Your reference
Our reference : HO1859/15 EXF32248
Contact : Sarah Wright, ph (02) 9995 6176, fax (02) 9995 5951

21 August 2006

Legal Services

Mr Allan Shearan MP
Chairman, Legislation Review Committee
Parliament House
Macquarie Street
Sydney NSW 2000
Fax: (02) 9230 3052

FAXED 21/8/06

BY FAX (15 pages) and POST

Dear Mr Shearan

Invitation to comment on Discussion Paper on Strict and Absolute Liability Offences

I refer to your letter dated 19 June 2006 inviting the Department of Environment and Conservation (DEC) to comment on the above discussion paper. DEC has a strong interest in this issue as an agency which runs around 120 prosecutions a year relating to environment and conservation protection, including Aboriginal cultural heritage.

Enclosed are the DEC's comments on the discussion paper. DEC was granted an extension to provide its comments after the due date for submissions.

If you have any questions regarding the DEC's comments, please contact Ms Sarah Wright, Acting Senior Legal Officer, on (02) 9995 6176.

Yours sincerely

STEVE GARRETT
Executive Director Legal Services

Encl.

PO Box A290 Sydney South NSW 1232
59-61 Goulburn St Sydney NSW 2000
Tel: (02) 9995 5000 Fax: (02) 9995 5999
TTY (02) 9211 4723
ABN 30 841 387 271
www.environment.nsw.gov.au

Department of **Environment and Conservation** NSW

Comments of the Department of Environment and Conservation (NSW) on Legislation Review Committee Strict and Absolute Liability Discussion Paper No. 2 dated 8 June 2006

Summary of submission

Successive State Governments and the Courts themselves have repeatedly expressed the community's concern about behaviour that degrades the environment. It has repeatedly been recognised in NSW that strict liability offences are necessary and appropriate in order to protect the environment.

Accordingly, the Department of Environment and Conservation (NSW) ("**the DEC**") disagrees with the general thrust of the Discussion Paper insofar as it applies to environmental offences.

Strict liability offences are an essential part of a regulatory framework that achieves strong environment protection outcomes. These offences operate along side other more serious environmental offences which require proof of intent or negligence.

Strict liability offences have evolved in recognition of that it is a particular area of law where it can be very difficult to prove intentional conduct as the "victim", the environment, cannot speak for itself. Strict liability offences also ensure that operators and the wider community take precautionary measures to prevent offences in the first place.

The costs of taking these precautions is rightly considered a cost that responsible operators must bear. Fines imposed by courts need to be at levels which have a general and specific deterrent effect so they are not merely seen as a cost of doing business but ensure that money is spent on appropriate precautions in the first place. In some cases where fines will not provide a sufficient deterrent a limited gaol term may also be an appropriate penalty, even where the offence is of a strict liability nature.

Common law defences to strict liability offences should be the only defences available, unless otherwise expressly specified in the legislation.

Background to the Department of Environment and Conservation

The DEC is a State government Department that was created on 24 September 2003. The creation of the DEC brought together a number of state government agencies, namely the Environment Protection Authority (**EPA**), National Parks and Wildlife Service (**NPWS**), former Resource NSW and the Botanic Gardens Trust.

The DEC has responsibilities, powers, duties and functions (some of which are exercised in the name of the EPA) under over 30 NSW Acts and regulations made under those Acts (see **Appendix A** for a list of Acts administered by DEC).

The main pieces of legislation administered by the DEC are the *Protection of the Environment Operations Act* 1997 ("**the POEO Act**"), the *National Parks and Wildlife Act* 1974 ("**the NP&W Act**") and the regulations made under those Acts.

Environmental offences

Offences under legislation administered by the DEC include offences where proof of mens rea is required and strict liability offences. The majority of offences under legislation administered by the DEC are strict liability offences.

POEO Act offences

Background to the POEO Act

The POEO Act streamlined and simplified NSW pollution law by repealing and replacing the provisions of the *Clean Air Act* 1961, the *Clean Waters Act* 1970, the *Pollution Control Act* 1970, the *Noise Control Act* 1975 and the *Environmental Offences and Penalties Act* 1989 ("**the EOP Act**"). The major regulatory provisions of the *Waste Minimisation and Management Act* 1995 were also incorporated into the POEO Act.

In the Second Reading speech for the POEO Act Ms Allan, Minister for the Environment, stated (New South Wales, Legislative Assembly, *Hansard*, 13 November 1997, at 1832-3, 1835-6):

> Through this legislation we are sharpening the teeth of the EPA and ensuring it has a full armoury to combat any threats to our environment from pollution.
> ...
> This Government is both aware of and acting on the urgent need to prevent harm to the environment and to ensure that we have ongoing improvement for future generations. ...
>
> The current legislation does not recognise sufficiently the importance of promoting sound environmental management within industry and the wider community, nor does it give appropriate emphasis to programs and policies that will prevent as well as control pollution. ... As well as delivering a single, comprehensive piece of legislation, the bill makes provision for a range of innovative programs that will enhance environmental outcomes.
> ...
> The Carr Government has also signalled with this bill that it is not all right to abuse the environment. This bill will significantly increase the penalties that may be imposed by the courts for the mid-range, or tier 2, offences. We want to send the strong signal to the offenders and the court that offences against the environment are not to be taken lightly...
>
> We are working to broaden the options available to the courts. We want changed behaviour and improved environmental performance and are giving the courts an opportunity to teach a salutary lesson to those who have been found guilty. ...

Tier 1 offences

Offences under the POEO Act are divided into three tiers of offences. Tier 1 offences are contained within Part 5.2 of the POEO Act (s 114(1)). These are considered to be the most serious offences and require proof of wilfulness or negligence. Tier 1 offences include offences such as the wilful or negligent disposal of waste in a manner that harms or is likely to harm the environment (s 115(1)) and wilfully or negligently causing any substance to leak, spill or otherwise escape in a manner that harms or is likely to harm the environment (s 116(1)). Tier 1 offences now carry maximum penalties of $5,000,000 (wilful) and $2,000,000 (negligence) for a corporation and $1,000,000 and/or 7 years imprisonment (wilful) and $500,000 and/or 4 years imprisonment (negligence) for an individual.

Tier 2 and Tier 3 offences

Tier 2 offences are all other offences under the POEO Act and regulations (s 114(2)). Tier 2 offences include offences such as pollution of waters (s 120), air pollution offences, pollution of land (s 142A), unlawfully transporting waste (s 143), unlawfully using land as a waste facility (s 144), and breach of licence conditions (s 64). The majority of Tier 2 offences under the POEO Act carry maximum penalties of $1,000,000 for a corporation and $250,000 for an individual. Some Tier 2 offences have much lower penalties, such as litter which now has a maximum penalty of $2,200 (see POEO Act s 145(1)).

Tier 3 offences are Tier 2 offences that are dealt with by way of penalty notice (s 114(3)). Penalty notice amounts range from $60 to $1,500 for individuals and $300 to $5,000 for a corporation for offences under the POEO Act and regulations (see Sch 1 of the *Protection of the Environment Operations (Penalty Notices) Regulation* 2004).

Most Tier 2 (and Tier 3) offences are strict liability offences (see discussion below) and do not require proof of mens rea. The maximum penalties for these offences are considerably lower than the Tier 1 offences which require proof of mens rea or negligence. It is noted that the Discussion Paper (at 6) refers to the offence of causing pollution to waters as being an absolute liability offence. However, the offence of water pollution under the POEO Act is a strict liability offence in NSW, not an absolute liability offence (see *Cooper v ICI Australia Operations Pty Ltd* (1987) 64 LGRA 58 at 65-66; *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715 at 719-720). It is the offence of causing pollution to waters under Victorian legislation which has been held to be an absolute liability offence (see *Allen v United Carpet Mills* [1989] VR 323).

<u>Prosecuting offenders under the POEO Act</u>

Prosecutions under the POEO Act and regulations may be taken by the EPA, and in certain circumstances, certain other authorities which have functions under the POEO Act such as local councils, the Maritime Authority of NSW or police officers.

The POEO Act sets out matters which must be taken into account by the court when imposing a penalty. Section 241 of the POEO Act provides:

> (1) In imposing a penalty for an offence against this Act or the regulations, the court is to take into consideration the following (so far as they are relevant):
> (a) the extent of the harm caused or likely to be caused to the environment by the commission of the offence,
> (b) the practical measures that may be taken to prevent, control, abate or mitigate that harm,
> (c) the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence,
> (d) the extent to which the person who committed the offence had control over the causes that gave rise to the offence,
> (e) whether, in committing the offence, the person was complying with orders from an employer or supervising employee.
> (2) The court may take into consideration other matters that it considers relevant.

<u>Alternative Sentencing Orders</u>

In addition to monetary penalties, the POEO Act provides a range of alternative sentencing options that the court may impose if an offender is found guilty of an offence under the POEO Act. These may be imposed in addition to, or in the alternative to, a monetary penalty. Alternative sentencing orders include matters such as ordering the offender to publicise the offence and its environmental consequences (s 250(1)(a)), ordering the offender to carry out a project to restore or enhance the environment in a public place or for the public benefit (s 250(1)(c)), ordering the offender to pay a specified amount of money to the Environmental Trust or an environmental organisation for them to carry out a specified environmental project (s 250(1)(e)) and ordering the offender to attend a training course or establish a training course for its employees (s 250(1)(f) and (g)).

NP&W Act offences

The NP&W Act and regulations contain offences that require proof of mens rea and offences that are regarded as strict liability offences. Examples of offences that require proof of mens

rea include knowingly destroying, damaging or defacing an Aboriginal object or Aboriginal place (s 90), and causing damage to any habitat (other than a critical habitat) of a threatened species, an endangered population or an endangered ecological community if the person knows that the land concerned is habitat of that kind (s 118D(1)).

Examples of strict liability offences include harming an animal that is within a National Park (s 45(1)(a)), certain offences relating to Aboriginal objects (s 86), harming protected fauna (s 98(2)(a)), and picking any plant that is, or is part of, a threatened species, endangered population or endangered ecological community (s 118A(2)). Some strict liability offences under the NP&W Act, such as s 45(1), s 86, s 98(2)(a) and s 118A, include imprisonment as a sentencing option (see *Corkill v Forestry Commission of New South Wales [No 2]* (1991) 73 LGRA 126 which held that s 98(2)(a) and s 99(1)(a) were strict liability offences even though imprisonment was a sentencing option).

Proceedings for an offence against the NP&W Act and regulations may be commenced by a police officer or by a person authorised by the Director-General (NP&W Act s 179(1)).

Prosecutions conducted by the DEC

The DEC conducts a number of prosecutions each year under various pieces of the legislation that it administers. Prosecutions commenced by the DEC (some of which are taken in the name of the EPA) are commenced in the Land and Environment Court of NSW (**LEC**) or the Local Court. The majority of prosecutions are conducted in the Local Court. The majority of prosecutions conducted relate to offences under the POEO Act, NP&W Act and regulations made under those Acts. In the 2005-2006 financial year DEC commenced a total of 180 prosecutions (91 of which were EPA prosecutions and 89 of which were prosecutions under the NP&W Act and regulations). 113 prosecutions were completed in the 2005-2006 financial year (75 EPA prosecutions and 38 prosecutions under the NP&W Act and regulations). In the past, approximately 110 EPA prosecutions have been conducted per year, with a success rate ranging between 94-98% over the past five financial years. The majority of prosecutions conducted by the DEC are in relation to strict liability offences. In addition to prosecutions the DEC also issues penalty notices for minor breaches of the legislation that it administers.

While prosecutions are an important part of the DEC's regulatory strategy, they are part of a wider, balanced enforcement strategy that includes a wide range of regulatory tools. Other regulatory tools available to the DEC include education, encouraging a voluntary approach towards environmental compliance, cautions, clean-up notices, prevention notices, civil enforcement, and accepting voluntary undertakings in connection with a matter in relation to which the EPA has a function under the POEO Act (including alleged offences). The availability of a wide range of regulatory tools ensures that the EPA can choose the most appropriate tool for the particular offender and for the particular circumstances of the offence. DEC has prosecution guidelines and policies which broadly follow guidelines developed by the Director of Public Prosecutions. These guidelines recognise that there is always a discretion as to whether or not to prosecute and that prosecution should not be the automatic outcome of any breach of the environmental legislation. Furthermore, the guidelines note that alternative regulatory strategies should be considered.

The importance of strict liability offences in environmental law

Although judicial consideration and academic discourse has historically focused more on environment pollution type offences, the principles discussed below are equally applicable to the wider array of environmental offences including Aboriginal cultural heritage protection, conservation and park management. In this submission, reference to "environmental offences" is used in this wider context.

Tier 2 offences under the POEO Act and regulations (and equivalent offences under its predecessor legislation) have generally been regarded as strict liability offences (for example, see *Cooper v ICI Australia Operations Pty Ltd* (1987) 64 LGRA 58; *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715 at 719-720; *Environment Protection Authority v Australian Iron & Steel Pty Ltd* (1993) 78 LGERA 373; *Environment Protection Authority v Water Board* (1993) 79 LGERA 103). Similarly, a number of offences under other pieces of legislation administered by the DEC, including the NP&W and regulations, are generally regarded to be strict liability offences.

As Bates has noted (in the context of offences under the POEO Act), "in the absence of any express indication to the contrary, the courts have generally presumed that the nature of environmental crime, as a crime against society as a whole, warrants imposition of principles of strict liability" (G Bates, *Environmental Law in Australia*, 5th Ed, Butterworths, 2002 at 207).

In the Court of Criminal Appeal decision of *Axer Pty Ltd v Environment Protection Authority* (2001) 113 LGERA 357 Mahoney JA, referring to the predecessor legislation to the POEO Act stated (at 359):

> The legislation does not seek merely to prevent deliberate or negligent pollution. It envisages that, at least in many cases, proper precautions must be taken to ensure that pollution does not occur. Experience has shown that it is not enough merely to take care: accidents will happen. The legislation envisages that in many cases care must be supplemented by positive precautions; business must be arranged and precautions taken so as to ensure that pollution will not occur.
>
> Precautions may be costly. The costs of precautions to avoid pollution will no doubt become accepted, in due course, as an ordinary cost of operating in an industry where, absent precautions, pollution may occur ... But I believe legislation of this kind contemplates that, in general, the costs of preventing pollution will be absorbed into the costing of the relevant industries and in that way will be borne by the community or by that part of it which uses the product which the industry produces ... The fine should be such as will make it worthwhile that the costs of precautions be undertaken ... Ordinarily, the fine to be imposed should be such as to make it worthwhile that costs of this kind be incurred.

Strict liability offences are therefore extremely important in environment law as they encourage industry to take positive steps to put proper precautions in place to prevent breaches of the law. This is particularly recognised in the large body of case law that has developed in relation to pollution type offences in NSW. As with other types of criminal offences, strict liability offences also have a strong deterrent effect.

In relation to conservation type offences, in *Corkill v Forestry Commission of New South Wales [No 2]* (1991) 73 LGRA 126 Stein J considered whether offences under s 98(2)(a) and s 99(1)(a) of the NP&W Act were strict liability offences. At that time, s 98(2)(a) of the NP&W Act provided that "A person shall not take or kill any protected fauna". Section 99(1)(a) provided that "A person shall not take or kill any endangered fauna". His Honour held that the offences were strict liability offences and stated that (at 143):

> In my opinion, a consideration of the subject matter of s 98 and s 99 of the NPWA does not support the need to establish a mental element. As I have said, the plain object of the provisions is to preserve protected and endangered species of fauna. This is an intention to achieve the protection of socially beneficial interests. It can be given effect to by making the actus reus itself the offence but preventing injustice by allowing a defence of honest and reasonable mistake. Additionally, as in *Caralis*, no express reference to a mental element is contained in the provisions. Indeed, as has been demonstrated, previous inclusions of "wilful" have been omitted. Provision for a gaol sentence is not conclusive: see, eg, *Caralis*. Furthermore, a class of "luckless

victims" should not be created because of the existence of the defence of honest and reasonable mistake. I am firmly of the view that proof (by the applicant) of guilty intent in the Forestry Commission is not required and the "offence" is one of strict although not absolute liability.

Comments addressing issues identified in the Discussion Paper

(a)(i) fault liability is one of the most fundamental protections of the criminal law and to exclude this protection is a serious matter and should only ever be done if there are sound and compelling public interest justifications for doing so

The DEC agrees that fault liability is one of the most fundamental protections of the criminal law. However, in relation to environmental offences there are sound and compelling public interest justifications for making a number of offences strict liability offences. Some of these justifications have been discussed above, namely that it is a means of ensuring appropriate preventative measures are taken and that these offences are considered to be crimes against society.

Strict liability and absolute liability offences have evolved in areas such as industrial safety and environmental regulation. Strict liability offences have evolved for a number of practical and policy reasons. Such offences have developed in recognition that in some situations it is appropriate to relieve the prosecutor of the virtual impossibility of proving intent or knowledge of the wrongful conduct. Related to this, strict liability offences are also seen as appropriate in situations where the "victim" cannot come forward to report the crime. Strict liability offences have also been created in response to the strong public policy reasons which underlie the decision that certain conduct should be considered criminal even where the person did not intend to commit an offence, but the conduct is otherwise morally reprehensible and worthy of criminal sanction. For example, as a matter of public policy, if a person cuts a pipe that causes oil to pollute nearby waters that person should not be exculpated from liability simply because that person says "I did not intend to pollute the waters" or "I could not afford to put in proper controls". Environmental offences often involve a calculated decision to avoid costs or to take a risk that the breach will not be detected. While this may not amount to intent, it evidences that the decision to breach the law is a positive/calculated decision.

Requiring proof of mens rea, such as knowledge, as an element of all environmental offences may encourage the regulated community, such as large industry, to take a "head in the sand" approach rather than encouraging them to implement appropriate measures to ensure that the environment is protected. The element of mens rea has generally been restricted to only the most serious of environmental offences (such as Tier 1 offences under the POEO Act).

Whilst mens rea is not an element of a strict or absolute liability offence, an offender's culpability will be a relevant factor considered by the prosecutor in deciding whether to prosecute or by a court in sentencing. For example, the culpability of an offender would be considered by the prosecutor as part of deciding whether to prosecute and considering the most appropriate charge(s) and defendant(s), and by the court in determining the appropriate sentence.

(a)(ii) strict and absolute liability should not be used merely for administrative convenience

The DEC accepts that administrative convenience alone should not be used to justify strict and absolute liability offences. However, the DEC notes that strict liability offences are appropriate where perpetrators of significant pollution incidents need to be held accountable for their actions and punished accordingly. As discussed above, strict liability offences have evolved in areas such as environmental regulation because of the recognised need to

protect the environment and to encourage the regulated community to take positive steps to prevent accidents which result in pollution.

(a)(iii) defences, such as due diligence, that take account of circumstances in which punishment for the prohibited conduct would be inappropriate should be available;

The DEC disagrees with this as a general principle that is broadly applicable to all environmental offences. There are some strict liability offences, such as environmental offences, where the only appropriate defence that should be available is the defence of honest and reasonable mistake of fact or such other defences which are specifically provided for in the particular piece of legislation, which may not necessarily include due diligence. Legislation administered by the DEC, such as the POEO Act and NP&W Act, does not include due diligence as a general defence for all strict liability offences (see discussion below). The availability of the defence of due diligence is not appropriate in relation to the majority of environmental strict liability offences. Where the defence is deemed to be appropriate it has been specifically provided for in legislation on a case by case basis.

Parliament, through statutes such as the POEO Act and NP&W Act, has generally indicated that it is not appropriate for the offence of due diligence to be available for all environmental offences. The POEO Act and NP&W Act provide for the defence of due diligence, but only in relation to limited offences. The general defence for Tier 1 offences under the POEO Act (offences that require proof of mens rea) is that the commission of the offence was due to causes over which the person had no control and the person took reasonable precautions and exercised due diligence to prevent the commission of the offence (POEO Act s 118). If a corporation commits an offence under the POEO Act or NP&W Act (which could either be a mens rea offence or a strict liability offence) its directors and persons concerned in the management of the corporation are also taken to have committed the offence (POEO Act s 169(1), NP&W Act s 175B(1)). It is a defence for directors and managers of a corporation who are in a position to influence the conduct of the corporation regarding an offence to prove that they used all due diligence to prevent the contravention by the corporation (POEO Act s 169(1)(c), NP&W Act s 175B(1)(c)).

In *Environment Protection Authority v Ampol Ltd* (1994) 82 LGERA 247, a Tier 1 offence under s 6(2) of the EOP Act (the predecessor to s 116(2) of the POEO Act), which requires proof of either wilfulness or negligence, an issue which arose was whether Ampol Ltd could be found to have been negligent. Essentially Ampol Ltd's led evidence about their compliance with industry codes, standards and practices and their compliance with other legislation. Pearlman J stated (at 255):

> Clearly, the purpose and intention of the *Act* is to cast upon all persons the obligation to avoid or minimise environmental harm.
>
> It is not to the point, therefore, that Ampol may have complied with other legislation, or with industry codes, standards or practices. ...
>
> Ampol's obligation under the *Act* did not rest on any of the standards; it was rather a general obligation to avoid or minimise environmental harm.

Although this was a Tier 1 offence, and therefore required proof of mens rea, the case highlights that arguments which may potentially be relevant to any possible defence of due diligence under environmental legislation, such as compliance with industry standards or other environmental statutes, are essentially not appropriate arguments in the context of the POEO Act (and its predecessors) which creates a general obligation to avoid or minimise environmental consequences.

It is noted that even in the absence of the availability of the defence of due diligence the prosecutor always has a discretion as to whether or not it is appropriate for a prosecution to be brought. The dominant factor in the exercise of such a discretion is the public interest

(see *EPA Prosecution Guidelines*, 2nd Ed (revised 2004) at 5-8). One of the factors that the *EPA Prosecution Guidelines* states arises for consideration in determining whether the public interest requires a prosecution is the degree of culpability of the offender. In some circumstances this may include consideration of matters which would otherwise be relevant to the defence of due diligence. Furthermore, in certain cases the Court may recognise that punishment in the particular circumstances of a case is inappropriate and may dismiss the charge under s 10 of the *Crimes (Sentencing Procedure) Act* 1999, refuse to convict the person or impose only a nominal fine.

(a)(iv) legislation creating strict and absolute liability offences should expressly provide that any other defences remain available

The DEC disagrees with this as a general principle that needs to be incorporated into NSW legislation. For the reasons set out above, not all statutory defences are appropriate to be available for environmental strict liability offences. In a number of cases it is appropriate that the only available defence is the common law defence of honest and reasonable mistake of fact. In relation to environmental offences, where Parliament considers that it is appropriate for other statutory defences to be available it has expressly provided what those other defences are.

The DEC is of the view that legislation creating strict and absolute liability offences only needs to expressly provide that any other defences remain available where there is some doubt about whether the common law position is being displaced. i.e. the common law position should remain the drafting convention in NSW.

(a)(v) strict and absolute liability offences should be applied only where the penalty does not include imprisonment

The DEC disagrees with this as a general statement. There are strict liability offences where it is appropriate to include imprisonment as a penalty option. Such mechanisms are necessary in the case of a number of environmental strict liability offences where the offences are essentially crimes against the public or aim to protect socially beneficial interests and the availability of a financial penalty may not prove to be a sufficient deterrent.

In relation to environmental offences monetary penalties may not provide a sufficient deterrent if the potential cost of contravening the environmental offence (i.e. the maximum penalty) is considered to be an acceptable cost of doing business or if the offender has no assets to lose. Furthermore, in relation to some strict liability environmental offences protection of the environment or its components is vital as the results of committing an offence may cause irreversible environmental loss. For example, it is an offence under the NP&W Act to pick any plant that is, or is part of, a threatened species, endangered population or endangered ecological community (s 118A). The protection of threatened species is of such importance, because damaging them may ultimately determine the survival of the species, that Parliament has considered it necessary to make the offence one of strict liability. In some circumstances, for example large profitable development sites, the threat of even a large fine may not provide a deterrent effect in comparison to the profits that may be made if the species did not exist in the location concerned. In such circumstances, the only real deterrent may be the threat of the person's liberty by potential imprisonment.

In the ICAC report *Taking the whiff out of waste: Guidelines for managing corruption risks in the waste sector* (2002), it was stated that:

> Waste generators often have a fragmented view of the waste cycle and a related concern with minimising waste disposal costs. As a result, they sometimes deliberately or unthinkingly classify and dispose of waste improperly. Lack of awareness about the waste sector means there is little public pressure for the industry to be more accountable for its practices.
>
> ...

There are many corruption risks associated with the waste sector. There is substantial money to be made by operating outside the regulated industry. The threat of detection is seen as relatively low. Compounding these problems, there are few, if any, filters on new players seeking entry into the sector.

In such circumstances, such illegal operators are outside of the responsible regulated community and are not responsive to public shaming or adverse publicity arising from a conviction. Where the money to be made or saved by committing an offence is substantial and the risk of detection is perceived to be low, the threat of monetary penalties alone for strict liability offences may not constitute a sufficient deterrent mechanism. Imprisonment may be the only viable option to pose a real deterrent mechanism and ensure that environmental compliance is achieved.

(a)(vi) monetary penalties should be assessed on a case by case basis and having regard to the lack of fault of the person punished and the legislative objective

The DEC is of the view that an arbitrary cap should not be set for all strict liability offences and that the appropriate maximum penalty for strict liability offences should be considered for each particular offence.

It is noted that the Committee has referred to the Commonwealth Attorney-General's Departmental Guidelines and the report of the Commonwealth Senate Standing Committee who have stated that for strict liability offences maximum penalties should be no more than 60 penalty units, being $6,600 for an individual and $33,000 for a corporation, but that the Committee recognises there are certain offences, such as water pollution, where higher penalties may be justified.

The DEC is of the view that environmental offences are one area where higher penalties than those suggested in the Commonwealth reports are strongly justified. High penalties are needed to ensure that persons, particularly industrial companies and developers, implement adequate precautions to comply with the legislation. The maximum penalties provided for offences (and sentences imposed by courts) need to be large enough to constitute a deterrence mechanism for industry and are not just subsumed as a cost of doing business (see *Axer Pty Ltd v Environment Protection Authority* (2001) 113 LGERA 357 at 359 per Mahoney JA). This principle applies equally to offences under the NP&W Act, particularly those related to matters such as threatened species, to ensure that developers put in place adequate measures to protect threatened species, rather than factoring any potential fine for their illegal destruction into the cost of the development. In *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 234, a threatened species prosecution under s 118(2) of the NP&W Act, Preston J (Chief Judge of the LEC) discussed the issue of the level of fines imposed by the court in relation to offences in light of any possible economic gain by offenders in committing offences. His Honour stated (at [152]-[156]):

> [C Hatton, P Castle and M Day, "The environment and the law does our legal system deliver access to justice? A review" (2004) 6(4) *Environmental Law Review* 240] recommended that in sentencing for environmental crime courts should place particular emphasis on "the environmental impact of an offence and the level of fine should reflect any economic gain arising from the offence": *supra*, p 264.
>
> Watson also reviewed sentences of courts for environmental crime: M Watson, "Environmental Offences: the Reality of Environmental Crime" (2005) 7(3) *Environmental Law Review* 190. He referred to sentences for wildlife crime, including damaging roosts for bats, and stated that:
>
> > "Property developers are obliged to protect or relocate the habitats of endangered species. It is generally easier – and much less expensive – to destroy them": *supra* at 198.
>
> Watson continued that:

> "Sentences tend to be lenient. This discourages future prosecutions. Environmental offenders can perhaps be forgiven that 'crime pays'. The 'economic calculus' must change": *supra*, p 199

In conclusion, Watson stated:

> "But environmental crime will remain profitable until the financial costs to offenders outweigh the likely gains. The anticipated net benefit of environmental crime to offenders much [sic] become negative...Degrading the environment must become economically irrational: *supra*, pp 199, 200.

The importance of the Court bearing in mind the economic realities of development of or that affects the environment and the need for the Court to impose a sentence which changes the "economic calculus" for those contemplating such development, was emphasised by Mahoney JA in *Axer Pty Ltd v Environmental Protection Authority* (1993) 113 LGERA 357 at 359-360. ...

The Courts use the maximum penalty provided for an offence to assess the seriousness with which Parliament and the community views the offence: see *Camilleri's Stock Feeds Pty Limited v Environment Protection Authority* (1993) 32 NSWLR 683 at 698 (Kirby P, Campbell and James JJ agreeing). The Courts use the maximum penalty to assess the appropriate penalty to impose in any particular case. Setting the maximum penalty at a low level indicates that Parliament views the offence as less serious. In the area of environmental law it is important to send a clear message that offences against the environment are viewed as serious crimes and will be punished accordingly, by setting maximum penalties that reflect that view.

In this respect, maximum penalties need to keep pace with community expectations regarding the seriousness of the offence. Maximum penalties in NSW environmental offences also need to keep pace with maximum penalties in other jurisdictions across Australia to prevent the development of "pollution havens".

It is noted that even in strict liability offences, where no proof of mens rea is necessary, courts determine the appropriate penalty in any particular case having regard to the maximum penalty available and all other relevant sentencing considerations, which may include the lack of fault of the defendant and the objects of the legislation.

The DEC also notes that the general limit on maximum penalties for strict liability offences that are applied at Commonwealth level need to be viewed in light of the fact that Commonwealth offence provisions may use civil penalty provisions as an alternative to strict liability criminal offences. For example, both s 181 and s 184 of the *Corporations Act* 2001 (Cth) require directors to act in good faith in the best interests of the company but s 184 makes it a criminal offence if the director has been reckless or intentionally dishonest i.e. there is no strict liability criminal offence in this situation. Civil penalties of up to $200,000 can be imposed (s 1317G *Corporations Act* 2001 (Cth)).

(a)(vii) strict and absolute liability offences should be of a regulatory nature (eg, public safety or protection of the environment), not serious criminal offences

While the DEC agrees that strict liability offences should be available for offences relating to protection of the environment, it disagrees (to the extent that this is implied in the discussion paper by question (a)(vii)) that environmental offences, including those traditionally regarded as strict liability offences, are not serious criminal offences. Environmental offences are regarded as criminal offences, many of which are regarded as serious criminal offences by the courts and the community. Furthermore, the DEC is of the view that while environmental offences are regarded as significant criminal offences, it is nevertheless still appropriate for some environmental offences to be strict liability offences.

In the recent case of *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419, which was a prosecution for water pollution under s 120(1) of the POEO Act, Preston J stated:

> The offence committed by the defendant is a crime; it is not a mere administrative breach: *R v United Keno Hill Mines Ltd* (1980) 1 YR 299; 10 CELR 43 at [9]. The community views pollution and other environmental offences as extremely serious: *Brimble v Epping Rubber Company Pty Ltd* [1990] NSWLEC 94 (17 August 1990); *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [145], [149]; B Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions" (1982-1983) 56 S Cal L Rev 1141 at 1151 and footnote 29; and D Chappell and J Norberry, "Deterring Polluters: The Search for Effective Strategies" (1990) 13 UNSWLJ 97 at 98-99, 100-101, 104.

Similarly, in *Bentley v BGP Properties Pty Limited* [2006] NSWLEC 34, a prosecution for picking a threatened species under s 118A(2) of the NP&W Act, Preston J stated (at [145], [148]-[149]):

> The informed and responsible public views the protection of the environment seriously. The longevity, extent and comprehensiveness of the response of the international, national and state communities to identify, assess and address environmental degradation is testament to the seriousness with which the issue is viewed.
> ...
> The offence provisions, including s 118A(2) of the NPW Act, are themselves designed to warn potential offenders of the seriousness with which the community views conduct which contravenes these requirements to protect threatened species, populations and ecological communities, to deter persons from such conduct and to punish those who nevertheless persist in engaging in such conduct.
>
> The Court must be alive to considerations of this kind and, by the sentence it passes, show its abhorrence of crimes against the environment and significant components of it such as threatened species, populations and ecological communities.

In *Camilleri's Stock Feeds Pty Limited v Environment Protection Authority* (1993) 32 NSWLR 683 at 698, Kirby P, with whom Campbell and James JJ agreed, referred to a number of relevant sentencing principles, including:

> While it is the function of the Court itself to assess the seriousness of the offence in question, the maximum penalty available for an offence reflects the "public expression" by parliament of the seriousness of the offence: *R v H* (1980) 3 A Crim R 53 at 65. Here, the maximum penalty is $125,000. Such a large penalty indicates the gravity of the offence as perceived by the community: see also the comments of the Hon T J Moore in *New South Wales Parliamentary Debates* (Legislative Assembly), 20 November 1990, 10037 at 10038.

(a)(viii) as a general rule, strict and absolute liability should be provided by primary legislation, with regulations used only for genuine administrative detail

The DEC disagrees with this proposition as a general statement. While Acts administered by DEC contain a number of offences, regulations made under those Acts contain a number of further offences of a more minor nature, including strict liability offences. For example, regulations made under the POEO Act create offences relating to "smoky vehicles" and "noisy vehicles", but the POEO Act itself contains the more serious offences. Furthermore, while the POEO Act permits regulations to be made creating offences, it limits the maximum penalty that can be imposed for those offences to $22,000 for an individual and $44,000 for a corporation (POEO Act s 323(3)), which are substantially lower than the maximum penalties provided for in the POEO Act.

(a)(ix) strict and absolute liability should depend as far as possible on the actions or lack of action of those who are actually liable for an offence, rather than be imposed on parties who must by necessity rely on information from third parties

The DEC agrees with this statement to a limited extent. DEC notes that areas such as waste transportation are difficult to regulate as rogue operators sometimes adopt a position of deliberate ignorance in an attempt to evade their responsibilities. To address this, some waste offences will place responsibilities on those who rely on information from third parties to ensure that they look behind that information. For example, s 143 of the POEO Act makes it an offence for a person to transport waste to an unlawful waste facility. The owner of the waste is also deemed to commit this offence. It is a defence if the owner or transporter received an "approved notice" and that the person had no reason to believe that the place where the waste was transported to could not lawfully receive that waste. That is, although the person has a defence based on information provided by a third party, the person needs to consider whether that information is reasonable.

The DEC's prosecution guidelines highlight that the most culpable person should be charged with an offence. As noted above in the context of waste enforcement, some environmental offences include provisions which deem others who did not directly commit the offence to be liable for the actions for another. Examples include owners of waste and owners of vehicles. These provisions have developed for deterrent reasons to ensure that other people who have an ability to influence the unlawful conduct are not able to escape liability on the basis that they were not directly involved in the unlawful actions. For example, there are strong public policy reasons relating to personal responsibility and a "cradle to grave" approach to waste generation and disposal which support the view that an owner of waste should be held accountable for ensuring that the waste is lawfully disposed of. Similarly, the owner of a vehicle should ensure that it is properly maintained so that it does emit excessive smoke or noise.

Corporate liability of directors and managers is another area of law where a person is held accountable for unlawful actions they did not directly commit. Rather, a director's liability stems from the fact that directors and managers of companies are the directing mind of that corporation and are in a position to influence the unlawful conduct or ensure that appropriate measures are put in place to prevent offences occurring in the first place.

(a)(x) the intention to impose strict or absolute liability offences should be explicit

The DEC agrees that it would assist both prosecutors and the community if legislation in NSW was required to explicitly state whether or not an offence is intended to be one of strict or absolute liability, although it is noted this is not the current drafting convention in NSW legislation.

Additional comments on other matters raised in Appendices 1 and 2

Investigative powers

The DEC notes that the extract of the Senate Standing Committee for the Scrutiny of Bills report contained in Appendix 1 of the Discussion Paper states (at 19) that:

> strict liability should not be accompanied by an excessive or unreasonable increase in agency powers of control, search, monitoring and questioning; any such increase in powers may indicate that the legislative and administrative scheme has structural flaws

The DEC is of the view that strong investigation powers are required in relation to all environmental offences, whether of a strict liability nature or otherwise, to ensure that potential breaches of the legislation can be effectively detected, especially where people are

trying to cheat the system or exploit potential loopholes. Strong investigative powers are also important to ensure that the regulated community knows that the risk of getting caught if they breach the law is high. They are also essential to respond to more sophisticated approaches by defendants who are deliberately attempting to undermine the law and investigations. Strong investigative powers are essential in relation to environmental offences as they are generally "victimless crimes" i.e. the environment cannot come forward to report violations.

It is noted that DEC officers that are appointed to exercise investigative powers are given training in the appropriate use of those powers. These powers are exercised in a cautious, balanced and appropriate manner. Officers are aware that having investigative powers does not automatically mean that they should be used; voluntary approaches are used where appropriate.

Costs to the regulated community

It is noted that on p 19 of the Discussion Paper (Appendix 1) the extract from the report of the Senate Standing Committee for the Scrutiny of Bills stated that:

> any potential adverse effects of strict liability on the costs of those affected should be minimised to the extent that this is possible; in particular, parties who are subject to strict liability should not have their costs increased as a consequence of an agency reducing its costs

The DEC notes that the costs of putting in place measures to prevent breaches of strict liability offences, and therefore ensure good environmental performance, are often far less than penalties imposed for the offences. For example, in *Environment Protection Authority v Gardner* (NSWLEC, Lloyd J, 7 November 1997), a Tier 1 waste offence under s 5(1) of the EOP Act there was evidence that the defendant had saved approximately $138,621.70 by illegally disposing of effluent. The defendant was convicted, fined $250,000, sentenced to 12 months imprisonment and ordered to pay costs.

Legislative review

Review of legislation plays an important role in considering whether offence and penalty frameworks remain up to date and reflect current community expectations. It allows assessment of how well offence and penalty provision are working in terms of issues such as deterrence of the regulated community.

Time limits for commencing prosecutions

Statute bar dates for prosecutions provided in legislation play an important role in ensuring that the time to prosecute an offender is reasonable. For example, statute bar dates for offences under the POEO Act vary according to the complexity of the investigation that may be involved. For example, Tier 1 offences under the POEO Act have statute bar dates of 3 years, as do certain Tier 2 offences relating to waste and pollution of land, whereas other Tier 2 offences have statute bar dates of only 12 months.

Appendix A – Acts administered by DEC

- Brigalow and Nandewar Community Conservation Act 2005
- Contaminated Land Management Act 1997
- Crown Lands Act 1989 (only for certain matters relating to the Jenolan Caves Reserves)
- Environmentally Hazardous Chemicals Act 1985
- Environmental Trust Act 1998
- Filming Approval Act 2004
- Forestry and National Park Estate Act 1998
- Forestry Restructuring and Nature Conservation Act 1995
- Forestry Revocation and National Parks Reservation Act 1996
- Forestry Revocation and National Parks Reservation Act 1983
- Forestry Revocation and National Parks Reservation Act 1984
- Lane Cove National Park (Sugarloaf Point Additions) Act 1996
- Lord Howe Island Act 1953
- Lord Howe Island Aerodrome Act 1974
- Marine Parks Act 1997
- National Environment Protection Council (New South Wales) Act 1995
- National Park Estate (Reservations) Act 2002
- National Park Estate (Reservations) Act 2003
- National Park Estate (Reservations) Act 2005
- National Park Estate (Southern Region Reservations) Act 2000
- National Parks and Wildlife Act 1974
- National Parks and Wildlife (Adjustment of Areas) Act 2001
- National Parks and Wildlife (Adjustment of Areas) Act 2005
- National Parks and Wildlife (Further Adjustment of Areas) Act 2005
- National Parks and Wildlife (Adjustment of Areas) Act 2006
- Nature Conservation Trust Act 2001
- Ozone Protection Act 1989
- Pesticides Act 1999
- Protection of the Environment Administration Act 1991
- Protection of the Environment Operations Act 1997
- Radiation Control Act 1990
- Recreation Vehicles Act 1983
- Road and Rail Transport (Dangerous Goods) Act 1997
- Roads Act 1993 (only in relation to Lord Howe Island)
- Royal Botanic Gardens and Domain Trust Act 1980
- Threatened Species Conservation Act 1995
- Waste Avoidance and Resource Recovery Act 2001
- Wilderness Act 1987