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Published by:

NSW Department of Planning and Environment

23-33 Bridge Street, Sydney NSW 2000
GPO Box 39, Sydney NSW 2001
Tel: 02 9228 6111
Fax: 02 9228 6455
Email: information@planning.nsw.gov.au

Translating & Interpreting Service: Please telephone 131 450. Ask for an interpreter in your language and request to be connected to (02) 9228 6333 - Planning & Environment Information Centre. Local call cost from fixed phones. Calls from mobiles at applicable rates.
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1. Introduction

This second edition of the Department of Planning and Environment’s (the Department) prosecution guidelines takes into account amendments to the Environmental Planning and Assessment Act 1979 (the Act), including the introduction of a tier based offence regime, as well as substantially higher penalties for offences under the Act.

1.1 New three tier offence regime

The Act now utilises a three tier system of penalties for offences, classified according to the severity of the offence (sections 125A, 125B and 125C). It also introduces new maximum penalties for those offences.

1.1.1 Tier 1:

Applies where it is established that an offence was committed intentionally and caused, or was likely to cause, significant harm to the environment or the death of, or serious injury to, a person. These offences may include carrying out development without approval or breaching conditions of approval.

The maximum penalties are:

- $5 million for corporations, with a further $50,000 for each day the offence continues; and
- $1 million for individuals, with a further $10,000 for each day the offence continues.

1.1.2 Tier 2:

Applies to most other offences against the EP&A Act. It includes offences such as carrying out development without approval, or breaching conditions of approval where the offences were committed without the aggravating factors of Tier 1 offences (i.e. offence unintended or offence did not cause actual or likely significant harm, death or injury). Some offences which previously attracted a lower maximum penalty will now be Tier 2 offences, such as occupying or changing the use of a building without an occupation certificate, or commencement of operations without fulfilling the obligations contained in project approval.

The maximum penalties are:

- $2 million for corporations, with a further $20,000 for each day the offence continues; and
- $500,000 for individuals, with a further $5,000 for each day the offence continues.

1.1.3 Tier 3:

Applies to lesser procedural and administrative–related offences (for example, knowingly providing false or misleading information in an environmental monitoring or audit report).

The maximum penalties are:

- $1 million for corporations, with a further $10,000 for each day the offence continues; and
- $250,000 for individuals, with a further $2,500 for each day the offence continues.
2. Principles of Prosecution

2.1 The purpose of these guidelines

The purpose of these guidelines is to identify the:

a. Basis upon which a decision to prosecute or issue a Penalty Infringement Notice is made;
b. Alternatives to prosecution;
c. Factors to be taken into account in identifying the appropriate defendant;
d. Factors to be taken into account in deciding which charges to lay;
e. Factors to be considered in determining which court to commence the proceedings; and
f. Factors considered by the Department before commencing an appeal against a sentence imposed on
   an offender.

These guidelines reflect the current policies of the Department of Planning and Environment, and are not
legally binding on the Department of Planning and Environment or upon any other organisation or agency.
3. The decision to prosecute

A breach of the Environmental Planning and Assessment Act (including the regulations) can constitute an offence for which a person may be liable for a criminal conviction and significant monetary penalties. Given the serious nature of a criminal conviction, and the significant penalties which may be imposed, a decision to prosecute requires careful consideration, and is to be guided by key principles, as discussed below.

The basic pre-requisite of any prosecution action is that there is sufficient evidence to establish a 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, as quoted at p.8 of ODPP Prosecution Guidelines).

This statement is equally applicable to the Department as it is for any other public agency responsible for safeguarding the public purse. The decision to undertake prosecution action is to be made in consideration of the public interest to be served by such an action, and should not be wasted pursuing inappropriate cases.

3.1 Is prosecution available?

A consideration in deciding whether or not to prosecute is whether a conviction for an offence is precluded by the Act, which provides that a person cannot be convicted of an offence if the offence is the subject of:

a. Civil enforcement proceedings to remedy or restrain a breach of the Act (brought under section 123) which have not concluded; or

b. An order made by the Court to remedy or restrain a breach (made under section 124); or

c. Civil enforcement proceedings under section 123, which have concluded but did not result in the making of a Court order.
3.2 Evidence

A decision to prosecute or to continue a prosecution must consider where there is sufficient evidence available to establish each element of the offence, and whether 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.

This evaluation must also take into account matters such as the reliability, availability, competence and credibility of witnesses and their likely impression on the court, the admissibility of any 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.

3.3 Discretion

While the Department has a responsibility to enforce environmental planning laws, the decision to prosecute is discretionary, and the dominant factor in the exercise of this discretion is the public interest. For example, based on the particular circumstances of a matter, it may be more appropriate to use an alternate enforcement option such as an order or a fine.

In making a judgement on whether a prosecution is in the public interest, the Department will take into account a range of factors, which vary with the circumstances of each case. The Department’s task is to assess individual cases and recommend the appropriate enforcement action to be taken. The general principles to be considered are set out in the following section.
4. Factors relevant to a decision to prosecute

The decision to prosecute is normally reserved for the most serious offences, not matters of a trivial nature. Therefore, a minor or technical breach of a statutory requirement would not, in the absence of other aggravating factors, justify a prosecution (such as, submitting an environmental monitoring report a few days late).

Other factors which are relevant in deciding whether it is in the public interest to prosecute for an offence include the following:

a. The degree of harm or potential harm caused by the offence to the environment (both natural and built), human health or the social and economic fabric of the community;
b. The degree of harm to the integrity of the planning system;
c. The degree of culpability of the alleged offender in relation to the offence;
d. The availability of any alternatives to prosecution;
e. The seriousness or, conversely, the triviality of the alleged offence or that it is of a ‘technical’ nature only;
f. Any mitigating or aggravating circumstances;
g. Whether the breach is a continuing or second offence;
h. The antecedents of the offender (Whether the offender has previously been dealt with by other less serious enforcement options and therefore prosecution may be more effective);
i. The prevalence of the alleged offence and the need for deterrence, both specific deterrence (of that individual) and general deterrence (of the community at large);
j. The length of time that has elapsed since the alleged offence;
k. The age, physical or mental health or special infirmity of the alleged offenders or witnesses;
l. Whether an urgent or prompt resolution is required (prosecution proceedings do not bring about an immediate solution);
m. Whether the alleged offender has been prosecuted by another agency for a related offence, arising from the incident for which the Department is considering prosecution;
n. Whether there are counter-productive features of the prosecution
o. The likely outcome in the event of a finding of guilt having regard to the sentencing options available to the Court
p. Any precedent which may be set by not instituting proceedings;
q. Whether the consequences of any conviction would be unduly harsh or oppressive;
r. Whether proceedings are to be instituted against others arising out of the same incident;
s. Whether the alleged offender acted in accordance with DPE advice or advice from another government agency; and
t. Whether or not the alleged offender is willing to cooperate or has cooperated in the investigation or prosecution of others.
4.1 Matters not relevant to a decision to prosecute

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 offender;

c. The political or other affiliations of those responsible for the prosecution decision;

d. Possible political advantage or disadvantage to the government or any political party, group or individual; or

e. Possible effects of the decision on the personal or professional circumstances of those responsible for the investigation or otherwise involved in its conduct.
5. **Who may prosecute**

As prosecution for offences under the Act or regulations must be in the public interest, it follows that the Department and other public authorities charged with acting in the public interest have the right to bring Court proceedings. Private citizens may bring prosecution proceedings under the Act but only with the leave of the Registrar.

**5.1 Department and local councils:**

The Department may bring prosecution proceedings for a breach of the Act or Regulations. A local council may also bring proceedings for breaches of the Act or Regulations, (e.g. offences relating to breach of orders, development consents for which it is the consent authority and planning instruments).

There may be instances where Departmental and council enforcement functions overlap. For example, a person may carry out excavation work contrary to a development consent granted by a council under Part 4 of the Act. The extent of that excavation may be so significant that it amounts to ‘extractive industry’ and qualify as state significant development. Consequently, it is open to the council to commence a prosecution for breach of its consent or the Department could prosecute for failure to obtain an approval for state significant development.

Councils may also commence prosecution proceedings in respect of breaches of State Significant development approvals.

Under the NSW Gas Plan, the Environment Protection Authority (EPA) is the lead regulator for compliance and enforcement for gas activities subject to approval under Part 5 of the Environmental Planning and Assessment Act 1979.

The appropriate body to commence a prosecution will depend upon the particular circumstances surrounding the offence.

**5.2 Time limit for commencing proceedings**

Proceedings for an offence against the Act or the regulations must be commenced no later than two years:

a. After the offence was alleged to be committed; or

b. After the date on which evidence of the alleged offence first came to the attention of an investigation officer.

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1 Section 127(5)
2 Section 127(5A)
6. Selecting the appropriate defendant

6.1 Sources of liability

Liability for offences under the Act may be imposed on:

a. The person who actually committed the offence;

b. A person who did not personally commit the offence, but who the law holds responsible for an offence committed by another person (for example, employers may be responsible for the acts of their employees, corporations may be held liable for their company directors);

c. A person who participated in a crime committed by another person and is therefore liable as an accessory.

More than one person may therefore be liable for an offence arising from the one activity. For example, where unauthorised development work has been carried out by a builder in accordance with a direction given by the owner of the property, both the builder (as the principal offender) and the owner may be liable for an offence.

6.2 Relevant factual issues

Factual matters to identify in establishing the appropriate defendant include:

a. Who committed the act (or omitted to act) which gave rise to the offence;

b. Any other person(s) who assisted in the commission of the offence;

c. Whether the offender is an employee and if so, the scope of their employment and the seniority of their position held;

d. Whether the offender is a corporate officer (e.g. company director) and if so, the scope of their duties and functions; and

e. Where an offence was committed by an employee or corporate officer, did they commit the offence in the course of carrying out their employment or duties or outside the scope of their employment or duties.

6.3 Factors relevant in establishing liability

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 individual employee, agent or officer and not against the corporation.
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.

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

6.4 Prosecution of Government Authorities

6.4.1 Public Interest

Government authorities have a responsibility to comply with the law and, unless the legislation provides otherwise, they can be guilty of the same offences as the rest of the community. The only exception that applies to public authorities under the Act is found in section 125(3): a public authority’s failure to comply with a direction given by the Minister does not give rise to an offence (section 125(3)). A public authority is otherwise guilty of breaches against the Act and Regulations.

As with all prosecutions, deciding whether prosecution of a Government authority is the appropriate method of enforcing compliance involves a consideration of the public interest. However prosecution of one Government authority by another also involves competing public interests: on the one hand, the public interest in authorities abiding by the law and accepting responsibility for the consequences of a breach of the Act; on the other hand, the public interest in minimising the cost to the public, as it is the taxpayer that bears the cost of any prosecution of a public authority as well as the cost of its defence.

6.4.2 Consultation

Generally, litigation between Government authorities is undesirable and should be avoided where possible. This principle is expressed in guidelines issued by the Premier’s Department for litigation involving Government authorities (Premier’s Memorandum M1997-26). The guidelines apply to all Government authorities and encourage attempts to settle or narrow disputes between authorities.

When considering whether to prosecute a Government authority, the Department is required to take the steps set out in the guidelines to consult with the authority against whom the prosecution is contemplated. A copy of Premier’s Memorandum M1997-27 can be found on the website of the Department of Premier and Cabinet (http://www.dpc.nsw.gov.au).

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.

It would be inappropriate to enter consultations with Government authorities solely to achieve a ‘by consent’ prosecution wherein the charges laid do not reflect the gravity of the offence. However, it is in the public interest that Court proceedings involving government authorities are concluded quickly. The Department will, therefore, 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.
7. Charges

Once a decision to prosecute has been made, it is in the public interest for that prosecution to be successful, and the Department is responsible for selecting appropriate charges which can be prosecuted 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. The Department must also determine whether it is more appropriate to commence the proceedings in the Land and Environment Court or the Local Court.

Where there is another prosecuting authority involved it is important to liaise with the other authority to ensure the most appropriate charge(s) are laid.

7.1 Tier 1 charges

Tier 1 charges will be laid in situations where an unlawful act is committed intentionally and causes, or is likely to cause, significant harm to the environment or the death of, or serious injury to, a person. These offences may include carrying out development without approval or breaching conditions of approval.

7.2 Tier 2 charges

Tier 2 charges will be laid where offences are committed without the aggravating factors of Tier 1 offences. Tier 2 offences are all offences under s125 of Act, except for those designated as Tier 3 offences.

7.3 Tier 3 charges

Tier 3 charges will be laid for certificate related offences and those offences designated as Tier 3 offences under the Act.

7.4 Continuing offences

There are two types of continuing offences. The first is where offence continues over a period of time such as an unlawful use operating over a period of days or weeks. The second is where acts form part of the same transaction or criminal enterprise, so can be charged within a single count.
8. Penalty notices

Penalty notices are primarily designed to deal with one-off, ‘minor’ breaches that have minimal harm. Offences for which a penalty notice may be issued are listed in Schedule 5 of the Regulation and include offences such as breach of conditions of approval. A penalty notice carries a fixed penalty which is much less than the available maximum penalty applicable if the matter is determined by a Court.

8.1 Amendments to penalty notice provisions

Section 127A of the Act authorises persons to issue penalty notices for offences against the Act or Regulation, as specified in Schedule 5 of the Regulation.

The July 2015 amendments to the Act include new penalty notice offences, and increase the penalty amounts for most offences.

Officers authorised by the Minister (generally Departmental officers) can issue the highest penalty notices of $15,000 (to corporations) and $7,500 (to individuals) for:

a. Carrying out a transitional Part 3A project, designated development, State significant development or State significant infrastructure without the relevant approval or consent; or
b. A breach of any conditions of approval of these types of development.

The next most serious offences will be subject to penalty notice amounts of $6,000 for corporations and $3,000 for individuals. Examples include carrying out local and regional development without development consent or in breach of any conditions, or failing to comply with an order issued under section 121B of the Act. Less serious offences have lower penalty notice amounts.

The new penalty notice offences provisions came into effect on 14 August 2015.

8.1.1 Authorised persons for the issue of penalty notices

The Minister or the Secretary can authorise persons for the purposes of section 127A of the Act, including employees of the Department, local government investigation officers, officers from Fire and Rescue NSW and officers of NSW Police.

Clause 284 (3) of the Regulation specifies who can issue a penalty notice under the Act as an authorised person.

As of 14 August 2015, authorised fire officers from Fire and Rescue NSW can issue penalty notices for fire related offences. The authorised fire officer should notify the relevant council on issuing a penalty notice under the Act, in the same way that authorised fire officers currently:

- notify the relevant council when they issue orders under section 121B (section 121ZE); or
- provide the relevant council with a fire safety inspection report (now section 119T(4)).

3 cl 284(3)(e) and (5) EP&A Regulation
8.1.2 Penalty notice regime

Once a penalty notice is paid, further prosecution proceedings cannot be brought against any person for that particular breach. However if a penalty notice is withdrawn before payment of the fine, then further proceedings may be brought for that same offence.

Payment of the fine does not lead to the recording of a criminal conviction. Non-payment of the fine is not dealt with by way of criminal sanctions, but is recoverable as a civil debt.

Should the recipient of the penalty notice elect to have the matter determined by a court, the matter would be heard in the criminal jurisdiction of the Local Court. Penalty notices are issued by authorised persons, and just as there is a discretion to prosecute Tier 1 and Tier 2 criminal matters, so there is a discretion on whether to issue a penalty notice.

Recipients of penalty notices may also make an application for an internal review of the issue of a penalty notice. A review will be undertaken by a person within the Department who was not involved in the making the decision to issue the penalty notice and must be completed within 42 days of the date of the application for review.

It is generally inappropriate to issue successive penalty notices for multiple statutory breaches. In such an instance, there is obviously a major, and probably continuing, compliance problem, even though each breach in itself may be comparatively minor. Such a problem needs to be dealt with by a Court so that the appropriate orders can be made and enforced.

The service of a penalty notice does not in itself institute criminal proceedings. It can, however, lead to the institution of criminal proceedings at the defendant’s election. All authorised bodies should therefore be aware of the Premier’s Memorandum No. 97-26, referred to in 3.6.4 above, in relation to the prosecution of government authorities.

8.2 Summary

Penalty notices are appropriate where the:

a. Breach is minor;

b. Facts are apparently incontrovertible;

c. Breach is a one-off situation that can be remedied easily; and

d. Issue of a penalty notice is likely to be a practical and viable deterrent.

It is not appropriate to issue penalty notices where the:

a. Breach is on-going and not within the alleged offender’s capacity to remedy quickly;

b. Penalty prescribed on the notice would be clearly inadequate for the severity of the offence;

c. Extent of the harm cannot be assessed immediately;

d. Evidence is controversial or insufficient; and

e. Multiple breaches have occurred.
9. Choosing the appropriate Court

Proceedings for an offence against the regulations are brought in the local court. Proceedings for an offence against the Act may be brought in either the local court or the Land and Environment Court of New South Wales.

The maximum penalty which can be imposed by each court is an important factor in deciding which court to commence a prosecution in for an offence against the Act. The specialist jurisdiction of the LEC may be more appropriate to adjudicate technical issues and evidence which are the subject of a prosecution.

9.1 Land and Environment Court

The Land and Environment Court (LEC) is a specialist court for environmental planning and protection disputes, including criminal prosecutions for offences against the Act. An LEC prosecution is commenced in the Court’s criminal jurisdiction (class 5) and is heard by a judge without a jury.

The Land and Environment Court can impose fines up to $5 million for corporations, with a further $50,000 for each day the offence continues; and $1 million for individuals, with a further $10,000 for each day the offence continues.

The Land and Environment Court can also impose alternative sentencing options. See section below.

9.2 Local Court

Prosecution proceedings are heard by a magistrate in the court’s criminal jurisdiction. The Local Court can only impose fines up to $110,000.

9.2.1 Tier 1 offences

A Tier 1 offence may be determined either summarily before the Land and Environment Court or local court. The choice of court rests with the prosecutor.
9.2.2 **General principle**

Tier 1 prosecutions will generally be instituted in the Land and Environment Court, in recognition of the following:

a. the Land and Environment Court has been established as a specialist court to hear environmental matters;

b. The maximum penalty that can be imposed by the Land and Environment Court is significantly higher than the local court;

c. The Land and Environment Court has the power to impose alternative sentencing options; and

d. Proceedings for tier 1 offences are likely to be more complex than other proceedings.

9.2.3 **Tier 2 offences**

Tier 2 offences can be instituted either in the Land and Environment Court or the Local Court, taking into consideration the maximum penalty that can be imposed in a Local Court compared to the Land and Environment Court.
10. Sentencing and appeals

10.1 Costs

The Department will generally seek costs in successful prosecutions.

10.2 Sentencing Considerations

Where a person is found guilty of an offence, the Court will consider a number of matters to determine a sentence which ‘fits the crime’. The general principle is that a sentence must reflect the seriousness of the offence and the personal circumstances of the offender.

10.3 Appeals

The Department may appeal against sentences imposed by Local Courts and the Land and Environment Court for offences under the Act. Although the Land and Environment Court has the power to impose greater fines than those which may be imposed by the Local Court, it does not necessarily follow that an appeal on sentence will result in a higher fine being imposed.

In deciding to appeal a sentence, the Department will be guided by the Prosecution Guidelines of the Office of the Director of Public Prosecutions, 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 Court has made a material error of fact or law or has imposed a sentence that is manifestly inadequate. In general, an appeal will only be instituted where it is considered likely to succeed.

Any such appeal is to be brought promptly.
10.4 Alternative sentencing options in the Land and Environment Court

Since 31 July 2015, the Land and Environment Court has a range of alternative sentencing options available to apply to guilty criminal offenders whose sentences have not yet been determined (section 126(2A)). Consistent with the Protection of the Environment Operations Act 1997, the Court will be able to impose various orders in addition to, or as an alternative to, a monetary penalty for planning offences. These will include orders:

a. To prevent, control, abate or mitigate any harm to the environment caused by the commission of the offence, including orders to reverse or rectify any unlawful development or activity related to the commission of the offence;

b. Enabling a public authority to recover certain costs and expenses it has incurred as a result of the commission of the offence;

c. Requiring the offender to pay back any monetary benefits gained by committing the offence;

d. Requiring the offender to give public notice of the offence, for example in local or regional newspapers;

e. Requiring the offender to carry out public environmental projects or social or community activities for the benefit of affected communities; and

f. Requiring the offender to attend training or other courses.

A court order to carry out an environmental restoration or enhancement work or program can also be supported.