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Welcome to the latest edition of the **Australian Environmental Law Digest**. NELA is very grateful to Natasha Hammond for editing this edition.

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IN THIS ISSUE

Going to mining rehab: New policies and reforms proposed for 'Better Mine Rehabilitation for Queensland'

KING&WOOD MALLESONS

Originally published on 9 May 2017

Matthew Austin and Anna Vella[1]

As stated in our recent article about the Queensland government's proposed redesigned financial assurance framework for resource projects, the government is undertaking a broad review of mining projects to achieve a tailored solution for various types of operators within the resource sector– aimed at encouraging 'best practice' environmental outcomes, dealing with residual risk issues and to reduce the State's risk in the event of environmental and rehabilitation obligations not being met.

In addition to announcing potential changes to the financial assurance framework and a broader jurisdictional review, the Queensland government has released a discussion paper[2] which outlines a proposed new policy for mine rehabilitation in Queensland.

Existing rehabilitation issues

Mining project rehabilitation is required under the *Environmental Protection Act 1994* (Qld) (**EP Act**). Where a proponent for a mining activity makes a variation or site-specific environmental authority (**EA**) application, the EP Act requires the proponent to provide details as to how the land the subject of the application will be rehabilitated after each relevant activity ceases.[3] In approving an EA application for a mining activity, the Department of Environment and Heritage Protection (**DEHP**) may impose a condition which relates to rehabilitating or remediating environmental harm caused by the undertaking of that activity.[4]

For some time, the criticism of Queensland's mining rehabilitation requirements have been gaining momentum as, among other things:

- the progressive rehabilitation obligations for a mining activity are informed by the project's plan of operations (**PoO**), which has a limited forward planning horizon;
- EA approval conditions have not provided detail as to the environmental outcomes, environmental criteria and ultimate land uses which are to be achieved on the land upon which mining activities are carried out;
- the regime does not provide a meaningful financial incentive for mining proponents to undertake progressive rehabilitation;
- rehabilitation commitments as stated in an environmental impact statement or a PoO are not necessarily translated into enforceable conditions or obligations; and

[1] Matthew Austin, Partner and Anna Vella, Senior Associate, King & Wood Mallesons. Please contact Matthew if you would like to know more about the matters discussed in this article and any implications for your business.

[2] *Better Mine Rehabilitation for Queensland,* Discussion Paper, Department of the Premier and Cabinet, Queensland Treasury, Department of Natural Resources and Mines and Department of Environment and Heritage Protection, released on 4 May 2017.

[3] In circumstances where an environmental impact statement is prepared under the EP Act and/or as per the requirements of section 125(1)(l)(i)(E), EP Act

[4] Section 207(1)(e), EP Act. Guidance is also provided by the Department of Environment and Heritage Protection's *Rehabilitation requirements for mining resource activities* guideline, Version 2, 23 May 2014.

- little guidance has been provided to mining proponents to indicate what the DEHP requires to be satisfied with rehabilitation so that it can be progressively certified (as part of an ongoing mining project) or to be accepted upon surrender of an EA for the whole or part of a project.

Rehabilitation policy and delivery elements

The rehabilitation discussion paper released by the Queensland government is a key component of an integrated mined land management framework. At this stage, the possible rehabilitation reforms are limited to the undertaking of mining activities – but may be broadened to eventually include the undertaking of petroleum activities.

The rehabilitation policies underlying the discussion paper are that:

- all mined land in Queensland should be rehabilitated so it is able to support another land use;
- mined land is to be rehabilitated progressively to minimise risks of environmental impacts and to demonstrate the success of waste and land management solutions. Central to the policy and to provide certainty about the outcomes and timing of rehabilitation, mining companies with large mines will be required to prepare a 'life-of-mine' plan (**LOM Plan**) which encompass all states of the mine's life[5] – such as development, operation, care and maintenance, decommissioning, closure and post-closure monitoring - and will include binding milestones that support transition to its future use. In circumstances where major changes need to be made to the LOM Plan over the life of the mine – the public is to have an opportunity to comment on those changes;
- when preparing a LOM Plan, future land uses will be identified having regard to community views and any desired use expressed in local and regional planning strategies, but may include retaining built infrastructure that will have ongoing value for the landholder or the community;
- a LOM Plan will include actions and time-based milestones for achieving rehabilitation outcomes which are intended to be enforceable and enable the regulator to act if an operator fails to meet its obligations;
- mined land will be considered available for rehabilitation unless it is:
  - being mined; or
  - being used for operating mining infrastructure; or
  - overlays a mineral reserve that has been assessed as economically viable for extraction within 10 years;
- mined land will be considered to be rehabilitated when it can be demonstrated it is safe, stable, will not cause environmental harm and is able to support the post mining land use;
- regular monitoring, assessment and public reporting of progress against rehabilitation outcomes stated in the LOM Plan are proposed which may in turn replace existing reporting processes – self-assessment by the operator is to be supplemented by independent auditing every three to five years as well as regular regulator checks;
- guidelines will be produced which outline standard criteria for common types of rehabilitation outcomes and the process companies must follow to develop additional completion criteria for rehabilitation outcomes that reflect site-specific characteristics. Further guidance is also to be developed as to the standard of scientific evidence required to support EA surrender application and the process for assessing final rehabilitation.

[5] With a view to potentially removing the need to prepare PoOs, which is likely to duplicate LOM Plan requirements

The discussion paper also contemplates that, to incentivise compliance, a risk factor based on rehabilitation performance could be built into the annual fee calculation for environmentally relevant activities and fees discounted where auditing and compliance show full compliance. Increased fees could be imposed where substantial non-compliance is identified.

Proposed transitional arrangements

At this stage, the government expects that the legislative changes required to implement the intentions of the rehabilitation discussion paper are likely to be made in mid-to-late 2018.

The new rehabilitation framework is to apply:

- to all new mines in Queensland that require an EA obtained through a site-specific assessment process; and
- progressively to all current operating site-specific mines – with a varying transitional arrangements depending on whether a mine is considered to be:
  - 'high risk' – based on factors which may include area of disturbance, proximity to significant environmental areas and the expected remaining life of mine[6] - which will need a LOM Plan within 1 year of the legislative provisions commencing; or
  - for the remaining existing mines, a LOM Plan will be required within 2 years after commencement of the legislative provisions.

Conclusion

The reforms outlined in the rehabilitation discussion paper seek to achieve, among other things:

- binding and enforceable rehabilitation obligations for new and existing mines which will be developed through a LOM Plan which encompass all stages of mine development;
- progressive rehabilitation of mined areas over the life of a mine;
- mining companies planning and committing to enforceable rehabilitation obligations;
- monitoring, assessment, auditing and reporting occurring on a regular basis with the opportunity for community scrutiny and third parties being consulted if major changes are proposed to made to the LOM Plan; and
- more rigour around 'care and maintenance' obligations for mining projects.

The overall effectiveness of this aspect of the overall reform framework will become more clear once detail as to the regulator's final certification requirements for rehabilitation requirements is made available.

[6] *Better Mine Rehabilitation for Queensland,* Discussion Paper, op. cit, p. 26

Queensland's environmental laws prevail over Cth Corporations Act

Originally published on 31 May 2017

Daniel Tweedale, Nadia Czachor, and Ian Wright[7]

In Brief

The case of *Linc Energy Ltd (in Liq); Longley & Ors v Chief Executive, Department of Environment and Heritage Protection* [2017] QSC 53 concerned an application to the Supreme Court by the liquidators for Linc Energy Ltd (Linc) who sought, amongst other things, directions in respect of:

- whether a disclaimer of onerous property under section 568 of the *Corporations Act 2001 (Cth)* had the effect of discharging Linc from compliance with an environmental protection order issued by the Department of Environment and Heritage Protection (**DEHP**) under the *Environmental Protection Act 1994* (**EP Act**);
- whether the liquidators were personally responsible to cause Linc to comply with the EP Act.

In ultimately refusing to grant the directions sought by the liquidators, the Supreme Court held that, despite the disclaimer of onerous property under section 568 of the *Corporations Act*, the obligations created by the EP Act prevailed and Linc therefore remained liable to comply with the environmental protection order.

The Supreme Court also held that the liquidators fell within the ambit of the definition of an "*executive officer*" for the purpose of section 493 of the EP Act. The liquidators were therefore obligated to cause Linc to comply with the environmental protection order, with any failure to do so constituting a breach of duty which may result in the liquidators becoming personally responsible and culpable for any consequential offence.

Factual Background

Linc was the proprietor and operator of an underground coal gasification facility at Chinchilla in the local government area of Western Downs.

Linc held a mineral development licence granted under the *Mineral Resources Act 1989* and a petroleum facility licence under the *Petroleum and Gas (Production and Safety) Act 2004*, as well as two associated environmental authorities under the EP Act.

On 15 April 2016, Linc resolved to enter voluntary administration after a series of investigations by the DEHP that led to Linc being committed to stand trial for causing serious environmental harm under the EP Act.

On 13 May 2016, the DEHP issued Linc with an Environmental Protection Order.

On 23 May 2016, the creditors of Linc passed a special resolution to have Linc voluntarily wound up and appointed the liquidators.

On 30 June 2016, the liquidators gave a notice of disclaimer of onerous property under section 568 of the *Corporations Act* to the DEHP, which purported to have the effect of discharging Linc from future compliance with any obligations under the Environmental Protection Order.

[7] Ian Wright, Partner, Nadia Czachor, Senior Associate, and Daniel Tweedale, Solicitor, Colin Biggers & Paisley. Please contact Nadia if you would like to know more about the matters discussed in this article.

The DEHP rejected the purported disclaimer and contended that the liquidators, as "executive officers" of Linc, were obliged to ensure compliance with the Environmental Protection Order.

Accordingly, the liquidators for Linc made an application to the Supreme Court for directions under section 511 of the *Corporations Act* as to the effect of the disclaimer and their liabilities in respect of the Environmental Protection Order.

The Effect of the Disclaimer of Onerous Property in Discharging Linc From Compliance with the Environmental Protection Order

The dominant issue in dispute was whether the disclaimer of onerous property issued by the liquidators had the effect of discharging Linc from compliance with the environmental protection order. To resolve this issue, the Supreme Court had to reconcile an apparent inconsistency between:

- section 361 of the EP Act, which creates the offence for contravention of an environmental protection order;
- sections 568 and 568D of the *Corporations Act*, which confers the right of a liquidator to disclaim onerous property with the effect of terminating the corporation's rights, interests and liabilities in or in respect of the environmental protection order.

The significance of this inconsistency required the Supreme Court to further consider the interaction between section 109 of the *Commonwealth of Australia Constitution Act* and section 5G of the *Corporations Act*, namely in regard to whether the general proposition enunciated in section 109 of the *Commonwealth of Australia Constitution Act:*

> *when a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail and the former to the extent of the inconsistency be invalid*,

was displaced by section 5G of the *Corporations Act*.

In this regard, the Supreme Court held that the EP Act met the conditions set out in section 5G of the *Corporations Act* and therefore, by virtue of its operation immediately before the commencement of the *Corporations Act* on 15 July 2001 and despite the provisions of the *Corporations (Queensland) Act 1990*, was protected from the application of direct inconsistency under section 109 of the *Commonwealth of Australia Constitution Act.*

In reaching the conclusion that the environmental protection order remained operative despite the disclaimer of onerous property, the Supreme Court conceded that their decision represented a significant departure from the existing, albeit scarce, common law on point. However, the Supreme Court nonetheless felt that such a departure was warranted and justified their decision on the basis of commentary from the High Court of Australia in *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, which relevantly stated as follows:

> *[a]lthough the considerations applying are somewhat different from those applying in the case of Commonwealth legislation, uniformity of decision in the interpretation of uniform national legislation such as the [Corporations] Law is a sufficiently important consideration to require that an intermediate appellate court — and all the more so a single judge — should not depart from an interpretation placed on such legislation by another Australian intermediate appellate* ***court unless convinced that that interpretation is plainly wrong****."* [emphasis added]

The "Executive Officers" of a Corporation Must Ensure That the Corporation Complies with the EP Act

A further issue in dispute was whether the liquidators fell within the ambit of the definition of an "*executive officer*" for the purpose of section 493 of the EP Act and were therefore obligated to cause Linc to comply with Environmental Protection Order, with any failure to do so constituting a breach of duty which may result in the liquidators becoming personally responsible and culpable for any consequential offence.

In ultimately finding that the imposition by statute of an obligation of a corporation to an "*executive officer*" does not, of itself, differentiate between obligations incurred before the commencement of the winding up and post-commencement obligations, the Supreme Court held that the liquidators were "executive officers" and were therefore obligated to cause Linc to comply with the Environmental Protection Order.

Finkel on the Future:
Australia to renew its energy policy and recharge investment with a clean energy target

Originally published on 9 June 2017

David Ryan and Robert Merrick[8]

High retail prices, a state-wide blackout, and a shift away from coal-fired power – In the wake of these challenges to the security and reliability of energy supply in Australia, COAG Energy Ministers commissioned an independent review of the National Electricity Market led by Chief Scientist, Dr Alan Finkel AO. The final report leaves open some key issues that will potentially impact investors' capital investment decisions.

Background

Australia is in the process of transitioning to a lower emissions economy, but this shift comes with challenges for energy security and reliability. The *Independent Review into the Future Security of the National Electricity Market* (**the Finkel Review**) was commissioned by the Council of Australian Governments (**COAG**) to address these challenges and provide recommendations for overcoming them. A preliminary report was released in December 2016 and was followed by a consultation period, during which submissions were made. The final Finkel Review was released to COAG on 9 June 2017.

Preliminary Report

The preliminary report did not contain recommendations, but highlighted key issues that needed to be addressed to ensure the future security of the National Electricity Market (NEM), including:

- The 'energy trilemma' of balancing security and reliability, affordability and reduction of emissions.

[8] David Ryan, Partner, Sydney and Robert Merrick, Partner, Perth, both of Herbert Smith Freehills.

- Integration of new technologies that could improve reliability and security of supply.
- Transition to a low emissions economy and the achievement of Australia's commitments to the emissions reduction targets under the Paris Agreement.
- Enhanced integration of variable renewable electricity generation and the provision of frequency control services as traditional sources of generation decline.
- Rising costs, in particular rising domestic gas prices that have rendered some gas-fired generators uneconomical.
- A market design that incentivises investment while maintaining security and reliability.

As readers will be aware, climate change has been a policy area that is fraught with danger in Australian politics. Just prior to the release of the preliminary report in December, the Federal Environment Minister Josh Frydenberg announced that the Government would consider an emissions intensity scheme (EIS) for the electricity sector. The Minister was then forced to revoke his comments within 36 hours due to internal party pressures.

Since the release of the preliminary report, the Government has maintained its position against an EIS. Attention has instead been focussed on a low emissions target (LET) scheme. The Labor Party and the weight of the business community supported an EIS, but have expressed a willingness to back a LET as a "second-best" option in the interests of Australia taking some positive action to tackle climate change.

Labor has said it will support a LET because it is easily "scalable", meaning the scheme variables could be adjusted in the future (ie. under a Labor Government) to accelerate the emissions outcome and to meet further international targets.

Finkel Review

The Finkel Review is principally about energy security and is wide-ranging in its scope and recommendations. However, the issue that has been attracting the most attention prior to the release of the Finkel Review has been the possibility of introducing a LET. This client alert focuses on the recommended LET component of the Finkel Review and its potential impact on the electricity generation sector.

The key aspects of the Finkel Review on how to achieve a "low emissions future" for Australia are set out below:

- The Finkel Review concluded that a Clean Energy Target (**CET**), in essence a LET mechanism, will provide the lowest impact on power prices to consumers while achieving the modelled emissions reductions, and was therefore the preferred policy approach.
- A CET would operate in a similar way to the existing RET certificate regime. Eligible low emissions generators will receive certificates for electricity produced, and electricity retailers will then purchase these certificates in order to meet their compliance obligations under the CET.
- A CET is ultimately preferred over an EIS due to ease of implementation, as it can readily be built on the model of the existing Renewable Energy Target (RET). It is also because the current high cost of domestic gas makes gas-fired generation an expensive alternative to coal for baseload and intermediate generation. A CET will provide a more gradual exit of coal-fired generation that under an EIS.
- A CET will set a target for the electricity generation sector to reduce carbon emissions by 2030. The Finkel Review noted a reduction of 26 to 28 per cent by 2030 (assessed against 2005 levels) as a minimum. This would be consistent with Australia's general commitments under the Paris

Agreement, but many commentators had expected the electricity sector to bear a much larger brunt of Australia's obligations. Ultimately the reductions target is left for the Government to determine.

- A CET will be technology neutral, unlike the RET which applies only to generation from renewable sources. Instead, eligibility will be determined by an emissions intensity threshold. The threshold will be a measure of carbon intensity for electricity generation, measured as kgs of carbon per MWh of generation.
- Where the threshold is set will determine what generation technologies qualify as low emissions technologies. A baseline of 700kg/MWh will exclude all current coal-fired generators, but may potentially include them in the future if carbon capture and storage was to become viable. Most gas-fired generators are likely to be eligible. However, the Finkel Review does not recommend a specific emissions intensity threshold. Instead, that decision is left to the Government.
- CET will have an additional dimension to the RET (which allows one certificate to be created for each MWh of eligible generation). The lower the emissions intensity of the generator, the more CET certificates the generator will be entitled to receive.
- Unlike an EIS, generators who are above the emissions intensity threshold will not face a compliance cost. However, they will not be eligible to receive low emissions certificates (and earn the related revenue stream). This will impact the competitiveness of the respective generation technologies in the NEM.
- A CET should continue indefinitely, but there may be a limit on the number of years for which an individual generator is eligible to receive CET credits (the Finkel Review modelled 15 years).
- New generators will also be subject to reliability standards that may require wind and solar plants to install battery storage or arrange the installation of new back up generation (this support cannot be contracted from existing installed capacity). This will increase the cost of developing renewables. Different reliability standards may be set for different NEM regions.
- Large generators will be required to provide 3 years' advance notice of closure, to mitigate security shocks from the exit of large generation capacity.

Implications

Many of the recommendations of the Finkel Review are broad-scoped and the Finkel Review is not particularly specific on the key details. It is crafted as a set of recommendations to Government, with the Government left to determine the preferred approach and specific policy settings. The response of the Government to the Finkel Review, and the determination of the key settings of any CET, will therefore be key.

The most political issue is likely to be the threshold. To include "clean coal" technologies, the threshold would need to be no lower than 750kgs/MWh. However, if the CET operates on the basis that the number of CET certificates an eligible generator can create will depend on its emissions intensity, then merely scraping in below the relevant threshold may be a hollow victory.

The interaction of the RET and a CET scheme will be important. However, the statements regarding the RET in the Finkel Review do not provide a lot of detail. The Finkel Review recommends that the RET should continue in its current form until expiry at the end of 2030 and should not be extended. A CET will be introduced by 2020 and will be a supplemental policy to the RET. The Finkel Review notes that the Government will need to consider how to prevent renewable generators from benefitting under both schemes.

The Finkel Review notes that new generators would be eligible to create CET certificates for all their generation. However, existing generators would only be eligible to create CET certificate for generation above a baseline (which is not specified).

The RET has contributed to an increase in renewables and a decline of traditional sources of generation, but wind and solar are not able to provide ancillary services such as frequency control that are typically provided by traditional generators. The Finkel Review places the obligation to address some of these reliability issues on the renewable generators with requirements for battery storage capacity and back up supply arrangements from new build generation. These obligations are likely to be higher in regions with higher levels of renewables capacity.

Existing power purchase agreements will need to be carefully reviewed to determine the party that will receive the benefit of a CET revenue stream, and how generation after 2030 will be treated. New power purchase agreements will need to consider the likely requirement for battery storage and back up supply arrangements.

If there is likely to be an impact on the NEM spot price from the introduction of a CET, then hedge contracts will need to be carefully reviewed to determine whether the introduction of a CET constitutes a change in tax/carbon tax for the purpose of ISDA and other electricity hedge structures. If so, it may be necessary for parties to consider dusting off some of the analysis and adjustment mechanisms we saw employed during the previous carbon pollution reduction scheme/carbon tax.

The key issue for investors will be whether the CET provides the regulatory certainty required to make large and long-term capital investment decisions. While the operation of the NEM under a RET and CET will need to be assessed, and forward NEM pricing projections adjusted accordingly, investors will be influenced by the extent to which a CET, or its component parts such as the threshold, is open to future review or adjustment.

There are a number of other proposals in the Finkel Review impacting the electricity market that deserve further intention, including the promotion of domestic gas production, the suggestion of an ex ante (day ahead) market in the NEM and limiting the life of coal-fired generating plant to 50 years. These will be the subject of further client alerts.

Court of Appeal decision shakes up staged development applications

NORTON ROSE FULBRIGHT

Originally published in July 2017

Felicity Rourke and Rebecca Hiscock[9]

The NSW Court of Appeal (**Court**) recently struck down a development consent for the Walsh Bay Arts Precinct in *Bay Simmer Investments Pty Ltd v State of New South Wales* [2017] NSWCA 135. This decision has implications for certain pending and determined staged development applications (**Staged DAs**). In response, the Department of Planning and Environment (**DPE**) has proposed an amendment to the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).

A brief summary of the Court's decision and the proposed legislative amendment is below.

The Court's decision

Arts NSW lodged a development application for the Walsh Bay Arts Precinct as a Staged DA, comprising a concept proposal as stage 1, with the intention that a subsequent detailed development application for the actual works would form stage 2. Consent was granted for the concept proposal. A local restaurant business challenged the validity of the consent on the basis that the consent authority had failed to consider construction related impacts on the surrounding businesses, and that the development application could not properly be characterised as a Staged DA.

The Court held the consent was invalid, finding that:

- construction impacts should be considered at the concept proposal stage (notwithstanding that the concept proposal did not approve construction); and
- if the initial Staged DA only relates to a concept proposal and does not include a detailed proposal for a separate part of the site, then the initial application must be followed by at least two detailed development applications, each for separate parts of the site, in order to be considered a Staged DA under the EP&A Act.

Commentary

These findings are contrary to the usual approach taken by councils and the DPE, which has been to assess construction impacts at a later stage, if the concept proposal does not permit construction to be carried out, and to allow a concept proposal to be followed by a single development application for construction. This has especially been the case in the City of Sydney, where the provisions in the *Sydney Local Environmental Plan 2012* for larger sites in clause 7.20 are typically complied with by securing a stage 1 concept approval (in place of a site-specific development control plan) followed by a second development application which covers the whole of the site.

As a result of the decision, the practice of lodging a Staged DA comprising a concept proposal for a building envelope with a single subsequent detailed development application to erect a building within that envelope, will no longer be possible. This complicates the approval process for new and existing Staged DAs which are yet to be determined. A risk also arises for legal challenges against consents for Staged DAs which have already been granted.

[9] Felicity Rourke, Partner and Rebecca Hiscock, Associate. Norton Rose Fulbright's Australian environment and planning team was recently named Best Lawyers' Law Firm of the Year 2018. Please contact Felicity if you would like to know more about the matters discussed in this article.

The DPE's proposed legislative amendment

In response to the Court's decision, on 30 June 2017 the DPE released the draft *Environmental Planning and Assessment Amendment (Staged Development Applications) Bill 2017* (**Bill**). If passed by Parliament, the Bill will amend the current provisions for Staged DAs by:

- renaming Staged DAs as 'concept development applications' (**Concept DAs**);
- allowing a Concept DA to be followed by only one development application for the site, rather than multiple applications as required by the Court; and
- allowing the impacts of carrying out development to be considered when approval to carry out works is sought.

The savings and transitional arrangements will ensure that these changes apply to both pending and already determined Staged DAs. The Bill is on exhibition until 24 July 2017 and is expected to be introduced to Parliament later this year.

If passed, the Bill will effectively restore the previous commonly-understood approach. Importantly, it will also clarify that a concept-only first stage DA need not assess all of the impacts of carrying out development at the concept stage. We will continue to monitor the progress of the Bill.

Transparent and consistent sentencing in Land & Environment Court of NSW: Orders for costs as an aspect of punishment

Judicial Commission of New South Wales

Summary published on 21 July 2017 – Full report available for purchase from NSW Govt shop.

Michael Cain and Hugh Donnelly[10]

This is the executive summary of a report released by the Judicial Commission of New South Wales at a seminar in Sydney on 21 July 2017.

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

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

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

[10] Michael Cain, Principal Researcher and Hugh Donnelly, Director, Research and Sentencing, Judicial Commission of New South Wales. Please contact the Judicial Commission for more information about any matters discussed in this report.

Costs and sentencing

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

Criminal liability

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

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

Charging practices

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

Given the "absolute discretion" of the prosecutor, the LEC (like any other criminal court) has no control over the charges brought before it.[xix] Prosecuting agencies bringing criminal matters before the LEC do not have a practice of using Tier 1 and Tier 2 offences as alternative charges. However, the practice of alternative charging is standard in other courts exercising criminal jurisdiction.[xx]

Consequently, the existing statutory hierarchy for environmental protection offences, as envisaged by Parliament, effectively, is not being used.

Culpability and the *De Simoni* principle

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

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

Jurisdictional ceiling of the Local Court

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

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

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

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

The study: lines of inquiry taken

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

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

First, Tier 1 pollution offences, of which there were only nine in the study period, were separated and examined qualitatively in terms of the objective and subjective features of each case. Secondly, the "Top 10" strict liability offences were identified and analysed. These offences made up 88% of the total number of offences before the LEC in the study period. The offence of polluting waters was the most common Tier 2 offence, representing almost one in every four offences (24%); contravening a licence made up one in every nine offences (11%); and the unlawful transporting and disposal of waste made up a further 8% of offences. Comparisons were made across the "Top 10" offences on a number of factors including level of environmental harm, objective seriousness, type of offender and penalties imposed. For example, the study found that the offences with the highest levels of serious environmental harm (putting aside Tier 1 offences) were native vegetation offences[xxxix], waste offences[xl] and offences involving the harming of an endangered or threatened animal, plant or ecological community[xli] (29%, 24% and 22%, respectively). These same Tier 2 offences had the highest levels of objective seriousness (17%, 24% and 22%, respectively). Notably, commercial gain was identified as the principal reason (75%) for the illegal clearing of native vegetation, which was even higher than for Tier 1 pollution offences (67%). Obtaining a financial advantage was also very prominent in the commission of waste offences (64%).

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

A problematic distinction: corporate and individual offenders

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

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

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

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

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

Penalties

Although a fine is the most common penalty for each class of offender, there are noticeable differences in the other penalties imposed. Companies and small business owners tend to receive Additional Orders (to acknowledge and make restitution for the environmental harm caused) with, or in lieu of, a fine; whereas "special liability" and "ordinary Joe" offenders received more s 10 orders.[liv] Offending behaviour by corporations and "special liability" directors tended to be treated more sternly by the LEC, especially with regard to monetary penalties. The highest average fines, around $44,000 each, were noted for these two groups. By contrast, the average fine for "ordinary Joe" offenders was around half that figure, and the average fine for small business owners was also lower at approximately $30,000.

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

Qualitative analysis

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

Cases tables

The authors supplemented the quantitative information with a comprehensive case-by-case analysis of sentences and costs across three critical areas of the LEC's workload: pollute waters offences, waste offences and native vegetation offences. This information is presented in the report as detailed case tables (see Cases Tables in Volume 2). These tables provide highly-relevant sentencing information, ordered in terms of the prevailing sentencing regime (statutory framework) that applied at the time of the offence. The set of cases are also stratified in terms of "like-with-like" cases employing discrete sub-categories such as "Single offence, fined, prosecutor's costs known". For each individual case, the following information is provided:

- citation details
- offender type — corporation or individual (separated into special liability offender, small business owner and "ordinary Joe" offender)
- Act and section number of the offence(s) committed
- the maximum penalty that applied at the time of offence[lviii]
- the quantum of the fine and/or any Additional Orders
- costs orders (quantified and unquantified) at sentence
- the proportion that costs orders represented of the total pecuniary punishment.

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

The pervasive influence of costs

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

It was found that it is not uncommon for costs orders to be the largest component of the total pecuniary amount — regularly up to 70% or even 80% of the total amount to be paid by the environmental offender. Even in cases where the quantum of costs is not known, the LEC has endeavoured to factor in the likelihood of substantial prosecution costs into the sentencing

equation. Costs orders can significantly reduce the capacity of the offender to pay a fine. A downward adjustment may be made to the quantum of the fine imposed. It is not uncommon for the LEC to indicate that it decided to impose a lesser fine to offset the impact of a known costs order or an unknown costs figure predicted to be substantial.[lxi] The proportionality principle requires that the punishment fit the crime. Costs are a critical component of the monetary punishment.

The study analysed the proportion that costs orders represented of the total pecuniary punishment. For a single s 120 pollute waters offence under the current version of the *POEO Act,* it was found that the average fine was $83,346 where costs were known at time of sentence, but was 48% less, at $43,333, where costs were unknown. This pattern appears to have also occurred under previous statutory regimes. Under the repealed *Clean Waters Act* 1970, the average fine for a s 16 pollute waters offence where costs were known was just over $17,000, but where costs were unknown the average fine was below $11,000. Similarly, under its immediate statutory successor (the *POEO Act*, with lower than current maximum penalties), the average fine for a single pollute waters offence was $25,190 where costs were known but it was 12% lower, at $22,169, where costs were unquantified at time of sentencing.

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

Resolving costs as a sentencing factor

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

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

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

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

END NOTES

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

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

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

[iv] See "The current law on costs" at [1.3.3]

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

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

[vii] (1992) 26 NSWLR 352.

[viii] (1992) 59 A Crim R 6.

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

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

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

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

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

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

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

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

[xvii] See Australian Law Reform Commission (ALRC), "Chapter 12: Strict and Absolute Liability" in ALRC, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws,* Issues Paper 46, 2014, accessed 16 May 2017.

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

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

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

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

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

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

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

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

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

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

[xxviii] *Nguyen v The Queen* (2016) 256 CLR 656 per Gageler, Nettle and Gordon JJ at [60]. Bell and Keane JJ at [29] stated: a judge sentencing an offender for [a lower offence within a statutory hierarchy] would err if the judge assessed the seriousness of the offence by taking into account that the offender had not committed [the ingredient for a higher offence] ...The judge would err because, plainly enough, that fact is irrelevant to the assessment of the seriousness. Also see Culpability and the De Simoni principle at [3.6].

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

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

[xxxi] ibid

[xxxii] Ibid at [35]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[liv] See Table 4 at [2.2.5].

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

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

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

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

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

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

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

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

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

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

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

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