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**GUIDELINES**

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## SECTION A

### INTRODUCTION

#### 1. Introduction

- 1.1** On 1 March 1992, the *Protection of the Environment Administration Act 1991* (the Administration Act) established the Environment Protection Authority (EPA) in NSW.
- 1.2** Under the Administration 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.<sup>1</sup> For prosecution, the most important piece of environment protection legislation administered by the EPA is the *Protection of the Environment Operations Act 1997* (the Operations Act). This creates a three-tiered structure of offences with the most serious offences under Tier 1 carrying maximum penalties of \$1 million for corporations and \$250,000 and/or seven years imprisonment for individuals.
- 1.3** The Administration 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*<sup>2</sup>. The phrase *criminal or related proceedings* is defined in the 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 of the Protection of the Environment Operations Act 1997*.<sup>3</sup>

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<sup>1</sup> Section 7(2)(e)

<sup>2</sup> Section 13(2)(c)

<sup>3</sup> Section 3(1)

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- 1.4** The Administration Act specifies that the EPA Board must determine whether the EPA should institute proceedings for serious environment protection offences.<sup>4</sup> The Board will have the assistance of Environmental Counsel to advise on the legal merits of a case.
- 1.5** Another function of the Board is *to develop, and make available for public information, guidelines relating to the institution of criminal and related proceedings.*<sup>5</sup> These guidelines will indicate how the EPA will exercise its prosecutorial powers.
- 1.6** The EPA is not the only body which may institute criminal proceedings under the environment protection legislation. Organisations such as local councils, the Waterways Authority, police 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.

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<sup>4</sup> Section 16(d)

<sup>5</sup> Section 16(c)

## SECTION A1

### Department of Environment and Conservation

- A1.1 On 24 September 2003, the Department of Environment and Conservation (DEC) was created, bringing together the staff of:
- the EPA
  - the National Parks and Wildlife Service (NPWS)
  - Resource NSW
  - The Royal Botanical Gardens and Domain Trust.
- A1.2 The Director-General of DEC manages the affairs of the EPA and was also appointed as the Chief Executive of the Sydney Catchment Authority (SCA).
- A1.3 Notwithstanding the creation of DEC, the EPA remains a statutory body established under the Administration Act. The EPA and the EPA Board retain all the functions and powers they had prior to the creation of DEC.
- A1.4 Some of DEC's and SCA's operational activities will be regulated under the environment protection legislation administered by the EPA. For example, the former NPWS (now DEC) holds a number of licences issued under the environment protection legislation. These operational activities will continue to be actively regulated by the EPA. To ensure that the EPA is accountable in this regard, the EPA Board will oversee regulation of DEC and SCA activities. It will receive quarterly reports from the EPA in relation to the EPA's regulation of DEC and SCA activities. The reports will detail compliance and enforcement action taken by the EPA, including:
- incident response and site inspections of DEC and SCA premises;
  - follow up by the EPA in relation to alleged non-compliance with environment protection legislation by DEC or SCA, including the issuing of penalty notices or the taking of prosecution action;
  - notices issued by the EPA to DEC or SCA, such as licence variations.

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A1.5 Any decision to prosecute DEC or SCA or to issue a penalty notice will be taken in accordance with these guidelines. To avoid any conflict of interest, the Director-General will not be involved in any decision by the EPA in relation to the regulation of DEC or SCA activities, including decisions to prosecute or issue a penalty notice to either DEC or SCA. Rather, in relation to any proposed Tier 1 prosecution, the decision will be taken by the Board and the Director-General will not participate in the Board's discussions in that regard. Further, the decision to commence Tier 2 proceedings or to issue a penalty notice against DEC or SCA will be made by the Deputy Director General, Environment Protection and Regulation Division. Finally, if the EPA is contemplating taking a prosecution against DEC or SCA, the consultation referred to at 10.4 and 10.5 will be undertaken by the Deputy Director General on behalf of the EPA.



## SECTION B

### PRINCIPLES OF PROSECUTION

#### 2. Purpose of Guidelines

- 2.1 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 mode of trial;
  - (e) those significant *co-operative* measures that may influence the EPA's decision to prosecute or, the EPA will submit, may operate as important mitigating factors on sentence;
  - (f) instances in which the EPA may recommend the indemnification of witnesses; and
  - (g) factors considered by the EPA before commencing an appeal against a sentence imposed on an environmental offender.
- 2.2 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.

#### 3. The Decision to Prosecute

##### *Evidence*

- 3.1 The basic pre-requisite of any prosecution is that the available evidence establishes a prima facie case. However, as noted in the Prosecution Policy and

Guidelines of the Office of the Director of Public Prosecution, 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.<sup>6</sup>

### ***Discretion***

- 3.2** Sufficiency of evidence is therefore not the sole criteria 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.
- 3.3** 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.<sup>7</sup>*

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<sup>6</sup> At page 3

<sup>7</sup> At para 2.2 and 2.3

- 3.4** 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, e.g. 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.
- 3.5** 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 Operations 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 Operations Act.
- 3.6** 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***

- 3.7** Factors which alone or in conjunction arise for consideration in determining whether the public interest requires a prosecution include:
- (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) any mitigating or aggravating circumstances;
  - (d) the degree of culpability of the alleged offender in relation to the offence;

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- (e) the availability and efficacy of any alternatives to prosecution;
- (f) whether the offender had been dealt with previously by non-prosecutorial means;
- (g) whether the breach is a continuing or second offence;
- (h) whether the issue of Court orders are necessary to prevent a recurrence of the offence;
- (i) the prevalence of the alleged offence and the need for deterrence, both specific and general;
- (j) the length of time since the alleged offence;
- (k) the age, physical or mental health or special infirmity of the alleged offenders or witnesses;
- (l) whether there are counter-productive features of the prosecution;
- (m) the length and expense of a Court hearing;
- (n) the likely outcome in the event of a conviction having regard to the sentencing options available to the court;
- (o) any precedent which may be set by not instituting proceedings;
- (p) whether the consequences of any conviction would be unduly harsh or oppressive; and
- (q) whether proceedings are to be instituted against others arising out of the same incident.

**3.8** 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 person e.g. race, nationality, political associations;
- (b) personal empathy or antipathy towards the offender; or
- (c) the political or other affiliations of those responsible for the prosecution decision.

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

**3.9** As discussed in 1.4 above, the Administration Act provides that the EPA Board must determine whether the EPA should institute proceedings for serious environment protection offences. The Board has nine 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.*<sup>8</sup>

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.

**3.10** 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 Director-General who will be responsible for instituting Court action;

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<sup>8</sup> *Bennets v Board of Fire Commission of NSW* (1967) 87 WN. at 311 per Street, J.

- (d) any public comment in relation to the institution of proceedings will be made by the Chairman or the Director-General 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.

**3.11** Prosecutions against DEC or SCA are discussed in Section A1 of these Guidelines. In relation to any such prosecutions, the reference to the Director-General in paragraph 3.10 should be read as a reference to the Deputy Director General, Environment Protection and Regulation Division.

#### **4. Who May Prosecute**

- 4.1** Under the Operations 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 Operations Act, whether or not the EPA is the appropriate regulatory authority in relation to the offence.<sup>9</sup> Other public authorities, such as local councils, can bring proceedings where they are the appropriate regulatory authority in relation to the offence.<sup>10</sup> Other persons, such as police officers, are also given the ability to commence proceedings in relation to specific environmental offences.<sup>11</sup>
- 4.2** The EPA has primary responsibility for bringing prosecution proceedings in relation to offences against the environment protection legislation referred to in section 3 of the Administration Act. This legislation includes the *Contaminated Land Management Act 1997* (the Contaminated Land Act)<sup>12</sup> and the *Pesticides Act 1999*.<sup>13</sup>

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<sup>9</sup> Section 217(1) of the Operations Act

<sup>10</sup> Section 217(2) of the Operations Act

<sup>11</sup> Section 218 of the Operations Act

<sup>12</sup> Section 94 of the Contaminated Land Act

<sup>13</sup> Section 73 of the *Pesticides Act 1999*

- 4.3** Further, other people may bring prosecution proceedings for offences against the Operations Act and the Contaminated Land Act but only if they have obtained leave of the Land and Environment Court.<sup>14</sup>
- 4.4** 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.<sup>15</sup> Under the Operations 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.<sup>16</sup> Under the Contaminated Land Act, such action includes taking action under that Act to ensure compliance with an investigation or remediation order.<sup>17</sup>
- 4.5** 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.

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<sup>14</sup> Section 219(1) of the Operations Act and section 95(1) of the Contaminated Land Act

<sup>15</sup> Section 219(2) of the Operations Act and section 95(2) of the Contaminated Land Act

<sup>16</sup> Section 219(3) of the Operations Act

<sup>17</sup> Section 95(3) of the Contaminated Land Act

## SECTION C

### SELECTING THE APPROPRIATE DEFENDANT

#### 5. General Principles

- 5.1** 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 a polluting act. 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.
- 5.2** In addition to the factors set out in 3.7 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.

#### 6 Corporate Liability

- 6.1** 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. 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 Section G.

## **7. Employees' Liability**

- 7.1** The Operations 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.<sup>18</sup> 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 Operations Act requires an employee to notify his/her employer of certain pollution incidents.<sup>19</sup>
- 7.2** 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.
- 7.3** 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.

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<sup>18</sup> Section 241(1)(e) of the Operations Act

<sup>19</sup> Section 148 (3) of the Operations Act

## 8. Liability of Directors and those Concerned in the Management of a Corporation

### 8.1 Section 169 of the Operations Act provides:

*If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision, unless the person satisfies the court that:*

- (a) the corporation contravened the provision without the knowledge actual, imputed or constructive of the person; or*
- (b) the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or*
- (c) the person, if in such a position, used all due diligence to prevent the contravention by the corporation.*

### 8.2 Section 169 recognises 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.<sup>20</sup> 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.*<sup>21</sup>

### 8.3 In any decision to prosecute under section 169 of the Operations Act, the crucial issue is the person's actual control or ability to influence the conduct of the

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<sup>20</sup> See also Section 98 of the Contaminated Land Act and Section 112 of the *Pesticides Act 1999*

<sup>21</sup> See Hemmings. J. in *SPCC v R.V Kelly*. unreported LEC, 26 June 1991 at p.7

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.

- 8.4** The matters set out above will be considered in addition to the factors set out in 3.7 in determining whether or not to commence proceedings against a director or manager.

## **9. Lenders' Liability**

- 9.1** Although there are very few situations in which lending institutions could attract criminal liability under the Operations Act, there are instances where lenders may be technically liable for prosecution because they fall into particular categories such as owners or occupiers.
- 9.2** 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.
- 9.3** 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 *Protection of the Environment Administration Act 1991*:

*... [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.*<sup>22</sup>

- 9.4** Hence, in the absence of any evidence of culpability, the EPA will not institute proceedings against lenders who are legally the owners of waste, substances or controlled substances pursuant to the extended liability provisions of the Tier 1 offence regime in the Operations 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.
- 9.5** 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.**

## **10. Public Authorities**

### ***Background***

- 10.1** As noted at 1.3, Parliament has specifically precluded Ministerial control or direction in relation to prosecutions, including prosecutions of public authorities, by the EPA.
- 10.2** 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

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<sup>22</sup> Parliamentary Debates (Legislative Assembly), 21 August 1991, page 312

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.

**10.3** The EPA recognises that the ultimate aim of any prosecution action is to ensure compliance with the environment protection legislation. 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.

#### ***Consultation***

- 10.4** 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.
- 10.5** It would be inappropriate to enter consultations with government departments solely to achieve a 'by consent' prosecution wherein the charges laid do not

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reflect the gravity of the 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.

## SECTION D

### CHARGES

#### 11. General Principle

**11.1** 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.

#### *Similar charges for the same offence*

**11.2** The EPA is aware that it has a duty to refine its case to avoid laying either duplicitous or multiple charges. There will be occasions where the same act will be prohibited under two separate statutes and involve an offence under each. 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.

#### *Tier 1 charges*

**11.3** As a general rule, the EPA will lay Tier 1 charges in those situations involving unlawful wilful or negligent acts which cause or have the potential to cause serious harm to the environment, such that the prosecution would be seeking a substantial penalty. Sometimes the elements of wilfulness or negligence will be evident in quite minor incidents but it would be a misuse of the Tier 1

provisions to use these if the incident could be adequately dealt with under Tier 2, or even Tier 3.

### ***Continuing offences***

**11.4** 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.<sup>23</sup> The charging of a continuing offence is also appropriate where there has been a continuing act, eg water pollution continuing over several days. If there is any doubt of continuity then separate charges will be laid.

### ***Charge-bargaining***

**11.5** 'Charge-bargaining' 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-bargaining and hence there will be only limited circumstances where bargaining will be considered.

**11.6** A charge-bargaining proposal will not be entertained by the EPA unless:

- (a) the remaining charges reflect adequately the nature of the criminal conduct of the defendant; and
- (b) those charges provide the basis for an appropriate sentence in all the circumstances of the case.

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<sup>23</sup> See *Smith R.J. v Shell Refining (Australia) Pty. Ltd.*, unreported LEC, 23 September 1983



## SECTION E

### PENALTY NOTICES

#### 12. Background

- 12.1** The penalty notice system was introduced to provide an effective and efficient means to deal with those breaches of Tier 2 provisions which, although widespread, were rarely serious enough to warrant instituting Court proceedings.
- 12.2** A notice is served because an offence apparently has been committed, but 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. On the other hand, if a person elects to have the matter heard, proceedings are instituted in the criminal jurisdiction of the Local Court.
- 12.3** Penalty notices may be issued by designated authorised officers under the environment protection legislation. Those authorised officers include officers from many organisations, such as local councils, the Waterways Authority, police, as well as the EPA. The EPA has no direct control over how authorised officers from other organisations carry out their duties. In the interest of fairness and consistency, it is recommended that all authorised officers implement the guidelines set out here in relation to penalty notices.

#### *Operation*

- 12.4** Just as there is a discretion to prosecute Tier 1 and Tier 2 criminal matters, so there is a discretion whether to serve a penalty notice. However, any discretion exercised by individual officers must take into account the intention manifested in the environment protection legislation to penalise those breaches which, in the past, may have gone unpunished.

- 12.5** Penalty notices are designed primarily to deal with one-off breaches that can be remedied easily. They are not appropriate in situations of an on-going nature where further inquiries are needed to ascertain the nature of the problem and develop an effective long-term solution.
- 12.6** It is generally inappropriate to issue contemporaneous or 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.
- 12.7** Tier 3 offences are minor infringements of the (generally) strict liability offences of Tier 2. The issue of a penalty notice, therefore, requires judgement on the part of the authorised officer that the infringement is not one for which a penalty substantially in excess of that prescribed for the notice would be appropriate. There is a safeguard provision in section 228 of the Operations Act for a penalty notice to be withdrawn within 28 days of service. While some error of judgement is catered for by this provision, its use should be viewed as a safety net rather than a mechanism to be applied regularly. If there is any doubt about the seriousness of the offence and therefore whether to issue a penalty notice or commence Court proceedings, then it is prudent to have the matter reviewed before proceeding. This is particularly the case in respect of pollute waters offences arising under section 120 of the Operations Act which can attract fines up to \$250,000 if heard in Court, as opposed to a \$1500 fine by way of penalty notice.
- 12.8** There is no specific time-frame set out in the legislation within which penalty notices have to be issued. However, since the service of the penalty notice may be the first notification that a person has of the alleged breach, it must be received at a sufficiently proximate time to enable the alleged offender to recall the events so that an informed election can be made to defend the matter in

Court. As a matter of fairness and courtesy, it is desirable that penalty notices be issued within 14 days of the alleged breach.

- 12.9** It would be inappropriate for another authority authorised to issue a penalty notice to issue it in a situation where the EPA was already involved in the matter. It may be that the EPA has decided to deal with the problem by way of issuing a direction that specified work be performed. In the event that such work is not performed, an offence would be committed and can be dealt with at that stage. In any event, where it is apparent that the EPA is already involved in a matter, it would be appropriate for another authority, prior to taking action, to consult with the EPA so that a co-ordinated and constructive approach can be adopted. Similarly, the EPA recognises that where a matter has been jointly investigated the EPA needs to consult with the other authority before issuing a penalty notice.
- 12.10** 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 10.4 above, in relation to the prosecution of public authorities.

***Summary***

- 12.11** Penalty notices are appropriate where:
- (a) the breach is minor;
  - (b) the facts are apparently incontrovertible;
  - (c) the breach is a one-off situation that can be remedied easily; and
  - (d) the issue of a penalty notice is likely to be a practical and viable deterrent.
- 12.12** It is not appropriate to issue penalty notices where:
- (a) the breach is on-going and not within the alleged offender's capacity to remedy quickly;
  - (b) the penalty prescribed on the notice would be clearly inadequate for the severity of the offence;

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- (c) the extent of the harm to the environment cannot be assessed immediately;
- (d) the evidence is controversial or insufficient such that if a Court heard the matter, it would be unlikely to succeed;
- (e) a period of 14 days has elapsed since the alleged breach;
- (f) negotiations to find a resolution to the problem which is the subject of the breach are being conducted already with the EPA;
- (g) a direction via notice has been issued by the EPA to perform specified work within a time-frame and the time limit for such performance has not expired;
- (h) at least one of the motivations for issuing a penalty notice to public authorities is to avoid the consultative procedures set out in the Premier's Memorandum No. 97-26 *Litigation Involving Government Authorities*; and
- (i) multiple breaches have occurred.

## SECTION F

### MODE OF TRIAL

#### 13. Tier 1 Offences

**13.1** A Tier 1 offence may be determined either summarily before the Land and Environment Court or on indictment in the Supreme Court.<sup>24</sup> The choice of venue rests solely with the prosecutor.

#### *General principle*

**13.2** 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 takes cognisance of 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

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<sup>24</sup> Section 214(1) of the Operations Act

from loss of liberty without first being afforded the opportunity of a fair trial by one's peers. Since the majority of 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.

#### **14. Tier 2 Offences**

**14.1** Tier 2 offences can be instituted either in the Land and Environment Court or the Local Court. Where the EPA has carriage of the matter it will consider the following factors in choosing the venue for the summary hearing:

- (a) unless the amount of the fine is likely to exceed the jurisdictional limit for Local Courts of \$22,000 or there are other special circumstances, proceedings for those offences committed in areas outside the Sydney metropolitan region will be heard by the most convenient Local Court;
- (b) all environment protection offences which are serious enough to attract possible penalties in excess of \$22,000 will be commenced in the Land and Environment 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 Operations 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.

**14.2** The EPA is not the only authority with power to commence Tier 2 proceedings. It would be appropriate in the interests of efficiency and consistency for other prosecuting authorities to adopt the procedures set out in 14.1 unless there are compelling reasons to the contrary.

## SECTION G

### DISCLOSURE, CO-OPERATION AND COMPLIANCE

#### 15. Background

**15.1** The EPA recognises that early notification of an incident together with full and informed co-operation 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 co-operation. Together with other relevant matters the factors of voluntary disclosure and co-operation will be considered by the EPA in exercising its prosecutorial discretion.

#### 16. Voluntary Disclosure

**16.1** 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 information assisted the control, abatement or mitigation of any harm to the environment;
- (c) the information substantially aided the EPA's investigation of the incident;
- (d) the information was available from other sources; and
- (e) the disclosure occurred prior to the EPA or any other regulatory body obtaining knowledge of the non-compliance.

#### 17. Mandatory Disclosure

**17.1** 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 Operations 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.

### **18. Co-operation**

**18.1** The extent of the co-operation 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.

### **19. Preventive Measures and Compliance Programs**

**19.1** The EPA wishes to encourage the introduction and implementation of comprehensive compliance programs such as environmental audits and environmental management programs, which will militate against non-compliance situations arising. Accordingly, the existence and implementation of such programs will be taken into consideration in deciding whether to prosecute.



## SECTION H

### INDEMNIFICATION OF WITNESSES

#### 20. Power to Indemnify

**20.1** 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.

**20.2** It is important to note the policy of the Office of the Director of Public Prosecutions in New South Wales in relation to immunity:

*Generally an accomplice should be prosecuted (subject to the policy and guidelines) whether or not he or she is to be called as a witness ... There may be rare cases, however, where that course cannot be taken. For example, there may be insufficient admissible evidence to support charges against the accomplice.*

*A request for an indemnity or undertaking on behalf of a witness will only be made by the Director after consideration of a number of factors, the most significant being:*

- (i) whether or not the evidence that the witness can give is reasonably necessary to secure the conviction of the accused;*
- (ii) whether or not that evidence is available from other sources; and*
- (iii) the relative degrees of culpability of the witness and the accused.<sup>25</sup>*

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<sup>25</sup> See p. 9

## SECTION I

### APPEALS AGAINST SENTENCE

**21.1** The EPA may appeal against sentences that have been imposed by local courts and the Land and Environment Court for environmental offences.<sup>26</sup> 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 Policy and 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 sentencer has made a material error of fact or law or has imposed a sentence that is manifestly inadequate.

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

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<sup>26</sup> Section 133AS (2) of the *Justices Act 1902* and section 5D (1A) of the *Criminal Appeal Act 1912*

**SECTION J**

**CONCLUSION**

- 22.1** These Guidelines address those issues that the EPA considers are of immediate concern and in respect of which clarification is desirable. It is anticipated that as the EPA continues to operate there will be other specific issues that will need to be addressed through guidelines.