material did not have the benefit of any of the [EPA’s] exemptions [detailed at [102]–[104]] ... it was ‘waste’, and should have been disposed of at licensed landfill”. The transported waste was also contaminated with lead, asbestos and other pollutants: at [149]–[150].

607 [2010] NSWLEC 98 per Craig J at [38].

608 *ibid* per Craig J at [40] citing *Camilleri’s Stock Feeds Pty Ltd v EPA* [1993] 32 NSWLR 683 at 698.



**Table 13: NSW waste offences legislation: present and past statutory offences and associated maximum penalties – Tier 2 offences**

Act		Section	Offence	Maximum penalty (Fine)	Penalty date range
Corporations					
Current	POEO Act	143	Unlawful transporting or depositing of waste	\$1,000,000	29/08/2014–present
		144	Use of place as waste facility without lawful authority	\$1,000,000 + \$120,000 per day	01/10/2013–present
		144AA(1)*	Supply false or misleading information about waste	\$250,000	01/05/2006–present
		144AA(2)	Knowingly supply false or misleading information about waste	\$500,000	01/10/2013–present
Previous (all repealed)	POEO Act	143	Unlawful transporting or depositing of waste	\$1,000,000	01/05/2006–28/08/2014
		143	Unlawful transporting or depositing of waste	\$250,000	01/07/2002–30/04/2006
		143	Unlawful transporting or depositing of waste	\$250,000	01/07/1999–30/06/2002
	WMM Act	63(1)	Dispose of waste on land without lawful authority	\$125,000 + \$60,000 per day	19/01/1996–30/06/1999
	POEO Act	144	Use of place as waste facility without lawful authority	\$1,000,000 + \$120,000 per day	01/05/2006–30/09/2013
		144	Use of place as waste facility without lawful authority	\$250,000 + \$120,000 per day	01/07/1999–30/04/2006
	WMM Act	64(1)	Allow land to be used as waste facility without lawful authority	\$125,000 + \$60,000 per day	19/01/1996–30/06/1999
	POEO Act	144AA(1)*	Supply false or misleading information re asbestos waste	\$250,000	01/05/2006–28/08/2014
Individuals					
Current	POEO Act	143	Unlawful transporting or depositing of waste	\$250,000	29/08/2014–present
		144	Use of place as waste facility without lawful authority	\$250,000 + \$60,000 per day	01/10/2013–present
		144AA(1)*	Supply false or misleading information about waste	\$120,000	01/05/2006–present
		144AA(2)	Knowingly supply false or misleading information about waste	\$240,000 or 18 months' imprisonment or both	01/10/2013–present
Previous (all repealed)	POEO Act	143	Unlawful transporting or depositing of waste	\$250,000	01/05/2006–28/08/2014
		143	Unlawful transporting or depositing of waste	\$120,000	01/07/2002–30/04/2006
		143	Unlawful transporting or depositing of waste	\$120,000	01/07/1999–30/06/2002
	WMM Act	63(1)	Dispose of waste on land without lawful authority	\$60,000 + \$30,000 per day	19/01/1996–30/06/1999
	POEO Act	144	Use of place as waste facility without lawful authority	\$250,000 + \$60,000 per day	01/05/2006–30/09/2013
		144	Use of place as waste facility without lawful authority	\$120,000 + \$60,000 per day	01/07/1999–30/04/2006
	WMM Act	64(1)	Allow land to be used as waste facility without lawful authority	\$60,000 + \$30,000 per day	19/01/1996–30/06/1999
	POEO Act	144AA(1)*	Supply false or misleading information re asbestos waste	\$120,000	01/05/2006–28/08/2014

\* Section 144AA(1) of the *POEO Act* was inserted by the *Protection of the Environment Operations Amendment Act* 2005 and commenced on 1 May 2006. This subsection has been subject to amending legislation, namely the *Protection of the Environment Operations Amendment (Illegal Waste Disposal) Act* 2013 which, inter alia, inserted s 144AA(2).

The offence under s 144AA(1) regarding the supply of “false or misleading information about waste” has remained unaltered since first introduced in May 2006. However, the *Protection of the Environment Operations (General) Regulation* 2009 specified differing infringement notice amounts for this section (with the same court maximum penalties, nonetheless) for supplying false or misleading information about asbestos waste, and for supplying false or misleading information about waste (not asbestos). Later, the *Protection of the Environment Operations (General) Amendment (Fees and Penalty Notices) Regulation* 2014, which commenced on 29 August 2014, removed the distinction between types of waste offences under s 144AA(1).

Penalties reflect “the community’s stern policy against pollution”. In the context of this maximum penalty, the fine to be imposed must be sufficient to deter others, particularly businesses, from offending rather than treating the risk of being caught and receiving a fine as a “cost of business”:<sup>609</sup>

An offender who operates a business unlawfully, such as unlawfully transporting and dumping waste without incurring the necessary costs and expenses for transporting waste lawfully and depositing it at a place that can lawfully be used as a waste facility, secures an unfair advantage compared to the offender’s law abiding competitors who incur the costs and expenses of operating lawfully. The offender has been unjustly enriched. Punishment is necessary to remove that unjust enrichment from the offender and so secure a just equilibrium — a level playing field — on behalf of those who are willing to be law abiding.<sup>610</sup>

The moral condemnation of dumping waste has been emphasised by recent legislative amendments regarding repeat waste offenders and increasing the penalties prescribed for penalty notice offences, including waste offences.<sup>611</sup>

The unlawful dumping of waste poses a significant problem for local councils and the EPA, with considerable resources devoted to combating it.<sup>612</sup> Landowners who have waste unlawfully deposited on their land often bear significant clean-up costs which may not be recovered given that the origins of the waste and the offender committing the offence often will remain unknown and unidentified.<sup>613</sup>

The courts have repeatedly stated, when sentencing for environmental offences, that the sentence of the court needs to be of such magnitude as to change the economic behaviour of persons in determining whether to comply with or contravene environmental laws. Manifestly, it should not be cheaper to offend than to prevent the commission of the offence:

Environmental crime will remain profitable until the financial cost to offenders outweighs the likely gains by offending. The amount of any fine needs to be such as will make it worthwhile to incur the costs of complying with the law and undertaking the necessary precautions. The amount of the fine must be substantial enough so as not to appear as a mere licence fee for illegal activity. In this way, the sentence of the court changes the economic calculus of persons who might be tempted not to comply with environmental laws or not to undertake the necessary precautions. Compliance with the law becomes cheaper than offending. Environmental crimes become economically irrational.<sup>614</sup>

### ***Waste offences and prosecution costs***

Offenders who commit waste offences are typically charged with more than one offence. The data revealed that of 11 of the 15 (73%) waste offenders convicted under the current sentencing regime of the *POEO Act* committed more than one offence. Calculating prosecution costs as a percentage of the principal penalty would give a distorted impression because of the operation of the principle of totality. Where an offender has committed more than one offence, the principle of totality requires the court to impose a penalty to reflect the total criminality of the offender. Adding two or more sentences which may individually be appropriate may result in a total sentence which is excessive, having regard to the totality of the criminality.<sup>615</sup> Fines cannot be made “concurrent” unlike imprisonment. The orthodox approach to totality requires the court to assign an appropriate fine for each offence, adjust each amount downwards, and then aggregate each to determine a

609 *ibid* citing *Axer Pty Ltd v EPA* (1993) 113 LGERA 357 at 359.

610 *Bankstown City Council v Hanna* [2014] NSWLEC 152 per Preston CJ of the LEC at [149].

611 *ibid* at [144]–[145].

612 *EPA v Hanna* [2010] NSWLEC 98 per Craig J at [42].

613 *ibid*.

614 *Bankstown City Council v Hanna* [2014] NSWLEC 152 per Preston CJ of the LEC at [152] (citations removed).

615 *R v Holder* [1983] 3 NSWLR 245 per Street CJ at 260.

total fine amount.<sup>616</sup> The total fine amount must reflect the overall criminality of the offender. The degree of the adjustment of individual fines is a discretionary decision and will depend on the circumstances of the offending. One factor which affects the degree of adjustment is whether the offences committed are part of a single course of conduct, or the charges arose out of a single episode.<sup>617</sup> In those cases, there will be a greater adjustment than if the offences are separated in time.

An analysis of the waste offence cases revealed that it was very common for offences to arise from a single course of conduct or episode. The cases below, which all involved the commission of more than one waste offence, illustrate the point:

- *EPA v Aargus Pty Ltd; Kariotoglou; Kelly*: “[given] the two offences committed by each defendant ‘took place at about the same time and involved the same set of facts’ ... it is appropriate to apply the totality principle”.<sup>618</sup>
- *EPA v Wyong Shire Council*: “[there was a] ... close correlation between use of the two Sites and the single purpose that informed that use ... [therefore, it was] ... ‘just and appropriate’ to reduce the penalty that would otherwise result if the two monetary penalties ... were aggregated”.<sup>619</sup>
- *EPA v Aust Pacific Oil Co Pty Ltd*: the court applied the totality principle in relation to each of the six offences to determine the overall criminality and then made downward adjustments in the penalty.<sup>620</sup>
- *EPA v Richardson; EPA v Behnfeld*: “there should be a downward adjustment of the penalty in respect of the second offence, following an assessment of the overall criminality involved in the two offences”.<sup>621</sup>
- *EPA v Ashmore*: “the single purpose of both offences ... was to have the waste removed from [one site] and taken to ... [a rural] property so as to avoid the cost of incurring the [waste disposal] charges ... at a licensed landfill facility able to receive that waste. In that circumstance ... the principle of totality should be applied so that a downward adjustment to the aggregate penalty that would otherwise be applicable would be appropriate”.<sup>622</sup>
- *EPA v Energy Services International Pty Ltd*: “The Court is ... required to take into consideration the totality principle namely, that the defendant has pleaded guilty to more than one charge. In respect of the charges relating to the use of the two [mobile recycling] rigs, they are similar in nature. The charge relating to the storage of the waste is a separate matter but is nevertheless taken into consideration”.<sup>623</sup>
- *Kogarah City Council v Man Ho Wong*: “the offences really form part of a single train of events, I determine whether the aggregate penalty, assessed separately for each offence, truly reflects the degree of criminality appropriate to the totality of the offences committed”.<sup>624</sup>

The totality principle also has a role to play where an offender is convicted of both transporting waste and dumping waste in one episode. To commit a “dumping” offence, the waste must first be transported. The intention behind the transporting of waste (to a place that is not an authorised waste facility) is to unlawfully dispose of the waste. In fact, it is one course of action but two

616 *EPA v Barnes* [2006] NSWCCA 246 per Kirby J at [50]. See also *Camilleri’s Stockfeeds Pty Ltd v EPA* (1993) 32 NSWLR 683 at 704, where Kirby J found that a straightforward arithmetical addition of the fines would arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. See *Pearce v The Queen* (1998) 194 CLR 610 per McHugh, Hayne and Callinan JJ at [45] concerning the application of the totality principle and imprisonment.

617 *L Vogel & Son Pty Ltd v Anderson* (1968) 120 CLR 157 per Taylor, Menzies and Owen JJ at 168.

618 [2013] NSWLEC 19 per Craig J at [111].

619 [2012] NSWLEC 36 per Craig J at [134]–[135].

620 [2003] NSWLEC 279 per Talbot J at [12].

621 [2002] NSWLEC 205 per Talbot J at [30].

622 [2014] NSWLEC 136 per Craig J at [107].

623 [2001] NSWLEC 59 per Cowdroy J at [32].

624 [2013] NSWLEC 187 per Craig J at [36].

distinct charges. One is a conduct offence — the physical act of transporting waste with the intent of illegally disposing of such waste; the other is a result offence — that the waste was “dumped” at a place other than a lawful waste facility causing land pollution. As Preston CJ of the LEC detailed in *Bankstown City Council v Hanna*:

The offence under s 143(1) [“transport waste to a place that cannot lawfully be used as a waste facility for that waste”] is a conduct offence while the offence under s 142A(1) [“A person who pollutes land is guilty of an offence”] is a result offence.

The offence under s 143(1) defines the external elements to consist only of the conduct of transporting waste to a place that cannot lawfully be used as a waste facility for that waste. In terms, the depositing of any waste transported at the place is not defined to be an external element of the offence. However, it is a defence to that offence if the defendant establishes that the waste transported by the defendant was not deposited by the defendant or any other person at the place to which it was transported: s 143(3C). Hence, [the defendant] committed the offence under s 143(1) by his conduct of transporting the waste to each of the properties ... each being a place that cannot lawfully be used as a waste facility for that waste. The conduct of depositing the waste transported at each property meant that [the defendant] could not rely on the defence under s 143(3C) to the offence.

It is also not an external element of the offence under s 143(1) that any waste transported to and deposited at a place that cannot lawfully be used a waste facility for that waste, cause the result of polluting the land at that place.

In contrast, s 142A(1) is a result offence. The offence under s 142A(1) requires the conduct of polluting land (which includes causing or permitting land to be polluted) to cause the result or consequence of the pollution of the land. In this case, [the defendant’s] acts of placing on the land of each property the building waste containing asbestos (the conduct) caused or was likely to cause degradation of the land, resulting in actual or potential harm to the health or safety of human beings and the environment, and actual or potential loss or property damage (the result).<sup>625</sup>

Consequently, for waste offence cases examined in this study, prosecution costs were measured against the total penalty imposed rather than against the adjusted penalty for the principal offence.

## Findings

The full set of LEC cases involving Tier 2 waste offences is provided in **Cases Table 2 in Volume 2**. Of the principal offences aggregated under this category, there were:<sup>626</sup>

- 34 cases of waste offences under the *POEO Act 1997*: 17 cases under s 143(1)(a): “Unlawfully transport waste” (or variants); three cases under s 143(1)(b): “Owner of waste transported to unlawful waste facility”; 11 cases under s 144(1): “Permit land to be used unlawfully as a waste facility”; and, three cases under s 144AA(1): “Cause/permit/supply false misleading info re asbestos waste”
- the remaining eight cases were charged under the *Waste Minimisation and Management Act 1995* (rep): four cases under s 63(1): “Disposing of waste on land without lawful authority”; and, four cases under s 64(1): “Allow land to be used as waste facility without lawful authority”.

Corporations committed 12 waste offences (29%) and company position holders were identified as responsible for another 15 offences (37%). An additional eight waste offences (19%) were committed by small business owners. “ordinary Joes” were convicted of seven offences (17%).

625 [2014] NSWLEC 152 at [168]–[171].

626 It is to be noted that the count of waste cases of 41 in **Cases Table 2** (in **Volume 2**), the qualitative waste cases table, is one less than reported elsewhere for waste offences. This occurred because two duplicate waste records were identified in the environmental crime sentencing database after the quantitative analysis was completed and during the process of compiling the qualitative waste cases table. Another important waste case, *EPA v Hanna* [2010] NSWLEC 98, inexplicably was not downloaded from the environmental crime sentencing database and was added for completeness to the set of waste cases examined in this study.

### **Financial gain**

Almost two-thirds (64%) of waste offences in the study period were identified as being committed for financial advantage.

### **Penalties**

In 25 cases, a fine was the only penalty given. In a further 15 cases an Additional Order (re s 250) was imposed as well as a fine. The remaining two cases involved solely an Additional Order under s 250 of the *POEO Act* with no further penalty imposed.

An Additional Order was imposed in a total of 17 cases involving waste offences. In six such cases, the court ordered that the offender undertake environmental remediation work: s 250(1)(c). In another instance, the order involved compulsory monthly reporting of business activities: also under s 250(1)(c). The remaining 10 cases involved the offender having to make public the details of the offence and its environmental consequences by way of a public notice: s 250(1)(a) and (b).

### **Fine amounts**

In contrast to other environmental protection offences, two or more offences (or counts) is more the norm for waste offences. Under the current provisions of the *POEO Act*, where costs were known at sentence (n=4), the average fine amount was \$19,725 (median: \$16,700).

The largest fine imposed across the study period for a waste offence was \$80,000.<sup>627</sup> The smallest fine for a waste offence in the period was \$1,500.<sup>628</sup>

### **Remediation costs**

There were six cases where, following a conviction for an illegal waste offence, the offender was ordered to undertake work to remediate the environmental damage caused, or to make reparation to the community for the commission of the environmental offence.

The average cost for the environmental remediation/restoration work ordered (n=6) was \$237,973 but this average is heavily skewed by an extremely large payment order to the Environmental Trust (see *EPA v Douglass [No 2]*<sup>629</sup> below). Therefore, the median value of \$58,500 is likely a more representative indicator of the cost of such work.

In *EPA v Douglass [No 2]*, the prosecutor sought an order that the offender pay to the Environmental Trust the sum of over \$1,169,000, representing the costs incurred by the Trust in the mitigation of harm to the environment caused by the commission of the offence, the unlawful use of land as a waste facility.<sup>630</sup> The EPA engaged contractors who removed more than 4,200 drums, mainly containing industrial waste solvents extremely deleterious to human health.

<sup>627</sup> In the *The Hills Shire Council v Suci* (No 3) [2009] NSWLEC 192 at [28], Pepper J agreed with the prosecutor that the offence was in the “worst type of case category”. Whilst a single charge was laid, the offence was viewed by her Honour in *The Hills Shire Council v Suci* [2009] NSWLEC 145 at [6] as a “continuing course of conduct”.

<sup>628</sup> In *Eurobodalla Shire Council v Tip It Today Broulee Pty Ltd* [2007] NSWLEC 274 at [34], Pain J reduced the size of the fine for a number of reasons, including regard for the fact that the matter could have been prosecuted in a Local Court (re *Barnes*) that was nearby and therefore the defendant could have avoided the expense and inconvenience of a hearing in Sydney.

<sup>629</sup> [2002] NSWLEC 94.

<sup>630</sup> *ibid* per Lloyd J at [1], [7]. Lloyd J went on to say at [17]:

There is no dispute that the amount claimed was incurred. Again the utility of making the order sought is a question which is raised. I am nevertheless inclined to the view that the order sought should be made. Although it is true that there may be little utility in making the order, the sum which I will order the defendant to pay will become a debt due to the Environmental Trust. The Environmental Trust can then itself choose whether to attempt to recover that sum: whether it does so by way of bankruptcy proceedings or otherwise, is a matter for it.

In another noteworthy case, the defendant unlawfully transported and dumped waste soil, containing lead bullets and bullet fragments, to the site of a residential housing development as “clean” landfill.<sup>631</sup> The site remediation costs exceeded \$336,000 and the offender also agreed to pay a further \$1 million in compensation to owners whose houses sat on top of land that could not be remediated.

### **Prosecution costs<sup>632</sup>**

Under the current sentencing regime of the *POEO Act*, there were seven cases where the prosecutor’s costs were specified and, for these cases, costs averaged \$43,774 (median: \$24,000). Average prosecutor’s costs were higher for two or more waste offences sentenced by way of fines (mean: \$45,826; median: \$24,000). The largest costs order in this set was in the case of *EPA v Shannongrove Pty Ltd (No 2)*,<sup>633</sup> where payments to compensate the prosecutor for legal and investigation costs added over \$118,000 to fines that totalled \$35,000.

### **“Total” cost**

Total costs ranged from \$34,500 to \$153,225 for the seven waste offences with disclosed prosecutor’s costs. As a percentage of the total financial impost, prosecutor’s costs ranged from 22% to a high of 77% in the case of *EPA v Shannongrove Pty Ltd (No 2)*.

## **2.4.5 Offend against direction or prohibition**

The 40 cases relating to s 125 offences include:

- 19 cases of “Do things forbidden to be done under Act”
- one case of “Do things forbidden to be done by regulations”
- five cases of “Fail to do thing directed to be done under Act”, and
- 15 cases of “Contravene tree preservation order”.

While only 15 cases (37.5%) identify the s 125 environmental planning offence as “Contravene tree preservation order”, in the judgments of an additional 13 cases (32.5%) the s 125 offence was referred to in terms of the removal, damage or destruction of trees (including native vegetation and threatened ecological systems). Therefore, in this study, the proportion of s 125 offences involving significant damage to trees and other vegetation is actually as high as 70%.

### **Findings**

Corporations accounted for 15 of the 40 (37.5%) s 125 offences. “Ordinary Joe” individuals were the offenders in a further 18 cases (45%). The remaining seven (17.5%) s 125 offences were committed by small business owners.

### **Financial gain**

One in every five (20%) s 125 offences were committed for financial advantage.

631 *EPA v JK Williams Contracting Pty Ltd* [2001] NSWLEC 13.

632 Where known, includes all prosecutor’s costs and expenses and any investigative costs.

633 [2012] NSWLEC 202. The percentage (85.6%) was calculated on the basis of the total monetary payment being a fine of \$20,000 for the *principal* offence and prosecutor’s costs of \$118,725. An additional fine of \$15,000 was ordered for a second waste offence committed in a different time period. Craig J at [101] applied the totality principle in setting both fine amounts.



### Penalties

By far, fines (80%) were the most common penalty for s 125 offenders (90% if fines, where combined with an “Additional Order” are included). Four other offenders were found guilty of the offence but received no conviction under s 10 of the *CSP Act*; although all four were directed by the LEC, nonetheless, to pay the prosecutor’s costs.

An Additional Order was imposed in four cases of offend against direction or prohibition. In all such cases, the court ordered that the offender undertake remediation work involving revegetation of the affected environment, consistent with s 126(3)(a) of the *EPA Act*: “to plant new trees and vegetation and maintain those trees and vegetation to a mature growth”.

### Fine amounts

The average fine amount (n=36) for s 125 offences was \$17,888 (median: \$10,500). The smallest fine imposed across the study period for this type of offence was \$500 and the largest fine was \$84,000.<sup>634</sup>

### Remediation costs

As indicated, there were four cases where, following a conviction and fine for a s 125 offence, the offender was ordered to undertake revegetation work under s 126(3)(a) of the *EPA Act*. One other offender, in receipt of a s 10 bond, was also ordered to revegetate the affected landscape. Only one (of the six) revegetation orders were costed. In that case, the revegetation work was assessed at \$34,752.<sup>635</sup>

### Prosecution costs<sup>636</sup>

In 17 of the 40 cases (42.5%) involving s 125 offences were prosecutor’s costs (or an estimate) recorded in the judgment. Where recorded, the prosecutor’s costs averaged at \$28,063 (median: \$15,000), and ranged from a low of \$4,500 to a high of \$80,000 in the case of *Manly Council v Taheri* where prosecutor’s costs represented over half (53%) of the total monetary payments ordered by the LEC.<sup>637</sup>

### “Total” cost

Leaving aside the case of *Manly Council v Taheri* [2008] NSWLEC 314, in 16 cases was a “total” cost available by summing the fine amount and the known prosecutor’s costs.<sup>638</sup> For these cases, the average “Total” cost was \$51,786 with a median value of \$37,750. The total monetary payment ranged from \$6,000 to \$125,000 with prosecutor’s costs representing from 30% to over 83% of the “Total” cost incurred.

634 *Director-General, Dept of Planning and Infrastructure v Integra Coal Operations Pty Ltd* [2012] NSWLEC 255. As noted by Craig J, this case was not a typical s 125 matter: “The mining operations overseen by the defendant are conducted not only pursuant to authorities granted under the *Mining Act* 1992, but also pursuant to project approvals granted under Pt 3A (repealed) of the *EPA Act*. It is an approval of the latter kind which founds the present prosecution”: at [2]. Furthermore, “[t]he defendant has pleaded guilty to an offence against s 125(1) of the *EPA Act* in that between 12 August 2011 and 18 March 2012 it carried out the ‘Integra Open Cut Coal Project’ otherwise than in accordance with the conditions attaching to the project approval for that project, contrary to s 75D of the *EPA Act*”: at [3].

635 *Manly Council v Taheri* [2008] NSWLEC 314 per Pain J at [113], [117].

636 Where known, includes all prosecutor’s costs and expenses and any investigative costs.

637 [2008] NSWLEC 314 per Pain J at [117]. The prosecutor’s costs were estimated in excess of \$80,000: at [110]. The orders made by Pain J (at [119]) included a fine of \$35,000 for the principal offence of development prohibited on a council controlled harbour foreshore reserve involving the cutting down, destruction and removal of trees and vegetation: at [2]–[3]. The defendant was also ordered to pay for implementing a revegetation plan costed at \$34,752: at [117]. Two other “tree removal” offences attracted additional fines of \$20,000 and \$10,000, respectively: at [119].

638 In two cases, *Council of Camden v Poyntz* [2007] NSWLEC 439 and *Hornsby Shire Council v Khoury* [2003] NSWLEC 83, a revegetation order was imposed but the cost of such an order was not indicated in the judgment.

## 2.4.6 Destruction of trees and tree preservation orders

The wilful destruction of trees and the lopping of tree limbs, most notably to improve views, particularly water views, and/or to increase the value of residential properties<sup>639</sup> is a recurring theme of media reports on local environmental issues and local councils' consternation.<sup>640</sup>

To injure a tree without consent as required by (a local council's or shire's) tree preservation order (TPO) is a breach of s 76A of the *EPA Act* and is contrary to s 125(1) of the *EPA Act*, which is an "umbrella" provision of the Act prohibiting the carrying out of development without consent. The offence created by s 125(1) is one of strict liability and is subject to a maximum penalty of \$1,100,000 where the charge is brought before the LEC. Nonetheless, "a relevant sentencing consideration" for the LEC is that the offence may also be dealt with by the Local Court where a jurisdictional maximum of \$110,000 applies.<sup>641</sup>

Councils often take considerable measures to counter tree vandalism once it has occurred including the placement of large signs and banners<sup>642</sup> (and, in the case of Port Stephens Council, the extraordinary step of stacking two empty shipping containers)<sup>643</sup> to spoil the views of householders suspected of illegally cutting down trees with the object of improving their vista.

### A recent development

In response to the destructive 2013 bush fires in the Blue Mountains, which destroyed more than 200 homes, the "10/50 Code" was developed to allow people to clear vegetation near their homes to improve protection from bushfires.<sup>644</sup> As described by Biscoe J, the 10/50 Code:

is the name given to provisions of the *Rural Fires Act* 1997 (principally ss 100Q and 100R) and the subsidiary code published by the NSW Rural Fire Service, entitled 10/50 Vegetation Clearing Code of Practice for New South Wales. The 10/50 Laws were introduced in 2014 to permit occupiers of dwellings situated on land in areas identified as being bushfire prone to remove trees within 10 metres of a habitable dwelling and vegetation within 50 metres of a habitable dwelling in order to reduce bushfire risk, without the need to obtain any approval, despite the provisions of any local environmental plan which purports to prohibit the cutting down of trees or vegetation without a development consent or permit.<sup>645</sup>

639 According to Randwick Council, "the vandalism, poisoning and wilful destruction of trees ... are ongoing problems that are driven by a number of factors ranging from property overhang to improving views to attempting to increase property values". [www.randwick.nsw.gov.au/environment-and-sustainability/trees/tree-vandalism](http://www.randwick.nsw.gov.au/environment-and-sustainability/trees/tree-vandalism), accessed 16 May 2017. For example, in *Wingecaribee Shire Council v O'Shanassy (No 6)* [2015] NSWLEC 138, Pepper J at [118] found the defendant's motivation for removing trees and other vegetation was "a desire to increase the value of his property and to improve its amenity by opening up panoramic views".

Other reasons for vandalising trees may be leaf litter entering pools and gutters, the blocking of sunlight, and trees releasing allergy causing pollens. Future damage or injury that may arise from branch drop or tree failure is also presented as a reason for orders seeking the lopping of tree limbs or the removal of trees: *Huggett v Burrowes* [2015] NSWLEC 1057 per Fakes C at [2].

640 See <http://theconversation.com/acts-of-arboreal-violence-tree-vandals-deprive-us-all-41342>, accessed 16 May 2017. Also see the articles (accessed 16 May 2017) relating to: Tweed Shire Council, at [www.dailytelegraph.com.au/news/nsw/councils-are-hitting-back-at-residents-who-poison-trees-to-preserve-their-ocean-views/story-fni0cx12-1226950413637](http://www.dailytelegraph.com.au/news/nsw/councils-are-hitting-back-at-residents-who-poison-trees-to-preserve-their-ocean-views/story-fni0cx12-1226950413637); Sutherland Shire Council, at [www.theleader.com.au/story/267397/tree-poisoners-targeted/](http://www.theleader.com.au/story/267397/tree-poisoners-targeted/); and, North Sydney Council, at [www.northsydney.nsw.gov.au/files/assets/public/docs/4\\_waste\\_environment/tree\\_vandalism\\_brochure.pdf](http://www.northsydney.nsw.gov.au/files/assets/public/docs/4_waste_environment/tree_vandalism_brochure.pdf).

641 *Council of the City of Shoalhaven v Wilson* [2015] NSWLEC 93 at [9], [32]. Pain J considered the lower jurisdictional limit of the Local Court in determining the appropriate sentence for the defendant, noting *Harris v Harrison*, per Simpson J at [92]–[98] and citing *R v Crombie* (1999) NSWCCA 297; *R v Doan* (2000) 50 NSWLR 115 and also noting that the defendant referred to *Barnes*.

642 Examples of "spoiler" signs and banners employed by local councils may be found at [www.haveyoursaywilloughby.com.au/2902/documents/4637](http://www.haveyoursaywilloughby.com.au/2902/documents/4637), accessed 16 May 2017.

643 At [www.news.com.au/national/council-blocks-suspected-tree-loppers-view/story-e6frfkwi-111115863763](http://www.news.com.au/national/council-blocks-suspected-tree-loppers-view/story-e6frfkwi-111115863763), accessed 16 May 2017.

644 NSW Rural Fire Service, *10/50 Vegetation Clearing Code of Practice for NSW*, 4 September 2015, p 4.

645 *Mosman Municipal Council v Spice (No 2)* [2015] NSWLEC 136 at [89(e)].

The 10/50 Code is consistent with the bushfire mitigation objectives of the *Rural Fires Act* 1997,<sup>646</sup> and was prepared by the NSW Rural Fire Service and in partnership with the Department of Planning and Environment and the Office of Environment and Heritage and introduced on 1 August 2014.<sup>647</sup> As at date of publication, the 10/50 Code was in its third iteration with critical changes introduced to prevent some property owners from abusing the scheme by cutting down trees for purposes other than bushfire protection.<sup>648</sup>

As alluded to by Biscoe J in *Mosman Municipal Council v Spice (No 2)*, the 10/50 Code allows owners to clear their property of trees without the need to obtain a permit from the RFS or other local authority, or to have the RFS inspect the property, before clearing takes place.<sup>649</sup> The Code also overrides local councils' land use plans, controls and provisions "contained within Local Environment Plans (LEPs), Development Control Plans (DCPs), conditions of development consent, vegetation management plans, tree preservation orders, biodiversity strategies and urban tree policies".<sup>650</sup>

The introduction of 10/50 Code has the potential to "legalise" environmental crimes involving the destruction or damage of trees that would have previously been prosecuted and dealt with summarily by the Local Court or by the LEC in its summary jurisdiction. On this point, the Code has been criticised for indiscriminately overriding environmental protection provisions under the State Environmental Planning Policies (SEPPs) and the *Threatened Species Conservation Act*.<sup>651</sup> It has been observed that, almost exclusively to-date, the Code has been used to improve views, enhance property values and facilitate urban development. According to the Nature Conservation Council, "less than five per cent of trees" were "removed for legitimate fire risk purposes".<sup>652</sup>

Significantly, in the appeal case of *Johnson v Hornsby Shire Council*, the LEC rejected a development proposal for a residential home on the basis that it would be unable to introduce conditions to protect a significantly endangered ecological community of native trees:

Granting consent to this proposal would allow more than half of the remnant Blue Gum High Forest in the Restricted Development Area, identified as a critically endangered ecological community pursuant to the *Threatened Species Conservation Act* 1995, to be lawfully removed.

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<sup>646</sup> *Rural Fires Act* 1997, s 3.

<sup>647</sup> *ibid.* Section 100Q of the *Rural Fires Act* 1997 commenced following the passage and gazetting of the Rural Fires (Amendment) Vegetation Clearing Bill 2014.

<sup>648</sup> Emergency Services Minister, the Hon D Elliott, was reported on 12 August 2015 as saying at [www.abc.net.au/news/2015-08-12/nsw-government-to-again-change-10-50-land-clearing-laws/6691050](http://www.abc.net.au/news/2015-08-12/nsw-government-to-again-change-10-50-land-clearing-laws/6691050), accessed 16 May 2017: if you are living within 100 metres of the coastline well you cannot simply use 10/50 [laws] to cut down a tree ... I am not about going around and using bushfire mitigation reasons so that people on the north shore and on the Sydney Harbour can simply improve their views.

<sup>649</sup> [2015] NSWLEC 136, above n 645. "The intention of the 10/50 Code is to enable the clearing of vegetation to reduce the risk of bushfires without the need for approval, consent or authorisation": Bartier Perry Lawyers, June 2015 at [www.bartier.com.au/publications/publicationDetail.aspx?PublicationID=504](http://www.bartier.com.au/publications/publicationDetail.aspx?PublicationID=504), accessed 16 May 2017.

<sup>650</sup> Local Government NSW, *Submission to the NSW Rural Fire Service on the Review of the 10/50 Vegetation Clearing Code of Practice*, November 2014, p 4. "The 10/50 Code only applies to buildings already completed and applies regardless of any TPOs or conditions of consent issued by a council or other authority": Bartier Perry Lawyers, *ibid.*

<sup>651</sup> *ibid.*, p 4 and Nature Conservation Council, *Review of 10/50 Vegetation Clearing Code of Practice: submission guide*, 14 November 2014, at [www.nature.org.au/media/1971/1050-submission-guide-161014.pdf](http://www.nature.org.au/media/1971/1050-submission-guide-161014.pdf), accessed 16 May 2017. Greens MP D Shoebridge labelled the 10/50 Code as "tree-killing law" at <http://davidshoebridge.org.au/2014/11/03/1050-clearing-laws-put-stop-on-planning-decisions/>, accessed 16 May 2017. Nonetheless, s 7.8 of the 10/50 Code states that a legal obligation exists to preserve vegetation where prior agreements remain in force, including but not restricted to: conservation agreements under Pt 4, Div 12 of the *NPW Act*; trust agreements entered into under Pt 3 of the *Nature Conservation Trust Act* 2001; property management plans enforceable under s 113B of the *Threatened Species Conservation Act* 1995; property vegetation plan agreements entered into under Pt 4 of the *NV Act*; and Biobanking Agreements entered into under Pt 7A of the *Threatened Species Conservation (Biodiversity Banking) Regulation* 2008.

<sup>652</sup> *ibid.*, Nature Conservation Council. According to one media report at [www.smh.com.au/environment/1050-treeclearing-rule-misuses-flagged-by-two-councils-before-1000-trees-removed-20141207-122e2h.html](http://www.smh.com.au/environment/1050-treeclearing-rule-misuses-flagged-by-two-councils-before-1000-trees-removed-20141207-122e2h.html), accessed 16 May 2017: Although no measures have been put in place by the RFS [NSW Rural Fire Service] to monitor tree removals, individual councils have been able to provide their own approximations. About 414 trees have been removed in Ku-ring-gai, 250 in Pittwater, and over 100 in Mosman. Mr Wrightson from Lane Cove Council, which has counted over 240 tree removals under 10/50, said: 'The risk of bushfire in Lane Cove is so low that there has not been a single house lost to bushfire as far as the records provided by NSW Fire and Rescue go back'.

I am not satisfied that this represents a reasonable balance between the development of the newly created and approved allotment and the preservation of the remnant Blue Gum High Forest.<sup>653</sup>

Critics have sought a moratorium on the 10/50 Code which effectively allows tree removal — in suburbs which face no real threat from bushfires — based on self-assessment and motivated predominately by selfish, counter-environmental interests.<sup>654</sup>

### Findings

In total, there were 25 offences involving breaches of TPOs dealt with by the LEC in the period examined. In two cases, the corporation together with the company's director/owner were prosecuted for the offence.<sup>655</sup>

The majority (17 of 25, (68%)) of offences involving the contravention of tree preservation orders were assessed as being of low objective seriousness, with seven of the remainder assessed to be of medium objective seriousness and one (4%) assessed to be of high objective seriousness. Similarly, 18 of the 25 breaches (72%) resulted in a low level of environmental harm, five (20%) resulted in a medium level of harm, and two offences (8%) resulted in serious levels of environmental harm.

Ensuring that the (unlawful) property development progressed uninterrupted — which generally resulted in a financial gain for the offender/developer, including increased property value — was identified as the motivation in eight cases (32%) involving trees being removed without legal consent. In a further three cases (12%), the motivation for removing the trees was to improve views — again with the likely result of increasing the market value of the property. In five cases (20%), the offender stated that the trees were removed because they posed a safety risk; and in another seven cases (28%) the offender stated that the trees were removed/pruned to reduce tree litter or other nuisance value. A licensed tree remover and an arborist were separately involved in two other offences, which were committed simply to obtain the commercial fee for removing the tree(s).

### Penalties

In terms of sentencing outcomes, three offences were finalised by way of a s 10 dismissal, and one by a s 10 bond which included an order to carry out a Bushland Restoration Plan.<sup>656</sup> The rest were disposed by way of fine (n=16) or “fine plus Additional Order” (n=5).

### Fine amounts

The average fine amount for a single TPO offence where the prosecutor's costs were specified (n=11) was \$16,951 (median: \$11,000). Fines ranged from \$1,500 to \$70,000.<sup>657</sup>

653 [2014] NSWLEC 1215 at [44].

654 Local Government NSW, 2014; Nature Conservation Council, 2014; Greens MP D Shoebridge called for the 10/50 Code to be repealed at [www.abc.net.au/news/2015-08-12/nsw-government-to-again-change-10-50-land-clearing-laws/6691050](http://www.abc.net.au/news/2015-08-12/nsw-government-to-again-change-10-50-land-clearing-laws/6691050), accessed 16 May 2017.

655 For example, in *Hawkesbury City Council v Johnson* [2009] NSWLEC 6 at [2], Pain J noted: the clearing activity giving rise to the offences was carried out by a contractor employed by the corporate Defendant. The individual Defendant ... is the sole director of the corporate Defendant. He was found guilty of the same offence separately from the corporate Defendant on the basis that he was the “heart and mind” of the corporate Defendant. [Citations removed.]

656 *Hornsby Shire Council v Devaney* [2007] NSWLEC 199 per Biscoe J at [87]. The Bushland Restoration Plan was ordered pursuant to s 126(3) of the *EPA Act*. The first defendant, an experienced earthmoving contractor who cleared the trees, was ordered to pay half the cost of the revegetation order to the second defendant, an individual, who was in care and control of the property which was owned by her parents through their corporate vehicle. The second defendant was ordered to undertake and pay for the works stipulated in the Bushland Restoration Plan, which was attached as an annexure to the judgment.

657 In considering the appropriate financial penalty for an offence involving the removal of “a large number of very large well-established, mature and healthy trees, of some quality and beauty”, Sheahan J in *Burwood Council v Jarvest Pty Ltd* [2011] NSWLEC 109 at [29], was of “the firm view that a substantial fine is called for”. His Honour was also not satisfied that the defendant lacked “the capacity to pay an appropriately discounted fine”. His Honour expressed, the view that “[s]ome degree of financial stress is a necessary component of an appropriate penalty”.

### Remediation costs

There were six cases where the LEC made revegetation orders. In five cases, the cost of the regeneration work was not given, estimated or otherwise indicated. The dollar value of the one costed revegetation order was just under \$35,000.

### Prosecution costs<sup>658</sup>

In 56% (14 of 25) of cases, prosecutor costs were not assessed (not available) at the time the offender was sentenced. Where known (n=11), the prosecutor's costs averaged at \$31,348 (median: \$13,216). This is more than double the average fine amount. Prosecutor's costs ranged from \$4,500 to a high of \$80,000.<sup>659</sup>

### "Total" costs

The average "Total" cost to an offender convicted of unlawfully removing or damaging a tree where a fine was issued and prosecutor's costs were specified (n=11) was \$47,939 (median: \$24,216) and ranged from \$6,000 to \$125,000.

Prosecutor costs represented, on average, almost two-thirds (65.4%) of the "Total" payment ordered on offenders who breached TPOs, and ranged from 44% to over 83% of the "Total" cost incurred by these offenders.

## 2.4.7 An overview of costs for environmental planning offences

**Figure 11** presents information on the average fine amount, cost of prosecution and environmental payment amount for the two most common environmental planning offences dealt with by the LEC: "Development without consent" under s 76A of the *EPA Act*, and "Offend against direction or prohibition" under s 125 of the same Act.<sup>660</sup> At the time of this study, the former offence carried a maximum penalty of \$110,000, while the maximum penalty for the latter was \$1.1 million (with an additional daily fine of \$1,000 for a continuing offence).

Fine amounts for s 76A offences averaged at over \$33,500, approximately double that for s 125 offences (despite the maximum penalty for the latter offence being 10 times higher). However, there appeared to be an increased cost associated with prosecuting s 125 offences, which was on average 10% higher than for the s 76A offences. This is probably more a function of the "drag net" provisions of s 125 offences which encompasses almost all contraventions of the *EPA Act* and which range from minor matters (eg not complying with a development application) to more serious criminal conduct (eg s 75D offence (repealed): "Minister's approval required for projects"). Offences of the latter kind are likely to demand more complex investigations and lengthier prosecutions.

Both the average "total" pecuniary amount for s 76A offences (approximately \$59,000) and that for s 125 offences (\$46,000) were well below the jurisdictional limit of the Local Court when imposing a fine. Furthermore, noting again the assessed level of objective seriousness of these environmental planning offences by the court, 62% of development without consent offences and 68% of offend against direction or prohibition offences were regarded by the LEC as being of low objective seriousness.

658 Where known, includes all prosecutor's costs and expenses and any investigative costs.

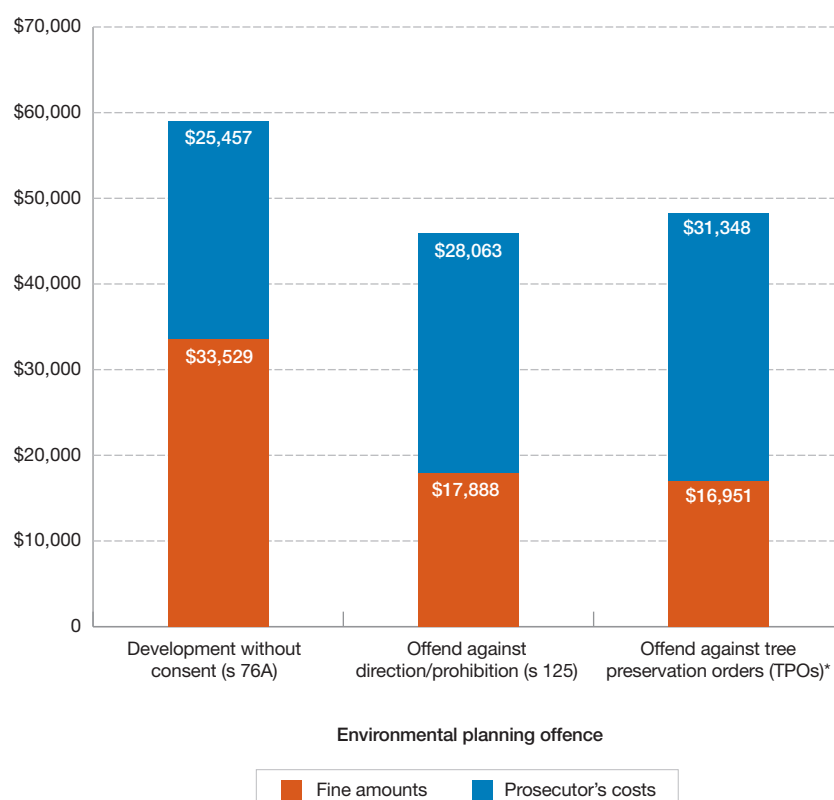
659 *Manly Council v Taheri* [2008] NSWLEC 314; n 635 and n 637 contain relevant information on this case.

660 Significant increases to the maximum penalties for offences under the *EPA Act* commenced on 31 July 2015 and apply to offences committed after this date, Planning and Environment NSW, *Commencement of provisions: offences, penalties and enforcement* (Planning Circular PS 15-004, 31 July 2015) at [www.planning.nsw.gov.au/Policy-and-Legislation/~media/0E2FF1073E344851964EE4D3B9E72B58.ashx](http://www.planning.nsw.gov.au/Policy-and-Legislation/~media/0E2FF1073E344851964EE4D3B9E72B58.ashx), accessed 16 May 2017. None of the environmental offences examined in this study were committed after the amendment date and thus were subject to the old maximum penalty of \$1.1 million.



Breaches of TPOs, a subset of offences against s 125 of the *EPA Act*, had the lowest average fine amount (\$16,951) of all environmental planning offences, but the highest average prosecutor's costs (\$31,348) bringing the average "total" cost to just below \$50,000. Low objective seriousness was noted for the majority (68%) of offences involving breaches of TPOs. These characteristics make these offences also potentially suitable for prosecution in the Local Court.

**Figure 11: Environmental planning offences in the LEC — average fines, prosecutor's costs by offence type — single offence, fined, prosecutor's costs known — 2000 to 2015**



\* The offence against TPOs is a sub-category of offenders against s 125(1) of the *EPA Act*. These offences are not counted twice in the data.

### 2.4.8 Native vegetation offences

At the time this study was undertaken, the principal piece of legislation in NSW concerning the sustainable management and conservation of native vegetation was the *Native Vegetation Act 2003 (NV Act)*.<sup>661</sup> This Act applied to both public land and privately owned or leased land in

661 Native vegetation is defined under s 6 of the *Native Vegetation Act 2003 (NV Act)* as trees, understorey plants, groundcover or wetland plants that existed in NSW prior to European settlement. It does not include any mangroves, seagrasses or any other type of marine vegetation to which s 205 of the *Fisheries Management Act 1994* applies. The *NV Act* categorises native vegetation as "remnant", "protected regrowth" and "unprotected regrowth" (ss 9, 10 and 19). The meaning of "clearing" native vegetation is defined under s 7 and means any one or more of the following: (a) cutting down, felling, thinning, logging or removing native vegetation, (b) killing, destroying, poisoning, ringbarking, uprooting or burning native vegetation.

Vegetation classified as remnant or protected regrowth, can only be cleared in limited circumstances as set out under s 12 in accordance with development consent or an approved property vegetation plan. Otherwise clearing of vegetation that is classified as only regrowth, but not protected regrowth, is permitted (s 19), as is the clearing of groundcover comprising less than 50% indigenous vegetation (s 20). Section 25 details the types of legislatively excluded clearing, for example, clearing carried out in accordance with a bush fire management plan under the *Rural Fires Act 1997*.



regional and rural areas of NSW.<sup>662</sup> The objects of the *NV Act*, which were framed explicitly in accordance with the principles of ecologically sustainable development,<sup>663</sup> were:

- (a) to provide for, encourage and promote the management of native vegetation on a regional basis in the social, economic and environmental interests of the State, and
- (b) to prevent broad-scale clearing unless it improves or maintains environmental outcomes, and
- (c) to protect native vegetation of high conservation value having regard to its contribution to such matters as water quality, biodiversity, or the prevention of salinity or land degradation, and
- (d) to improve the condition of existing native vegetation, particularly where it has high conservation value, and
- (e) to encourage the revegetation of land, and the rehabilitation of land, with appropriate native vegetation.<sup>664</sup>

The *NV Act* was assented to on 11 December 2003 but did not commence until 1 December 2005.<sup>665</sup> The Act was supplemented by the *Native Vegetation Regulation 2013*<sup>666</sup> which was introduced in recognition of “the need to strike the right balance between sustainable agriculture and protecting the environment”, “to streamline existing clearing controls” and to introduce “codes of practice for vegetation clearing, including self-assessable codes of practice for certain low-risk clearing activities”.<sup>667</sup>

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*.<sup>668</sup>

Under s 12 of the *NV Act*, native vegetation must not be cleared except in accordance with development consent from the appropriate regulatory authority or a Property Vegetation Plan (PVP).<sup>669</sup> Division 3 of the Act sets out the activities which are permitted to be carried out without the authority conferred by a development consent or PVP that do not constitute the clearing of native vegetation. Permitted activities under the provisions of ss 22–24 include: routine agricultural management activities; continuation of existing farming activities; and sustainable grazing.

662 The *NV Act* does not apply to the following land under s 5(1)(a)–(d): National park estate and other conservation areas; State forestry land; urban areas; and, biodiversity certified land within the meaning of Pt 7AA of the *Threatened Species Conservation Act 1995*.

663 Section 3 of the *NV Act* states that its objects are “in accordance with the principles of ecologically sustainable development”. For a detailed account of “economic sustainable development” see: International Union for the Conservation of Nature (1980) “World conservation strategy: living resource conservation for sustainable development”; Australian Government Publishing Service (1983), *National conservation strategy for Australia: living resource conservation for sustainable development*; and, Bates, above n 38, pp 117–140.

664 *NV Act*, s 3. The *NV Act* replaced the *Native Vegetation Conservation Act 1997* which, for the first time in NSW brought the clearing of native vegetation under one legislative framework.

665 See [www.legislation.nsw.gov.au/acts/2003-103.pdf](http://www.legislation.nsw.gov.au/acts/2003-103.pdf), accessed 8 June 2017. The apparent reason for this delay in the commencement of the *NV Act* was “in finalising the draft *Native Vegetation Regulations* [sic] ... to accompany the Act”: Environmental Defenders Office NSW, above n 286, p 166.

666 The *Native Vegetation Regulation 2013* replaced the *Native Vegetation Regulation 2005* on 23 September 2013, see cl 2, 64 of the 2013 regulation.

667 NSW Office of Environment and Heritage at [www.environment.nsw.gov.au/vegetation/](http://www.environment.nsw.gov.au/vegetation/), accessed 16 May 2017.

668 The *Local Land Services Amendment Act 2016*, No 64 of 2016, was assented to on 23 November 2016 and commences on proclamation. At the time of publication, it had not commenced. See [www.legislation.nsw.gov.au/acts/2016-64.pdf](http://www.legislation.nsw.gov.au/acts/2016-64.pdf).

669 Section 12(1)(b) of the *NV Act*. Part 4 of the Act defines and describes a Property Vegetation Plan (PVP). A PVP is a legally-binding agreement entered voluntarily by the landholder with a Local Land Service, which provides advice and assistance to landholders on native vegetation management. According to the NSW Office of Environment and Heritage (at [www.environment.nsw.gov.au/vegetation/pvp.htm](http://www.environment.nsw.gov.au/vegetation/pvp.htm), accessed 16 May 2017), a PVP may be obtained for a number of reasons, including:

- to obtain clearing approval, and to secure any offsets associated with that clearing
- to confirm that native vegetation on a property is regrowth, providing a landholder with assurance that they will not need future clearing approval
- to change the regrowth date of native vegetation to an earlier date, provided that landholders can demonstrate a history of rotational farming practices on the land
- to confirm whether existing rotational farming, grazing or cultivation practices meet the definitions of these in the Act so that clearing approval will not be required
- applying for native vegetation incentive funding
- to protect native vegetation for future generations.

Since the European settlement of Australia, a significant proportion of native vegetation has been cleared for urban areas, infrastructure, industry and agriculture. Australia's record on native vegetation clearance has been labelled as a matter of "national shame".<sup>670</sup> Increasing political and public awareness of the environmental impacts of removing land cover has led to action at the federal, state and local levels of government to prevent, arrest and, in some cases, reverse the clearing of native vegetation.<sup>671</sup>

The benefits of maintaining native vegetation are many, and include preventing and controlling soil erosion and salinity, maintaining water quality, providing habitats for wildlife including protected and endangered species,<sup>672</sup> providing economic benefits to landholders and farmers,<sup>673</sup> and functioning as natural carbon sinks absorbing greenhouse gases with the result of mitigating the effects of climate change.<sup>674</sup> On the other hand, the destruction and broadscale clearing of native vegetation is seen as "natural precursor" to other forms of environmental degradation.<sup>675</sup> It contributes to a decrease in native species, land degradation of farmland, bushland and catchment areas, and the disruption (if not the devastation) of many ecosystems and botanical ecological communities.<sup>676</sup> In the not-too-long-ago dark past, the removal of native vegetation to free up land for agriculture was even encouraged by governments through taxation incentives and land sale agreements, which set broadscale clearing of vegetation as a condition of purchase.<sup>677</sup>

The management of native vegetation in NSW has been regulated since the 1880s, with the earlier Acts of Parliament expressing one of two primary objectives:

- prohibiting the ringbarking or destroying of a tree on Crown land without a permit (eg *Forestry Act 1916*),<sup>678</sup> and
- protecting trees in and alongside rivers and lakes, whether on public or private land (eg *Irrigation and Water (Amendment) Act 1946* and the *Irrigation, Water and Rivers and Foreshores Improvement (Amendment) Act 1955*).<sup>679</sup>

In the 20th century and, in particular, in the three decades which followed the Second World War, land degradation slipped from Australian political view behind spectacular gains in agricultural productivity.<sup>680</sup> In the 1980s, increased public and political awareness of major environmental

670 J Bradsen, "Perspectives on Land Conservation" (1991) 8 *EPLJ* 16 at 17.

671 For example, a 2009 review of the *NV Act* stated that "[a]s a direct result of the Act, approximately 250,000 hectares of native vegetation across the state were conserved or rehabilitated through revegetation or restoration between 2006 and 2008": NSW Dept of Environment, Climate Change and Water, *Review of the Native Vegetation Act 2003*, 2009, p 6 at <http://www.environment.nsw.gov.au/resources/nativeveg/09751NVActReview.pdf>, accessed 16 May 2017.

672 Schedule 3 of the *Threatened Species Conservation Act 1995* recognises the clearing of native vegetation as a key threatening process for critically endangered and vulnerable species and ecological communities.

673 S Walpole, "Economic values of conserving native vegetation", (undated), Biodiversity Fact Sheet No 4, NSW National Parks and Wildlife Service at [www.environment.nsw.gov.au/resources/nature/sbsDrpStage104EconValueNativeVeg.pdf](http://www.environment.nsw.gov.au/resources/nature/sbsDrpStage104EconValueNativeVeg.pdf), accessed 16 May 2017.

674 Intergovernmental Panel on *Climate Change*, *Climate change 2007: mitigation of climate change*, Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, 2007, at [www.ipcc.ch/publications\\_and\\_data/ar4/wg3/en/contents.html](http://www.ipcc.ch/publications_and_data/ar4/wg3/en/contents.html), accessed 16 May 2017.

675 Bates, above n 38, p 463.

676 *ibid* p 430. As Bates explains:

Australia, in fact, has an unenviable record of habitat destruction and species extinction. In just two centuries since Europeans arrived in Australia, half the forests have been cleared, more than half our arid and semi-arid lands degraded, and half (that is, 20) of all the mammal species which have become extinct worldwide in the last 200 years have been in Australia. Currently some 800 species of plants and 111 species of animals are considered endangered or vulnerable in Australia. Ecological communities such as temperate grasslands have also dwindled to near extinction.

677 NSW Parliamentary Research Service, A Bombell and D Montoya, *Native vegetation clearing in NSW: a regulatory history*, Briefing Paper No 05/2014, 2014, p i.

678 *ibid* pp i–ii, and its legislative predecessors, the *Crown Lands Act* of 1884, and the *Ringbarking on Crown Lands Regulation Act* 1881.

679 *ibid*.

680 The Archives of the NSW State Library proudly state that the rise of the Australian economy was based on the wool ("riding on the sheep's back"), cattle and wheat industries. In fact, wheat "remains one of Australia's biggest exports today", at [www2.sl.nsw.gov.au/archive/discover\\_collections/history\\_nation/agriculture/produce/index.html](http://www2.sl.nsw.gov.au/archive/discover_collections/history_nation/agriculture/produce/index.html), accessed 16 May 2017.

issues put the clearing of native vegetation higher on the political agenda for State and federal governments.<sup>681</sup>

In 1982, the Commonwealth Government established the National Tree Program to reverse tree decline by encouraging individuals, communities and State Governments to act to conserve, regenerate and plant trees. In 1983, the NSW Government launched the “Trees on Farms” program, aimed at encouraging the establishment of trees on farming land throughout the State. Later, in 1989, the Commonwealth Government established two programs — “One Billion Trees” and “Save the Bush” — to protect and enhance native land cover. Also in 1989, the Landcare initiative was established by the Commonwealth Government, in response to a joint proposal of the National Farmers’ Federation and the Australian Conservation Foundation for action on land degradation in Australia.<sup>682</sup>

The effect of native vegetation laws, particularly on farmers and the broader agricultural industry, has been the subject of periodic examinations and reviews at the highest levels of State and federal governments.<sup>683</sup> In general, getting rural landowners to accept native vegetation conservation policies, laws and practices has been a significant challenge,<sup>684</sup> with the current statutes and regulations in NSW “strongly opposed” by the farming industry.<sup>685</sup> This is largely because, prior to regulations being introduced in 1995, “land and hence native vegetation clearance was a conventional and legally-condoned practice, largely committed to open up land for agriculture but standard for any private landowner wishing to modify the environment”.<sup>686</sup> Also there is farmer belief in the primacy of their individual property rights<sup>687</sup> in the face of environmental policies and the government’s system of “resource governance”.<sup>688</sup> Land clearing,

681 The Centre for Rural Social Research, *Critical LandCare*, Charles Sturt University, 1999, p 1 at [www.csu.edu.au/\\_\\_data/assets/pdf\\_file/0019/705034/Critical\\_Landcare.pdf](http://www.csu.edu.au/__data/assets/pdf_file/0019/705034/Critical_Landcare.pdf), accessed 16 May 2017, described previous government and public apathy with the environmental consequences of land clearing this way:

Rural land degradation has never enjoyed the status, attention and emotive appeal of other environmental issues. Next to rainforest destruction, reef development and koala disease, the problems of soil erosion, salinity and acidification simply haven’t been “sexy” enough to capture the public or political consciousness.

682 NSW Parliamentary Research Service, 2014, p 3.

683 Government inquiries into native vegetation laws include the following reports:

- Australian Government Productivity Commission, *Impacts of native vegetation and biodiversity regulations*, 2004, Report No 29, at [www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0005/49235/nativevegetation.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0005/49235/nativevegetation.pdf), accessed 16 May 2017.
- The Senate, Finance and Public Administration References Committee, *Native vegetation laws, greenhouse gas abatement and climate change measures*, Report, April 2010, at [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Finance\\_and\\_Public\\_Administration/Completed%20Inquiries/2008-10/climate\\_change/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Completed%20Inquiries/2008-10/climate_change/report/index), accessed 16 May 2017.
- NSW Office of Environment and Heritage, Independent Biodiversity Legislation Review Panel (IBLRP), *A review of biodiversity legislation in NSW: final report*, 18 December 2014, at [www.environment.nsw.gov.au/resources/biodiversity/BiodivLawReview.pdf](http://www.environment.nsw.gov.au/resources/biodiversity/BiodivLawReview.pdf), accessed 16 May 2017.

684 R Bartel, “Compliance and complicity: an assessment of the success of land clearance legislation in New South Wales” (2003) 20 *EPLJ* 116.

685 IBLRP, above n 683, p 4.

686 S Bricknell, *Environmental Crime in Australia*, Research and Public Policy Series, Report No 109, Australian Institute of Criminology, 2010, p 85. Bricknell at p 90 also notes that native vegetation laws “suddenly blocked a long standing permissible practice without which, agriculturalists argued, effective management of properties and expansion of businesses would be seriously compromised”.

687 A Macintosh and R Denniss, *Property rights and the environment: should farmers have a right to compensation?*, Discussion Paper No 74, The Australia Institute, November 2004, p 6:

(T)he phrase “property rights” is not a legal but an economic term ... (describing) the broad collection of legal and social arrangements that govern access and use of a society’s resources ... So, for example, the ability of a landholder to clear native vegetation without the need to obtain approval from the state is not a right at law; it is a mere privilege associated with the particular title the person holds in the parcel of land. However, to economists and others involved in the property rights debate, this legal privilege is a property right.

Therefore, when farm lobby groups talk of farmers’ property rights being taken away or being expropriated for the benefit of the broader community, they are referring to the loss of the ability to determine how a particular resource is used ... not necessarily the formal loss of a right that is protected under law.

Importantly, as “property rights” in this context are a social construct, they are constantly changing to reflect the shifting values and norms of our community. Whether these rights are reflected in law is another question and, indeed, is a central issue in the property rights debate.

688 Resource governance can be described as government intervention to encourage, initiate, operate and regulate “in selected bibliography some form of collective and coordinated action so that the resource can be used by individuals without causing harm to others”: The Centre for Rural Social Research, *Critical LandCare*, above n 681.

“while being seen by some as environmental destruction, can be understood from the perspective of many farmers as being land improvement”.<sup>689</sup>

A finding common to all government inquiries and studies on the topic is that native vegetation laws have impacted on rural landholders in considerable ways.<sup>690</sup> The most serious perceived negative impacts on agricultural landowners include:

- the overregulation of agricultural activities and farm management practices<sup>691</sup>
- the reduction and loss of present and future agricultural production, profitability and income<sup>692</sup>
- the erosion of owners’ property and ownership rights over the land (including imposing significant restrictions on landowners to effectively manage their properties in an economically sustainable way)<sup>693</sup> and
- inadvertently targeting and having the harshest effects on those landowners who had not yet cleared some or all of their properties including those who, prior to the Act, had taken their role as environmental “stewards” seriously.<sup>694</sup>

As with other environmental protection laws, native vegetation laws are regulated through a system of “commands” and “controls”. In NSW, the Office of Environment and Heritage is the government agency responsible for regulating and enforcing the *NV Act* across all areas of NSW.<sup>695</sup> The utilitarian need for governments to regulate the use of property to achieve socially desirable outcomes is recognised as essential.<sup>696</sup>

Farmers and other land users view the native vegetation legislation in force in NSW as being cumbersome, over-regulated and process driven.<sup>697</sup> A perceived major weakness of the *NV Act* is its “top-down”, “one size fits all” approach to the environmental management of native vegetation, which is seen as being highly dismissive of local factors, local knowledge and local stakeholders.<sup>698</sup> The Act’s outcomes are, at times, viewed as paradoxical and counter-productive to its own conservation objects: a good example being the application of “lock and leave”

689 D Pannell and F Vanclay, *Changing land management: adoption of new practices by rural landholders*, CSIRO Publishing, 2011, p 56.

690 IBLRP, above n 683, p 4, believes that different standards apply to the clearing of native vegetation depending on whether the land being developed is to be used for mining, urban development or infrastructure. The Panel believes that rural landholders are subject to “stricter rules” that require environmental outcomes to be improved or maintained. Social and economic factors are not considered as highly in rural areas as they are in urban areas when tree clearing is part of development or land improvement. This differential treatment creates “inequalities and double standards” and is “potentially preventing sustainable agricultural development from occurring in some highly productive parts of NSW”: at p 4.

691 See above n 683, Productivity Commission at p 129; The Senate, Finance and Public Administration References Committee at pp 25–26 [3.12]; IBLRP, at p 4.

692 This flies in the face of the economic protections contained in the *NV Act*, including s 10(4), which directs that: “Before native vegetation is identified as protected regrowth in a property vegetation plan, the Minister [for the Environment and Minister for Heritage] is to have regard to the social and economic implications of the preservation of the vegetation”. The first stated object of the Act is “to provide for, encourage and promote the management of native vegetation on a regional basis in the social, economic and environmental interests of the State”: s 3(a).

693 The Senate, Finance and Public Administration References Committee, above n 683, pp 28–29 [3.20–3.23].

694 The *NV Act* has significantly fewer negative consequences on landholders who have little native vegetation remaining on their properties: The Senate, Finance and Public Administration References Committee, above n 683, p 27 [3.17]–[3.19]. S Bricknell, above n 686, notes that this unintended consequence of the legislation “may have generated an additional layer of resentment”.

695 The Office of Environment and Heritage (OEH) manages the implementation of the *NV Act* and its regulations in partnership with Local Land Services and the EPA. The OEH has primary responsibility for compliance assurance under the *NV Act* in relation to broadscale clearing, while (since 2012) the EPA regulates the logging of native forests on private lands: Office of Environment and Heritage, *NSW Report on Native Vegetation 2011–13*, 2014, p 17.

696 A Macintosh and R Denniss, above n 687, p 43. It is also argued at p 29 that:  
society’s desire for the conservation of various aspects of the environment will fluctuate through time. Therefore, to achieve the most efficient allocation of resources and to maximise social welfare, it is essential that governments have [in their legislative and regulatory powers] the capacity to respond efficiently and effectively to environmental, social and economic changes.

697 *ibid.*

698 R Bartel, “Vernacular knowledge and environmental law: cause and cure for regulatory failure” (2014) 19(8) *Local Environment: The International Journal of Justice and Sustainability* 891.



provisions.<sup>699</sup> Policy and law that is seen as draconian, inflexible and counterproductive to the needs of the agricultural community are likely to result in landowners feeling unfairly treated and even persecuted. Significant tensions may arise between landowners and the government regulators, particularly where the application and enforcement of native vegetation laws is perceived as being over-zealous and heavy-handed.<sup>700</sup>

Unfortunately, the frustrations with government policies and laws may go well beyond mistrust of environmental authorities: “regulatory resistance” and active non-compliance may be the “forced” choice of landowners to ensure the financial viability of their farming business.<sup>701</sup> In 2010, a submission from a Northern NSW landowners’ rights group, warned of the “complete dislocation” between agricultural and environmental interests in the area and the degeneration of adversarial relationship between farmers and government officials regulating native vegetation laws.<sup>702</sup> Almost as a portend of the tragic events that would unfold, the prosecution of a Moree farmer for unlawful clearing offences committed in late 2011 to early 2012 led to the fatal shooting of an environmental officer in July 2014 following what was reported in the media as a long-running dispute (see **Case study 2**).<sup>703</sup> The spotlight had been on the enforcement of native vegetation laws in country NSW years before the fatal shooting with talkback host Alan Jones in 2010 describing Northern and North-Western NSW as “a ‘hotbed’ for the bitter stoush over land clearing”.<sup>704</sup> Farmers were defending their right to remove vegetation on their own properties while, on the other hand, environmentalists believed the land clearing was causing irreversible environmental damage. Alan Jones went on to describe the actions of the then Department of Environment and Climate Change as “heavy handed”, and ominously predicted that: “The behaviour of this department is the kind of behaviour that leads people to murder”.<sup>705</sup>

699 A central principle of habitat conservation is to protect the location(s) in which that species occupies. Locking up the landscape and leaving it may not always work in rural areas subject to invasive native flora that will eventually dominate an area and reduce biodiversity. One submission to the Senate’s 2004 inquiry into native vegetation laws stated that “any regulatory regime which removes the ability to maintain the tree-grass balance will ultimately result in the eventual loss of all grazing utility and a reduction in biodiversity through the excessive proliferation of woody species”: above n 683, p 31 [3.34]. “Lock and leave” native vegetation laws negatively impact on agricultural productivity in a number of ways: being unable to expand farming activities into areas not already developed (“locked” away); removing or reducing previously productive land from farming activities; and, the over-use of existing available land where otherwise productive land is made unavailable: above n 683, p 30 [3.27].

700 Bartel, above n 698, also warns of associated financial, political and other costs. These may arise from the unreasonable and over-zealous enforcement and prosecution of offences and in ensuring strict compliance with revegetation directions.

701 IBLRP, above n 683, p 5. Gunningham and Grabosky, above n 287, pp 45–46, observed that “[r]esistance to what is perceived to be the heavy hand of regulation may be a very rational response where regulations impede efficiency and competitiveness. When mutual distrust between government and industry degenerates into adversarial legal combat, efficiency and effectiveness are in even greater jeopardy”.

702 The Senate, Finance and Public Administration References Committee, above n 683, pp 29 [3.26], quoting *Property Rights Reclaimers Moree*, Submission 234, p 1, accessed 16 May 2017.

703 On-line media reports and social commentaries, accessed 16 May 2017, include: **Sydney Morning Herald**: 22 April 2016, at [www.smh.com.au/nsw/ian-robert-turnbull-pleads-not-guilty-to-murdering-environment-officer-20151204-glftmn.html](http://www.smh.com.au/nsw/ian-robert-turnbull-pleads-not-guilty-to-murdering-environment-officer-20151204-glftmn.html); 30 July 2014, at [www.smh.com.au/nsw/elderly-man-charged-with-murder-of-environment-and-heritage-worker-near-moree-20140729-zycl2](http://www.smh.com.au/nsw/elderly-man-charged-with-murder-of-environment-and-heritage-worker-near-moree-20140729-zycl2); 2 October 2014, at [www.smh.com.au/nsw/ian-turnbull-accused-of-murdering-environmental-officer-glen-turner-refused-bail-20141002-10p3xd.html](http://www.smh.com.au/nsw/ian-turnbull-accused-of-murdering-environmental-officer-glen-turner-refused-bail-20141002-10p3xd.html); 28 April 2016, at [www.smh.com.au/nsw/robert-strange-tells-how-glen-turner-pleaded-to-get-him-medical-help-20160428-gogy4t.html](http://www.smh.com.au/nsw/robert-strange-tells-how-glen-turner-pleaded-to-get-him-medical-help-20160428-gogy4t.html); 29 April 2016, at [www.smh.com.au/nsw/slain-environment-officer-glen-turner-did-not-dislike-turnbull-family-robert-strange-20160429-goi7qk.html](http://www.smh.com.au/nsw/slain-environment-officer-glen-turner-did-not-dislike-turnbull-family-robert-strange-20160429-goi7qk.html); 5 May 2016, at [www.smh.com.au/nsw/farmer-ian-turnbull-accused-of-murdering-environmental-officer-glen-turner-a-champion-court-20160505-gon4pu.html](http://www.smh.com.au/nsw/farmer-ian-turnbull-accused-of-murdering-environmental-officer-glen-turner-a-champion-court-20160505-gon4pu.html); 18 June 2016, at [www.smh.com.au/nsw/son-of-killer-ian-turnbull-ordered-to-pay-millions-for-clearing-land-illegally-20160616-gpkqvz.html](http://www.smh.com.au/nsw/son-of-killer-ian-turnbull-ordered-to-pay-millions-for-clearing-land-illegally-20160616-gpkqvz.html); and, 23 June 2016, at [www.smh.com.au/nsw/farmer-ian-turnbull-jailed-for-murdering-environment-officer-glen-turner-20160623-gppzki.html](http://www.smh.com.au/nsw/farmer-ian-turnbull-jailed-for-murdering-environment-officer-glen-turner-20160623-gppzki.html).

**The Australian**: 21 April 2016, at [www.theaustralian.com.au/news/latest-news/environment-officer-murder-trial-begins/news-story/3c8f081c6851d68fe66421ac3803194a](http://www.theaustralian.com.au/news/latest-news/environment-officer-murder-trial-begins/news-story/3c8f081c6851d68fe66421ac3803194a); 17 May 2016, at [www.theaustralian.com.au/national-affairs/state-politics/after-first-shot-calmness-overcame-killer-farmer-ian-turnbull/news-story/ade9c170e35ed5897c21ab5f5a7d9089](http://www.theaustralian.com.au/national-affairs/state-politics/after-first-shot-calmness-overcame-killer-farmer-ian-turnbull/news-story/ade9c170e35ed5897c21ab5f5a7d9089); 25 May 2016, at [www.smh.com.au/nsw/farmer-ian-turnbull-committed-manslaughter-not-murder-defence-tells-court-20160525-gp3n08.html](http://www.smh.com.au/nsw/farmer-ian-turnbull-committed-manslaughter-not-murder-defence-tells-court-20160525-gp3n08.html); and, 27 May 2016, at [www.smh.com.au/action/printArticle?id=1009650707](http://www.smh.com.au/action/printArticle?id=1009650707).

**ABC News**: 22 July 2016, at [www.abc.net.au/news/2016-04-21/farmer-fatally-shot-environment-officer-fuelled-by-hatred-court/7347838](http://www.abc.net.au/news/2016-04-21/farmer-fatally-shot-environment-officer-fuelled-by-hatred-court/7347838); 2 October 2014, at [www.abc.net.au/news/2014-10-02/moree-farmer-who-shot-environment-officer-glenn-turner-cracked/5784724](http://www.abc.net.au/news/2014-10-02/moree-farmer-who-shot-environment-officer-glenn-turner-cracked/5784724); 10 September 2014, at [www.abc.net.au/news/2014-09-10/nrn-croppa-creek-operation-underway-looking-10-09-14/5733972](http://www.abc.net.au/news/2014-09-10/nrn-croppa-creek-operation-underway-looking-10-09-14/5733972); 31 July 2014, at [www.abc.net.au/news/2014-07-30/farmer-in-land-dispute-charged-with-murder/5634006](http://www.abc.net.au/news/2014-07-30/farmer-in-land-dispute-charged-with-murder/5634006); 5 August 2014, at [www.theaustralian.com.au/news/farmer-kept-firing-at-fleeing-environment-officer-court-told/news-story/7bd5e0a9f79ec2d58ec2837a4a74a285](http://www.theaustralian.com.au/news/farmer-kept-firing-at-fleeing-environment-officer-court-told/news-story/7bd5e0a9f79ec2d58ec2837a4a74a285); 16 May 2016, at [www.abc.net.au/news/2016-05-16/moree-farmer-ian-turnbull-shot-dead-glen-turner-trial/7417720](http://www.abc.net.au/news/2016-05-16/moree-farmer-ian-turnbull-shot-dead-glen-turner-trial/7417720); 27 May 2016, at [www.abc.net.au/news/2016-05-27/nsw-farmer-found-guilty-of-murdering-environment-officer/7452728](http://www.abc.net.au/news/2016-05-27/nsw-farmer-found-guilty-of-murdering-environment-officer/7452728); and, 23 June 2016, at [www.abc.net.au/news/2016-06-23/moree-shooting-ian-turnbull-sentenced-over-murder/7535808](http://www.abc.net.au/news/2016-06-23/moree-shooting-ian-turnbull-sentenced-over-murder/7535808).

704 *R v Turnbull* [2016] NSWSC 189 per Johnson J at [75], as contained in Exhibit D, affidavit of Mark Dight, 3 November 2015.

705 *ibid*.

As indicated, the application and regulation of native vegetation laws often runs counter to agricultural profitability. Not surprisingly, it is the LEC's experience that the clearing of native vegetation is "invariably undertaken for the purpose of commercial gain":<sup>706</sup>

On land used or proposed to be used for purposes of urban or rural residential development, clearing of native vegetation might be intended to remove a perceived impediment, enable an attribute of the land to be realised or better realised (such as views), lessen costs of development or increase density, yield or profits, with the expectation of a concomitant increase in the capital value of the land.<sup>707</sup>

...

On land used or proposed to be used for purposes of agriculture, clearing of native vegetation might be intended to increase the grazing productivity (such as increasing pasture and stocking rate), change from a financially lower yielding to a financially higher yielding agricultural use (such as from grazing to cropping) or facilitate more practical and cost effective operations, including of machinery and equipment, also with the expectation of an increase in the capital value of the land.<sup>708</sup>

In 2009, Pain J in *Director-General, Dept of Environment and Climate Change v Calman Aust Pty Ltd* gave "judicial notice of long standing difficulties for government in managing uncontrolled native vegetation clearances in NSW".<sup>709</sup> Rural properties are often registered as farming businesses with the proprietors/directors/managers of these "corporations" regularly being the landowners.<sup>710</sup> Historically, private landowners in NSW have a high profile as the perpetrators of illegal land clearing offences.<sup>711</sup> Executive liability provisions for company directors and managers responsible for the commission of native vegetation offences may be found under ss 45 and 45A of the *NV Act*.<sup>712</sup>

It needs to be noted that native vegetation offences examined in this study were committed before the introduction of the *Environmental Planning and Assessment Amendment Act 2014*. That amending piece of legislation took effect on 31 July 2015 and substantially increased the maximum penalties available through the *EPA Act* for a wide range of environmental offences, including the unlawful clearing of native vegetation. For a strict liability native vegetation offence (eg a "Tier 2 *EPA Act* offence") the maximum penalty was increased to \$2 million for a corporation

706 *Director-General of the Dept of Environment and Climate Change v Rae* (2009) 197 A Crim R; (2009) LGERA 121 at [11].

707 *ibid*. Preston CJ of the LEC cited the following cases as examples where the clearing of native vegetation for residential development was undertaken for commercial gain: *Director General of National Parks and Wildlife v Wilkinson* [2002] NSWLEC 171 at [92]; *Cameron v Eurobodalla Shire Council* (2006) 146 LGERA 349 at [70]; *Gittany v Sutherland Shire Council* [2006] NSWLEC 242; (2006) 145 LGERA at [141]; *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34; (2006) 145 LGERA 234 at [246], [247].

708 *ibid* at [12]. Preston CJ of the LEC cited the following cases as examples where the clearing of native vegetation on farming land and for agricultural purposes was undertaken for commercial gain: *Piva v Brinkworth* (1992) 59 SASR 92 at 96; *Minister for the Environment and Heritage v Greentree (No 3)* [2004] FCA 1317; (2004) 136 LGERA 89 at [65] and see also [47], [48], [59] and [61]; *Director-General Dept of Environment and Climate Change v Wilton* [2008] NSWLEC 297 at [51], [76]; *Director-General of the Dept of Environment and Climate Change v Hudson* [2009] NSWLEC 4; (2009) 165 LGERA 256 at [78]; *Lamattina v Gould* [2009] SASC 130 at [3], [17] and [19]; and, *Minister for Environment, Heritage and the Arts v Lamattina* [2009] FCA 753 at [39] and [68].

709 [2009] NSWLEC 182 at [52].

710 For example, see: *Calman, ibid*; *Chief Officer of the Office of Environment and Heritage v Humphries* [2013] NSWLEC 213; *Chief Officer of the Office of Environment and Heritage v Newbigging* [2013] NSWLEC 144; and, *Chief Executive, Office of Environment and Heritage v Kennedy* [2012] NSWLEC 159.

711 See *Dept of Land and Water Conservation v Orlando Farms Pty Ltd* (1998) 99 LGERA 101; *Director-General Land and Water Conservation v Rial* (1998) 99 LGERA 130; *Director-General of the Dept of Environment and Climate Change v Taylor* [2007] NSWLEC 530; *Director-General of the Dept of Environment and Climate Change v Wilton* [2008] NSWLEC 297; and, *Director-General of the Dept of Environment and Climate Change v Hudson* [2009] NSWLEC 4.

712 *NV Act*, s 12 (Note): "An offence ... committed by a corporation is an executive liability offence attracting executive liability for a director or other person involved in the management of the corporation — see section 45." In *Director-General, Dept of Environment, Climate Change and Water v Vin Heffernan Pty Ltd* [2010] NSWLEC 200 ("*Vin Heffernan*"), proceedings for a s 12 offence on land owned by a family run corporation was taken against a small business contracted to clear the land. In separation proceedings for the same offence in *Director-General, Dept of Environment, Climate Change and Water v Source & Resources Pty Ltd* [2011] NSWLEC 87, Pepper J determined that the sole corporate officer — and "the will and mind" — of the company that owned the unlawfully cleared land was "unfit to stand trial" because of dementia: at [23]. Consequently, the issue arose as to the utility and fairness of proceeding with the prosecution against the company: at [30]. There is no subsequent LEC judgment which indicates the prosecutor's decision to proceed, or not proceed, with the charge against the company.



and \$500,000 for an individual.<sup>713</sup> The substantial maximum penalty for illegal land clearing “reflects the public expression of Parliament of the seriousness of the offence”.<sup>714</sup> As Preston CJ of the LEC articulated many years earlier in *Rae*:

The very high maximum penalties fixed by parliaments for offences of clearing native vegetation contrary to law are, to a significant extent, intended to act as a deterrent, a countervailing disincentive to the economic incentives to clear native vegetation illegally. The penalties imposed by sentencing courts for offences of clearing native vegetation need to be of such magnitude or nature as to make the financial cost to an offender outweigh the likely commercial gain by offending. In this way, the sentence of the court changes the economic calculus of the offender and also of other owners, occupiers and developers of land on which native vegetation occurs who might be tempted to clear illegally by the prospect that only light punishment will be imposed by the courts. Compliance with the law becomes cheaper than offending. Crime becomes economically irrational.<sup>715</sup>

A person or corporation found guilty of carrying out or authorising the clearing of native vegetation in contravention of s 12 of the *NV Act* during the period covered by this study was liable to the maximum penalty provided for at the time under s 126 of the *EPA Act*.<sup>716</sup> Notably, at no time during the study period, did the maximum penalty for a native vegetation offence exceed \$1.1 million. Up to 1 December 2005, the maximum penalty under the former *NVC Act* was \$110,000, whereas between 1 December 2005 and 30 July 2015, under the *NV Act*, the maximum penalty was ten times higher at \$1.1 million.<sup>717</sup>

A further disincentive to the clearing of native vegetation rests in the provisions of s 126(3) of the *EPA Act*, where the court may, in addition to or in substitution for any fine imposed, direct the offender to plant new trees and vegetation and provide security to maintain and protect those trees and vegetation to a mature growth.<sup>718</sup> Regenerative work may be similarly directed under s 38 of the *NV Act* which includes:

- repairing any damage resulting from the clearing of native vegetation: s 38(2)(a)
- rehabilitating any land affected by the clearing, including taking steps to allow the land to regenerate: s 38(2)(b)
- preventative actions ensuring that specified land, or any specified river or lake, will not be damaged or detrimentally affected, or further damaged/affected, by the clearing: s 38(2)(c).

A mitigating factor in the sentencing of offenders convicted for offences of clearing native vegetation, and which often obviates the need for a formal order or direction for remedial work, is the voluntary entering of an agreement to undertake regeneration and conservation work on the property affected by the clearing.<sup>719</sup>

713 Consistent with other Acts, such as the *POEO Act*, the *Environmental Planning and Assessment Amendment Act 2014* introduced a distinction between individual (natural persons) and corporate offenders: corporations being liable to heavier penalties than individuals. For example, under s 125B of the latest version of the *EPA Act*, the Tier 2 maximum penalty for a corporation is \$2 million (plus, for a continuing offence, a further \$20,000 for each day the offence continues) and, for an individual, it is \$500,000 (plus, for a continuing offence, a further \$5,000 for each day the offence continues).

714 [2014] NSWLEC 150 per Sheahan J at [124] (citations removed).

715 *Director-General of the Dept of Environment and Climate Change v Rae*, above n 706, at [13].

716 Prior to the introduction of the *Environmental Planning and Assessment Amendment Act 2014*, the *NV Act* did not stipulate a separate maximum penalty for corporations. In some native vegetation cases, such as *Vin Heffernan*, above n 712 at [34], a discrete maximum penalty for corporate offenders appears to be alluded to: “The maximum penalty for an offence by a corporation in breach of s 12 is a fine of \$1,100,000 (10,000 penalty units)”.

717 *Director-General of the Dept of Land and Water Conservation v Leverton Pastoral Co Pty Ltd* [2002] NSWLEC 212 per Talbot J at [39].

718 *EPA Act*, s 126(3)(a) and (b).

719 For example, see *Chief Executive of the Office of Environment and Heritage v Humphries* [2013] NSWLEC 213. In this case, Preston CJ of the LEC noted that the offender “offered to make partial reparation for the environmental harm caused by commission of the offence by undertaking conservation works on other parts of the property” and “proposed entering into a conservation agreement” with the Office of Environment and Heritage which would “add another layer ... of protection to the native vegetation” in an area of “significant conservation value”: at [31].

Remedial work may also be directed under s 41(5) of the *NV Act* where civil enforcement proceedings have been brought before the LEC to impose an order to remedy or restrain a contravention of the *NV Act*.<sup>720</sup> In the context of restorative justice, the LEC has deliberated on the nature of remedial orders made respectively under ss 38 and 41(5) of the *NV Act*. As Craig J proffered:

In *Terranora Group Management Pty Ltd v Director-General, Office of Environment & Heritage* [2013] NSWLEC 198; 200 LGERA 1, Biscoe J accepted at [62] accepted that a direction given under s 38 “had to be a reasonable and proportionate response” to the unlawful clearing alleged. When framing an order under s 41(5) “to remedy” a contravention of the Act that has been found, I would have thought that “a reasonable and proportionate response” was equally applicable to the order that the Court “thinks fit” to make in that context. Just as the text of s 38 contemplates the carrying out of “remedial work”, so also s 41(5) contemplates the making an appropriate order that is remedial in its effect.<sup>721</sup>

## Findings

The full set of LEC cases involving native vegetation offences is provided in **Cases Table 3** in **Volume 2**.

In total, during the study period, there were 24 prosecutions for native vegetation offences.<sup>722</sup> Twenty offences were prosecuted under the *NV Act* and four offences were prosecuted under the *NVC Act* (rep),<sup>723</sup> which the current Act replaced.<sup>724</sup> **Cases Table 3** provides detailed information on all 24 native vegetation offences. As caution needs to be exercised in comparing sentences handed down under different sentencing regimes, the table is organised by sentencing regime and further stratified in terms of single and multiple counts of the native vegetation offence.<sup>725</sup>

The majority (71%) of native vegetation offences were assessed as being of medium or high objective seriousness; and all except one offence (96%) were assessed as resulting in medium to serious levels of environmental harm.

In three cases, the rural corporate entity (ie farming business) that committed the offence, together with that company’s director(s) (ie landowners), were prosecuted for the offence.<sup>726</sup>

720 In *Chief Executive of the Office of Environment and Heritage v Turnbull (No 4)* [2016] NSWLEC 66 (*Turnbull No 4*), Craig J heard Class 4 civil enforcement proceedings for an action to obtain a judicial order to restrain landowner Grant Turnbull from (further) clearing native vegetation or causing or permitting the clearing of native vegetation on his property: at [2]. Grant Turnbull was found responsible for illegally clearing over 500 hectares including land subject to a “settled” direction for remedial work to be undertaken made by Preston CJ of the LEC some two years earlier in *Turnbull v Director-General, Office of Environment and Heritage (No 2)* [2014] NSWLEC 112 (*Turnbull No 2*) (also see *Turnbull v Director-General, Office of Environment and Heritage* [2014] NSWLEC 84; 212 LGERA 163 (*Turnbull No 1*)). A second order was sought by the OEH, pursuant to s 41(5) of the *NV Act*, “requiring that remedial action be undertaken in accordance with a detailed rehabilitation plan served upon Mr Turnbull”: at [3]. A third order was also sought to make “Mr Turnbull comply with a [s 38] direction for remedial work to be undertaken” on designated areas of the affected property, consistent with the earlier rulings made in *Turnbull No 2* (at [3], [26]–[29]), which included “areas outside the areas then cleared ... where direct actions could be undertaken that would provide measurable conservation gain for the species, populations of species and ecological communities of native vegetation affected by the clearing in the cleared areas (*Turnbull No 1* at [54])”.

721 *Turnbull No 4*, *ibid* at [119]–[120].

722 In one case, *Director-General Dept of Environment and Climate Change v Wilton* [2008] NSWLEC 297, the defendant pleaded guilty to two offences against s 21(2) of the *NVC Act*. The offences were dealt with as separate crimes as they were committed on discrete sections of the defendant’s property over different time spans. Both offences were assessed as being of low (to moderate) objective seriousness and causing moderate environmental harm: at [66], [73]. Separate fines (\$30,000 and \$10,000) were ordered and the prosecutor’s costs apportioned equally across the two offences: at [80]–[83]. In this study, only the principal native vegetation offence was included in the count of native vegetation offences.

723 The four native vegetation offences in this study sentenced under the former *NVC Act* are: *Director-General, Dept of Environment, Climate Change and Water v Linklater* [2011] NSWLEC 30; *Director-General Dept of Environment and Climate Change v Wilton* [2008] NSWLEC 297; and, *Director-General of the Dept of Land and Water Conservation v Leverton Pastoral Co Pty Ltd* [2002] NSWLEC 212.

724 Section 17(1) of the former *NVC Act* made contravention of s 21(2) of that Act an equivalent offence to that against s 12(1) of the *NV Act*. This was noted by Preston CJ of the LEC in *Rae*, above n 706 at [79].

725 With regard to native vegetation offences, in *Rae*, above n 706, Preston CJ of the LEC at [88] warned that:

Prior to the enactment of the *Native Vegetation Conservation Act* 1997, clearing of native vegetation was regulated under State Environmental Planning Policies made under the *EPA Act*. However, the statutory scheme, the maximum penalties and the approach to sentencing of the court were sufficiently different as to make the sentences imposed for offences under that regime offer no guidance to the court when sentencing for offences under the current *Native Vegetation Act* 2003.

726 Under s 175B of the *NPW Act*.

Financial advantage (ie commercial gain) was identified as the main reason for the commission of the offence in 18 of the 24 native vegetation offences (75%). This is the highest proportion of financially motivated offending for any offence type — even higher than that for Tier 1 pollution offences (67%).

In 19 native vegetation offences (79%), the convicted offender was also the owner of the land affected by the illegal clearing; in *Director-General, Dept of Environment, Climate Change and Water v Vin Heffernan Pty Ltd* [2010] NSWLEC 200, the offender was a tenant leasing the rural property; and, in *Chief Executive of the Office of Environment and Heritage, Dept of Premier and Cabinet v Turnbull* [2014] NSWLEC 150, the offender was the father and grandfather of the owners of the land illegally cleared.

In 19 cases, a remediation order under s 38 of the *NV Act* was issued against the owner(s) of the affected land. In the case of *Turnbull*, the remediation notices were directed to his son and grandson — the owners of the affected land — and were the subject of later appeals. In the case of *Vin Heffernan*, the remedial notice was served on the landowner, the “principal director” of the rural property who represented the “will and mind of the company” (at [30]) and who was found unfit to stand trial (due to dementia): at [1], [33].

### Penalty

Considering only the 20 cases sentenced under the *NV Act*, all involved a single offence of illegal land clearing. One offence resulted in a conviction without further penalty (aside from the corporate defendant being ordered to pay costs). The other 19 offences were penalised by way of a fine.

### Fine amounts

The average fine amount for the principal offence across all 19 *NV Act* offences (costs specified and unspecified) was \$91,074 (median: \$67,500).<sup>727</sup>

The smallest actual fine imposed for a *NV Act* offence was \$5,000<sup>728</sup> and a fine of \$318,750 was the largest.<sup>729</sup>

For a *single NV Act* offence, where the prosecutor’s costs *were specified* and thus known before sentencing (n=10), the average fine amount was \$58,065 (median: \$35,075). However, for a *single NV Act* offence, where the prosecutor’s costs *were NOT specified* before sentencing (n=9), the average fine amount was much greater at \$127,750 (median: \$100,000). In general, the higher fine amounts seem to be a function of these particular offences being contested cases and/or more complex cases involving higher levels of environmental harm and culpability.

<sup>727</sup> The average for all 19 offences under the *NV Act* examined in this study includes both those fine amounts where the prosecutor’s costs were specified and the fine amounts where prosecutor’s costs were not specified at time of sentencing.

<sup>728</sup> *Director-General of the Dept of Land and Water Conservation v Leverton Pastoral Co Pty Ltd* [2002] NSWLEC 212. Talbot J commented at [42]–[43] that:

No submission has been made that a penalty should not be imposed. I recognise, however, that the acceptance by the defendant of the direction to carry out remedial work is in a sense, at least as to part, a penalty. Part of the so-called remedial work appears to go beyond simply restoring the damage caused.

I expressly accept the explanation given by the defendant that at the time the offence occurred it held the belief that it was entitled, in view of the history of the clearing on the land and the nature of the vegetation being cleared, to do what it was doing without having to obtain consent.

<sup>729</sup> *Director-General, Dept of Environment and Climate Change v Hudson (No 2)* [2015] NSWLEC 110. This case involved a second hearing following a successful appeal. The CCA quashed the original penalties and remitted the matter back to the LEC. The second hearing resulted in a fine of \$318,750 for a single native vegetation offence and an additional \$1,275 for a failure to comply offence under s 36(4) of the *NV Act*. At first instance, Lloyd J found the land clearing offence “as falling within the upper range of seriousness”: *Director-General of the Dept of Environment and Climate Change v Hudson* (2009) 165 LGERA 256; [2009] NSWLEC 4 at [79]. This fact was not disputed and, at the remitted hearing ([2015] NSWLEC 110), Pepper J stated at [124]:

I have no doubt whatsoever that the extent of the environmental harm caused by the unlawful clearing was severe. Moreover, I have no hesitation in finding that the commission of the offence caused environmental harm at the higher end of the spectrum and, to use the language of 21A(2)(g) of the *CSPA*, may be characterised as ‘substantial’ and therefore constitutes an aggravating factor pursuant to that provision. [Citations removed.]

### Remediation costs

Of the full set of 24 native vegetation cases, there were 18 (75%) where an agreement to restore the environmental damage was entered into with the defendant. In each of these cases, the cost of the remediation project was not estimated or quantified in any way in the judgment by the regulatory authority issuing the remediation notice.<sup>730</sup>

### Prosecution costs<sup>731</sup>

In just under one-half (11 of 24) of the cases dealing with native vegetation offences, prosecutor costs were not specified (available) at the time of judgment.

Where known, prosecutor's costs averaged at \$44,787 (median: \$32,000) for a *single* offence under the *NV Act* (n=10), and ranged from a low of \$15,000<sup>732</sup> to a high of \$172,275.<sup>733</sup>

Prosecutor costs represented, on average, 43.5% of the "total" payment ordered on defendants convicted of a single offence under the *NV Act*. In relation to these cases, prosecutor costs ranged from 26% to 75% of the total financial "hit" taken by these defendants.<sup>734</sup>

### "Total" costs

The average "Total" cost, where the sum of the fine amount and the prosecutor's costs were known, for a single offence under the *NV Act* (n=10), was \$102,852 (median: \$68,375).

730 It would appear that the costs associated with remediation directions are likely to be considerable. Two 2016 native vegetation cases in the LEC provide some insight into the costs of carrying out remediation orders. First, following the sentencing of his father, Ian Turnbull, in the Supreme Court on 26 June 2016 for the shooting murder of environmental compliance officer, Glen Turner, Grant Turnbull gave some indication of the magnitude of the financial imposition of a remediation direction notice imposed on him as the landowner of the property affected by illegal land clearing conducted, with his knowledge, by his father. In *Chief Executive of the Office of Environment and Heritage v Turnbull (No 4)* [2016] NSWLEC 66 per Craig J at [127] stated: "[a]n estimate given [by Grant Turnbull] for the costs of compliance [with the remedial work order] over the next 15 years was \$3,948,000 while an estimate to fence the area being rehabilitated was \$406,560. Secondly, in *Director-General, Dept of Environment and Climate Change v Hudson (No 2)* [2015] NSWLEC 110, the defendant claimed, although no objective material was provided, that he had incurred significant economic losses as a result of carrying out the remediation order on the land that he had illegally cleared: "[i]n particular, he estimated that he had incurred additional expenses of \$101,255, and had incurred lost profits of approximately \$1,419,320": at [79].

731 Where known, includes all prosecutor's costs and expenses and any investigative costs.

732 In *Director-General, Dept of the Environment, Climate Change and Water v Ian Colley Earthmoving Pty Ltd* [2010] NSWLEC 102, Pain J determined that: "[i]n light of all the objective and subjective circumstances and taking into account the Defendant's limited capacity to pay a substantial fine a nominal fine should be imposed". The defendant's counsel submitted that only a limited costs order, half these costs, ought be paid as the landowner has not been prosecuted despite being an appropriate defendant. Had the landowner been charged, the costs could have been shared equally as has occurred in other cases such as *Calman*": at [74]–[75]. The landowner was not prosecuted as, under s 11 of the *NV Act*, exceptions are provided to allow native vegetation to be cleared, including the construction of rural infrastructure such as dams and farm roads. Further, "there was no reason for the earth moving contractor to believe that there was any likelihood that clearing of vegetation in breach of the *NV Act* might arise and that he should ask if the necessary permit had been obtained": at [42]. Pain J determined at [44] it is "not appropriate to find that the defendant was careless in not making inquiries of the landowner as to whether he had the necessary permit to enable clearing of native vegetation. In these circumstances the defendant's culpability is low". As a result, her Honour ruled at [76] that "costs incurred in relation to the prosecution of the landowner ... should not be borne by this defendant ... Any costs payable must arise solely from the investigation of this defendant. The amount of costs has now been agreed at \$15,000. The amount of costs is substantial and will impact on the ability of the Defendant to pay a fine, a matter I take into account, per *EPA v Barnes* [2006] NSWCCA 246". The "appropriate" fine was set at \$5,000: at [77].

733 *Chief Executive of the Office of Environment and Heritage, Dept of Premier and Cabinet v Turnbull* [2014] NSWLEC 150.

734 In *Director-General of the Dept of Land and Water Conservation v Leverton Pastoral Co Pty Ltd* [2002] NSWLEC 212, the defendant was a landowner running a family farming business in Moree who was ordered by Talbot J to pay a "modest" fine of \$5,000 for a single offence under the former *NVC Act*: at [44]. He was also ordered to pay the prosecutor's costs of \$31,000, which represented 86% of the total pecuniary costs incurred. The defendant was subject to an extensive remediation plan, voluntarily agreed to, with sizeable constraints on agricultural activities and future productivity: at [32]–[37]. The "significant impost of paying the prosecutor's costs" was also taken into consideration in determining the size of the final penalty": at [40].



## Case study 2

### Illegal land clearing led to murder of environmental officer by farmer

#### The environmental offence

In the period from late 2011 to early 2012, farmer and family patriarch Ian Turnbull committed an offence against s 12 of the *Native Vegetation Act 2003 (NV Act)*, in that he unlawfully cleared native vegetation: (*Chief Executive of the Office of Environment and Heritage, Dept of Premier and Cabinet v Turnbull* [2014] NSWLEC 150). While Ian Turnbull pleaded guilty to the offence, he disputed the extent of the unlawful clearing, the nature and extent of the native vegetation cleared, and the extent of environmental harm: at [21], [26]. The illegal clearing was committed on two adjoining wheat farms situated in Croppa Creek, near Moree, in Northern NSW. At the time of the offence, one property, “Strathdoon”, was being sold by a neighbour to the defendant’s son, Grant Turnbull; and, the other property, “Colorado”, was being sold by the defendant to his grandson, Corey Turnbull. After contracts were exchanged but before the sales were settled, Ian Turnbull, together with a contractor employed by the defendant, used bulldozers to fell a total of over 3,400 trees located on land that traversed both properties.

The clearing was undertaken to convert the properties from grazing properties to more lucrative broadacre farms; and, there was a “commercial imperative” to make the heavily-mortgaged farms as productive as soon as possible. This was considered by the LEC to be an aggravating factor and, as the environmental harm was substantial, increased the objective seriousness of the offence: at [136], [186]. Ian Turnbull was convicted of the offence, fined \$140,000 (at [189]) and ordered to pay the prosecutor’s costs estimated at \$172,275: at [171].

Prior to the sentencing hearing of Ian Turnbull in [2014] NSWLEC 150, a separate dispute arose concerning remediation notices issued by the prosecutor, the NSW Office of Environment and Heritage (OEH), not to the defendant but to the owners of the affected properties, his son and grandson: at [8]. The need for remedial work was extensive and scheduled to be performed over a period of 15 years. The OEH’s directions for remedial work included “assisted revegetation” and, if that failed, “assisted planting” of native trees (*Turnbull No 1* at [135]–[152], see **Cases** at p 135). They also included the registration of a Property Vegetation Plan under s 26 of the *NV Act* and extensive monitoring and reporting requirements: at [21], [154]–[166]. These remediation notices were the subject of appeals: *Turnbull No 1* and *Turnbull No 2* (see **Cases** at p 135).

Also in process were two further prosecutions before the LEC against Ian Turnbull and his grandson, Corey, in relation to alleged unlawful clearing of native vegetation between January and September 2012. Furthermore, in September 2014, OEH officers, accompanied by police, inspected the property owned by Grant Turnbull to gather information on allegations of ongoing illegal land clearing. Compliance operations had been suspended following the fatal shooting of environmental officer, Glen Turner, by Ian Turnbull. The OEH’s Chief Executive was reported online on the ABC News (10/9/2016) as saying:



Image: Land clearing in Queensland (not in relation to this case study).



This morning's visit is part of an investigation into allegations of recent illegal clearing of a large amount of land ... We think it could be up to 500 hectares and we are also concerned that some of the land involved in the clearing activity may have been subject to a Land and Environment court order for remediation ... The police are there to ensure the safety of Office of Environment & Heritage staff and police, and anyone else that happens to be in the area.

### The fatal shooting

Ian Turnbull was charged with murdering environmental compliance and regulation officer, Glen Turner, on 29 July 2014. Ian Turnbull was refused bail, with Supreme Court Judge, Johnson J, describing the alleged shooting as a “deliberate execution.” In the Supreme Court trial and sentencing hearing, which commenced in April 2016 (see **Cases** at p 135), the Crown Prosecutor said that the accused was propelled by “personal hatred” and his belief that the OEH, led by Glen Turner, were persecuting him and his family over land clearing. The Crown also alleges that, two years before the shooting, Ian Turnbull had threatened Glen Turner and, as a result of the alleged threat, the environmental officer had been instructed not to have any further contact with Ian Turnbull.

Ian Turnbull pleaded not guilty to murder but guilty to manslaughter on the grounds of substantial impairment due to mental illness — a partial defence under s 23A of the *Crimes Act* 1900. Lawyers for Ian Turnbull argued that he was not thinking rationally after snapping under the pressure of persistent legal action, perceived harassment from the OEH, and the threat of financial ruin for him and his family. The Crown did not accept the plea to manslaughter and the murder trial proceeded.

In describing the events on the day of the fatal shooting, Robert Strange, Glen Turner's work colleague, testified that Ian Turnbull pulled up in his car behind them while they were outside their work vehicle on a public road next to a property owned by Ian Turnbull's grandson, Corey. At the time, the two environmental officers were taking photographs of a number of fires burning on the property which consisted of cleared trees. Ian Turnbull got out of his car and, from a distance of 10 metres, raised a .22 calibre rifle and shot Glen Turner once in the neck. Glen Turner dropped to one knee and said “Ian what are you doing?” Glen Turner managed to stand up and was shot a second time in the chest, at which point he stumbled to the work vehicle to take cover from further shooting.

Over the course of at least 20 minutes, Ian Turnbull pursued Glen Turner in a “cat-and-mouse” chase around the vehicle firing three additional shots at the environmental compliance officer. Ian Turnbull ignored the repeated pleas of Robert Strange to put the gun down and let him take his injured colleague to hospital. Ian Turnbull refused, telling Robert Strange that Glen Turner had “ruined the Turnbolls” and the only way that Glen Turner was leaving was “in a body bag”. Glen Turner attempted to run to the cover of a tree line to escape from Ian Turnbull but was shot in the back by a sixth shot fired by Ian Turnbull, which was fatal.

The 81 year-old farmer entered the witness box for the first time at his murder trial on 16 May 2016 and said that he was extremely nervous when he first confronted Glen Turner after being told by a colleague that the OEH officer was in the area. However, he said that a calmness came over him after firing the first shot. After he fired the final and fatal shot, and Glen Turner dropped to the ground, he told the fallen officer's colleague, Robert Strange: “You can do what you like now, I'm going home ... people know where to come and get me”.

Evidence tendered in Ian Turnbull's defence indicated that, prior to the shooting, Ian Turnbull had told friends that he believed that Glen Turner had a "personal vendetta" against him and his family. A forensic psychiatrist, Dr Neilssen, also gave evidence that Ian Turnbull interpreted Glen Turner's real and perceived actions as a "personal vendetta", and this had substantially impaired his capacity to exercise self-control. Following the shooting, Ian Turnbull described Glen Turner's actions as "exert[ing] his power over and above what the *Native Vegetation Act* is". He also believed that Glen Turner was a "wicked evil man [out] to destroy farming families".

### The murder trial

Ian Turnbull's legal team ran the partial defence of extreme provocation submitting that Glen Turner's conduct over a period of two years from August 2012 to July 2014 amounted to a serious indictable offence, namely harassment pursuant to s 13 of the *Crimes (Domestic and Personal Violence) Act* 2007. Johnson J declined to leave the partial defence of extreme provocation to the jury on the basis that the accused failed to prove that the conduct of the deceased constituted a serious indictable offence.

In taking to the witness box, Grant Turnbull, Ian Turnbull's son, testified that the family had faced financial ruin if it lost its legal battle with the OEH. One significant point of dispute was the size of the land alleged to have been illegally cleared. If the Turnbulls lost their latest appeal, the cost to comply with the remediation order over the next 15 years was reported to be more than \$5 million. In June 2015, Preston CJ of the LEC upheld an earlier appeal and said remedial work could be carried out on other areas of the properties rather than the parts illegally cleared by Ian Turnbull (*Turnbull No 2*). In a subsequent civil enforcement case before the LEC (*Turnbull No 4*), Grant Turnbull was found responsible for illegally clearing over 500 hectares including land subject to the earlier direction for remedial work to be undertaken.

The jury in the Supreme Court trial took just one day to find Ian Turnbull guilty of murder, which carries a maximum penalty of life imprisonment. Ian Turnbull was also convicted by the court of the offence of detaining Robert Strange for advantage contrary to s 86(1) of the *Crimes Act* 1900. Ian Turnbull was sentenced on 23 June 2016 and received an aggregate sentence of imprisonment for 35 years with a non-parole period of 24 years: (*R v Turnbull (No 26)* [2016] NSWSC 847). Outside the court, Glen Turner's partner, Alison McKenzie, and sister Fran Pearce expressed relief at the guilty verdict but criticised the way Ian Turnbull's defence team had sought to portray the murder victim, whom the court found was murdered exercising his lawful duties consistent with his public service position: at [5], [77]. Pearce felt that the trial was hijacked by the defence and turned into an attack on her brother's character as well as a platform for the Turnbull "dynasty" to express their grievances over native vegetation laws. Outside the Supreme Court, she told reporters: "The murderer was portrayed as the victim — a poor, depressed respectable farmer driven to despair by the Office of Environment and Heritage. In reality, he is a wealthy property developer who simply refused to accept that the law applied to him".

In his sentencing remarks, Johnson J acknowledged that the lengthy prison term imposed on Ian Turnbull "will almost certainly constitute a de facto life sentence, with the Offender dying in custody before the expiration of the non-parole period". His Honour, nonetheless, was "satisfied that no lesser sentence is appropriate in all circumstances of the case": at [183]. In March 2017, it was reported that Ian Turnbull had suffered a heart attack and died while serving his prison sentence.

## Cases

### Supreme Court

#### ***R v Ian Robert Turnbull* murder trial (File reference no: 2014/00223920)**

During the course of the trial and sentencing, the Supreme Court delivered 26 judgments: *R v Turnbull (No 1)* [2016] NSWLEC 189 to *R v Turnbull (No 26)* [2016] NSWLEC 847, including:

*R v [Ian Robert] Turnbull (No 1)* [2016] NSWSC 189: venue of trial to be changed to Sydney due to: evidence of strong community feelings concerning native vegetation laws in local district; issues of expediency; and evidence of difficulty empanelling a jury in the district in which the offence occurred.

*R v [Ian Robert] Turnbull (No 25)* [2016] NSWSC 831: reasons for rulings given during the course of the trial. Whether partial defence of extreme provocation should be left to the jury.

*R v [Ian Robert] Turnbull (No 26)* [2016] NSWSC 847: sentencing of convicted offender following guilty verdict by jury.

### Court of Criminal Appeal

*Turnbull v R* [2016] NSWCCA 109: ruling (on partial defence of extreme provocation) not an interlocutory judgment. Appeal deemed incompetent.

*Turnbull [Ian Robert] v Chief Executive of the Office of Environment and Heritage* [2015] NSWCCA 278: appeal allowed with regard to costs order only.

### Land and Environment Court

*Chief Executive of the Office of Environment and Heritage, Dept of Premier and Cabinet v Turnbull [Ian Robert]* [2014] NSWLEC 150: Class 5 (criminal enforcement).

### LEC Appeals

*Turnbull [Grant and Corey] v Director-General, Office of Environment and Heritage* [2014] NSWLEC 84; 212 LGERA 163 (*Turnbull No 1*): appeal (25/6/2014).

*Turnbull [Grant and Cory] v Director-General, Office of Environment and Heritage* [2014] NSWLEC 112 (*Turnbull No 2*): appeal (31/7/2014).

*Turnbull [Ian Robert] v Director-General of the Dept of Premier and Cabinet* [2012] NSWLEC 121: Class 1 (appeal upheld).

*Turnbull [Ian Robert] v Director-General of the Dept of Premier and Cabinet (No 2)* [2012] NSWLEC 124: Class 1 (costs order made in favour of applicant).

*Chief Executive of the Office of Environment and Heritage v Turnbull [Grant]* [2014] NSWLEC 153: Class 4 (interlocutory injunction granted) (19/9/2014).

*Chief Executive of the Office of Environment and Heritage v Turnbull [Grant] (No 2)* [2014] NSWLEC 155: Class 4 (application for interlocutory relief; modified injunction granted) (25/9/2014).

*Chief Executive of the Office of Environment and Heritage v Turnbull [Grant] (No 3)* [2014] NSWLEC 181: Class 4 (application for interlocutory relief granted; hearing vacated) (14/11/2014).

*Chief Executive of the Office of Environment and Heritage v Turnbull [Grant] (No 4)* [2016] NSWLEC 66 (*Turnbull No 4*): Class 4 (civil orders restraining further clearing of native vegetation and ordering remedial revegetation works) (3/6/2016).

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The events of the fatal shooting were reported extensively in the media. See above n 703.

## 2.5 Summary of findings on value of monetary punishments

**Tables 14a** and **14b** present summary information on the various reported offences, providing a convenient way for comparing average fine amounts, prosecutor's costs, remediation costs and "total" costs under the *current* applicable offence and penalty regimes.

### Key findings from Tables 14a and 14b

Note, in **Table 14a** only single offences are compared; in **Table 14b**, the statistics were derived for two or more waste offences:<sup>735</sup>

- The largest total pecuniary costs were noted for pollute waters offences, where the average "total" pecuniary punishment exceeded \$141,000. Pollute waters offences also received the highest average fine (\$83,346) and the highest average prosecutor's costs (\$57,677).
- Convictions for native vegetation offences also resulted in total pecuniary costs to the offender in excess of \$100,000. Both the average fine amount (\$58,065) and the average costs order (\$44,787) were high for this offence compared to other offences (excluding pollute waters offences where the average fine and average costs order were higher; and waste offences where average prosecutor's costs were on par).
- Contravene licence offences carried the lowest average prosecutor's costs of any "Top 5" offence. Presumably, this is because criminal proceedings and investigation of this type of environmental offence is made easier because of self-reporting of breaches which is not uncommon for this type of offence as it is a general condition of holding an environmental protection licence. Offenders convicted of contravene licence offences were subject, on average, to the most expensive restorative orders (\$95,803), even higher than for pollute waters offences (\$74,000).
- While offences against TPOs, a subset of s 125 offences (offend against direction or prohibition), received on average the lowest fines (\$16,951), the costs orders (\$31,348) associated with these criminal matters comprised over 65% of the total pecuniary punishment received.
- The full set of s 125 offences were characterised similarly by lower average fine amounts (\$17,888) and substantial costs orders (\$28,063) that regularly exceeded the amount of the fine ordered.
- Waste offences were identified as having the second highest average prosecutor's costs (\$45,826) of all offences. Costs orders for waste offences comprised the highest share of the total pecuniary punishment of any category of offence at just under 70%.

<sup>735</sup> All comparisons except for waste offences based on a "single offence, fined, with known prosecutor's costs". Two or more waste offences are more the norm in cases before the LEC, although commonly they are recognised as a singular course of conduct or single episode. See general discussion at [2.4.4]. The discrete sub-category used to calculate average fine amounts and costs (etc) for waste offences was "2 or more offences, fined, with known prosecutor's costs".

**Table 14a: Monetary payments imposed by the LEC by offence type — single offence, fined, prosecutor's costs specified (current offences and sentencing regimes)**

Offence	Pollute waters	Development without consent	Contravene licence	Offend against direction/prohibition	Native vegetation offences	Offend against TPOs
Current legislation	<i>POEO Act: s 120(1)</i>	<i>EPA Act: s 76A</i>	<i>POEO Act: s 64(1)</i>	<i>EPA Act: s 125(1)</i>	<i>NV Act: s 12</i>	<i>EPA Act: ss 76A, 125(1)</i>
<b>Fine amounts</b>						
Mean	\$83,346	\$33,529	\$29,040	\$17,888	\$58,065	\$16,951
Median	\$58,500	\$17,500	\$26,000	\$10,500	\$35,075	\$11,000
Range	\$18,000–\$280,000	\$5,000–\$200,000	\$5,000–\$90,000	\$500–\$84,000	\$5,000–\$140,000	\$1,500–\$70,000
<b>Prosecutor's costs</b>						
Mean	\$57,677	\$25,457	\$13,931	\$28,063	\$44,787	\$31,348
Median	\$59,645	\$20,500	\$12,000	\$15,000	\$32,000	\$13,216
Range	\$18,044–\$158,407	\$1,100–\$80,000	\$4,500–\$35,000	\$4,500–\$80,000	\$15,000–\$172,275	\$4,500–\$80,000
<b>"Total" cost<sup>a</sup></b>						
Mean	\$141,023	\$58,986	\$42,971	\$51,786	\$102,852	\$47,939
Median	\$113,390	\$42,500	\$30,500	\$37,750	\$68,375	\$24,216
Range	\$53,000–\$438,407	\$11,200–\$255,000	\$9,500–\$110,000	\$6,000–\$125,000	\$20,000–\$312,275	\$6,000–\$125,000
<b>Prosecutor's costs as % of "Total" cost</b>						
Mean	40.9%	43.2%	32.4%	54.2%	43.5%	65.4%
Range	28.2%–66.0%	6.4%–85.7%	14.8%–63.5%	30.6%–83.2%	25.9%–75.0%	44.0%–83.2%
<b>Remediation costs<sup>b</sup></b>						
Mean	\$74,000	\$9,800	\$95,083	6 remediation orders, only one costed: \$34,752 <sup>c</sup>	11 revegetation orders, none costed.	6 remediation orders, only one costed: \$34,752 <sup>c</sup>
Median	\$75,000	\$11,500	\$59,500			
Range	\$50,000–\$120,000	\$1,200–\$15,000	\$14,000–\$464,329			

a The "Total" cost is the combined amount of the fine for the principal offence and prosecutor's costs.

b Remediation costs based on the discrete sub-category: Additional Order in lieu of fine.

c The same order for the same principal offence, each involving a TPO. The offence against TPOs is a sub-category of offences against s 125(1) of the *EPA Act*. These offences are not counted twice in the data.



**Table 14b: Monetary payments imposed by the LEC for waste offences — two or more offences or counts,<sup>a</sup> fined, prosecutor's costs specified (current offences and sentencing regimes)**

Offence	Waste offences <sup>a</sup>
Current legislation	<i>POEO Act</i> : ss 143, 144 and 144AA
<b>Fine amounts</b>	
Mean	\$19,725
Median	\$16,700
Range	\$10,500–\$35,000
<b>Prosecutor's costs</b>	
Mean	\$45,826
Median	\$24,000
Range	\$17,080–\$118,225
<b>"Total" cost<sup>b</sup></b>	
Mean	\$65,551
Median	\$37,240
Range	\$34,500–\$153,225
<b>Prosecutor's costs as % of "Total" cost</b>	
Mean	69.9%
Range	46.1%–77.2%
<b>Remediation costs<sup>c</sup></b>	
Mean	\$83,000
Median	\$83,000
Range	\$62,000–\$104,000

a A single offence/count is more the exception for waste offences, although multiple offences may be viewed by the court as representing a "single" episode or course of conduct. See discussion in [2.4.4]. Monetary payments for waste offences, therefore, are based on the more prevalent sub-category: "two or more offences or counts, fined, costs specified".

b The "Total" cost is the combined amount of the fine for the principal offence and prosecutor's costs.

c Remediation costs based on the discrete sub-category: Additional Order in lieu of fine.

## 3. Discussion

This study has sought to analyse sentencing in the LEC, initially with reference to quantitative materials with respect to penalties and then more detailed case-by-case qualitative information. The investigation revealed that sentencing in the LEC is complex and that, in any given case, there is an interaction between conventional sentencing principles and a requirement to compensate the prosecution for its legal and other professional costs. The degree to which costs have a role in the sentencing decision is unique to the LEC.

### 3.1 A necessary departure from a conventional sentencing analysis

A conventional sentencing analysis generally focuses on the penalties imposed by a court exercising criminal jurisdiction, including the frequency, distribution and quantum of penalties imposed. The Judicial Commission of NSW has a rich history, going back almost three decades, of conducting conventional sentencing analyses on a diverse range of State and Commonwealth criminal offences dealt with by courts.<sup>736</sup> A focus of many of these studies was consistency of punishment and the application of well-established sentencing principles. In the LEC, as is the case in other NSW courts with summary jurisdiction, fines are by far the most frequently imposed penalty. This would seemingly make the penalties imposed by the LEC amenable to a conventional sentencing analysis. Additional Orders are also commonly imposed by the LEC. These regularly take the form of a monetary payment to the Environmental Trust or other government body with the statutory power “to make good” any environmental damage resulting from the offender’s criminal conduct.<sup>737</sup> Additional Orders are routinely made “in lieu of the imposition of a fine”.<sup>738</sup>

Unfortunately, a conventional approach to the sentencing results of the LEC, which concentrates primarily on fine amounts and the dollar amount of Additional Orders imposed, would be grossly deficient and, in all likelihood, highly misleading. This would hold even if there was a direct relationship between the quantum of the pecuniary penalty and the objective and subjective features of the case.<sup>739</sup> This is because of the essentially civil law method the jurisdiction deals with the prosecution’s legal and investigative costs.<sup>740</sup> Costs ordinarily follow the event of proof of the charge. The long-established common law rule that the Crown neither receives nor pays costs, in criminal proceedings, does not apply. Where an offence is proved, the costs are an important part of the criminal proceedings and result in a financial liability borne by the convicted offender in addition to any fine or other pecuniary penalty.<sup>741</sup> It is self-evident that the payment of professional costs substantially adds to the monetary punishment that the offender suffers as a result of being found guilty of an environmental crime.<sup>742</sup>

736 For example, P Mizzi, Z Baghizadeh and H Donnelly, *Sentencing Commonwealth drug offenders*, Research Monograph No 38, 2014; P Poletti and G Brignell, *Sentencing for common offences in the NSW Children’s Court: 2010*, Research Monograph No 36, 2012; P Mizzi, T Gotzis and P Poletti, *Sentencing offenders convicted of child pornography and child abuse material offences*, Research Monograph No 34, 2010; L Barnes and P Poletti, *Sentencing robbery offenders since the Henry guideline judgment*, Research Monograph No 30, 2007.

737 Generally, the estimated costs to the offender of carrying out such work is recorded in the judgment.

738 An order for such a payment may be made in lieu of the imposition of a fine, as held by Preston CJ of the LEC in *EPA v Austar Coal Mine Pty Ltd* [2011] NSWLEC 252 at [48]: “The orders that are set out in Pt 8.3 of the *Protection of the Environment Operations Act*, which include the orders under s 250, may be made by the Court regardless of whether any penalty is imposed or other action taken in relation to the offence: see s 244(2) and (3) *Protection of the Environment Operations Act*”. Also, see *EPA v Tea Garden Farms Pty Ltd* [2012] NSWLEC 89 per Craig J at [148].

739 *The Queen v Kilic* (2016) 91 ALJR 131 at [18]–[19]. The High Court said that a court is bound to consider where the facts of the particular offence and offender lie on the spectrum from most to least serious.

740 *Latoudis v Casey* (1990) 170 CLR 534. Costs follow the event on proof of the charge.

741 *EPA v Barnes* [2006] NSWCCA 246 at [78] and [88].

742 The prosecution’s legal costs and any expenses incurred in investigating the circumstances of the offence, including harm to the environment, represent two major components of professional costs. As defined in s 117(3) of the *CP Act*, “professional costs” means costs (other than court costs) relating to professional expenses and disbursements (including witnesses’ expenses) in respect of proceedings before a court.

In the LEC, it is not uncommon for the costs order not to be quantified, or for the final figure not to be available for consideration by the LEC at time of sentence. For example, in *one-third* of pollute waters cases examined in this study, the quantum of the costs at time of sentence was still “to be agreed or assessed”. In such cases, in order to finalise a sentence hearing, the sentencing judge must determine the appropriate level of the fine or other monetary order *without* any clear indication of the magnitude of such costs. At other times, the LEC will proceed to sentence on the basis that costs remain unquantified but are understood to be “substantial”.<sup>743</sup>

This is unfortunate for a number of reasons. First, as the CCA held, costs are an integral aspect of the punishment in the LEC.<sup>744</sup> Costs, therefore, affect the application of the common law principle of proportionality, which operates to guard against the imposition of unduly harsh or unduly lenient sentences:

There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed.<sup>745</sup>

As the proportionality principle requires that a sentence should neither exceed nor be less than the gravity of the offence having regard to the objective circumstances of the offence,<sup>746</sup> how then can the court properly determine “a punishment that fits the crime”, when a critical part of the pecuniary punishment is unavailable at time of sentence for the court to set the appropriate fine?

Secondly, costs also affect the offender’s means to pay. Section 6(a) of the *Fines Act* 1996 provides that in exercising its discretion “to fix the amount of any fine, the court is required to consider ... such information regarding the means of the accused as is reasonably and practicably available to the court for consideration.”<sup>747</sup> Given that the court “is required” to consider the offender’s means to pay a fine, this is not a discretionary consideration but a mandatory one.

As the High Court remarked in the sentencing appeal of *Markarian v The Queen*:

The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public.<sup>748</sup>

It is not possible to obtain an accurate measure of the severity of the overall punishment imposed on an environmental offender until the quantum of the costs order is considered together with the fine and/or any other pecuniary penalty. Any analysis of sentences in the LEC must have regard to the costs figure as well as the quantum of any penalties imposed. This study was hampered by the fact that the quantum of costs orders was not recorded in the environmental crime sentencing database or disclosed in the LEC’s judgment. The systemic lack of information about costs makes it difficult to assess the overall severity or leniency of sentences imposed by the LEC. This, in turn, renders previous academic research on penalties imposed in the LEC of questionable value because of the erroneous approach of solely focusing on fine amounts without taking account of orders for costs.<sup>749</sup> Preston CJ of the LEC has described the consideration of monetary orders in determining an appropriate penalty in terms of a discretionary element:

<sup>743</sup> For example, *EPA v Environmental Treatment Solutions Pty Ltd* [2015] NSWLEC 160 per Pepper J at [108]–[109]; *Chief Executive, Office of Environment and Heritage v Rummary* [2012] NSWLEC 271 per Pepper J at [192]; and, *Corbyn v Walker Corporation Pty Ltd* [2012] NSWLEC 75 per Preston CJ of the LEC at [64].

<sup>744</sup> *EPA v Barnes* [2006] NSWCCA 246 at [78] and [88].

<sup>745</sup> *R v Scott* [2005] NSWCCA 152 per Howie, Grove and Barr JJ at [15].

<sup>746</sup> *R v McNaughton* at [15]; *Veen v The Queen (No 2)* (1988) 164 CLR 465; and, *Hoare v The Queen* (1989) 167 CLR 348 at 354.

<sup>747</sup> *Fines Act* 1996, s 6(a). Under s 6(b), the court is required to also consider “such other matters as, in the opinion of the court, are relevant to that fixing of that amount”. Consideration of the financial circumstances of an offender may increase, rather than decrease, a fine in order for it to serve as a specific deterrent: *Jahandideh v R*, above n 212, at [17].

<sup>748</sup> (2005) 228 CLR 357 per Gleeson CJ, Gummow, Hayne and Callinan JJ at [39]. Also see J Bosland and J Gill, “The principles of open justice and the judicial duty to give public reasons” (2014) 38(2) *Melbourne University Law Review* 482.

<sup>749</sup> 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 81–83; M Hain and C Cocklin, “The Effectiveness of the courts in achieving the goals of environment protection legislation” (2001) 18 *EPLJ* 319 at 332.

The fine may be only part of the penalty imposed on an offender. Consideration can also be given to other monetary amounts the offender may be ordered to pay, including the prosecutor's legal costs of the proceedings and investigation costs.<sup>750</sup>

While it may continue to exist as a sentencing consideration in the LEC, the CCA has held that costs orders made to compensate the prosecuting agency for its legal and other expenses are a significant component of the punishment.<sup>751</sup> This decision has been applied extensively by the LEC in recognition that costs "should be factored into the determination of the appropriate penalty" and should be considered "as a factor that acts to reduce the penalty".<sup>752</sup> Therefore, the LEC would need to give good reasons for not downwardly adjusting a monetary penalty to offset the punitive effect of a costs order. Failure to do so, in fact, may constitute an error at law.<sup>753</sup>

In order to more fully consider the pervasive influence of costs on sentences made in the LEC, this study partitioned and examined separately cases where the costs figure was known, from cases where the costs figure was not known. Further stratification of cases in terms of "like-with-like" offences allowed more nuanced comparisons of the monetary penalties and costs orders imposed based on this primary division. Clear patterns in sentencing were observed with regard to costs, which were not only consistent across different environmental offence categories but across different sentencing regimes.

Even when the cases are delineated according to defined criteria, the sentencing result can only be truly understood by a close analysis of the facts of the case. For example, particular sentencing results may seem enigmatic unless costs orders and the reasons for the final quantum of monetary penalties are fully exposed. The definitive example is the strikingly different fines and costs orders imposed on dual corporate defendants in the associated cases of *EPA v Cleary Bros (Bombo) Pty Ltd*<sup>754</sup> (sentenced by Lloyd J) and *EPA v Waste Recycling and Processing Corp*<sup>755</sup> (sentenced by Preston CJ of the LEC some three weeks earlier). Lloyd J was careful to make clear his Honour's justification for imposing a much lower fine and a vastly different costs order compared to those imposed by Preston CJ of the LEC:

In the associated case of *Waste Recycling and Processing Corporation*, Preston CJ [of the LEC] imposed a penalty of \$75,000, ordered the defendant to pay the prosecutor's costs of \$39,000 and the prosecutor's investigative costs and expenses of \$7,240, and ordered the defendant to comply with a publication order. This may be contrasted with the present case involving precisely the same offence with precisely the same environmental impact, in which I impose a penalty of \$16,000, an order that the defendant pay the prosecutor's costs of \$104,000 and the prosecutor's investigative costs and expenses of \$7,240, and in which I decline to make a publication order. This may at first sight be seen to be somewhat surprising, but it demonstrates that for precisely the same offence there can be vastly different degrees of culpability and vastly different mitigating circumstances. It also demonstrates the truth of the observations made in the Court of Criminal Appeal in *Cabonne Shire Council v Environment Protection Authority* at [35] that "because the penalty will turn on the facts of the individual case comparison with other decisions will be of limited utility"; and the further observations, as noted in par [159] above, that "indiscriminate reference to other cases is of little utility and should be discouraged. Even discriminating reference is likely to be of no utility because the facts in cases such as the present will almost always be peculiar to the individual case."<sup>756</sup>

750 *EPA v Causmag Ore Co Pty Ltd* [2015] NSWLEC 58 at [123].

751 *EPA v Barnes* [2006] NSWCCA 246 at [78] and [88].

752 *EPA v Environmental Treatment Solutions Pty Ltd* [2015] NSWLEC 160 per Pepper J at [108]; *Chief Executive, Office of Environment and Heritage v Fish (No 2)* [2014] NSWLEC 67 Pain J at [48]. See **Appendix D** for a list of LEC cases applying the costs principles espoused in *Barnes*.

753 In a number of cases before the intermediate appellate court, the grounds of appeal were the perceived excessiveness or unreasonableness of the financial imposition on the offender. See *Turnbull v Chief Executive of the Office of Environment and Heritage* [2015] NSWCCA 278 and the defence submissions in *EPA v Barnes* [2006] NSWCCA 246 per Pain J at [62]–[63].

754 [2007] NSWLEC 466.

755 (2006) 148 LGERA 299; [2006] NSWLEC 419.

756 [2007] NSWLEC 466 at [175]. Original emphasis retained.

### 3.2 Key findings on costs

The following lists the key findings from this study with regard to costs.

- Costs are not infrequently the largest component of the total pecuniary punishment for environmental offenders. Costs can comprise up to 70% or even 80% of the total monetary impost on an environmental offender.  
For a single pollute waters offence which attracted a fine and prosecutor's costs were known,<sup>757</sup> costs averaged 41% of the total amount ordered to be paid by the offender. Costs were a slightly larger share of the total pecuniary amount for native vegetation (43.5%) and a much larger share for waste offences (70%). For a *single* environmental planning offence under the *EPA Act*, costs constituted a large portion of the total monetary punishment, on average over 54% for a s 125 offence, and over 65% where such an offence involved a violation of a TPO.
- Total pecuniary costs ranged to a high of over \$438,000 for a *single* pollute waters offence which attracted a fine,<sup>758</sup> and a high of more than \$344,000 where the pollute waters offence was penalised by way of an Additional Order.<sup>759</sup> In these particular LEC cases, the cost of the prosecution constituted 36% and 81%, respectively, 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 almost half that, at \$43,333, where costs were *unknown*.  
Under earlier sentencing regimes, fines for a single pollute waters offence also appeared to have been conservatively set by the court where costs were not quantified at time of sentence. For example, under the *CW Act* (rep), 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 only \$10,833. Similarly, under the provisions of its immediate statutory successor (the *POEO Act* with lower than current maximum penalties), the average fine for a single pollute waters offence was \$25,190 where costs were quantified but 12% lower where costs were *not* known at sentence.
- It is not uncommon for the LEC to indicate in the judgment that it decided to impose a lesser fine to offset the impact of a known costs order or an unknown costs figure which is forecast to be substantial.<sup>760</sup>

A further issue, specifically related to costs orders, is that there is no public record of whether or not the prosecutor actually recovered its costs. Costs effectively become a private matter between the parties after the LEC make final orders in the sentencing proceedings. This is problematic as the failure to pay a fine or the prosecution's reasonable costs, where agreed or assessed, may constitute a contempt of court. There are certainly cases in this study period where the LEC is aware that an offender reappearing before the court has failed to pay court-ordered fines and costs orders for earlier convictions.<sup>761</sup>

757 This was one of the discrete sub-categories applied to compartmentalise "like-with-like" cases. The complete set of discrete sub-categories are utilised in **Cases Tables 1, 2 and 3** (in **Volume 2**).

758 *EPA v CSR Building Products Ltd* [2008] NSWLEC 224. Sheahan J at [60] indicated that a fine of \$280,000 would be imposed.

759 *EPA v Queanbeyan City Council (No 3)* (2012) 225 A Crim R 113; [2012] NSWLEC 220. Pepper J indicated at [281]–[282] that the Additional Order under s 250(1)(e) was made in lieu of the imposition of a fine of \$80,000. There was an attempt by the offender to stay proceedings on the basis of abuse of process which was unsuccessful (*Queanbeyan City Council v EPA* [2011] NSWCCA 108).

760 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 (eg *Director-General of the Dept of Land and Water Conservation v Leverton Pastoral Co Pty Ltd* [2002] NSWLEC 212 per Talbot J at [40]).

761 For example, see *Bankstown City Council v Hanna* [2014] NSWLEC 152 per Preston CJ of the LEC at [121]:  
Mr Hanna has failed to pay most of the penalty notices, fines and orders for costs and compensation imposed upon him. A schedule of enforcement orders made against Mr Hanna, tendered in evidence, revealed that he has been fined and ordered to pay amounts totalling \$211,110. With the exception of eight penalty notices issued between 2007 and 2009, totalling \$7,750, which Mr Hanna has paid, all other fines and amounts are unpaid and overdue. These include the aggregate of the fines and cost orders of \$125,000 imposed by this Court in 2010 for his four offences against s 143(1) of the *POEO Act* of transporting and depositing waste unlawfully.



It is an incontrovertible fact that costs are a substantial component of punishment in the LEC. A strong argument can be made to further increase the transparency of the sentencing process in the LEC by ensuring that all monetary costs to be paid by the offender are known to the court at the time of sentencing and are recorded as part of the judgment. This may involve a change in sentencing practices. This would involve enacting statutory provisions similar to those which governed costs in the first version of s 52 (rep) of the *LEC Act* and, in particular, requiring that “the amount so ordered to be paid for costs shall in all cases be specified in the conviction or order”.<sup>762</sup>

Until such time as reforms are made, the full and true economic deterrent of a criminal prosecution and the consequent sanctions for environmental offending will remain unknown to like-minded offenders, the public and critics of the LEC. Achieving “individualised justice” in sentencing is also compromised because a substantial and crucial element of the pecuniary punishment is not known by the LEC at sentence to better inform the court’s decision of the appropriate penalty. The quantum of costs was not available to the LEC in a significant proportion of LEC cases. For example, one-third of pollute waters offences in the study period included an order that the defendant was to pay the prosecutor’s reasonable legal costs which were still awaiting assessment or agreement. Fortunately, this situation appears to have improved over time: only 15% of pollute waters cases under the current sentencing regime of the *POEO Act* had unquantified orders for costs, compared with 42% under earlier provisions of the *POEO Act*, and 43% of unquantified costs orders under the *CW Act* (rep).

### 3.3 Criminal liability

A good starting point for understanding how criminal liability is framed for environmental offences is the landmark Canadian Supreme Court decision in 1978 of *R v Sault Ste. Marie*.<sup>763</sup> It was considered by the High Court of Australia in *He Kaw Teh v The Queen*<sup>764</sup> in the context of a Commonwealth drug importation offence. In dealing with a charge of discharging, or permitting the discharge, of refuse into public waterways causing pollution, the Canadian Supreme Court distinguished three categories of offences: offences that require some state of mind (*mens rea*) as an element of the crime — typically implied by the use of language in the statute such as “knowingly” or “intentionally”; offences that do not require the proof of *mens rea* — the act alone is punishable (subject to a due diligence defence); and, absolute liability offences — also not requiring proof of *mens rea* but with no defences available.<sup>765</sup> The dumping offences of causing water pollution in *R v Sault Ste. Marie* were held to be strict liability offences, not requiring proof of *mens rea*.

The distinctions drawn in *R v Sault Ste. Marie* regarding the casting of environmental offences remain pertinent for the charging, prosecution and punishment of environmental offences committed in NSW. 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>766</sup> The *POEO Act* persists with the *mens rea* ingredient “wilfully” found in its statutory predecessor.<sup>767</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>768</sup> Well before the enactment of the *POEO Act*, “wilfully” was

762 Section 52(2). Section 52 of the *LEC Act* was repealed by the *Justices Legislation Repeal and Amendment Act 2001* which commenced 7 July 2003.

763 [1978] 2 SCR 1299.

764 (1985) 157 CLR 523 per Gibbs CJ (Mason J agreeing) at 533–534, Dawson J at 592.

765 [1978] 2 SCR 1299 at 1325–1326.

766 *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.

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

768 *EPA v Gardner* (unrep, 7/11/97, NSWLEC).

regarded by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General as an antiquated concept and abandoned for the purposes of the Model Criminal Code.<sup>769</sup> The use of “wilfully” by the NSW Parliament in the *POEO Act* in 1997 did not reflect the prevailing views about framing criminal liability at the time. Given the antiquated nature of “wilful” perhaps other more modern concepts of liability, such as intention or recklessness, should be considered in the framing of Tier 1 environmental offences. Recklessness is established if the fact finder is satisfied beyond reasonable doubt that the damage is caused recklessly: ie, the accused realised that some damage may possibly result by his/her actions yet he/she went ahead and acted as he/she did. In short, the existing statutory hierarchy for environmental offences under the *POEO Act* is ripe for review.

### 3.4 Charging practices

In assessing whether criminal legislation enacted for environmental crime is effective, it is necessary to take into account the prosecutor’s charging practices. It is well established that the prosecutor’s selection of the charge has a real bearing on the sentence.<sup>770</sup> The LEC has no control over which charge is brought by the prosecution, except where there is an abuse of process.<sup>771</sup> The selection of the charge is within the “absolute discretion” of the prosecutor.<sup>772</sup> The rationale for this is to maintain the independence and impartiality of the judicial process in hearing and determining criminal matters by keeping separate and independent the executive power of the prosecutor and the judicial powers of the court.<sup>773</sup>

The chief statutes for the prosecution of environmental offenders are the *POEO Act* and the *EPA Act*. The *POEO Act* is the principal statute dealing with environmental pollution defining criminal offences in relation to air, water, land and noise pollution.<sup>774</sup> The *EPA Act* regulates competing land use in NSW and deals with development applications and other planning-related issues, including breaches of environmental planning laws.<sup>775</sup> The *POEO Act* has a three-tiered system of offences with differential levels of jurisdictional responsibility and associated penalties.<sup>776</sup> Tier 1 offences are the most serious of environmental offences, involving wilful or negligent conduct that causes, or is likely to cause, harm to the environment.<sup>777</sup> Tier 1 offences carry the highest maximum penalties including up to seven years’ imprisonment for an individual. Proceedings for a Tier 1 offence

769 The Standing Committee of Attorneys-General established the Criminal Law Officers Committee (also later known as the Model Criminal Code Officers Committee (MCCOC)) in order to promote uniformity in law between the States and Territories. The Committee was formed following the Review of Commonwealth Criminal Law by the “Gibbs Committee” which, in 1990, released its interim report, *Principles of Criminal Responsibility and Other Matters* (“the Gibbs report”). The Criminal Law Officers Committee (also known as MCCOC) authored *Model Criminal Code, Chapter 2: General principles of criminal responsibility: discussion draft*, June 1992, and *Model Criminal Code, Chapter 2: General principles of criminal responsibility: final report*, 1992.

As to the abandonment of “wilful blindness”, see *Model Criminal Code, Chapter 2: General principles of criminal responsibility: discussion draft*, p 29. Also see discussion of “wilful” in I Leader-Elliott, *The Commonwealth Criminal Code: a guide for practitioners*, 2002, pp 49 and 203 at [www.ag.gov.au/Publications/Documents/CriminalCodePractitionerGuideLinesMarch2002/GuideforPractitioners.pdf](http://www.ag.gov.au/Publications/Documents/CriminalCodePractitionerGuideLinesMarch2002/GuideforPractitioners.pdf), accessed 16 May 2017.

770 *Elias v The Queen* (2013) 248 CLR 483 per French CJ, Hayne, Kiefel, Bell and Keane JJ at [34].

771 *Maxwell v The Queen* (1996) 184 CLR 501 per Dawson and McHugh JJ at 514 and Gaudron and Gummow JJ at 534. In that case the trial judge had rejected a plea to a charge of manslaughter on the basis that a murder charge was more appropriate. The High Court held that the judge had no power to reject the plea.

772 *Elias v The Queen* (2013) 248 CLR 483 per French CJ, Hayne, Kiefel, Bell and Keane JJ at [33].

773 *Likiardopoulos v The Queen* (2012) 247 CLR 265 per French CJ at [2]; *Jago v District Court (NSW)* (1989) 168 CLR 23 per Brennan J at 39.

774 *POEO Act*, Ch 5.

775 For example, ss 76A, 76B and 125 of the *EPA Act*.

776 Outside the study period, in mid-2015, changes to the *EPA Act* also created a three-tiered system of penalties for development and planning offences, classified according to the seriousness of the offence and the culpability of the offender. New maximum penalties applied to each tier. In contrast with Tier 1 offences under the *POEO Act*, proceedings for Tier 1 offences under the amended *EPA Act* (s 125A) may be taken before the Local Court (as well as the LEC in its summary jurisdiction): s 127(1). The commencement date for these (and other) changes to the *EPA Act* was 31 July 2015.

777 *POEO Act*, ss 16(2), 115(1), 116(1), 117(1). See also the use of “wilfully” in s 112 for the offence of “wilfully delays or obstructs” a person who is carrying out any action in compliance with an environment protection notice.

may be brought before the LEC in its summary jurisdiction, although the maximum period of imprisonment that may be imposed in that court is two years.<sup>778</sup> No environmental offender during the 15-year period examined received a sentence of full-time imprisonment for an offence under the *POEO Act*.

The EPA and other prosecuting authorities, such as local councils, have rarely charged Tier 1 offences under the *POEO Act*. This Act was enacted almost two decades ago and yet, only nine Tier 1 offences were identified in the 15-year study period.<sup>779</sup> It is not clear why this is the case but it might be because there is a perception on the part of prosecutors that criminal negligence is hard to prove beyond reasonable doubt. Criminal negligence has certainly been misunderstood. One commentator held the view that liability related to the “civil standard” of negligence.<sup>780</sup>

A Tier 1 offence based on negligence requires the application of an objective test as explained by the CCA appeal in *NSW Sugar Milling Co-Op Ltd v EPA*<sup>781</sup> and later in *EPA v Ampol Ltd*.<sup>782</sup> The prosecution must prove that the risk of environmental harm was foreseeable to a reasonable person in the position of the defendant.<sup>783</sup> The prosecution is not required to prove “whether the defendant subjectively foresaw the risk”.<sup>784</sup> The fact finder must conclude beyond reasonable doubt that the accused’s conduct was negligent to such a degree as to warrant punishment by the criminal law. Each case is determined according to its particular circumstances.

It is important to note the MCCOC’s view of criminal negligence as it is applied to environmental offences. It acknowledged that *NSW Sugar Milling Co-Op Ltd v EPA* set a lower standard of criminal negligence for environmental crime than that required to be proved for manslaughter by criminal negligence.<sup>785</sup> The Committee had, in its earlier Discussion Paper, used a definition “based closely on [the manslaughter case of] *Nydam v R* [1977] VR 430”. However, in its final report the Committee accepted, with specific reference to *NSW Sugar Milling Co-Op Ltd v EPA* and *R v Buttsworth*<sup>786</sup> that:

the degree of negligence required for conviction is related to the nature of the offence.<sup>787</sup>

In *R v Buttsworth*, the CCA held that the offence of culpable driving causing death under s 52A of the *Crimes Act* 1900 was “a species of negligent driving of less gravity than negligent driving appropriate to manslaughter”.<sup>788</sup> This view remained the law in NSW until it was overturned by the High Court in *King v The Queen*.<sup>789</sup> In short, there is a lower standard of criminal negligence that applies to Tier 1 environmental offences than to manslaughter.

778 Alternatively on indictment before the Supreme Court. To date, not a single environmental offence has been dealt with by the Supreme Court. Tier 1 offences cannot be dealt with by the Local Court as the maximum penalty for Tier 1 offences (s 119) exceeds the jurisdictional limit of the Local Court.

779 Including under the *POEO Act*’s predecessor, the *EOP Act* (rep).

780 Z Lipman, “Old wine in new bottles: difficulties in the application of general principles of criminal law to environmental law” in N Gunningham, J Norberry and S McKillop (eds), *Environmental crime*, Australian Institute of Criminology, 1995, p 31. The author opined that: “‘negligence’ could mean any one of ‘gross’ negligence (as associated with the traditional criminal law), the civil standard, or some statutory half measure depending on the circumstances of the case”. The author goes on to state that in *EPA v Ampol Ltd* (1993) 81 LGERA 433, “it seems that Pearlman CJ [of the LEC] applied the civil standard” (pp 4–5).

781 (1992) 59 A Crim R 6.

782 (1993) 81 LGERA 433. Ampol unsuccessfully appealed in *Ampol v EPA* (unrep, 26/10/95, NSWCCA).

783 *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. As to manslaughter, see *R v Lavender* (2005) 222 CLR 67 at [60]; *Patel v The Queen* (2012) 247 CLR 531 per French CJ, Hayne, Kiefel and Bell JJ at [88].

784 *EPA v N* (1992) 26 NSWLR 352 per Hunt CJ at CL at 359.

785 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General principles of criminal responsibility: final report*, December 1992, p 33. Also see above n 769.

786 [1983] 1 NSWLR 658 at 674 per O’Brien CJ of Cr D, Street CJ and Nagle CJ at CL agreeing.

787 See above n 769, p 33.

788 [1983] 1 NSWLR 658 at 674 per O’Brien CJ of Cr D, Street CJ and Nagle CJ at CL agreeing.

789 (2012) 245 CLR 588. The court held that the offence of dangerous driving causing death does not require the Crown to prove an element of negligence. The concept of negligence “has no role to play” for the offence of dangerous driving: *King v The Queen* per French CJ, Crennan and Kiefel JJ in a joint judgment at [45]. Bell J agreed with some aspects of the majority judgment but dissented on the negligence point and the orders. Heydon J agreed with Bell J.

This lower standard of liability for negligence, compared with that for manslaughter, has not translated into prosecutions for Tier 1 environmental offences either in the context of charging directors of corporations or, as put in the *EPA prosecution guidelines*, those with “actual control or ability to influence the conduct of the corporation in relation to its criminal conduct”.<sup>790</sup> The guidelines further state:

As a general policy, the EPA will institute proceedings [against officers of corporations] under section 169 [of the *POEO Act*] only where there is evidence linking a director or manager with the corporation’s illegal activity. That link need not necessarily be of a positive (intentional) character but could be of a negligent nature.<sup>791</sup>

Prosecutors bringing criminal matters before the LEC very rarely charge Tier 1 criminal negligence and prefer to charge Tier 2 offences. Tier 2 offences are often, but not always, strict liability offences.<sup>792</sup> The prosecution does not have to prove as part of the ingredients of the offence that the defendant was negligent or intended to commit the offence. Notably, there were 35 alleged offenders in this study who pleaded not guilty to a principal Tier 2 offence. However, in all 35 cases, there was a guilty finding.

While low prosecution costs are viewed as another professed benefit of strict liability offences, this could not be said to be the case, generally speaking, for Tier 2 offences prosecuted in the LEC. However, given that there is a perceived or real risk of not recovering sizeable prosecutor’s costs through the Local Court, the prosecuting agency may prefer to bring a charge for an environmental offence before the LEC. The discretionary power to substantially reduce the costs payable by the defendant is evident in the Ballina Local Court case of *EPA v Feodoroff*.<sup>793</sup> In this matter, the EPA received only 13% of the legal and investigative costs it originally sought to claim.

Although the prosecutor forfeits its chance of securing a conviction for a more serious Tier 1 offence by electing to prosecute a charge in the LEC for a lesser offence Tier 2 offence carrying a lower maximum penalty, the chances of securing a conviction is almost certain. In a sense, there is no gamble for the prosecuting agency.<sup>794</sup> So too is the high probability of the prosecutor recouping its legal and investigation costs upon a finding of guilt for a Tier 2 offence. However, should a defendant only be charged with a Tier 1 offence and be acquitted, not only is the conviction lost, but so too is the opportunity to recover costs and expenses accrued through the prosecutorial process. This accords with the High Court principle that an order to recover costs is to compensate the successful party, not punish the unsuccessful party.<sup>795</sup>

Prosecutors bringing environmental offences before the LEC do not plead alternative charges — that is, charge a Tier 1 offence *and* a Tier 2 offence as an alternative included offence. Alternative charging is available wherever a statute (like the *POEO Act*) contains a serious offence and a lesser included offence.<sup>796</sup> The latter is left as an alternative verdict. This is standard practice for other criminal offences, such as homicide, sexual offences, robbery, firearm and property offences.<sup>797</sup> The consequence of prosecutors adopting this practice in the LEC is a better utilisation of the Tier 1 provisions of the *POEO Act*. Nothing is lost as the almost certain conviction for the alternate Tier 2 offence remains.

<sup>790</sup> *EPA prosecution guidelines*, above n 310, [3.4.3].

<sup>791</sup> *ibid*.

<sup>792</sup> For example, in *EPA v Bulga Coal Management Pty Ltd* [2014] NSWLEC 5 it was held that the offence under s 148 of the *POEO Act* (Pollution incidents causing or threatening material harm to be notified) “is not a strict liability offence ... the prosecutor must prove as a subjective fact that the defendant was aware of a pollution incident which caused or threatened material harm which it failed to notify as soon as practicable”: per Pain J at [95].

<sup>793</sup> Unreported. Information on this case is available at the *Environmental Law Australia* website at <http://envlaw.com.au/epa-v-feodoroff/>, accessed 16 May 2017. The EPA received only 13% of the legal and investigative costs it originally sought to claim.

<sup>794</sup> *EPA v Snowy Hydro Ltd* (2008) 162 LGERA 273; [2008] NSWLEC 264 at [146] citing the appellate authority of Kirby P in *R v Booth* (unrep, 12/11/93, NSWCCA). L Levenson, above n 93 at p 404, argued that a conviction for a strict liability offence is virtually guaranteed, securing for the prosecutor an almost perfect “strike rate”.

<sup>795</sup> *Latoudis v Casey* (1990) 170 CLR 534; *Oshlack v Richmond River Council* (1998) 193 CLR 72 per Gaudron and Gummow JJ at [40].

<sup>796</sup> See discussion in *James v The Queen* (2014) 253 CLR 475.

<sup>797</sup> See “Alternative verdict” discussion in the Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2nd edn, 2002-, at [2-200]ff, at [http://www.judcom.nsw.gov.au/publications/benchbks/criminal/alternative\\_verdicts\\_and\\_alternative\\_counts.html](http://www.judcom.nsw.gov.au/publications/benchbks/criminal/alternative_verdicts_and_alternative_counts.html), accessed 16 May 2017.

### 3.5 The application of sentencing principles

Sentencing is the last and most difficult stage of the criminal justice process. As the High Court said in *Veen v The Queen (No 2)*:

the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform.<sup>798</sup>

The courts and the Parliament, through the common law and provisions such as s 241 of the *POEO Act*, have developed general sentencing principles for environmental offences which must be applied in an individual case. It is not enough to simply state the general sentencing principles without explaining how they are applied; they are applied to achieve what the High Court describes as “individualised justice”:

The administration of the criminal law involves individualised justice, the attainment of which is acknowledged to involve the exercise of a wide sentencing discretion.<sup>799</sup>

In *Veen v The Queen (No 2)*, Wilson J, in his Honour’s own judgment, referred to “the ease with which obscurity of meaning can infect this area of discourse”.<sup>800</sup> The following discussion highlights some points of contention in sentencing law with regard to the cases examined in this study.

### 3.6 Culpability and the De Simoni principle

If the prosecution charges the offender with an offence less serious than the facts warrant, it cannot then ask the court at sentence to find facts that then render the offender liable to a more serious penalty.<sup>801</sup> This is known in sentencing law as the *De Simoni* principle. As Bell and Keane JJ put it recently in the 2016 High Court case of *Nguyen v The Queen*, “no one should be punished for an offence of which the person has not been convicted”.<sup>802</sup> Nonetheless, in assessing the objective seriousness of an offence where the difference between the offence charged and a higher offence (whether hypothetical or not) is a matter of degree, the CCA has stated that “the precise ambit of the [*De Simoni*] principle is yet to be determined”.<sup>803</sup>

This study identified scenarios where the LEC applied or chose not to apply the *De Simoni* principle. There have been cases where the prosecuting agency has sought, without success, to have the LEC take into account the ingredients of a Tier 1 offence in sentencing for a Tier 2 pollution offence.<sup>804</sup> Such an approach is a direct breach of the *De Simoni* principle. For offences under s 120 of the *POEO Act*, it is also a breach of the *De Simoni* principle to take into account the fact that the offender was reckless. This is because recklessness falls somewhere between wilful and negligent conduct used for the Tier 1 offence.<sup>805</sup> The LEC has consistently accepted that, for the purposes of a strict liability offence under s 120 of the *POEO Act*, the *De Simoni* principle prevents it from making findings of fact that the offender acted *intentionally*,<sup>806</sup> *wilfully* or *negligently*.<sup>807</sup>

798 (1988) 164 CLR 465 at 476.

799 *Elias v The Queen* (2013) 248 CLR 483 per French CJ, Hayne, Kiefel, Bell and Keane JJ at [27].

800 (1988) 164 CLR 465 at 486.

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

802 (2016) 256 CLR 656 per Bell and Keane JJ at [29].

803 *R v Overall* (1993) 71 A Crim R 170 at 175, Mahoney JA, Allen J agreeing.

804 *EPA v Snowy Hydro Ltd* (2008) 162 LGERA 273; [2008] NSWLEC 264 per Biscoe J at [151].

805 *EPA v Tea Garden Farms Pty Ltd* [2012] NSWLEC 89 at [102], [142]–[150] approving *EPA v Snowy Hydro Ltd*, *ibid*.

806 *EPA v Queanbeyan City Council (No 3)* [2012] NSWLEC 220; (2012) 225 A Crim R 113 at [178].

807 *Chief Executive, Office of Environment and Heritage v Orica Pty Ltd* [2015] NSWLEC 109 per Preston CJ of the LEC at [110].



The *De Simoni* principle also has been applied to waste offences under the *POEO Act*. For a Tier 2, s 143(1) offence of unlawfully transporting or depositing waste the court cannot sentence on the basis of wilfully or negligently disposing of waste in a manner that harms or is likely to harm the environment. This is because there is a more serious offence in s 115(1) of the *POEO Act* with those ingredients.<sup>808</sup> There is a decision which took a contrary approach, but no adverse factual finding was made.<sup>809</sup>

This study also identified scenarios where the LEC did not apply the *De Simoni* principle on the basis of CCA authority. 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 where there is no "higher" offence in the statute.<sup>810</sup> The approach was first taken in the 1974 case of *Majury v Sunbeam Corp Ltd*<sup>811</sup> and later applied by Kirby J in *Camilleri's Stock Feeds Pty Ltd v EPA*.<sup>812</sup> It is argued by the authors that such an inquiry is an unnecessary distraction in sentencing for strict liability offences. Furthermore, it may be asserted that the "search" for further fault ingredients (ie intention, recklessness or negligence) ultimately results in an inconsistent approach to the issue of culpability for strict liability offences both within and across environmental statutes.<sup>813</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 fault ingredients.<sup>814</sup>

The High Court has not addressed the issue directly. It has held, however, that taking into account an aggravating circumstance that is hypothesised and does *not* exist, whilst not a breach of the *De Simoni* principle, is irrelevant to the assessment of the seriousness of the offence<sup>815</sup> and "likely to distort the assessment of objective gravity".<sup>816</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 offending conduct,<sup>817</sup> that is, the reverse of the *De Simoni* principle. 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>818</sup> In short, just as it is erroneous for a court to take into account as a matter in mitigation the fact that the offenders conduct could have been accommodated by a less serious charge,<sup>819</sup> so it may be for a court to add fault ingredients to strict liability offences. It is for the Parliament to frame criminal liability and for the prosecution to choose the appropriate charge.

808 *The Hills Shire Council v Kinnearney Civil & Earthworks Pty Ltd (No 2)* [2012] NSWLEC 95 at [36].

809 *EPA v Terrace Earthmoving Pty Ltd* [2016] NSWLEC 158 at [75]. Robson J, nevertheless, found at [77] that the waste offences were committed unintentionally.

810 *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".

811 [1974] 1 NSWLR 659 per McClellens CJ at CL at 664.

812 (1993) 32 NSWLR 683.

813 See examples cited at [1.2.1] and [1.2.2] of the **Introduction**.

814 *POEO Act*, s 241. Also, see general discussion of the issues at [1.2.1] to [1.2.3] of the **Introduction**.

815 *Nguyen v The Queen* (2016) 256 CLR 656 at [60] per Gageler, Nettle and Gordon JJ. 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".

816 *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".

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

818 *ibid* at [35].

819 *ibid*.

### 3.7 Jurisdictional ceiling of the Local Court

The statutory maximum monetary penalty that the Local Court can impose for an environmental offence increased 500% from \$22,000 to \$110,000 early in 2012. The increase was criticised as being too large with the potential to “remove the bulk of cases from the specialised jurisdiction of the LEC”.<sup>820</sup> Two years later, the CCA handed down its decision in *Harris v Harrison*.<sup>821</sup> While there were many grounds for this appeal, the applicant did include an appeal that the total penalty was manifestly excessive.<sup>822</sup> The CCA found, for a diverse number of reasons,<sup>823</sup> that “this was an offence that should have been treated as one suitable to be prosecuted in the Local Court, with its limitation on penalty [which, at the time, was capped at \$22,000]”.<sup>824</sup>

This study identified that, during the 15-year study period, over 60% of principal environmental offences received a fine which was less than the Local Court jurisdictional limit at the time. This finding suggests that, historically, as many as six in every 10 offences dealt with by the LEC could have been prosecuted in the Local Court, where *lower* maximum penalties and *reduced* cost orders generally apply. Furthermore, “low” objective gravity was identified in *Harris v Harrison* as a factor that makes an offence potentially suitable for prosecution in the Local Court, and to the lower maximum penalty available in that jurisdiction.<sup>825</sup> The subset of offences assessed as being of low objective seriousness — some 40% of all offences dealt with by the LEC in the study period — were potentially suitable for disposal in the Local Court, rather than in the LEC, consistent with the appellate court’s decision in *Harris v Harrison*.

Post-*Harris*, and consistent with the current offence and penalty statutory regimes, the proportion of environmental offences that attracted a fine in the LEC less than the Local Court’s jurisdictional limit of \$110,000 was almost 87%.<sup>826</sup> On face value, this would seem to suggest that a substantial number of post-*Harris* LEC sentencing decisions could be subject to similar grounds of appeal as upheld by the CCA. Over 46% of environmental offences in the post-*Harris* period which received fines of less than \$110,000 were assessed by the LEC as being of “low” objective seriousness.<sup>827</sup>

### 3.8 Penalties

The LEC appears to prefer the imposition of monetary penalties even where alternative sanctions are available. A fine was the most common penalty imposed by the LEC for the principal environmental offence: almost 64% of principal offences received a fine. A significant share of environmental offences also attracted a fine plus an Additional Order(s) under s 250 of the *POEO Act*. Other penalties were rarely imposed: a community service order (s 8 of the *CSP Act*) was imposed on just seven offenders. Suspended sentences (s 12), intensive correction orders (s 7) and full-time imprisonment (ss 5, 44–46) — despite their availability as potential penalties for some offences — were not used at all by the LEC during the period examined.

820 H Donnelly, Z Baghizadeh and P Poletti, “Environmental planning and protection offences prosecuted in the NSW Local Court”, *Sentencing Trends & Issues*, No 43, Judicial Commission of NSW, 2014, p 3.

821 (2014) 86 NSWLR 422.

822 *ibid* at [5]. The total penalty included a fine of \$28,000, an order to pay the prosecutor’s costs recognised as “not insignificant” [66] and in the order of \$75,000 [100], and a newspaper advertisement taken out at the offender’s expense making public the circumstances and outcome of the offence.

823 The reasons are articulated at [69]–[96] and concern the sentencing judge’s errors in assessing the objective seriousness of the offence, including the original findings of circumstances of aggravation (ie intent) and a financial motive behind the commission of the offence. The conclusions were identified by the CCA as significant to the assessment of objective seriousness [80]–[90] but ultimately unsustainable.

824 *Harris v Harrison* (2014) 86 NSWLR 422 at [96]–[97].

825 *ibid*.

826 Not included in the calculations are offences dealt with by the LEC that were: (i) Tier 1 offences that could not be prosecuted in the Local Court, and (ii) offences where an Additional Order was made by the LEC under s 250(1) of the *POEO Act* that could not be ordered by a Local Court.

827 The fine amounts imposed by the LEC ranged from \$22,500 to \$82,500 (mean: \$48,028; median: \$38,375).

The perceived criminal status of Tier 2 environmental offences, which represent the bulk of the LEC's work, has been questioned in the past. They have been labelled variously as “regulatory”, “public welfare”, “quasi-criminal”, “white collar crimes” and “trivial”. Many of the offenders too — not uncommonly factory managers, small business owners and government agencies — do not neatly fit the “criminal” stereotype.<sup>828</sup> The sanctions applied to environmental crimes appear to resonant penalties more characteristic of civil penalties under corporations laws.<sup>829</sup> Over recent times, the increasing use of Additional Orders with an expensive restorative component together with larger fines and substantial orders for costs would seem to reflect that environmental offences are deemed serious and are being treated seriously by the LEC.

### 3.9 Factoring the type of individual offender into the analysis of sentencing

Parliament provides for different maximum penalties depending upon whether the environmental offender is charged as a corporation or an individual. While the maximum penalty for corporations is generally higher, individuals may be subject to harsh penalties which impact on their personal liberty such as imprisonment, home detention, intensive correction orders, suspended sentences and community service orders.<sup>830</sup> In many cases, the prosecutor may elect to charge 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>831</sup> and small business owners are prosecuted as “individuals.”<sup>832</sup> The separation of “special liability” offenders is particularly important given that these designated individuals — described as “the directing mind and will of the corporation”,<sup>833</sup> — are dealt with by the LEC under the same provisions as corporations,<sup>834</sup> except that the maximum penalty for individuals *not* corporations apply. “Special liability” offenders can be proceeded against and convicted regardless of whether or not the corporation has been proceeded against or has been convicted.<sup>835</sup> Notwithstanding the above, it is a defence that the corporation position holder “used all due diligence to prevent the contravention by the corporation”.<sup>836</sup>

Offenders prosecuted under “special liability” provisions and small business owners prosecuted as individuals (not corporations), often commit their offence(s) in a commercial setting. They are often the direct beneficiaries of profits made by their companies through illegal as well as legitimate business activities. Profit-making and the financial benefits of cost-cutting are

828 *R v Curtis (No 3)* [2016] NSWSC 866 at [51].

829 For example, s 1317E of the *Corporations Act* 2001 (Cth) and Pt VI of the *Competition and Consumer Act* 2010 (Cth).

830 *CSP Act*, Pt 2, Div 2 and 3. The study found that these custodial alternatives and alternatives to custody are rarely imposed by the LEC: see general discussion at [2.1.2].

831 For example, under s 169 of the *POEO Act*. There are similar provisions under other NSW environmental protection legislation (eg s 175B(1) of the *National Parks and Wildlife Act* 1974). Similarly, the *Marine Pollution Act* 1987 (repealed) imposed liability for criminal acts and omissions on: ship masters and ship owners (ss 8(1) and 18(1)); the crews of ships (s 8A(1)); and, ship crew involved in marine pollution incidents (s 18A(1)).

832 *Bankstown City Council v Hanna* [2014] NSWLEC 152 is a notable example where the individual, a serial waste dumper, operated a small demolition, excavation and tipper hire business.

833 *EPA prosecution guidelines*, above n 310, [3.4.2]. Pain J in *EPA v Alcobell Pty Ltd*, *EPA v Campbell* [2015] NSWLEC 123 at [120]–[121] referred to the co-defendant, the sole director and shareholder in the company, as it’s “the guiding mind”.

834 Authority exists for the proposition that a defendant company charged with a pollution offence can be found liable for that offence based on vicarious liability for the conduct of its employees: *Tiger Nominees Pty Ltd v State Pollution Control Comm* (1992) 25 NSWLR 715. The issue of vicarious liability was also considered by the CCA at [84] in *Director-General of the Dept of Land and Water Conservation v Greentree* (2003) 140 A Crim R 25, where it was determined at [108] that there were “common elements in the counts against [the applicant] personally and those against him as a director”.

835 *POEO Act*, s 169(1)–(2).

836 For example, see s 169(1)(c) of the *POEO Act*. G Bates, above n 262, [9.16], described the notion of “due diligence” as “taking sufficient precautions to avoid environmental harm such that a court could conclude that the defendant was not at fault”, but goes on to say that while “[t]he concept is well understood in areas such as corporations and trade practices law ... there is still considerable uncertainty over what may be involved in environmental due diligence”. [Citations omitted.]

recognised as motives for their offending.<sup>837</sup> Where an offence is committed for financial advantage, this is considered an aggravating factor by the court.<sup>838</sup>

It was possible to ascertain whether financial gain was the motive behind the offence from the findings of fact laid down by the LEC.<sup>839</sup> This study identified that 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 36%. For “ordinary Joe” individuals, the percentage was only 19% — the same as for corporations. Without a breakdown of the sub-classes of “individual” offender, the statistic would be raw and undifferentiated: approximately 34% of offences committed by “individuals” being committed for financial gain.

Examining whether the offending conduct occurred in the course of a business activity also allows a more meaningful explanation of offending patterns and the differences in fine amounts and other components of the sentence. 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 special liability provisions were found to be most prominent in waste offences committed by corporations under their directorship or management. As **Tables 14a** and **14b** reveal there are substantial differences in the quantum of fines and costs for these various offence categories. For example, “special liability” offenders and small business owners were prominent in the commission of waste offences which, more often than not, were financially motivated. Consequently, waste offenders received some of the highest costs orders as well as some of the highest fines. So too did rural landowners for native vegetation offences, where committed to realise a financial advantage.

The *EPA prosecution guidelines* state that “those who direct a corporation’s illegal activities will not be shielded from responsibility by the corporate legal structure”.<sup>840</sup> Directors and managers of corporations involved in environmental offending may attempt to hide behind the corporate identity or blame sub-ordinates, workers or contractors.<sup>841</sup> Others claim that they have already been punished as a consequence of being subject to extra curial punishment, such as lost earnings resulting from the offence or bad publicity arising from the commission of the offence. The extra curial punishment may even be claimed to have caused the company to “wind down” and the company director to become bankrupt, as was the case in *Director General, Dept of Environment and Climate Change v Mura*<sup>842</sup> and as the defence counsel submitted in *EPA v Wattke*.<sup>843</sup> In the latter case, Pain J held, in imposing fines totalling \$60,000 on both the company director and the company’s manager, that:

837 Bricknell, above n 686, at p 3.

838 It is an aggravating factor under s 21A(2)(o) of the *CSP Act*.

839 Similarly, Bricknell, above n 686 at pp 3, 44 reported that:

A primary incentive for committing environmental crimes is personal gain. These gains are obtained directly through benefits achieved from performing a specified act but also through the resources saved by ignoring standardised codes as to how certain practices should be performed. Personal gain may be distributed between distinct players and in some cases, follows a gradient of financial benefit dependent on role and circumstances. One notorious example is the involvement of the so-called *ecomafia* in relieving companies and municipalities of industrial and other waste. The companies benefit as they do not have to pay increased costs in depositing waste at designated sites and the waste collectors benefit by exacting a fee for their services.

...

[Another example involved a] demolition company prosecuted in Victoria for dumping and burning demolition waste on a rural property [in order] to avoid \$10,000 in tipping fees.

840 *EPA prosecution guidelines*, above n 310.

841 In *Penrith City Council v 24/7 Waste Bins Pty Ltd* [2002] NSWLEC 186, the defendant was the director and secretary of a waste skip business who did not have approval to use land for the stockpiling and sorting of waste. In the summons, the defendant was charged with an offence that he aided, abetted, counselled or procured the commission of an offence by the company contrary to ss 76A(1) and 125(1) of the *EPA Act*. Seeking leniency in sentence, legal counsel for the defendant, submitted that their client had “not sought to hide behind the corporate identity”: at [20]. In *Gosford City Council v Build Max Developments Pty Ltd* [2000] NSWLEC 224, the defendant was charged with the same offence “by virtue of his directorship of the Defendant Company” under the liability provisions of s 169 of the *POEO Act*. Bignold J at [24] commended the individual defendant for “taking the ultimate responsibility for the proper management of his building development projects and not seeking to hide behind his management team or his project or site team”.

842 [2009] NSWLEC 233.

843 [2010] NSWLEC 24.

A penalty imposed by the Court for an offence under the *POEO Act* is not a debt provable in bankruptcy, *Bankruptcy Act* 1966 (Cth) s 82(3). This means that a defendant will continue to be liable to pay if the bankruptcy is discharged (*EPA v Ableway Waste Management Pty Ltd* [2005] NSWLEC 469 at [35]).

In *EPA v Hogan* [2008] NSWLEC 125, the financial position of the defendant, an undischarged bankrupt with an ongoing earning capacity, was given some but not significant weight. In *EPA v Douglass (No 2)* [2002] NSWLEC 94, also involving an impecunious offender, Lloyd J took into account the seriousness of the offence and the need for general deterrence in awarding costs for over \$1 million in mitigation of the environmental harm despite the defendant being bankrupt.

I considered these cases in determining in *EPA v Buchanan (No 2)* to impose a substantial fine.<sup>844</sup>

Her Honour considered “a community service order close to the maximum of 460 hours should also be imposed” on both company position holders together with the substantial fines because of the level of environmental harm resulting from the Tier 1 land pollution offence.

Finally, the LEC also has been required 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>845</sup> The Federal Court’s approach to the imposition of civil penalties for corporations and their directors has provided the LEC with some guidance.<sup>846</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 sentence to avoid double punishment.<sup>847</sup> The LEC may also resolve the issue by imposing a substantial fine on a company director and a nominal fine on the company.<sup>848</sup>

### 3.10 Resolving costs as a sentencing factor

Prosecutor costs were not an issue in the early days of sentencing for environmental offences. For example, in *Majury v Sunbeam Corp Ltd*,<sup>849</sup> following a successful prosecution for an offence under s 16 of the *CW Act* (rep), the court imposed a fine of \$3,000 and assessed the prosecutor’s costs to be \$600.<sup>850</sup> This was for a two-day hearing which involved junior counsel for the prosecution calling witnesses.<sup>851</sup> This can be contrasted with the recent case of *Leichhardt Council v Geitonia Pty Ltd (No 7)*,<sup>852</sup> a three-week trial, with the prosecutor represented by senior and junior counsel, and an estimate of costs “in the vicinity of \$500,000”.<sup>853</sup>

<sup>844</sup> *ibid* at [93]–[94]. The company director and company manager were charged with a Tier 1 waste offence committed negligently and an associated Tier 2 pollute waters offence. See **Table 2**.

<sup>845</sup> Examples include: the pollute waters case of *Fairfield City Council v TT Rubbish Removal Pty Ltd* [2008] NSWLEC 201 and 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 Council v Kinnarney Civil & Earthworks Pty Ltd (No 2)* [2012] NSWLEC 95.

<sup>846</sup> The Federal Court cases include *ACCC v ABB Transmission & Distribution Ltd (No 2)* (2002) 190 ALR 169 per Finkelstein J at [45]. See *EPA v Alcobell Pty Ltd*; *EPA v Campbell* [2015] NSWLEC 123 per Pain J at [120]. See also *Leichhardt Council v Geitonia Pty Ltd (No 7)* [2015] NSWLEC 79.

<sup>847</sup> *Keir v Sutherland Shire Council* [2004] NSWLEC 754 per McClellan (then) CJ of the LEC at [22]; *The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd (No 2)* [2012] NSWLEC 95 per Biscoe J at [39], [42]; *Leichhardt Council v Geitonia Pty Ltd (No 7)* [2015] NSWLEC 79 per Biscoe J at [52]–[63]. See n 234 at [1.4].

<sup>848</sup> 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 and each received a fine of \$20,000 for the offence against s 143(1)(b) of the *POEO Act*. The LEC imposed a nominal fine of \$10 on the company for the same offence.

<sup>849</sup> [1974] 1 NSWLR 659.

<sup>850</sup> *ibid* at 665. McClellan CJ at CL was required to make an assessment of what costs would be “just and reasonable” under s 14 of the *Supreme Court (Summary Jurisdiction) Act* 1967.

<sup>851</sup> *ibid* at 665.

<sup>852</sup> [2015] NSWLEC 79.

<sup>853</sup> *ibid* at [64].



Originally, the LEC was required to specify the quantum of the costs at time of sentence in accordance with s 52 of the *LEC Act* as it applied then. This requirement was removed by the *Courts Legislation Amendment Act 1997* and replaced with a costs assessment process.<sup>854</sup> The effect on sentencing practices in the LEC was not given appropriate consideration by the Parliament.

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 consequence of this change.

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>855</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. The change adversely affected the court's ability to compare sentences imposed in "like" cases where the costs figure was known in some instances but unknown in others.

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>856</sup> It is imperative to consider costs in the sentencing result in order 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>857</sup> and to broadcast to the public and "like-minded individuals" the economic consequences of environmental 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>858</sup>

The quantum of *all* costs orders, as well as the fine amount, needs to be disclosed in each LEC judgment. 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 the review and reform of the laws relating to costs orders in the LEC will lead to greater transparency and consistency in sentencing: an outcome the court, the Parliament and the public will appreciate and welcome. This could be accompanied by a much needed review of criminal liability in this area of the law.

854 See general discussion at [1.3.2].

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

856 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; and, M Newman, "Evaluating the EPA's performance in pollution regulation and management against its registered objectives" at [www.nela.org.au/NELA/Documents/Evaluating\\_the\\_EPAs\\_performance\\_Max\\_Newman.pdf](http://www.nela.org.au/NELA/Documents/Evaluating_the_EPAs_performance_Max_Newman.pdf), accessed 16 May 2017. Newman's article relied upon Poisel's analysis and stated:

low fines that tend to be imposed by the courts limit their deterrent effect for pollution offences, and the payment of fines to the NSW Treasury (rather than a fund dedicated to environmental matters) fails to ensure any remedying of the environmental damage caused.

857 *CSP Act*, s 3A(b), (f).

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

## Appendices

### Appendix A

#### Land and Environment Court Act 1979 (current as at 16 May 2017)

##### 21 Class 5—environmental planning and protection summary enforcement

The Court has jurisdiction (referred to in the *Land and Environment Court Act 1979* as “Class 5” of its jurisdiction) to hear and dispose of the following in a summary manner:

- (a) proceedings under Parts 8.2 and 8.3 of the *Protection of the Environment Operations Act 1997*,
- (a1) proceedings under section 67, 70, 71, 73, 74, 77, 80, 81, 84, 92, 93 or 94 of the *Water NSW Act 2014* or offences under regulations made under that Act,
- (aa) proceedings under section 23 of the *Ozone Protection Act 1989*,
- (b) proceedings under Divisions 1, 3 and 4 of Part 10 of the *Pesticides Act 1999*,
- (ba)–(d) (Repealed)
- (da) proceedings under section 47 (5) of the *Dangerous Goods (Road and Rail Transport) Act 2008*,
- (e) proceedings under section 158 of the *Heritage Act 1977*,
- (f) proceedings under section 127 of the *Environmental Planning and Assessment Act 1979*,
- (faa) proceedings under Divisions 1, 2, 2A and 4 of Part 10 of the *Contaminated Land Management Act 1997*,
- (fa) proceedings under section 12 of the *Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986*,
- (g) proceedings under section 691 of the *Local Government Act 1993*,
- (ga) proceedings under section 364 of the *Water Management Act 2000*.
- (gb) proceedings under section 277 (1) (c) of the *Fisheries Management Act 1994*,
- (gc) proceedings under section 53 of the *Sydney Water Act 1994*,
- (h) proceedings under section 176 (1AA) of the *National Parks and Wildlife Act 1974*,
- (ha) proceedings under section 21 of the *Very Fast Train (Route Investigation) Act 1989*,
- (hb) proceedings under sections 127S, 127ZI and 127ZR of the *Threatened Species Conservation Act 1995*,
- (hc) proceedings for an offence under section 15 of the *Trees (Disputes Between Neighbours) Act 2006*,
- (he) proceedings for an offence under the *Marine Pollution Act 2012*,
- (i) any other proceedings for an offence which an Act provides may be taken before, or dealt with by, the Court.

## Appendix B

### Jurisdiction of the LEC — jurisdictional overlap with Supreme and Local Courts — Part 1: *POEO Act* and Part 2: *EPA Act*

Supreme Court	Land and Environment Court	Local Court	Various authorities
Indictable matters	Summary matters	Summary matters	Penalty notice
Trial by judge (and jury, if required) ( <i>Supreme Court Act</i> 1970)	Summary enforcement ( <i>Land and Environment Court Act</i> 1979, s 21, Class 5 matters)	Summary enforcement ( <i>Local Court Act</i> 2007)	By penalty notice
<b>Part 1: <i>POEO Act</i></b>			
Tier 1 offences	Tier 1 and 2 offences	Tier 2 offences	Tier 3 offences (Tier 2 offences dealt with by PN)
<b>Maximum term of imprisonment</b>			
Individual only: <sup>a</sup> 7 years (wilful); 4 years (negligent)	Tier 1 offences, individual only: <sup>a</sup> 2 years (wilful); 2 years (negligent)	N/A <sup>b</sup>	N/A
<b>Maximum fine</b>			
<b>Tier 1 offences</b> Corporation: \$5 million (where the offence was committed wilfully); \$2 million (committed negligently) Individual: \$1 million (where the offence was committed wilfully); \$500,000 (committed negligently)		N/A	N/A
<b>Tier 2 offences<sup>c</sup></b> Corporation: \$1 million (plus \$120,000 each day offence continues) Individual: \$250,000 (plus \$60,000 each day offence continues)		\$110,000 <sup>d</sup>	As specified by the relevant regulation <sup>e</sup>
<b>Additional Orders</b>			
Additional Orders under s 250(1)(a)–(h) made in addition to, or in lieu of, imposing a fine <sup>f</sup>		Additional Orders, but not s 250(1)(c), (d), (e) and (h) <sup>g</sup>	N/A

- a Under s 169A of the *POEO Act*, a company director (etc) found guilty of an “executive liability” offence is subject to the maximum penalty for the corporate offence (rather than the maximum penalty for the individual offence). This provision, therefore, precludes a penalty of imprisonment. Also relevant is s 169B concerning the liability of directors (etc) for offences by a corporation, where they are deemed to be an accessory to the commission of the offence(s).
- b A maximum penalty of 2 years’ imprisonment is available to the Local Court for certain offences under other Acts dealing with environmental offences. For example, s 118A of the *National Parks and Wildlife Act* 1974 carries a maximum penalty that can include 2 years’ imprisonment for the offence of harming or picking threatened species, endangered populations or endangered ecological communities.
- c The example given is for a s 120 pollute waters offence. Other Tier 2 offences carry the same or lower maximum monetary penalties.
- d The maximum monetary penalty that the Local Court may impose for a Tier 2 offence is \$110,000: s 215(2) (that is 1,000 penalty units at \$110 per unit).
- e Penalty notice amounts for the most serious offences under the *POEO Act* (including ss 91, 97, 120, 128, 142A, 143 (asbestos or hazardous waste, or any other waste exceeding prescribed volume or weight) and 144) were substantially increased under the *Protection of the Environment Operations (General) Amendment (Fees and Penalty Notices) Regulation* 2014 (Sch 1[14]). The penalty amount depends on who issues the penalty notice: when served by the officer of a local authority (that is, a local council), the penalty amount is \$8,000 for corporations and \$4,000 for individuals; when served by any other officer empowered to do so (eg an EPA officer), the penalty notice amount is \$15,000 for corporations and \$7,500 for individuals. For other *POEO Act* offences (ss 124, 125, 126, 143 (other waste), 152 and 167), when served by the officer of a local authority, the penalty amount is \$4,000 for corporations and \$2,000 for individuals; when served by any other officer empowered to do so (eg an EPA officer), the penalty notice amount for these offences is \$8,000 for corporations and \$4,000 for individuals.
- f Part 8.3 of the *POEO Act* empowers the LEC to make certain orders for restoration and prevention of environmental damage, recovery of clean-up and investigation costs of enforcement authorities, forfeiture of monetary benefits, publication of offences and funding of environmental projects. Under s 250(1A), the LEC also may order the offender to carry out a “restorative justice activity”, that is any social or community activity that would benefit persons or the community adversely affected by the offence. The offender must agree to carry out such activity. However, the Local Court is not authorised to make such an order.
- g Under s 250(1) of the *POEO Act*, the Local Court does not have the authority to make Additional Orders that involve: environmental restoration or enhancement projects — s 250(1)(c); environmental audits of activities — (s 250(1)(d)); payments to the Environmental Trust — (s 250(1)(e)); or, a financial assurance paid to the EPA for environmental purposes — (s 250(1)(h)). With regard to Additional Orders that it is authorised to make, the Local Court can order one or more Additional Orders instead of a fine, or impose a fine as well as one or more Additional Orders. The Local Court is not authorised to make an order to carry out any “restorative justice activity”: s 250(1A).

Appendix B *continued*

Supreme Court	Land and Environment Court	Local Court	Various authorities
Indictable matters	Summary matters	Summary matters	Penalty notice
Trial by judge (and jury, if required) ( <i>Supreme Court Act 1970</i> )	Summary enforcement ( <i>Land and Environment Court Act 1979</i> , s 21, Class 5 matters)	Summary enforcement ( <i>Local Court Act 2007</i> )	By penalty notice
<b>Part 2: EPA Act</b>			
N/A	<b>Tier 1, 2 and 3 offences</b> For Tier 1 offences, s 125A(1) declares that the court attendance notice or application commencing the proceedings must allege that the aggravating factors applying to the commission of the offence were that: <ul style="list-style-type: none"> <li>(a) the offence was committed intentionally; and,</li> <li>(b)(i) caused or was likely to cause significant harm to the environment, or</li> <li>(b)(ii) caused the death of or serious injury or illness to a person.</li> </ul> The prosecution must also establish (to the criminal standard of proof) these factors: s 125A(1).		Tier 3 offences by PN: (s 125C(3): a <i>certificate-related offence</i> ; or any other offence under s 125(1) for which a tier 3 maximum penalty applies).
<b>Maximum term of imprisonment</b>			
N/A	N/A		N/A
<b>Maximum fine:</b>			
N/A	<b>Tier 1</b> Corporation: \$5 million (plus \$50,000 each day offence continues) Individual: \$1 million (plus \$10,000 each day offence continues). <b>Tier 2</b> Corporation: \$2 million (plus \$20,000 each day offence continues) Individual: \$500,000 (plus \$5,000 each day offence continues). <b>Tier 3</b> Corporation: \$1 million (plus \$10,000 each day offence continues) Individual: \$250,000 (plus \$2,500 each day offence continues).	Tier 1, 2 & 3 offences: \$110,000 <sup>h</sup>	By PN: As specified by the <i>Environmental Planning and Assessment Regulation 2000</i> (Sch 5) or other relevant regulation. <sup>i</sup>
<b>Additional Orders</b>			
N/A	s 126(2A) incorporates Pt 8.3 of the <i>POEO Act</i> empowering the LEC to make certain orders for restoration and prevention of environmental damage, recovery of clean-up and investigation costs of enforcement authorities, forfeiture of monetary benefits, publication of offences and funding of environmental projects. (These Additional Orders can be made in addition to, or as an alternative to, imposing fines.) s 126(3) allows the making of “revegetation” orders. <sup>j</sup>	s 126(2A) (and Pt 8.3 of the <i>POEO Act</i> ) restricts the Additional Orders that the Local Court can make (see note <sup>9</sup> above). s 126(3) “revegetation” orders permitted. <sup>j</sup>	N/A

<sup>h</sup> Under s 127(3) of the *EPA Act*, the maximum monetary penalty that the Local Court may impose in respect of an offence, notwithstanding any other provisions of the Act, is \$110,000 (ie 1,000 penalty units at \$110 per unit) or the maximum monetary penalty provided by the Act in respect of the offence, whichever is the lesser.

<sup>i</sup> Increases to penalty notice amounts for certain planning offences were introduced under the *Environmental Planning and Assessment Amendment (Inspections and Penalty Notices) Regulation 2009*, Sch 1[16].

<sup>j</sup> *EPA Act*, s 126 (3): In addition to, or in substitution for any pecuniary penalty, the court may direct the planting of new trees or vegetation, and to provide security to ensure performance of such direction.

## Appendix C

### Most common environmental planning and protection offences in the NSW Land and Environment Court, 2000 to 2015 (principal offences only)

Rank	Offence	Act	Section	N	% of total
1	Pollute any waters	<i>POEO Act</i>	120(1)	66	
	Pollute waters	<i>POEO Act</i>	120(1)	26	
	Cause waters to be polluted	<i>POEO Act</i>	120(2)	12	
	Pollute any waters	<i>CW Act (rep)</i>	16(1)	14	
				<b>118</b>	<b>23.5</b>
2	Development carried out without a development consent	<i>EPA Act</i>	76A(1)(a)	41	
	Development without development consent – other	<i>EPA Act</i>	76A(1)(a)	7	
	Development without development consent – class 1/10 building	<i>EPA Act</i>	76A(1)(a)	2	
	Development not carried out in accordance with consent	<i>EPA Act</i>	76A(1)(b)	20	
	Development not accord consent – other	<i>EPA Act</i>	76A(1)(b)	4	
	Development not accord consent – class 1/10 building	<i>EPA Act</i>	76A(1)(b)	1	
	Fail to comply with conditions of approval	<i>EPA Act</i>	75D(2)	1	
	Fail to cease specified building work or subdivision work	<i>EPA Act</i>	121B(1)(19)	1	
	Fail to repair or remove a building contrary to order	<i>EPA Act</i>	121B(1)(14)	1	
				<b>78</b>	<b>15.5</b>
3	Contravene any condition of licence – not noise	<i>POEO Act</i>	64(1)	30	
	Contravene any condition of licence relating to noise	<i>POEO Act</i>	64(1)	20	
	Occupier of premises with scheduled activity not hold licence	<i>POEO Act</i>	48(2)	5	
				<b>55</b>	<b>11.0</b>
4	Transport waste to unlawful waste facility	<i>POEO Act</i>	143(1)(a)	5	
	Cause/permit/transport waste to unlawful waste facility	<i>POEO Act</i>	143(1)(a)	4	
	Transport other waste to facility unlawfully	<i>POEO Act</i>	143(1)(a)	3	
	Transport waste >1 cbm >2 tonnes to facility unlawfully – owner	<i>POEO Act</i>	143(1)(a)	2	
	Cause/permit/transport asbestos waste to unlawful facility	<i>POEO Act</i>	143(1)(a)	2	
	Transport waste to a place that is not a waste facility	<i>WMM Act</i>	63(1)(a)	2	
	Owner of waste transported to unlawful waste facility	<i>POEO Act</i>	143(1)(b)	3	
	Permit land to be used unlawfully as a waste facility	<i>POEO Act</i>	144(1)	6	
	Owner/occupier cause/permit/use land as waste facility	<i>POEO Act</i>	144(1)	5	
	Disposing of waste on land without lawful authority	<i>WMM Act</i>	63(1)	2	
	Allow land to be used as waste facility without lawful authority	<i>WMM Act</i>	64(1)	4	
	Cause/permit/supply false misleading info re asbestos waste	<i>POEO Act</i>	144AA(1)	4	
				<b>42</b>	<b>8.4</b>
5	Do thing forbidden to be done under Act	<i>EPA Act</i>	125(1)	19	
	Contravene tree preservation order	<i>EPA Act</i>	125(1)	15	
	Fail to do thing directed to be done under Act	<i>EPA Act</i>	125(1)	5	
	Do thing forbidden to be done by regulations	<i>EPA Act</i>	125(2)	1	
				<b>40</b>	<b>8.0</b>
6	Discharge as master oily mixture from ship into State waters	<i>MP Act</i>	8(1)	11	
	Discharge as owner oily mixture from ship into State waters	<i>MP Act</i>	8(1)	11	
	Discharge oil or oily mixture from ship into State waters	<i>MP Act</i>	8(1)	8	
	Crew etc responsible for discharge of oil into State waters	<i>MP Act</i>	8A(1)	2	
	Owner of ship discharging liquid substance into waters	<i>MP Act</i>	18(1)	1	
	Person causing discharge of liquid substance from ship	<i>MP Act</i>	18(1)	2	
	Master of ship discharging liquid substance into waters	<i>MP Act</i>	18(1)	1	
	Unlawfully discharge prohibited substance into State waters	<i>MP Act</i>	27(1)	3	
				<b>39</b>	<b>7.8</b>



Appendix C *continued*

Rank	Offence	Act	Section	N	% of total
7	Harm animal of endangered threatened species	<i>NPW Act</i>	118A(1)(a)	1	
	Pick plant of threatened species	<i>NPW Act</i>	118A(2)	2	
	Pick threatened species/population/ecological community	<i>NPW Act</i>	118A(2)	2	
	Pick plant of an endangered ecological community	<i>NPW Act</i>	118A(2)	4	
	Pick plant of an endangered population	<i>NPW Act</i>	118A(2)	3	
	Harm protected fauna	<i>NPW Act</i>	98(2)(a)	2	
	Damage habitat of a threatened species	<i>NPW Act</i>	118D(1)	6	
	Damage/remove vegetation/rock/soil/sand/stone etc	<i>NPW Act</i>	156A(1)(b)	5	
	Cause damage to non-critical habitat	<i>NPW Act</i>	118D(1)	2	
				27	5.4
8	Carry out/authorise clearing contrary to s 12	<i>NV Act</i>	12(2)	19	
	Clear native vegetation contrary to consent/code of practice	<i>NVC Act</i>	21(2)	4	
	Contravene Pt 2-clearing native vegetation and land	<i>NVC Act</i>	17(1)	1	
				24	4.8
9	Contravene section by emission of odours	<i>POEO Act</i>	129(3)	5	
	Contravene section by exceeding air purity emissions	<i>POEO Act</i>	128(3)	1	
	Occupier deal with materials and thus cause air pollution	<i>POEO Act</i>	126(1)	2	
	Scheduled premises not licensed	<i>CA Act</i>	10	1	
	Occupier scheduled premises fail to process etc any material	<i>CA Act</i>	14(3)	1	
				10	2.0
10	Erect without a construction certificate having been issued	<i>EPA Act</i>	81A(2)(a)	6	
	Erect building without construction certificate	<i>EPA Act</i>	81A(2)(a)	3	
				9	1.8
Sub total (1–10)				442	88.0
Tier 1 offences					
	Wilfully or negligently dispose of waste in manner likely to harm environment	<i>POEO Act</i>	115(1)(a)	2	
	Negligently dispose of waste harms etc environment	<i>POEO Act</i>	115(1)(a)	4	
	Wilfully or negligently allow substance to be leaked in way to harm environment	<i>POEO Act</i>	116(1)(a)	1	
	Person in possession of substance harming environment	<i>POEO Act</i>	116(2)(a)	1	
	Cause substance to escape harm/likely to harm environment	<i>EOP Act</i>	6(1)(a)	1	
				9	1.8
Other offences before the LEC examined					
	Use/allow use/cause use of vehicle that emits impurities	<i>CA(MV) Reg</i>	27(1)	1	
	Carry out a site audit when not accredited under Pt 4	<i>CLM Act</i>	48(1)(a)	1	
	Person hold out accredited when not accredited under Pt 4	<i>CLM Act</i>	57(1)	1	
	Employ/engage/cause/permit unlicensed driver	<i>DG Act</i>	7(1)	1	
	Fail to ensure dangerous goods are transported safely	<i>DG Act</i>	9(1)	3	
	Use unlicensed vehicle to transport dangerous goods by road	<i>DG Act</i>	6(1)	1	
	Maximum penalty under <i>Pollution Control Act</i> 1970	<i>EPA Act</i>	8D(1)	1	
	Issue unauthorised Pt 4A/complying development certificate	<i>EPA Act</i>	109ZH(1)(a)	1	
	Local government authority carry out dredging without permit	<i>FM Act</i>	200(1)	1	
	Breach condition/restriction attached to licence	<i>NPW Act</i>	133(4)	1	
	Harm Aboriginal object	<i>NPW Act</i>	86(2)	1	
	Maximum penalty where no expressed penalty	<i>NPW Act</i>	175(2)	1	
	Destroy objects/Aboriginal places without consent	<i>NPW Act</i>	90(1)	1	
	Disturb object on land the property of the Crown no permit	<i>NPW Act</i>	86(b)	2	
	Fail to comply with order under Pt 15, Div 3	<i>NPW Act</i>	206	1	
	Not supply information in compliance with notice issued	<i>NV Act</i>	36(4)(a)	1	

Rank	Offence	Act	Section	N	% of total
	Disregard instructions in preparing registered pesticides	<i>P Act</i>	33(1)	3	
	Use pesticide contrary to label without authority of permit	<i>Pest. Act</i>	15(1)(a)	1	
	Use pesticide in manner that damages others property	<i>Pest. Act</i>	10(1)(b)	1	
	Use pesticide in manner so as to injure other person	<i>Pest. Act</i>	10(1)(a)	3	
	Use unregistered pesticide without holding permit for same	<i>Pest. Act</i>	13(a)	1	
	Breach condition of title – environmental management – T2	<i>P(O) Act</i>	136A(1)	1	
	Licence holder must not contravene condition	<i>PC Act</i>	17D(9)	2	
	Owner of motor vehicle emitting excessive air impurities	<i>POEO (CA) Reg</i>	9(1)	1	
	Fail to comply with clean-up notice	<i>POEO Act</i>	91(5)	1	
	Fail to comply with prevention notice	<i>POEO Act</i>	97	2	
	Occupier of premises not notify pollution incident	<i>POEO Act</i>	148(4)	1	
	Provide false/misleading information to regulatory authority	<i>POEO Act</i>	66(2)	1	
	Attempt to comply with Chapter 7 by false/misleading means	<i>POEO Act</i>	211(2)	2	
	Delay/obstruct authorised officer exercising power – Chapter 7	<i>POEO Act</i>	211(3)	1	
	Not comply with requirement under Chapter 7	<i>POEO Act</i>	211(1)	2	
	Unlawfully make an excavation on, in or under protected land	<i>RFI Act</i>	22B(1)(a)	3	
	Not transport dangerous goods safely – death/injury	<i>RRT Act</i>	37(1)	1	
	Not transport dangerous goods safely – no death/injury	<i>RRT Act</i>	37(1)	2	
	Interfere/damage/destroy/disconnect meter w/intent/reckless	<i>WMM Act</i>	91K(1)	1	
	Take water unlawfully from water source	<i>WMM Act</i>	341(1)(a)	1	
	Use water supply work to take water without approval	<i>WMM Act</i>	343(1)(a1)(i)	1	
				<b>51</b>	<b>10.2</b>
			<b>All offences</b>	<b>502</b>	<b>100.0</b>
<b>Offences not examined</b>					
	Contempt of court	<i>J Act</i>	152	29	
	Contempt	Common Law (NSW)	Common Law	17	
				<b>46</b>	<b>8.4</b>

### Legend

<i>CA Act</i>	<i>Clean Air Act 1961 (rep)</i>
<i>CA (MV) Reg</i>	<i>Clean Air (Motor Vehicles and Motor Vehicle Fuels) Regulation 1997 (rep)</i>
<i>CLM Act</i>	<i>Contaminated Land Management Act 1997</i>
<i>CW Act</i>	<i>Clean Waters Act 1970 (rep)</i>
<i>DG Act</i>	<i>Dangerous Goods (Road and Rail Transport) Act 2008</i>
<i>EOP Act</i>	<i>Environmental Offences and Penalties Act 1989 (rep)</i>
<i>EPA Act</i>	<i>Environmental Planning and Assessment Act 1979</i>
<i>FM Act</i>	<i>Fisheries Management Act 1994</i>
<i>J Act</i>	<i>Justices Act 1902 (rep)</i>
<i>MP Act</i>	<i>Marine Pollution Act 1987 (rep)</i>
<i>NPW Act</i>	<i>National Parks and Wildlife Act 1974</i>
<i>NV Act</i>	<i>Native Vegetation Act 2003</i>
<i>NVC Act</i>	<i>Native Vegetation Conservation Act 1997 (rep)</i>
<i>P Act</i>	<i>Pesticides Act 1978 (rep)</i>
<i>Pest. Act</i>	<i>Pesticides Act 1999</i>
<i>P(O) Act</i>	<i>Petroleum (Onshore) Act 1991</i>
<i>PC Act</i>	<i>Pollution Control Act 1970 (rep)</i>
<i>POEO Act</i>	<i>Protection of the Environment Operations Act 1997</i>
<i>POEO(CA) Reg</i>	<i>Protection of the Environment Operations (Clean Air) Regulation 2002 (rep)</i>
<i>RFI Act</i>	<i>Rivers and Foreshores Improvement Act 1948 (rep)</i>
<i>RRT Act</i>	<i>Road and Rail Transport (Dangerous Goods) Act 1997 (rep)</i>
<i>WMM Act</i>	<i>Waste Minimisation and Management Act 1995 (rep)</i>

## Appendix D

### LEC cases applying the costs principles stated in *EPA v Barnes*

The following statements regarding costs were made in *EPA v Barnes* [2006] NSWCCA 246 per Kirby J (Mason P and Hoeben J agreeing):

At [78]: *The assertion by the appellant that the penalty imposed was “a miniscule proportion of the maximum penalty” is not entirely accurate. The individual fines (which total \$4,500) had, in each case, been discounted by 25% to take account of the pleas of guilty. But, more than that, the costs of \$15,727.13 were an important aspect of the punishment of Mr Barnes. Quite apart from his own costs, he was required, by reason of his breaches of the law, to pay slightly in excess of \$20,000.*

At [88]: *Returning to the penalty imposed upon Mr Barnes. As a matter of first impression, the fines imposed appeared unduly lenient, suggesting error. However, the fines were part only of the penalty. Mr Barnes was obliged to pay substantial costs. Her Honour made it clear that, but for that fact, the fines she would have imposed would have been much higher.*

The following LEC judgments applied the principles cited in paragraphs [78] and/or [88] of *EPA v Barnes* (the judgments are listed by year in reverse chronological order):

- Cumberland Council v Khoury* [2017] NSWLEC 14 at [106]
- EPA v Complete Asbestos Removal Pty* [2016] NSWLEC 167 at [134]
- EPA v Morgan Cement International Pty Ltd* [2016] NSWLEC 140 at [145]
- EPA v Foxman Environmental Development Services (No 2)* [2016] NSWLEC 120 at [125]
- EPA v Environmental Treatment Solutions Pty Ltd* [2015] NSWLEC 160 at [108]
- Warringah Council v ProjectCorp Aust Pty Ltd* [2015] NSWLEC 141 at [259]
- Wingecarribee Shire Council v O'Shanassy (No 6)* [2015] NSWLEC 138 at [226]
- EPA v Alcobell Pty Ltd* [2015] NSWLEC 123 at [119]
- Director-General, Dept of Environment and Climate Change v Hudson (No 2)* [2015] NSWLEC 110 at [186]
- EPA v Wyanga Holdings Pty Ltd* [2015] NSWLEC 78 at [160]
- Leichhardt Council v Geitonia Pty Ltd (No 7)* [2015] NSWLEC 79 at [64]
- EPA v Causmag Ore Co Pty Ltd* [2015] NSWLEC 58 at [123]
- Willoughby City Council v Livbuild Pty Ltd* [2015] NSWLEC 34 at [110]
- EPA v Truegain Pty Ltd (No 4)* (2014) 206 LGERA 1; [2014] NSWLEC 179 at [132]
- Bankstown City Council v Hanna* (2014) 205 LGERA 39; [2014] NSWLEC 152 at [176]
- EPA v Orica Aust Pty Ltd* [2014] NSWLEC 103; (2014) 206 LGERA 239 at [209]
- Simpson v Office of Environment and Heritage* (2014) 205 LGERA 17; [2014] NSWLEC 34 at [52]
- Port Macquarie-Hastings Council v Notley (No 2)* [2013] NSWLEC 220 at [92]
- Newcastle Port Corp v MS Magdalene Schiffahrts GmbH* [2013] NSWLEC 210 at [160]
- Mouawad v Hills Shire Council* (2013) 199 LGERA 28; [2013] NSWLEC 165 at [195]
- Harrison v Harris* (2013) 195 LGERA 79; [2013] NSWLEC 105; at [171]
- EPA v Forestry Commission (NSW)* [2013] NSWLEC 101 at [169]
- North Sydney Council v Perini (No 2)* [2013] NSWLEC 91 at [175]
- Chief Executive, Office of Environment and Heritage v Ausgrid* (2013) 199 LGERA 1; [2013] NSWLEC 51, at [85]
- Chief Executive, Office of Environment and Heritage v Rummary* (2012) 192 LGERA 314; [2012] NSWLEC 271, at [192]

- Warringah Council v Bonanno* [2012] NSWLEC 265 at [55]
- EPA v Queanbeyan City Council (No 3)* (2012) 225 A Crim R 113; [2012] NSWLEC 220 at [248]
- EPA v Shannongrove Pty Ltd (No 2)* (2012) 198 LGERA 232; [2012] NSWLEC 202 at [96]
- The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd (No 2)* [2012] NSWLEC 95 at [38]
- EPA v BMG Environmental Group Pty Ltd* (2012) 188 LGERA 324; [2012] NSWLEC 69 at [137]
- Loel v Warringah Council* [2012] NSWLEC 11 at [77]
- Ku-ring-gai Council v Abroon (No 3)* [2012] NSWLEC 12 at [130]
- Hurstville City Council v Naumcevski* [2011] NSWLEC 226 at [73]
- Plath v Vaccount Pty Ltd* [2011] NSWLEC 202 at [125]
- Cessnock City Council v Bimbadgen Estate Pty Ltd (No 2)* [2011] NSWLEC 140 at [89]
- EPA v Unomedical Pty Ltd (No 4)* [2011] NSWLEC 131 at [115]
- Director-General, Dept of Environment and Climate Change v Walker Corp Pty Ltd (No 4)* [2011] NSWLEC 119 at [120]
- EPA v Ramsey Food Processing Pty Ltd* [2010] NSWLEC 23 at [188]
- Liverpool City Council v Leppington Pastoral Co Pty Ltd* [2010] NSWLEC 170 at [49]
- EPA v Transpacific Industries Pty Ltd* [2010] NSWLEC 85 at [120]
- Cessnock City Council v Quintaz Pty Ltd* (2010) 172 LGERA 52; [2010] NSWLEC 3 at [112]
- Pittwater Council v Brown Brothers Waste Contractors Pty Ltd (No 2)* [2009] NSWLEC 210 at [124]
- The Council of the Municipality of Kiama v Pacific Real Estate (Warilla) Pty Ltd* [2009] NSWLEC 191 at [97]
- EPA v Ghossayn* [2009] NSWLEC 181 at [125]
- Minister for Planning v Fancott Pty Ltd* [2009] NSWLEC 170 at [73]
- EPA v Causmag Ore Co Pty Ltd* [2009] NSWLEC 164 at [77]
- Garrett v Freeman (No 5)* (2009) 164 LGERA 287; [2009] NSWLEC 1 at [176], [183]
- Blue Mountains City Council v Carlon* [2008] NSWLEC 296 at [60]
- Plath v Knox* [2007] NSWLEC 670 at [36]
- EPA v Lithgow City Council* [2007] NSWLEC 695 at [71]
- EPA v Hardt* [2007] NSWLEC 284 at [61]
- Hornsby Shire Council v Devaney* [2007] NSWLEC 199 at [84]
- Garrett v Williams* (2007) 151 LGERA 92; [2007] NSWLEC 96 at [117]
- Garrett v Williams* (2006) 160 LGERA 115; [2006] NSWLEC 785 at [186]
- EPA v Williams* [2006] NSWLEC 722 at [46]
- EPA v Centennial Newstan Pty Ltd* [2006] NSWLEC 732 at [103].

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