

# EPA Prosecution Guidelines

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# Contents

<b>1. Introduction</b>	<b>4</b>
<b>2. Principles of prosecution</b>	<b>6</b>
<b>3. Selecting the appropriate defendant</b>	<b>11</b>
<b>4. Charges</b>	<b>15</b>
<b>5. Selecting the appropriate court</b>	<b>17</b>
<b>6. Related proceedings</b>	<b>19</b>
<b>7. Disclosure, cooperation and compliance</b>	<b>21</b>
<b>8. Indemnification of witnesses</b>	<b>22</b>
<b>9. Sentencing and appeals against sentence</b>	<b>23</b>

# 1. Introduction

## 1.1. Introduction

1.1.1. On 1 March 1992, the Protection of the Environment Administration Act 1991 (POEA Act) established the Environment Protection Authority (EPA) in NSW. The EPA's objectives, set out in section 6(1) of the POEA Act, are:

- to protect, restore and enhance the quality of the environment in NSW, having regard to the need to maintain ecologically sustainable development; and
- to reduce the risks to human health and prevent degradation of the environment.

1.1.2. Under the POEA Act, the EPA has responsibility for investigating and reporting on alleged non-compliance with environment protection legislation for the purposes of prosecution or other regulatory action (section 7(2)(e)).

## 1.2. Legislation

1.2.1. For prosecution, the most widely used piece of environment protection legislation administered by the EPA is the Protection of the Environment Operations Act 1997 (POEO Act). This creates a three-tiered structure of offences with the most serious offences under Tier 1 carrying maximum penalties of \$5 million for corporations and \$1 million and/or seven years imprisonment for individuals.

1.2.2. The EPA can also take proceedings under the following Acts:

- *Biodiversity Conservation Act 2016*;
- *Contaminated Land Management Act 1997 (CLM Act)*;
- *Dangerous Goods (Road and Rail Transport) Act 2008*;
- *Environmentally Hazardous Chemicals Act 1985*;
- *Forestry Act 2012*;
- *Local Land Services Act 2013*;
- *Ozone Protection Act 1989*;
- *Pesticides Act 1999*;
- *Radiation Control Act 1990*;
- *Recreation Vehicles Act 1983*; and
- *Waste Avoidance and Resource Recovery Act 2001*.

These guidelines will be used in relation to any criminal or related proceedings taken by the EPA under any Act.

1.2.3. The EPA can also take proceedings under each of the Regulations under the POEO Act and the Acts listed at 1.2.2.

## 1.3. POEA Act and the EPA Board

1.3.1. The POEA Act separates the prosecution process from the political arena. While, in general terms, the EPA is subject to the control and the direction of the Minister, the EPA is specifically exempted from that control and direction in relation to any decision to institute or approve of the institution of *criminal or related proceedings* (section 13(2)(c)). The phrase *criminal or related proceedings* is defined in the POEA Act as any *proceedings for an offence against the environment protection legislation or any proceedings under Division 4 of Part 8.2 and Part 8.4, or under Schedule 2A of the POEO Act* (section 3(1)).

1.3.2. The POEA Act specifies that the EPA Board must determine whether the EPA should institute proceedings for serious environment protection offences (section 16(1)(d)). The Board will have the assistance of Environmental Counsel to advise on the legal merits of a case.

1.3.3. Another function of the Board is to *develop, and make available for public information, guidelines relating to the institution of criminal and related proceedings* (section 16(1)(c)). These guidelines will indicate how the EPA will exercise its prosecutorial powers and the circumstances in which it might commence related proceedings.

#### **1.4. Purpose of these guidelines**

1.4.1. The purpose of these guidelines is to identify for the benefit of the public, including those within the regulated community, and other prosecutorial organisations:

- a. the basis on which the EPA will make a decision to prosecute;
- b. the factors to be taken into account in deciding which persons are the appropriate defendants;
- c. the factors to be taken into account in deciding which charges to lay;
- d. the factors to be considered in determining the appropriate jurisdiction to bring the trial;
- e. those significant cooperative measures that may influence the EPA's decision to prosecute or which the EPA will submit may operate as important mitigating factors on sentence;
- f. instances where the EPA may commence or be a party to related proceedings (i.e. proceedings for restraining orders, for remedies or to restrain breaches, in relation to enforceable undertakings or for enforcement of gas and other petroleum legislation);
- g. instances in which the EPA may recommend the indemnification of witnesses; and
- h. factors considered by the EPA before commencing an appeal against a sentence imposed on an environmental offender.

1.4.2. The guidelines are not legally binding on the EPA or any other organisation. They reflect the current policies of the EPA. Those policies will be kept under review and any changes will be notified publicly.

# 2. Principles of prosecution

## 2.1. The role of the prosecutor

2.1.1. The role of the Prosecutor is set out in the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, at rule 29, and in the *Legal Profession Uniform Conduct (Barristers) Rules 2015*, commencing at rule 83. When prosecuting, the EPA will comply with these rules, including the prosecutor's duty of disclosure.

## 2.2. The decision to prosecute

2.2.1. The basic pre-requisite of any prosecution is that the available evidence establishes a prima facie case. However, as noted in the Prosecution Guidelines of the Office of the Director of Public Prosecutions, New South Wales:

*It has never been the rule in this country...that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should...prosecute 'wherever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest'. That is still the dominant consideration.*

(Sir Hartley Shawcross QC, UK Attorney General and former Nuremberg trial prosecutor, speaking in the House of Commons on 29 January 1951, at p. 3).

This statement is equally applicable to the EPA. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue with vigour those cases worthy of prosecution.

### Evidence

2.2.2. Generally, a prosecution should not be instituted or continued unless the available evidence is capable of establishing each element of the offence and there are reasonable prospects of the offence being proved. This decision requires an evaluation of how strong the case is likely to be when presented in court.

The evaluation should not just consider whether or not there is a prima facie case but it must take into account matters such as the availability, competence and credibility of witnesses and their likely impression on the court, the admissibility of the evidence, all potential defences and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of the offence being proved. When making this evaluation in respect of environmental offences, it is also important to consider the availability and strength of any scientific evidence and the capabilities and expertise of any expert witness.

### Discretion

2.2.3. Sufficiency of evidence is therefore not the sole criterion for prosecution:

- a. not every breach of the criminal law is automatically prosecuted – the laying of charges is discretionary; and
- b. the dominant factor in the exercise of that discretion is the public interest.

2.2.4. The Prosecution Policy of the Commonwealth states:

*The decision whether or not to prosecute is the most important step in the prosecution process...The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases. (At paragraphs 2.2 and 2.3).*

2.2.5. In criminalising breaches of environmental laws a primary, though not the sole, aim of Parliament is deterrence. By extending criminal liability to a wide range of people who may be involved in some way with environmental breaches, for example, owners of substances, owners of containers, directors and managers of corporations, the legislation generates increased awareness and responsibility for environmental performance both vertically within corporate hierarchies and laterally across a broad spectrum of those with responsibility for preventing environmental harm. Potential liability, however, does not mean automatic prosecution.

2.2.6. Parliament has recognised that prosecution may not always be the appropriate response. The EPA has a discretion as to how to proceed in relation to environmental breaches and section 219(3) of the POEO Act envisages that the EPA may pursue non-prosecution options to prevent, control, abate or mitigate any harm to the environment caused by an alleged offence or to prevent the continuance or recurrence of an alleged offence. Where the EPA uses these alternatives, prosecution by third parties is precluded under the POEO Act.

2.2.7. Prosecution will be used, therefore, as part of the EPA's overall strategy for achieving its objectives. Each case will be assessed to determine whether prosecution is the appropriate strategic response. It will be used as a strategic response where it is in the public interest to do so.

### **Factors to be considered**

2.2.8. Factors which alone or in conjunction arise for consideration in determining whether the public interest requires a prosecution include, but are not limited to:

#### *Offence related factors*

- a. the seriousness or, conversely, the triviality of the alleged offence or that it is of a 'technical' nature only;
- b. the harm or potential harm to the environment caused by the offence;
- c. the harm or potential harm to human health, and/or unreasonable interference or potential unreasonable interference with human comfort or repose;
- d. whether the breach is a continuing or repeat offence;
- e. the prevalence of the alleged offence and the need for deterrence, both specific and general;
- f. the length of time since the alleged offence;
- g. whether, if legislative provisions have changed, the conduct giving rise to the alleged offence is no longer unlawful;

#### *Alleged offender related factors*

- h. the degree of culpability of the alleged offender in relation to the offence;
- i. the antecedents of the alleged offender and whether the alleged offender had been dealt with previously by prosecutorial or non-prosecutorial means;
- j. whether the alleged offender had been prosecuted by another agency for a related offence, arising from the incident for which the EPA is considering prosecution;
- k. the age, physical or mental health or special infirmity of the alleged offender(s);
- l. whether the consequences of any conviction would be unduly harsh or oppressive;
- m. whether the alleged offender acted in accordance with EPA advice or advice from another government agency;
- n. whether or not the alleged offender is willing to co-operate or has cooperated in the investigation or prosecution of others;

#### *Sentencing factors*

- o. the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the Court;
- p. whether the issuing of Court orders are necessary to prevent a recurrence of the offence or to recompense for the harm caused by the offence;

#### *Other factors*

- q. any mitigating or aggravating circumstances;
- r. whether prosecution of the alleged offence would assist in resolving an ambiguity in the law;
- s. environmental justice principles such as any disproportionate impact of an alleged offence on disadvantaged communities or other vulnerable persons;
- t. the availability and efficacy of any alternatives to prosecution;
- u. whether there are counter-productive features of the prosecution;
- v. the length and expense of a Court hearing;
- w. any precedent which may be set by instituting or by not instituting proceedings;
- x. the strategic value of the proposed prosecution;
- y. whether proceedings are to be instituted against others arising out of the same incident; and
- z. the age, physical or mental health or special infirmity of the alleged offenders or witnesses.

2.2.9. The EPA adopts the cardinal principle that a prosecution must not be brought for improper purposes. A decision whether or not to prosecute will not be influenced by:

- a. any elements of discrimination against the alleged offender or any other person involved, for example, race, religion, sex, nationality, social affiliations, political affiliations or political associations, activities or beliefs of the alleged offender or any other person involved;
- b. personal empathy or antipathy towards the alleged offender;
- c. the political or other affiliations of those responsible for the prosecution decision; or
- d. subject to any public interest consideration set out at paragraph 2.2.8, the possible advantage or disadvantage to the government or any political party, group or individual.

#### **The role of the EPA Board**

2.2.10. As discussed in 1.3.2 above, the POEA Act provides that the EPA Board must determine whether the EPA should institute proceedings for serious environment protection offences. The Board consists of the Chairperson of the EPA and four part- time members. In exercising their functions, members of the Board recognise their duty is to the Board, irrespective of the policies or interests of their affiliates:

*Once a group has elected a member that member assumes office as a member of the board and becomes subject to the over-riding and predominant duty to serve the interests of the board in preference, on every occasion upon which any conflict may arise, to serving the interests of the group which was responsible for the appointment. With this basic proposition there can be no room for compromise.*

(Bennets v Board of Fire Commission of NSW (1967) 87 WN at 311 per Street J.)

Decisions by the Board in relation to prosecutions will be made fairly and impartially on the merits of the case and taking into account any discretionary aspects as set out in these guidelines.

2.2.11. The Board of the EPA recognises that openness and consultation is desirable in carrying out most of its functions. However, in the interests of fairness to defendants, the following considerations will be followed by the Board in relation to deliberations on prosecutions:

- a. all such deliberations will be in confidence;
- b. the decision will be recorded as a decision of the Board without dissenting votes being recorded;
- c. any decision to prosecute will be communicated to the Chief Executive Officer;
- d. any public comment in relation to the institution of proceedings will be made by the Chairperson or the Chief Executive Officer on behalf of the EPA at the time the proceedings are instituted; and
- e. in any subsequent post-hearing public statements, Board members will not comment on the initial decision to prosecute.



## Penalty notices

2.2.12. These guidelines apply in determining whether to institute proceedings following the issue of a penalty notice, where the recipient elects to have the matter heard by a court. Such proceedings, if commenced, will ordinarily be commenced in the Local Court.

### 2.3. Who may prosecute

2.3.1. Under the POEO Act, responsibility for bringing prosecution proceedings for environmental offences is given to various parties. The EPA can bring proceedings for any environmental offence against the POEO Act, the *Waste and Resource Recovery Act 2001*, the *Ozone Protection Act 1989* and the *Environmentally Hazardous Chemicals Act 1985*, whether or not the EPA is the appropriate regulatory authority in relation to the offence (section 217(1) of the POEO Act, in conjunction with section 213(1)). Other public authorities, such as local councils, can bring proceedings where they are the appropriate regulatory authority in relation to the offence (section 217(2) of the POEO Act). Other persons, such as police officers, are also given the ability to commence proceedings in relation to specific environmental offences (section 218 of the POEO Act).

2.3.2. The EPA has responsibility for bringing prosecution proceedings in relation to offences against the legislation set out at 1.2.2, above, which may change from time to time.

2.3.3. Other people, beyond those authorities set out in s 218 of the POEO Act, may bring prosecution proceedings for offences against the POEO Act, the *Waste and Resource Recovery Act 2001*, the *Ozone Protection Act 1989*, the *Environmentally Hazardous Chemicals Act 1985* and the CLM Act but only if they have obtained leave of the Land and Environment Court (section 219(1) of the POEO Act, in conjunction with section 213(2) of the POEO Act, and section 95(1) of the CLM Act).

2.3.4. The Land and Environment Court may only grant leave where it is satisfied that the EPA has decided not to take relevant action in respect of the act or omission constituting the alleged offence or has not made any decision to take such action within 90 days of being requested to institute proceedings (section 219(2) of the POEO Act and section 95(2) of the CLM Act). Under the POEO Act, such action includes using statutory powers to address any harm to the environment caused by the alleged offence or otherwise taking action to prevent the continuance or recurrence of the offence (section 219(3) of the POEO Act). Under the CLM Act, such action includes taking action under that Act to ensure compliance with a preliminary investigation order or management order (section 95(3) of the CLM Act).

2.3.5. As a general principle, where a serious breach of the environment protection laws comes to the attention of the EPA, the EPA will lead any investigation and take any appropriate action. This principle recognises that, because of its functions, powers and objectives and because of the legal and specific expertise within the organisation, the EPA is generally in a better position than most other parties to investigate and prosecute serious breaches.

### 2.4. Working with other authorities

2.4.1. The EPA is not the only body which may institute criminal or related proceedings under the environment protection legislation. Organisations such as local councils, police, transport authorities and water supply authorities as well as individuals in the community may bring proceedings in their own right. They are not bound directly by these guidelines. However, the EPA recognises that the publication of these guidelines will provide a framework within which consistency, fairness and efficiency can be developed across those agencies assisting the EPA in administering the environment protection legislation. The EPA will also ensure that through its educational programs other agencies which may institute environmental prosecutions are familiar with the principles and content of the guidelines.

2.4.2. The EPA will work collaboratively with other authorities when conducting criminal or related proceedings in respect of the same incident, conduct or defendant/respondent.

2.4.3. Where there is another prosecuting authority involved as well as the EPA, the EPA will liaise with the other authority to ensure the most appropriate charge(s) are laid. Conversely, it would be preferable for other prosecuting bodies which know of the EPA's actual or potential involvement in a case to initiate contact prior to commencing proceedings.

# 3. Selecting the appropriate defendant

## 3.1. General principles

3.1.1. In keeping with the aims of the environment protection legislation, liability is imposed on a wide range of people who may have participated in or contributed to an incident. This may mean that a number of people commit an offence arising out of one incident. However, it is not always appropriate to prosecute every person who may be liable for an offence.

3.1.2. In addition to the factors set out in 2.2.8 above, there are some further considerations that may be taken into account in determining the appropriate defendant/s. These are:

- a. who is primarily responsible for the alleged offence, that is, who was primarily responsible for the acts or omissions giving rise to the alleged offence or the material circumstances leading to the alleged offence or who formed any relevant intention;
- b. in relation to the matters set out in (a) above, what was the role of the proposed defendant; and
- c. the effectiveness of any Court orders that might be made against the proposed defendant.

## 3.2. Corporate liability

3.2.1. The environment protection legislation imposes liability on corporations as well as individuals. Where an offence is committed by employees, agents or officers of a corporation in the course of their employment, proceedings will usually be commenced against the corporation. Where, however, the offence has occurred because the employee, agent or officer has embarked on a venture of their own making and volition, outside the scope of their employment, proceedings may be instituted against the employee, agent or officer and not against the corporation. Depending on the circumstances, it may be appropriate to commence proceedings against both a corporation and an individual in respect of the same factual circumstances giving rise to an alleged offence.

3.2.2. Another factor which will be considered is the existence and effective implementation of any compliance programs of the corporation. This topic is dealt with in more detail in Part 7 of these guidelines.

## 3.3. Employees' liability

3.3.1. The POEO Act requires that the Court, in imposing a penalty, will take into account whether an employee was acting under orders from a supervisor in committing the offence (section 241(1)(e) of the POEO Act). However, the section does not absolve the employee from all responsibility. Parliament has imposed on all employees an obligation to protect the environment irrespective of their employers' attitudes. Further, the POEO Act requires an employee to notify his/her employer of certain pollution incidents (section 148(3) of the POEO Act).

3.3.2. The guiding principle in deciding whether to charge an employee is the degree of culpability involved. Factors relevant to assessing the degree of culpability include:

- a. whether the employee knew or should have known that the activity in question was illegal;
- b. the seniority of the employee and the scope of the employee's employment duties; and
- c. whether, having regard to the employee's seniority and employment duties, the employee had taken reasonable steps to draw to the attention of the employer or any other relevant person the impropriety of the practice.

3.3.3. An employee who, in good faith, followed a specific environment management procedure would not normally be prosecuted for an offence occasioned by following that procedure.

### **3.4. Liability of directors and those concerned in the management of a corporation**

3.4.1. Sections 169, 169A and 169B of the POEO Act provide for the EPA to prosecute directors or individuals concerned in the management of a corporation, if a corporation contravenes certain provisions of the POEO Act.

3.4.2. These sections recognise that while corporations are legal entities, nevertheless, it is the directors and managers who represent the directing mind and will of the corporation and control its activities.

3.4.3. The following provisions in other Acts also provide for certain individuals involved in the management of a corporation to be prosecuted where the corporation has contravened a section of that Act:

- a. section 13.6 of the *Biodiversity Conservation Act 2016*;
- b. section 98 of the *CLM Act*;
- c. section 12 of the *Dangerous Goods (Road and Rail Transport) Act 2008*;
- d. sections 53 and 53A of the *Environmentally Hazardous Chemicals Act 1985*; and
- e. section 22 of the *Ozone Protection Act 1989*;
- f. section 112 of the *Pesticides Act 1999*; and
- g. section 23 of the *Radiation Control Act 1990*.

3.4.4. The legislation clearly indicates that those who direct a corporation's illegal activities will not be shielded from responsibility by the corporate legal structure. The basic test as to whether proceedings will be brought is again one of culpability. For example, the Land and Environment Court noted in *Kelly's* case that:

*...in certain circumstances it might be appropriate to also prosecute the person who had the day-to-day control of the premises or the business of the corporation, and who for all relevant purposes committed the offence. (See Hemmings J in SPCC v R V Kelly, unreported LEC, 26 June 1991, at p. 7.)*

3.4.5. Section 169 of the POEO Act applies where a corporation has committed an offence attracting "special executive liability", which is defined in the section and includes 21 offences under the POEO Act, including the Tier 1 offences, water pollution, air pollution and certain waste offences. A director or person concerned in the management of the corporation is taken to have contravened the same provision that the corporation has contravened, unless the person satisfies the court that they were not in the position to influence the conduct of the corporation in relation to the contravention of the provision or that they used all due diligence to prevent the contravention by the corporation.

3.4.6. In any decision to prosecute under section 169 of the POEO Act, the crucial issue is the person's actual control or ability to influence the conduct of the corporation in relation to its criminal conduct. It will be a question of fact in each case as to who is concerned in the management of that corporation and the prosecution will be required to prove that fact beyond reasonable doubt. What is important is not the scope of a management role per se, nor the capacity to influence the corporation's operations in a broad sense. As a general policy, the EPA will institute proceedings under section 169 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.

3.4.7. Section 169A of the POEO Act applies where a corporation has committed an "executive liability offence", which is defined in the section and includes 20 offences under the POEO Act. In order to establish that a person is guilty of an offence against s 169A, the EPA is required to prove that the person was a director or person involved in the management of the corporation, knew or should have known that the offence would be or was being committed and failed to take all reasonable steps to prevent or stop the offence.

3.4.8. Section 169B of the POEO Act applies in circumstances where a corporation has committed an offence against the POEO Act, whether or not it is an offence referred to in section 169 or 169A, and a director or person involved in the management of the corporation was concerned in or a party to the commission of the offence. In order to establish that the person is guilty of an offence against s 169B, the EPA is required to prove that the person was involved in the commission of the offence.

3.4.9. The matters set out above will be considered in addition to the factors set out in 2.2.8 in determining whether or not to commence proceedings against a director or manager under the POEO Act or any of the other Acts set out in paragraph 3.4.3.

### 3.5. Lenders' liability

3.5.1. Although there are very few situations in which lending institutions could attract criminal liability under the POEO Act, there are instances where lenders may be technically liable for prosecution because they fall into particular categories such as owners or occupiers.

3.5.2. The guiding principle for the EPA in this area is again the culpability of potential defendants in relation to the offence. More than technical legal liability will be necessary as a pre-requisite to prosecution.

3.5.3. The EPA acknowledges that, in framing the legislation, it was not Parliament's intention to restrict in any way the legitimate commercial activities of lending institutions. As the Minister for the Environment noted in his Second Reading Speech on the POEA Act:

*...[the Government] does not believe that lenders should be subject to liability for pollution caused by an enterprise if they have done nothing more than advance money to that enterprise by normal commercial form in some legal fashion and have taken no role that would have led to the creation of environmental problems. (Parliamentary Debates (Legislative Assembly), 21 August 1991, p. 312.)*

3.5.4. In the absence of any evidence of culpability, the EPA will generally not institute proceedings against lenders who are legally the owners of waste, substances or controlled substances, for example, those pursuant to the extended liability provisions of the Tier 1 offence regime in the POEO Act, that is, sections 115(1)(b), 116(1)(b) and 117(1)(b). Nor will the EPA consider a normal commercial loan transaction as giving rise to an ancillary offence under section 168.

3.5.5. By engaging in normal business practices, lending institutions may be concerned in the management of the borrower corporation. However, the EPA will not institute proceedings on the basis of management capacity nor on the basis of actual management of the company in a general sense. The crucial factor for any potential defendant under section 169, including lenders, is the actual control or ability to influence the conduct of the corporation in relation to its criminal conduct.

### 3.6. Public authorities

#### Background

3.6.1. As noted at 1.3.1, Parliament has specifically precluded Ministerial control or direction in relation to prosecutions, including prosecutions of public authorities, by the EPA.

3.6.2. The EPA recognises that the issue of deciding in what circumstances public authorities should be prosecuted is a specific instance of determining whether prosecution is in the public interest and acknowledges that there are two competing public interests in relation to the prosecution of public authorities. These are:

- a. the public has an interest in Government authorities abiding by the law. The law should apply equally to the private and public sectors; and
- b. it is the taxpayer that bears the cost of any prosecution of public authorities. Since any fines imposed as a result of criminal proceedings go to Consolidated Revenue, it could be argued that public funds are not expended, simply recycled. However, the use of Crown legal resources, the briefing of private legal firms and the use of Court time are not recoverable and such expenditure needs to be justified as being in the public interest.

3.6.3. The EPA recognises that the ultimate aim of any prosecution action is assist in achieving the objectives of the EPA, as set out in section 6 of the POEA Act. Public authorities are usually under the control and direction of a Minister who can direct compliance with the relevant legislation. However, experience indicates that sole reliance on that avenue does not make for the same rigid adherence as the requirements of the Court process. Moreover, in the interests of general deterrence, there will be instances where it is important that compliance not only be achieved but be seen to be achieved, with independent scrutiny.

### **Consultation**

3.6.4. While the EPA is not subject to Ministerial control or direction in respect of prosecutions, it is guided by the *Premier's Memorandum No. 97-26 Litigation Involving Government Authorities*. The EPA recognises that the consultative steps set out in the Memorandum may facilitate remedial action and may expedite any Court hearing by better defining the facts in issue. Consultation can also focus on longer term strategies and directions. Indeed, the consultative process, as an adjunct and not necessarily an alternative to prosecution, will not be restricted to public authorities but can be applied to the private sector as well.

3.6.5. The aims of the Premier's memorandum are to ensure that:

- a. the cost to the taxpayer of one Government authority prosecuting another is kept to a minimum;
- b. only appropriate prosecution action is taken;
- c. inappropriate or irrelevant defences are not pleaded;
- d. the Court's time spent resolving the matter is kept to a minimum;
- e. responsible Ministers are kept informed; and
- f. Government authorities act as model litigants before the Court.

3.6.6. It would be inappropriate to enter consultations with government departments solely to achieve a 'by consent' prosecution wherein the charges laid do not reflect the gravity of the alleged offence. However, it is in the public interest that Court proceedings involving public authorities are concluded quickly. The EPA will attempt, therefore, to define the facts in issue and, with the concurrence of the other authority, will prepare and tender to the Court an agreed statement of facts.

# 4. Charges

## 4.1. General principle

4.1.1. Once a decision has been made to deal with an incident by way of prosecution, it is in the public interest for that prosecution to succeed. It is, therefore, the EPA's responsibility to select charges it can prosecute successfully and which are consistent with the seriousness of the alleged criminal conduct. The charge or charges laid must reflect adequately the nature and extent of the conduct disclosed by the evidence with the aim of providing a basis for the Court to impose an appropriate penalty. In line with this general principle, the following policy positions have been adopted.

## 4.2. Similar charges for the same offence

4.2.1. The EPA is aware that it has a duty to refine its case to avoid laying duplicate or multiple charges for the same alleged breach. There will be occasions where the same act will be prohibited under two separate statutes and involve an offence under each. Laying of duplicate or multiple charges should be avoided unless it is considered appropriate in the circumstances to lay both a primary charge and a 'back-up' charge for the same alleged breach.

## 4.3. Serious environment protection offences

4.3.1. Serious environment protection offences are defined in s 17(8) of the POEA Act to be:

- a. Tier 1 offences, as created by Part 5.2 of the POEO Act;
- b. offences created by s 144AA(2) or 144AB of the POEO Act;
- c. Tier 2 offences that are designated as serious environment protection offences by the Board;
- d. offences under Division 1 of Part 2 of the *Pesticides Act 1999*; or
- e. offences under s 60ZZA of the *Local Land Services Act 2013* or under s 69SA of the *Forestry Act 2012* that were committed intentionally and that caused or were likely to cause significant harm to the environment.

4.3.2. As a general rule, the EPA will lay charges for serious environment protection offences in those situations involving unlawful wilful or negligent acts which cause or have the potential to cause serious harm to the environment or human health, such that the prosecution would be seeking a substantial penalty. In deciding whether such charges are appropriate, the EPA will consider the factors set out in 2.2.8 above. In particular, consideration will be given to the harm or potential harm caused to the environment or human health; whether the offence was committed wilfully or instead negligently; whether the offence was a one-off offence or a continuing or repeat offence; and the culpability and antecedents of the alleged offender. Sometimes the elements of wilfulness or negligence will be evident in quite minor incidents but it would be a misuse of these provisions to use these if the incident could be adequately dealt with under other offence provisions.

## 4.4. Continuing offences

4.4.1. The determining factor in whether to charge a continuing offence or separate offences is whether there was a single act or omission which gave rise to consequences which continued over a period of time. A single act or omission with continuing consequences should appropriately be charged as a continuing offence (see *Smith R.J. v Shell Refining (Australia) Pty Ltd*, unreported LEC, 23 September 1983). The charging of a continuing offence is also appropriate where there has been a continuing act, for example, water pollution continuing over several days. If there is any doubt of continuity then separate charges will be laid.

## 4.5. Charge negotiation

4.5.1. 'Charge negotiation' involves negotiations between the defence and the prosecution in relation to the charges which will proceed to hearing. As a result of these negotiations, the defendant may opt to plead guilty to fewer than all the charges initially laid, or to a lesser charge or charges, in return for the prosecution offering no evidence on the remaining charges. However, if appropriate charges are laid initially, there is little scope for charge negotiation and hence there will be only limited circumstances where negotiation will be considered. In any event, charge negotiation will only be considered where it is in the public interest.

4.5.2. A charge negotiation proposal will not be entertained by the EPA unless:

- a. the remaining charges reflect adequately the nature of the criminal conduct of the defendant;
- b. those charges provide the basis for an appropriate sentence in all the circumstances of the case;
- c. the cost saving to the community is significant when weighed against the likely outcome of the matter if the defendant entered pleas of not guilty to the charges; or
- d. there are otherwise compelling public interest factors in favour of charge negotiation (see the factors set out at 2.2.8).

4.5.3. Though uncommon, the discontinuance of a prosecution may occur from time to time. In determining whether to discontinue a prosecution, the EPA will consider the factors set out at paragraph 2.2.8 and any change in circumstances since the prosecution was commenced.



# 5. Selecting the appropriate court

## 5.1. Serious environment protection offences

### Tier 1 offences under the POEO Act

5.1.1. A Tier 1 offence may be determined either summarily before the Land and Environment Court or on indictment in the Supreme Court (section 214(1) of the POEO Act). The choice of venue rests solely with the prosecutor.

5.1.2. The general principle adopted by the EPA is that 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. This principle recognises the following factors:

- a. the intention of Parliament as manifested in the jurisdictional limits prescribed by the Act. The maximum fines for corporations and individuals are identical in the Supreme Court and the Land and Environment Court. The only difference lies in that the maximum term of imprisonment which can be imposed by the Land and Environment Court is two years, as opposed to the maximum penalty of seven years imprisonment that can be imposed by the Supreme Court'
- b. the Land and Environment Court has been established as a specialist court to hear environmental matters'
- c. the process of proceeding by way of indictment, involving as it does an initial committal hearing, is a lengthy process'
- d. historically, the rationale for trial by jury was to safeguard the individual from loss of liberty without first being afforded the opportunity of a fair trial by one's peers. Where environmental offenders are corporate entities, no loss of liberty is involved; and
- e. where an offender is charged with offences arising under Tier 1 and Tier 2, the option is available in the Land and Environment Court to have these matters adjudicated together, making for a more efficient utilisation of public resources.

### Other serious environment protection offences

5.1.3. Proceedings for:

- a. offences created by s 144AA(2) or 144AB of the POEO Act may be determined summarily before the Local Court or the Land and Environment Court;
- b. tier 2 offences that are designated as serious environment protection offences by the Board may be determined summarily before the Local Court or the Land and Environment Court;
- c. offences under Division 1 of Part 2 of the *Pesticides Act 1999* may be determined summarily before the Land and Environment Court;
- d. offences under s 60ZZA of the *Local Land Services Act 2013* committed intentionally and that caused or were likely to cause significant harm to the environment may be determined summarily in the Local Court or the Supreme Court; and
- e. offences under s 69SA of the *Forestry Act 2012* that were committed intentionally and that caused or were likely to cause significant harm to the environment may be determined summarily in the Local Court.

## 5.2. Other offences

5.2.1. Other offences can be instituted either in the Land and Environment Court, the Supreme Court or the Local Court, depending on the particular piece of legislation.

5.2.2. Where the EPA has a choice of court to institute proceedings for serious offences referred to in 5.1.3, or in relation to other offences, the EPA will consider the following factors in choosing the venue for a hearing:

- a. the maximum penalty that can be imposed in a Local Court compared to the Land and Environment Court or the Supreme Court;
- b. all environment protection offences which are serious enough to attract possible penalties in excess of the jurisdictional limit for Local Courts will be commenced in the Land and Environment Court or the Supreme Court;
- c. those matters which have or are expected to give rise to applications for orders under Division 4 of Part 8.2 or Part 8.4 of the POEO Act or similar provisions in other environment protection legislation, will be commenced in the Land and Environment Court; and
- d. unless there are good reasons to the contrary, all charges arising out of the same incident will be instituted in the same jurisdiction (and preferably at the same time) so the Court has the option to hear them together.

# 6. Related proceedings

## 6.1. Restraining orders

6.1.1. If a person or company is prosecuted by the EPA for an offence against the POEO Act, or other Acts set out in section 213 of the POEO Act, then the EPA may apply for a restraining order in relation to the property of that person or company (see Division 4 of Part 8.2 of the POEO Act).

6.1.2. The EPA may seek a restraining order in circumstances where there is a risk that a defendant to criminal proceedings might dispose of assets to avoid being subject to, avoid paying, or to minimise, a financial penalty or adverse costs order.

## 6.2. Civil proceedings to remedy or restrain breaches

6.2.1. The EPA may bring proceedings in the Land and Environment Court to:

- a. remedy or restrain a breach (or threatened or apprehended breach) of the POEO Act, the regulations under the POEO Act or other Acts set out in section 213 of the POEO Act, under section 252 of the POEO Act; or
- b. restrain a breach (or threatened or apprehended breach) of any other Act, or statutory rule, if the breach is causing or is likely to cause harm to the environment, under s 253 of the POEO Act. Any person that brings such proceedings must provide the EPA with a copy of the application for those proceedings and the EPA is entitled to become a party to those proceedings.

6.2.2. The EPA might consider bringing civil proceedings under section 252 or section 253 of the POEO Act for a number of reasons, including:

- a. to obtain an order that the proposed respondent to the proceedings either do, or stop doing, something to prevent environmental harm from occurring; or
- b. to achieve an outcome quickly and more cost-efficiently than through prosecution.

The EPA will also consider the factors set out in section 2.2.8 in determining whether to bring civil proceedings.

6.2.3. Generally, the EPA will only make a decision to commence civil proceedings under section 252 or section 253 if it is satisfied that there are reasonable prospects of establishing its case on the balance of probabilities, in accordance with the standard of proof that applies in civil proceedings.

6.2.4. Any other person may also bring proceedings in the Land and Environment Court under sections 252 and 253 of the POEO Act.

## 6.3. Enforceable undertakings

6.3.1. Under section 253A of the POEO Act, the EPA may accept a written undertaking from a company or individual in relation to an actual or potential breach of the POEO Act or other Acts set out in section 213 of the POEO Act (namely, the *Waste Avoidance and Resource Recovery Act 2001*, the *Ozone Protection Act 1989* and the *Environmentally Hazardous Chemicals Act 1985*). In certain circumstances, the EPA may consider whether an enforceable undertaking is a more appropriate regulatory response versus a potential prosecution. The EPA will do so in accordance with the principles outlined in the EPA's [Enforceable Undertakings Guidelines](#). These guidelines outline factors that the EPA will consider in deciding whether to accept an enforceable undertaking and the terms of enforceable undertakings.

6.3.2. If the person does not comply with the undertaking it can be enforced in the Land and Environment Court. In deciding whether to enforce an undertaking that has not been complied with, the EPA will consider the seriousness or triviality of the non-compliance.

## 6.4. Enforcement of gas and other petroleum legislation

6.4.1. Schedule 2A to the POEO Act provides for the EPA to institute proceedings for gas and petroleum related offences under the *Petroleum (Onshore) Act 1991*, *Environmental Planning and Assessment Act 1979*, *Water Management Act 2000*, *Water Act 2000*, the POEO Act or any other Act in relation to petroleum activities. The EPA will consider the factors set out in section 2.2.8 in deciding whether or not to institute proceedings under Schedule 2A to the POEO Act. If relevant, the EPA may also consider the guidelines of other regulators (such as the Department of Planning, Industry and Environment, the Natural Resources Access Regulator and WaterNSW) in determining whether or not to institute proceedings under Schedule 2A to the POEO Act.

# 7. Disclosure, cooperation and compliance

## 7.1. Background

7.1.1. The EPA recognises that early notification of an incident together with full and informed cooperation on the part of the offender will often minimise harm to the environment. It is in the public interest, therefore, to encourage such voluntary disclosure and cooperation. Together with other relevant matters the factors of voluntary disclosure and cooperation will be considered by the EPA in exercising its prosecutorial discretion.

## 7.2. Voluntary disclosure

7.2.1. Consideration will be given as to whether the person made a voluntary, timely and complete disclosure of the breach incident. Specifically, consideration will be given to whether:

- a. the person notified the EPA promptly;
- b. the person admitted any wrongdoing in relation to the breach incident;
- c. the information assisted the control, abatement or mitigation of any harm to the environment;
- d. the information substantially aided the EPA's investigation of the incident;
- e. the information was available from other sources; and
- f. the disclosure occurred prior to the EPA or any other regulatory body obtaining knowledge of the non-compliance.

## 7.3. Mandatory disclosure

7.3.1. A disclosure is not considered voluntary if that disclosure is already a mandatory requirement under law, for example, disclosure pursuant to Part 5.7 of the POEO Act relating to the duty to notify authorities of particular pollution incidents. Nevertheless, even in situations of mandatory disclosure, the quantity and quality of the information provided as well as expeditious notification will be regarded by the EPA as mitigating factors to be taken into account on sentence and will so submit to the Court.

## 7.4. Cooperation

7.4.1. The extent of the cooperation between the EPA and the offender from the time of the occurrence of the incident to the conclusion of the investigation may determine the timeliness and effectiveness of the response to the incident. An offender's willingness to make available to the EPA all relevant information (including the complete results of any internal or external investigation and the identity of all potential witnesses) is to be encouraged and, hence, is a factor to be considered.

## 7.5. Preventive measures and continuous improvement

7.5.1. The EPA wishes to encourage the introduction and implementation of comprehensive compliance programs such as environmental audits and environmental management programs, as well as a focus on continuous improvement and training initiatives within an organisation, which will militate against non-compliance situations arising. Accordingly, the existence and implementation of such programs and initiatives will be taken into consideration in deciding whether to prosecute.

# 8. Indemnification of witnesses

## 8.1. Power to indemnify

8.1.1. The EPA does not have the power to indemnify a witness or to provide immunity against prosecution. It can, however, recommend such a course to the Attorney General.

8.1.2. It is important to note the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* in relation to immunity.

## 8.2. Informer witnesses

8.2.1. The EPA may from time to time rely upon evidence obtained from an informer witness. An informer witness is any person seeking benefit for providing information, such as a co-offender.

## 8.3. Induced statements

8.3.1. In very rare circumstances, the EPA may consider an application for an induced statement. An induced statement is a statement obtained by the EPA, with a promise not to use that information against that witness in criminal proceedings.

# 9. Sentencing and appeals against sentence

## 9.1. Costs

9.1.1. The EPA will generally seek costs in successful prosecutions.

## 9.2. Compensation, restoration and other orders

9.2.1. Depending on the offence being prosecuted and the court in which proceedings are brought, the EPA can seek:

- a. orders aimed at restoration/preventing a recurrence of the offence, such as a clean-up order or an order that a defendant carry out an environmental audit; and
- b. orders aimed at punishing or deterring offenders, such as a custodial sentence, a fine, a monetary benefits order or a publication order.

Further information about the orders that the EPA can seek can be found in the *EPA Guidelines for Seeking Environmental Court Orders* and *Guidelines on Recovering Monetary Benefits*, which apply to prosecutions taken by the EPA.

## 9.3. Appeals

9.3.1. The EPA may appeal against sentences that have been imposed by Local Courts and the Land and Environment Court for environmental offences (*Crimes (Appeal and Review) Act 2001* and *Criminal Appeal Act 1912*). However, such appeals ought to be rare. In deciding whether to appeal a sentence, the EPA will be guided by the principles set out in the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*. The key factors to be taken into account are:

- a. appeals should only be brought to establish and maintain adequate standards of punishment for environmental crime or to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice; and
- b. appellate courts will intervene only where it is clear that the sentencer has made a material error of fact or law or has imposed a sentence that is manifestly inadequate.

9.3.2. In general, an appeal will only be instituted where it is considered likely to succeed. Any such appeal should be brought promptly.