environmentaldefender's office newsouth wales

Court Imposed Fines and their Enforcement: Submission to the NSW Sentencing Council

8th June 2006

The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- *the importance of public participation in environmental decision making in achieving environmental protection*
- *the importance of fostering close links with the community*
- *that the EDO has an obligation to provide representation in important matters in response to community needs as well as areas the EDO considers to be important for law reform*
- *the importance of indigenous involvement in protection of the environment.*

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NSW Sentencing Council
GPO Box 6
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8th June 2006

Dear Chairperson,

Court Imposed Fines and their Enforcement

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment on court imposed fines and their enforcement.

We note that the Attorney General has requested that the NSW Sentencing Council examine:

- the effectiveness of fines as a sentencing option;
- the consequences of not paying fines; and
- the potential for greater use of alternate sentencing options.

The EDO is a community legal centre specialising in public interest environmental law. The EDO has 20 years experience in litigating environmental matters and participating in environmental law reform processes. In this context, our comments are confined to penalties in relation to environmental offences, predominantly in NSW.

Our experience and research has revealed discrepancies between the imposition of fines for different types of environmental offences. In particular, there is a significant differential in penalties imposed for pollution-related offences as compared with offences under natural resources legislation. The EDO would strongly support the instigation of a review by the Bureau of Crime Statistics and Research (BOCSAR) examining environmental crime and penalties. A comprehensive analysis would greatly assist in identifying inconsistencies in enforcement and sentencing between different areas of environmental regulation.

For the purposes of this inquiry we make comments in relation to:

1. **Penalties for environmental offences**
    a. **Purpose**
    b. **Enforcement**
    c. **Corporate Liability**

2. **Effectiveness of fines as a sentencing option**

3. **The consequence of failing to pay fines**

4. **Innovative sentencing options**

Appendix: Considerations for imposing penalties – case studies

1. Penalties for environmental offences

Purpose

Penalties are an important part of any effective regulatory framework as a tool for punishing behaviour which is deemed undesirable and promoting behaviour which is deemed desirable. The form and quantum of a penalty will generally depend on: 1

- The specifically defined purpose, usually retribution, deterrence or rehabilitation;2
- the area of activity being regulated – in this case environmental regulation;
- the type of wrongdoer - an individual or a corporation; and
- the nature of the wrong.

In relation to environmental offences, the EPA's *Prosecution Guidelines 2001* state that a primary aim of criminalising breaches of environmental law is deterrence. Deterrence is the theory that punishment serves to deter future offending, and can be either specific (deterrence of the individual offender from repeating the particular prohibited behaviour) or general (deterrence of others from engaging in the prohibited behaviour).3 Other purposes for penalties include social condemnation (through the stigma of a criminal record or the severity of a sentence of imprisonment), protection of the public and payment of compensation or reparation.

In NSW, section 241 of the *Protection of the Environment Operations Act 1997* (NSW) (*POEO Act 1997)* requires that when imposing a penalty, the court must take into account the following five factors:

- the level of environmental harm; the practical measures taken to prevent or lessen the harm;
- the foreseeability of the harm by the person who committed the offence;
- the level of control that the person who committed the offence had over the causes of the offence; and
- whether in committing the offence, the person was following orders from an employer or supervisor.

Other factors the court may have regard to include:4

- Evenhandedness;
- principle of totality;
- principle of proportionality;
- whether there is an early entry of a plea of guilty;
- lack of prior convictions;
- genuine contrition;

1 *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation*, ALRC 95, 2002, para 3.4.

2 See also the 7 factors set out in Part 3A of the *Crimes (Sentencing Procedure) Act 1999*).

3 Brown et al, *Criminal Laws – Materials and Commentary on Criminal Law and Process in New South Wales*, The Federation Press 2001, p1379.

4 Bates, G *Environmental Law in Australia*, Butterworths, Australia 2002, p.226-227.

- co-operation with the investigation;
- remedial measures undertaken;
- whether a repeat offence in likely; and
- any agreement voluntarily undertaken between the defendant and the regulator for environmental benefit.

Sentencing considerations were most recently considered by the Land and Environment Court in *Bentley v BGP Properties* [2006] NSWLEC 34 (6 February 2006). In *Bentley*, the defendant pleaded guilty to picking a threatened species in violation of sections 175A and 118A(2) of the *National Parks and Wildlife Act 1974* (NSW). The Act set the maximum penalty for the offence at $55,000, one year imprisonment, or both. The Court levied a discounted penalty of $40,000 and payment of prosecution's costs.[5] In reaching the sentencing decision, the Court discussed those factors to be considered in levying penalty, both statutory and judicial in origin. These factors are divided into the objective circumstances of the offence and the subjective circumstances of the offender. Objective concerns include: the maximum statutory sentence (as an expression of the public's admonition of the crime through the legislature); the environmental harm caused; the *mens rea* of the offender; the foreseeability of the risk of harm; the practicality of prevention; and the reasons for commission of the offence.[6] Subjective concerns include: the nature of the defendant; the defendant's response to the charges (including contrition or remorse, cooperation with authorities, any offer of compensation or restitution, or pleading guilty); and the defendant's character or prior criminality.[7] The Court noted that fines should be designed to deter both the charged offender from repeating his offence and other potential offenders from committing similar crimes. This concern is particularly important in environmental crimes.[8] Noting the trend that polluters absorb fines as an accepted cost of business, the Court discussed the importance of making fines high enough that the preventive "as-you-go" costs of cleaner operation become the more desirable financial decision for a potential polluter.[9]

The way that sentencing considerations have been applied by the Courts in NSW is summarised in relation to other cases in the **Appendix**. These examples are included in order to illustrate current judicial trends in considering monetary penalties for environmental offences.

Enforcement

The procedure by which penalties are imposed for breaches of environmental laws can be administrative, civil or criminal. We note that the focus of this inquiry is on court imposed fines, however in the context of environmental offences, there is an increasing preference for the use of administrative processes (such as issuing penalty infringement notices) rather than pursuing prosecutions. This is discussed further in Part 4 below.

While civil enforcement procedures provide for the penalties such as injunctions, revocations of licence, orders for compensation and orders for reparations, it is most

5 *Bentley* at 276 and 277.
6 *Bentley* at 163.
7 *Bentley* at 250.
8 *Bentley* at 139 and 140
9 *Bentley* at 150-158, citing C Hatton, "The environment and the law does our legal system deliver access to justice? A review." (2004) 6(4) *Environmental Law Review* 240 and M Watson, "Environmental Offences: the Reality of Environmental Crime" (2005) 7(3) *Environmental Law Review* 190.

common for judges to impose monetary penalties.10 The *POEO Act 1997* provides for a relatively broad and flexible arrangement for the power of courts to grant a civil remedy, with open standing to enforce breaches and court discretion regarding the type or the range of orders that may be appropriate. Similarly, criminal enforcement of environmental offences tend towards the imposition of fines rather than imprisonment.

Many pollution offences are 'instrumental', 'cold-blooded' or calculated crimes ie, capable of being deterred. While a strong penalty system is necessary for deterrence, penalties themselves are insufficient without an effective system of enforcement. It is also important to note that studies have consistently shown that *certainty* of being apprehended is a more significant factor in deterrence than the penalty itself.

Also important is certainty in punishment and in this regard, the EDO supports penalties being applied consistent with the principles of the He Kaw Teh Case. In *He Kaw Teh v R* (1985) 157 CLR 523, the High Court provided guidance on how to interpret criminal offence provisions in statutes by confirming the common law presumption that *mens rea* (a guilty mind through intention, recklessness or negligence) is an essential element of every criminal offence unless expressly or impliedly displaced by statute.11 The court classified statutory offences into three tiers as follows:

- Tier 1 (serious offences) – *mens rea* applies in full and therefore proof of a person's intention is necessary in order to convict a person of a crime.
- Tier 2 (mid-range offences) - strict liability where only the *actus reus* (the guilty act causing a proscribed effect) needs to be proved to convict a person of a crime. The only defence to a strict liability offence is a pleading of 'honest and reasonable mistake of fact' (the defendant was not aware of the facts that led to the commission of the offence).
- Tier 3 (minor offences) - absolute liability where there is no defence that can be pleaded.

These principles have been translated into legislation. Under the *POEO Act 1997*, Tier 1 offences include: disposal of waste-harm to environment, leaks, spillages and other escapes, emission of ozone depleting substances;12 and Tier 2 offences include polluting, causing or permitting pollution to water, air, noise and land in NSW.13

While the tendency is for environmental legislation to specify whether *mens rea* is required to commit an offence, in the absence of express statement by statute, the courts have presumed that the nature of environmental crime, a crime against the public at large, is a strict liability crime ie, a Tier 2 offence (examples include breaches of conditions of development consents, disposal of waste on land and land degradation).14

It is interesting to note how different penalty options have been applied to different offences handled by the Department of Environment and Conservation (DEC). Some of

10 ALRC report *op cit*, para 2.67.
11 Bates, *op cit*, p206.
12 *POEO Act 1997*, ss115, 116,117.
13 *POEO Act 1997* ss120, 124, 136, 143.
14. Bates, *op cit* p 207. Tier 1 offences are the offences under Part 5.2 of the Act; Tier 2 offences are all other offences under the Act or the regulations; and Tier 3 offences are tier 2 offences that may be dealt with under Part 8.2 of the Act by way of penalty notice.

the results from the DEC Annual Report 2004-515 are summarised in the following table.

	Number of prosecutions/PINs	Penalty
Tier One Offence	1 offence (negligent disposal of waste in a manner that harms or is likely to harm the environment)	Penalty: $30,000 (L&E Court)
Tier Two Offences	122 offences (under POEO Act 1997, regulations regarding clean air, noise, dangerous goods; and 2 offences under the *National Parks and Wildlife Act 1974*).	Total fines: $513,675 Fines ranged from $100 for a noisy vehicle to $40,000 for unlawfully transporting and depositing waste.
PINs	The total PINs issued for environmental offences by a) DEC authorised officers amounted to 3539; b) Local Government authorised officers equating to 6787	$1,270,840 $3,456,740. Total: $4,727,580

While this tiered categorisation is explicit under pollution-related legislation, it is less clear in the areas of natural resources law and planning law. Without clear guidance categorising the type and 'seriousness' of environmental crime, achieving consistency in determining the correlative proportionate penalty is problematic. As noted by the Chief Judge of the Land and Environment Court in his address "Principles Sentencing for Environmental Offences" to the Annual EDO Conference 2006: 16

> "…Parliament varies in its inclination to and frequency of review and updating of statutory maximum penalties. Pollution statutes are more frequently reviewed than other statutes.35 Other statutes have been left alone, with the consequence that in relative terms the statutory maximum penalties appear disproportionately low.
>
> The maximum penalty might apply to a large class of offences, such as for all contraventions of a statute. The class may contain a wide diversity of conduct. For example, breaches of the *Environmental Planning and Assessment Act* 1979 (NSW) can range from the trivial, to the most serious. Yet the same maximum penalty of $1,100,000 applies to all offences against the Act. This lack of discrimination in the maximum penalty introduces difficulty in ranking different offences.
>
> The result is that the maximum statutory penalty may not be an accurate or helpful basis for determining the relative seriousness of offences as against each other.
>
> A second difficulty is determining by what criteria the penalty scale should be anchored, that is to say, how should its overall degree of punitveness be decided?
>
> The magnitude of a penalty scale seems to derive from tradition and from the habit of associating offences of a certain gravity with penalties of a certain severity. However, the problem with environmental offences is that there is little tradition to draw upon. Many offences are of comparative recent origin. There may have been few prosecutions and hence inadequate

15 See pp150 – 155.

16 The Hon Justice Brian J Preston, Chief Judge, Land and Environment Court of NSW "Principled Sentencing for Environmental Offences" A paper presented to the EDO Annual Conference "Making Law Work: Improving environmental compliance and enforcement in Australia" 26th May, Darlington Centre, Sydney. This paper is available at: http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/EDO_Conference.pdf/$file/EDO_Conference.pdf.

> sentencing data. Sentences given have mostly been fixed at the low end of the penalty scale. However, the maximum penalty has been continually increased by Parliament. Very few offenders have ever been sentenced at the higher end of the scale. It is also far more difficult in cases of environmental offences to conjure up what is the worst category of cases. Accordingly, there are difficulties in determining where along a penalty scale particular criminal conduct falls."

Corporate Liability

Corporate liability for environmental offences has received an increasing amount of attention of the last decade, with different penalties targeted at individuals and corporations. It is generally recognised that corporations need to be subjected to the criminal law due to their central role in today's society in controlling the means of production, distribution and exchange of goods and services. Corporations are able to engage in extremely large scale developments which have the potential to cause equally large scale environmental damage. It is appropriate therefore, that corporations attract higher penalties than individuals due to the likelihood that their actions will have a greater potential effect on the environment and because of the greater benefit corporations are likely to gain for the commission of the same offence. Penalties for corporate environmental crime have recently been increased.17 Section 119 of the *POEO Act 1997* now provides:

> **119 Maximum penalty for tier 1 offences**
> A person who is guilty of an offence under this Part is liable, on conviction:
> (a) in the case of a corporation—to a penalty not exceeding $5,000,000 for an offence that is committed wilfully or $2,000,000 for an offence that is committed negligently, or
> (b) in the case of an individual—to a penalty not exceeding $1,000,000 or 7 years' imprisonment, or both, for an offence that is committed wilfully or $500,000 or 4 years' imprisonment, or both, for an offence that is committed negligently.

Tier 2 offences have also increased. Water pollution offences maximum penalties have been set at $1,000,000 with $120,000 for each day the offence continues for corporations; (compared with $250,000 with $60,000 for each day the offence continues for an individual).18 Similarly, waste offences provide for penalties of $1,000 000 penalties for corporations (compared with $250,000 for individuals).19 The EDO strongly supports these increased maximum penalties.

In relation to imposing fines, the key concern is that fines are sufficiently large to punish and deter inappropriate corporate behaviour, and not simply be factored into the budget of a corporation as an incurred expense of doing business. Environmental crime will remain profitable until the financial cost to offenders outweigh the likely gains.20 Fines need to be sufficiently high to affect corporate profitability and prestige.

As noted by the Court in relation to pollution fines:

> Precautions may be costly. … 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

17 *Protection of the Environment Operations (Amendment) Act 2005*. Amendments commenced on 1st May 2006.
18 Section 123 *POEO Act 1997*.
19 Section 143, 144 *POEO Act 1997*.
20 M Watson, "Environmental Offences: the Reality of Environmental Crime", (2005) 7(3) Environmental Law Review 190 at 199-200.

worthwhile that costs of this kind be incurred. 21

Progress has been made in terms of broadening the criminal liability for corporations in that, while corporate officers are not liable for offences committed by their corporations at common law, most Australian jurisdictions have introduced legislation imposing personal criminal liability on corporate officers: section 169 *POEO Act 1997*.22 The EDO supports the use of a range of innovative sentencing orders to ensure that corporations are held accountable for actions which may impact the environment. The use of these mechanisms should be advocated for all new legislation and proposed amendments to existing legislation. These are discussed below in Part 4.

2. Effectiveness of fines as a sentencing option

The Australian Law Reform Commission Report, *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation*, ALRC 95, 2002 has identified principles for assessing effective regulation as: transparency; accountability; proportionality; consistency, and targeting23. In the area of environmental law, the EDO submits that as recognition of the real and potentially serious consequences of environmental crime are better understood and taken seriously by the legislature, the proportionality, consistency, and targeting of penalties will improve. Increased penalties are evidence of the recognition now given to the significant impact of environmental crime. This is becoming more evident regarding pollution offences, for example, in 2005 a Victorian record fine of $1 million was handed down to a ship owner for an oil spill at Phillip Island.24

The case study of illegal clearing of native vegetation illustrates current discrepancies in consistency and proportionality of sentencing. Historically, relatively low financial penalties have been imposed on landholders in breach of the *Native Vegetation Conservation Act 1997* (NSW); however a recent substantial penalty imposed for land clearing under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) sent a signal that illegal land clearing will be taken more seriously.25 However at the same time, the deterrence value of significant fines has the potential to be undermined by the overuse of administrative penalties and the under use of prosecutions. The recently released Compliance Policy of the Department of Natural Resources indicates a preference in NSW to use Penalty Infringement Notices (PINs) for breaches of medium to high significance. This is discussed further below.

Increased fines and deterrence

As noted, the EDO supports penalties being increased, in order to increase deterrence as well as punish an offender. However, we note that criminological research points clearly to the fact that certainty of being caught is a more important factor in deterrence than the penalty. Therefore, increased penalties without increased resources being put into enforcement, are of limited value. As noted by Jacobs J of the High Court:

21 *AXER Pty Ltd v EPA* - 113 LGERA 357 (CCA 1993).
22 Lipman and Bates, "Pollution Law in Australia", Lexis Nexis Butterworths, Australia, 2002, p.183.
23. ALRC Report, *op cit* para 3.122.
24 Melbourne Magistrate's Court: Ship Owner RSS, ship's master: Ergard Schuschan. See www.abc.net.au/news/newsitems/200512/s1535173.htm.
25 *Greentree v Minister for the Environment and Heritage* [2005] FCAFC 128.

> "The deterrent to an increased volume of serious crime is not so much heavier sentences as the impression on the minds of those who are persisting in a course of crime that detection is likely and punishment will be certain. The first of these factors is not within control of the courts; the second is. Consistency and certainty of sentence must be the aim… Certainty of punishment is more important than increasingly heavy punishment."26

In relation to amendments that were made to the *POEO Act 1997* which increased maximum penalties, the Minister stated in Parliament:

> Fines and penalties underpin the successful operation of the Protection of the Environment Operations Act. … This Bill will increase the fines and penalties in the Act to maintain their original deterrent value. … These increased fines will send a strong message to potential polluters that they will be caught and they will be punished.27

Similarly, judicial opinion includes:

> "The action of the legislature in almost tripling the maximum sentence for a particular type of offence must be taken by the courts as reflecting community standards in relation to the seriousness of that offence, and the courts are required to give effect to the obvious intention of the legislature that the existing sentencing patterns are to move in a sharply upward manner"28

However it is important to note that proportionality still applies in sentencing:

> It does not follow, …, that every offence for which a fine of $X would have been imposed under s16 of the Clean Waters Act should result in a fine of $2X under s120 of the Act. Offences of low criminality remain offences of low criminality even if the maximum penalty is increased, and the increase can readily be recognised as operating as a deterrent to wilful disregard of statutory obligations.29

Civil penalties

Recent developments in environmental law enforcement arguably suggest a greater potential for deterrence and punishment through application of civil penalties. The Western Australian government has indicated an intention to set a new maximum fine of $5 million for corporations who breach the Environmental protection Act and to include civil penalties which require less proof.30

The enforcement of pollution law in the United States has long been dependent on the existence and enforcement of civil penalties by the prosecuting authorities. The Australian Law Reform Commission has previously considered these issues.31 Civil penalties are presently incorporated as an option under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (*EPBC Act 1999*) and are being considered in South Australia.32 A discussion of considerations in the Federal *Greentree* prosecution is included in the Appendix.

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26 *Griffiths* (1977) 137 CLR 293, 327.

27 Mr Bob Debus, Attorney General, Minister for the Environment, HANSARD, 2nd Reading Speech, 28 November 2005.

28 *R v Slattery* – 90 A Crim R 519 CCA 1996.

29 Carbonne Shire Council v EPA – 115 LGERA 304 (CCA 2001).

30 See www.abc.net.au/news/newsitems/200605/s1649859.htm.

31 See ALRC Discussion Paper 65 *Civil and Administrative Penalties: Civil and Administrative Penalties in Australian Federal Regulation* April 2002.

32 See, for example, (Cth) *Environment Protection and Biodiversity Conservation Act 1999* sections 20 and 20A.

The use of civil and administrative penalties to address environmental offences appears to be focussed on punishment. However, whilst legislation such as the *EPBC Act 1999* contains a wide range of environmental offence and penalty provisions, the aims of the Act in relation to these provisions, are not clear. Rather, they have been established without any reference to general principles or an organising framework.

The EDO strongly supports the inclusion in legislation of guiding principles for the administration of environmental penalties, so that those involved with and affected by the legislation have a clear understanding of their rights, roles and responsibilities. Stating up front the philosophical and operational basis upon which the legislation is based, is also more likely to promote greater consistency of interpretation of the legislation, and assist in determining whether the scheme is meeting its goals.

Effectiveness of fines for corporate offenders

Despite our strong support for increased fines for corporate environmental offenders, we note that certain limitations have been identified regarding the imposition of fines on large corporations.33 These include:

- Large monetary penalties do not necessarily result in corporate offenders taking internal disciplinary action against responsible officers and that, as a consequence, internal controls are often not revised to prevent further contraventions;
- The burden of large monetary penalties may be borne by shareholders, workers or consumers rather than the responsible officers of the offending corporation;
- Monetary penalties may convey the impression that offences are purchasable commodities or a cost of doing business;
- A large monetary penalty may force a corporation into liquidation. The court may be faced with the choice of putting the company into liquidation or imposing a penalty that does not reflect the gravity of the offence; and
- Monetary penalties are prone to evasion through the use of incorporated subsidiaries and other avoidance techniques such as asset stripping.

In light of these limitations, the EDO supports the use of additional innovative sentencing orders (to supplement fines) targeted at specific corporate behaviour, as discussed below in Part 4.

3. The consequence of failing to pay fines

At the recent EDO Annual Conference "Making law Work: Improving Environmental Compliance and Enforcement in Australia"34 problems relating to the payment of fines were discussed in the broader context of challenges to enforcement of environmental law. A representative from the Department of Environment and Heritage reported that in relation to the *Greentree* case (as discussed above and in the Appendix), the Department had to threaten bankruptcy in order recover the $450,000 fine following the case. It was indicated that the time, staff and financial resources required for this post-decision follow-up were considerable.

33 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), Australian Law Reform Commission, Sydney, para 10.3.
34 Friday 26th May, 2006, Darlington Centre, University of Sydney.

In NSW there are mechanisms in place for contempt of court proceedings to be undertaken where there is a failure to comply with a court order. Most court orders specify payment of a fine within a specified period, and contempt proceedings may be commenced after that period has elapsed. There are currently 76 contempt decisions listed on the land and Environment Court website.35 The majority of these are for failure to carrying out clean up or remediation orders, however proceedings could be commenced to enforce a fine order. We note the DEC Annual Report 2004-5 lists a successful action for contempt where a penalty of $50,000 was imposed for failure to comply with orders.36 This sends a positive signal that courts will take contempt of environmental orders seriously, however, as noted, recovering a fine can be a resource intensive exercise.

4. Innovative sentencing options

Court Orders

Section 250 of the *POEO Act 1997* currently provides for the Court to make a number of additional orders designed to target the nature of corporations and to best protect the environment. Section 250 states:

> **250 Additional orders**
>
> (1) **Orders**
> The court may do any one or more of the following:
> (a) order the offender to take specified action to publicise the offence (including the circumstances of the offence) and its environmental and other consequences and any other orders made against the person,
> (b) order the offender to take specified action to notify specified persons or classes of persons of the offence (including the circumstances of the offence) and its environmental and other consequences and of any orders made against the person (including, for example, the publication in an annual report or any other notice to shareholders of a company or the notification of persons aggrieved or affected by the offender's conduct),
> (c) order the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit,
> (d) order the offender to carry out a specified environmental audit of activities carried on by the offender,
> (e) order the offender to pay a specified amount to the Environmental Trust established under the *Environmental Trust Act 1998*, or a specified environmental organisation, for the purposes of a specified project for the restoration or enhancement of the environment or for general environmental purposes,
> (f) order the offender to attend, or to cause an employee or employees or a contractor or contractors of the offender to attend, a training or other course specified by the court,
> (g) order the offender to establish, for employees or contractors of the offender, a training course of a kind specified by the court,
> (h) if the EPA is a party to the proceedings, order the offender to provide a financial assurance, of a form and amount specified by the court, to the EPA, if the court orders the offender to carry out a specified work or program for the restoration or enhancement of the environment.

Under an adversarial system, it is incumbent on the prosecuting authority, the EPA, to seek such orders. Furthermore, a Local Court is not authorised to make an order referred to in paragraph (c), (d), (e) or (h). In terms of failure to comply with orders, section 250 goes on to state:

> (2) **Machinery**
> The court may, in an order under this section, fix a period for compliance and impose any other requirements the court considers necessary or expedient for enforcement of the order.

35 See http://caselaw.lawlink.nsw.gov.au/index.html.
36 See E*PA v Thaler* [2005] NSWLEC 109.

(3) **Failure to publicise or notify**
If the offender fails to comply with an order under subsection (1) (a) or (b), the prosecutor or a person authorised by the prosecutor may take action to carry out the order as far as may be practicable, including action to publicise or notify:
(a) the original contravention, its environmental and other consequences, and any other penalties imposed on the offender, and
(b) the failure to comply with the order.
(4) **Cost of publicising or notifying**
The reasonable cost of taking action referred to in subsection (3) is recoverable by the prosecutor or person taking the action, in a court of competent jurisdiction, as a debt from the offender.
(5) **Financial assurances**
Sections 302–307 apply to a financial assurance provided by an offender under an order made under this section in the same way as they apply to a financial assurance given by a holder of a licence under a condition of a licence under Part 9.4.

In practical terms this means a Court may order an offender to take action to clean-up or prevent a further offence; pay any costs of clean-up or losses; pay investigation costs; undertake works for environmental benefit, including fund environmental organisations; complete audits, training and financial assurances; publicise offences or notification certain people; and remove any monetary benefit of the crime.

Similarly in Victoria, section 67AC *Environment Protection Act 1970* provides a broad discretion to a court in deciding on a penalty including imposing requirements regarding: publication of the offence and penalties imposed; notification of one or more people in a manner specified; carry out a specific project for restoration or enhancement of the environment in a public place or for the public benefit (even if the project is unrelated to the offence); or carry out audits of activities.37

The DEC 2004-5 Annual Report indicates that for Tier 2 offences, a range of financial penalties were imposed (as noted above) however, several of the more serious offences also attracted additional orders. For example:

- Cargill Australia Ltd was ordered to enhance the environment by planting trees to the value of $32,000 for emitting an offensive odour from scheduled premises.
- Goulburn Wool Scour Pty Ltd polluted waters and was ordered to enhance the environment by regenerating bushland to the value of $20,000 (for polluting waters)
- Andrew Howard Slade was ordered to build a $20,000 cattle proof fence on a border with a national park (for unlawful use of land as a waste facility)
- Steepleton Pty Ltd unlawfully transported and deposited waste and was fined $40,000 and ordered to publicise details of the offence in *The Newcastle Herald* and the *Waste Management and Environment Journal*.
- Terrace Earthmoving Pty Ltd unlawfully transported and deposited waste, and was also ordered to publicise details of the offence in *The Newcastle Herald*
- Yolarno Pty Ltd, was charged with air pollution caused from a failure to deal with materials in a proper and efficient manner, and was ordered to restore Ploughman's Creek to the value of $10,000 and to publicise details of the offence in the *Central West Daily*.

37 "Trends in Environmental Prosecution" Rosemary Martin, Paper presented at the National Environmental Law Association Ltd, national Conference, July 2005 Canberra.

The EDO encourages the use of additional orders where appropriate. The orders currently available could be extended further, for example to include corporate probation orders, which would allow the court to insist that the corporate defendant undertake satisfactory internal disciplinary action in response to the commission of an offence.

The use of administrative penalty procedures

In NSW, a trend can be observed amongst certain departments in favour of administrative penalties being imposed or enforced automatically by a regulator without intervention by a court or tribunal. These generally aim to recover monetary penalties pre-determined under legislation and usually carry a right of review (both merits and judicial review). We note that penalty notices are not an administrative penalty as such but "an administrative device to dispose of a matter that involves a criminal or non-criminal breach".38 The EDO is concerned about the potential overuse of PINs and the bypassing of the court process for serious offences.

With regard to the use of PINs, the EDO has previously noted that "intentional offences should warrant more serious penalties, and not allow an offender to 'write off' a minor fine as part of the cost of the development. The availability of PINs for intentional offences undermines deterrence."39 The EPA's *Prosecution Guidelines 2001* provide the following summary as to when penalty notices are appropriate:

> "Penalty notices: Summary
> 12.11 Penalty notices are appropriate where:
> (a) the breach is minor;
> (b) the facts are apparently incontrovertible;
> (c) the breach is a one-off situation that can be remedied easily; and
> (d) the issue of a penalty notice is likely to be a practical and viable deterrent.
> 12.12 It is not appropriate to issue penalty notices where:
> (a) the breach is on-going and not within the alleged offender's capacity to remedy quickly;
> (b) the penalty prescribed on the notice would be clearly inadequate for the severity of the offence;
> (c) the extent of the harm to the environment cannot be assessed immediately;
> (d) the evidence is controversial or insufficient such that if a Court heard the matter, it would be unlikely to succeed;
> (e) a period of 14 days has elapsed since the alleged breach;
> (f) negotiations to find a resolution to the problem which is the subject of the breach are being conducted already with the EPA;
> (g) a direction via notice has been issued by the EPA to perform specified work within a time-frame and the time limit for such performance has not expired;
> (h) at least one of the motivations for issuing a penalty notice to public authorities is to avoid the consultative procedures set out in the Premier's Memorandum No. 97-26 Litigation Involving Government Authorities; and
> (i) multiple breaches have occurred."

As noted above, the EDO has concerns regarding the recently released Compliance Policy for guiding DNR prosecutions under the *Native Vegetation Act 2003*. The policy indicates that PINs are an option for both medium and high significance offences. This is contrary to the rationale behind PINs as expressed in the EPA Prosecution Guidelines, that they should only be used for minor breaches. The EDO submits that for serious

38 ALRC Report *op cit*., para 2.67.

39 EDO submission on proposed *National Parks and Wildlife Amendment (Threatened Species) Regulation 2005, Threatened Species Conservation Amendment (Listing Criteria) Regulation 2005, and the Threatened Species Conservation (Savings and Transitional) Amendment (Significant Effect) Regulation 2005*, July 2005, p.1.

offences there continues to be an important role to be played by courts in imposing increasing penalties. This is commensurate with the increasing recognition of the serious impacts of environmental crime.

If you require further information, please contact Rachel Walmsley on 02 9262 6989 or rachel.walmsley@edo.org.au.

Yours sincerely,
Environmental Defender's Office

Rachel Walmsley
Policy Director

Appendix: Considerations for imposing penalties – case studies

New South Wales

Environment Protection Authority v Coe Drilling Australia Pty Ltd [2005] NSWLEC 719

Offence: In *Coe Drilling*, the defendant pleaded guilty to violating s 120(1) of the *POEO Act 1999* in discharging bentonite into wetlands while drilling for a water pipeline. The statutory maximum fine for the offence was set at $250,000.

Penalty Considerations:

- Based upon reports of three studies performed pursuant to the incident (one engaged by the principal for whom the defendant was drilling under contract and two engaged by the DEC) the Court found that there was little or no risk of significant long or short-term effects on the environment.
- The Court incorporated the same list of considerations to be discussed in *Bentley* in deciding a sentence. This included the weighing of the objective nature of the offence and the subjective circumstances of the offender.
- The court noted that the fact that an offence occurs in relation to contractual actions taken for material gain will heighten the deemed severity of the offence.
- As in *Bentley*, the Court seems to give a significant amount of weight to subjective mitigating factors such as the remorse of the offender and the defendant's guilty plea.

Penalty: The Defendant ultimately was sentenced $18,000 penalty and to pay prosecution's costs of $20,000.

Environment Protection Authority v Incitec Ltd [1999] NSWLEC 18

Offence: "A large amount of ammonia gas was discharged under pressure [by the company] into the air at Kooragang Island and caused some impacts in the Stockton area"

Penalty considerations:

- There was potential of serious environmental harm, and there was actual environmental harm.
- Defendant has implemented various strategies to prevent a recurrence of this incident. However, the crucial structural elements of those strategies could well have been implemented **prior** to this incident, at relatively **modest** cost;
- The company had environmental management systems in place, even if they were not brought together in one protocol.
- The early plea, and agreement to pay the Prosecutor's costs.
- The defendant's contrition, and its remedial initiatives (the remedial reaction of the defendant was instinctive and very rapid but 333kg of ammonia was released and residents 2.1km away);
- The defendant's co-operation with the Prosecutor, and
- The defendant's practical concern for those affected by the incident.

Penalty: fine of $25,000 (20% of the maximum)

Environment Protection Authority v Metziya Pty Ltd [2003] NSWLEC 196

Offence: Breach of section 120(2) of the *POEO Act 1997* for causing water to be polluted, ie for the discharge of soil from premises (occupied by the Defendant) into waters as a result of earth moving works carried out at the premises.

Penalty considerations:

- S 241(1) factors to be taken into account when determining penalty
    - (1)(a): "the fact that there is no evidence of actual harm beyond the actual pollution itself will be relevant to the question of penalty in terms of the seriousness of the offence."
    - (1)(b): "measures to prevent, control, abate and mitigate the harm could have been taken. While the Defendant emphasised a lack of action or cause for any concern being raised by the Department of Land and Water Conservation officers in their inspection on 1 February 2002, this does not excuse the Defendant's obligations under the POEO Act."
    - (1)(c)-(d): conceded, not disputed by Defendant.
    - (1)(e): not relevant
- Defendant's actions were not deliberately intended to cause the pollution offence with which it was charged, but largely arose as a result of oversight on the Defendant's part.

- General deterrent: companies carrying out construction work should be sent a clear message that adequate steps need to be taken in terms of sediment and erosion control to ensure that waters are not polluted by sediment and other inorganic material running off premises during the construction phase.
- Specific deterrent: "Given this is the first time that this Defendant has been before this Court, its expression of contrition, and that steps were taken promptly to clean up after the incident, I do not consider there is a particular need for an element of specific deterrence in the penalty to be imposed."

Penalty calculations

- Taking into account the circumstances of the case, a penalty of $30,000, representing 12% of the maximum penalty, was imposed.
- This was reduced by mitigating factors. First, the Defendant pleaded guilty at a very early stage and thus was entitled a discount of 25% (*R v Thompson*; *R v Houlton* (2000) 49 NSWLR 383). Second, the Defendant expressed contrition and remorse. Third, the Defendant co-operated at all times with the Prosecutor in participating in a record of interview, in the prompt clean up after the pollution event, and fourth, the Defendant is a significant contributor to the local community in Blayney and is a significant employer in that community. Finally, the Defendant has agreed to pay the Prosecutor's cost in the amount of $14,000. The penalty was thus discounted by 35%.

Penalty imposed: $19,500. The court allowed the Defendant time to prepare a proposal for a project (to do with the river which it polluted), to allow the Defendant to obtain an order under s 250(1)(c).

Environment Protection Authority v Caltex Refineries Pty Limited [2005] NSWLEC 761

Offence: Breach of section 120 of the *POEO Act* whereby the Defendant polluted waters through the leakage of chemicals from the Defendant's underground pipeline.

Sentencing considerations:

- Sentence discount due to Defendant's guilty plea
- The Defendant, through its general manager Mr Edward Matthew Tomp, expressed remorse and contrition for the offence, showing genuine concern and disappointment that the pipeline had failed.
-The Defendant has also co-operated throughout with the prosecutor. The offence was reported within 1 hour and 40 minutes of the occurrence and as soon as it became known to the defendant. The Defendant has also agreed to pay the costs of the prosecutor. Voluminous evidence was tendered concerning the steps it is taking for its environmental program and the substantial expenditure which is to be made in respect of those matters.
- The environmental harm is virtually non-existent, however it was noted that the responsibility imposed on the Defendant in handling dangerous chemicals requires the highest degree of care.

Penalty: The court first considered the maximum penalty prescribed for this offence ($250,000) and then considered that the appropriate penalty to be $60,000. This was reduced by 25% to $45,000 in view of the early plea of guilty.

Environment Protection Authority v Timber Industries Ltd (2001) NSWLEC 25 – paragraph 33

Offence: Polluting waters under the *POEO Act 1997*

Penalty considerations:

- The doubling of a penalty does not mean that the Court should simply impose a penalty effectively twice that which the Court would have imposed prior to the operation of the current penalty.
- "The proper approach of the Court must be to assess the relative seriousness of the particular offence in relation to a worst case for which the maximum penalty is now provided; that is, the penalty to be imposed is that which correlates upon the scale of penalty set by the legislature from zero to the maximum: *Camilleri's Stock Feeds Pty Ltd v EPA* (1993) 32 NSWLR 683 at 698."
- "The increase in penalty must be taken as indicative of the legislature's reflection of community standards in relation to the seriousness of the offence (*R v Slattery* (1996) 90 A Crim R 519), and it is the increased penalty against which the penalty for this particular offence must be measured."
- The Defendant's plea of guilty entitles it to a discount in the range of 10 - 25 per cent (*R v Thompson* [2000] NSWCCA 309)

Penalty: $25,000 (10% of the maximum) reduced by 20% (for guilty plea) = $20,000.

Environment Protection Authority v Orange City Council [1995] NSWLEC103 (extemporary judgement)

Offence: Breach of section 16(1) *Clean Waters Act* (repealed and replaced with *POEO Act 1997* section 120)

Penalty considerations

- Four considerations from *Environmental Offences and Penalties Act*, section 9
- In attempting to determine the appropriate level of fine to impose the court takes into account that the range of penalties is between zero and the maximum penalty.
- Penalty scale:
    - Lowest end of the range: 0 – 10 % of the max penalty
    - Low to mid: 10 – 30%
    - Middle range: 30 – 60 %
    - Mid to high: 60 – 80%
    - Highest end: 80 - 100%
    - ➢ Examine all of the circumstances surrounding the offence and consider mitigating factors to determine where the penalty lies.

Penalty: not "in the lowest range…Rather, it would fall a little further up the range, in the low to mid range," at 20% = $25,000.

Cabonne Shire Council v Environment Protection Authority (2001) 115 LGERA 304

Offence: Pollution of waters under the *POEO Act 1997*

Penalty considerations

- Section 241(1) factors were considered.
- "The courts must, of course, recognise the maximum penalty provided for an offence, and with an increase in the maximum penalty there will come the imposition in some cases of higher penalties." Per Giles JA
- "It remains necessary to address the facts of the particular case, with due regard to the current maximum penalty and the seriousness of the offence and to the need for deterrence thereby indicated together with all other relevant matters." Per Giles JA

Penalty:

- The appropriate penalty would be a fine of $15,000.
- Discount for the early plea of 25 per cent, the resulting fine is $11,250.

Commonwealth

Minister for the Environment & Heritage v Greentree (No 3) [2004] FCA 1317

Offence: clearing protected wetlands: *EPBC Act 1999* section 16(1).

Determining pecuniary penalty ([59] – [67]): The assessment of penalty, set out below, was affirmed by Kiefel J *in Greentree v Minister for the Environment and Heritage* [2005] FCAFC 128.

- Section 481(3) of the *EPBC Act 1999* sets out the factors which guide the making of a pecuniary penalty, but it is not exhaustive. In particular his Honour found that the contravention was deliberate; that the first appellant was well aware that he was not entitled to clear the land; and that he would contravene the *EPBC Act 1999.*

- Relevant factors not listed in the Act**:** Sackville J considered the approach that had been applied in proceedings for pecuniary penalties under the *Trade Practices Act 1974* was appropriate, subject to any necessary adaptations, to proceedings for pecuniary penalties under the *EPBC Act 1999*. He took the following matters into consideration:

- The high maximum penalty available for these contraventions, the size of which reflects the 'public expression' by Parliament of the seriousness of the offence;
- Whether the penalty is high enough not only to deter Mr Greentree and Auen Grain from further contraventions, but anyone else thinking of damaging a protected wetland;
- Contrition - in this case, none was shown;
- The respondents' current financial capacities - they did not say that they would be unable to pay a fine;

- The fact that Auen Grain is, in effect, a one-man company, of which Mr Greentree is the sole director and, in effect, the sole shareholder. This has two consequences: first, although Auen Grain can pay a substantial penalty, a large fine is of greater significance than for a very large publicly listed corporation. Secondly, any diminution of Auen Grain's assets resulting from the fine should be taken into account in order to prevent Mr Greentree being punished, in effect, twice over; and
- When a Court is imposing penalties for more than one offence, particularly when essentially the same conduct constitutes separate offences, the Court should ensure that the penalties imposed in aggregate are just and appropriate. Here, the conduct of Mr Greentree and Auen Grain was not within the worst category of contraventions as the wetlands were already degraded, but it was still very serious.

- Factors not relevant to determining a penalty

- The quality of the wetlands Windella Ramsar site when compared with other Ramsar wetlands. While the extent of the degradation of the site before the contravention cannot be ignored, equally the significance of the designation of the site in the List of Wetlands of International Importance cannot be ignored;
- The small size of the damaged wetlands, which was only a fraction of the larger Gwydir Ramsar Wetlands;
- Any lack of co-operation between the respondents and the investigators; and
- The fact that a person who has deliberately contravened the *EPBC Act 1999* will also be the subject of an adverse costs order. Ordinarily this will not warrant a reduction in the penalty that should be imposed on the contravener.

Calculating penalty ([65] – [82]):

- The role of specific and general deterrent were taken into account.
- After considering the maximum penalty that can be levied on an individual - $550,000 - Justice Sackville thought that $150,000 would be the proper penalty for Mr Greentree.
- As for Auen Grain, if it had been the only contravener, Justice Sackville would have imposed a penalty of $400,000, taking into account its status as a private company and the higher maximum penalty applicable to a contravention by a corporation. Since Mr Greentree is both the sole director and shareholder of Auen Grain, a large fine has the potential to penalise him twice, so the penalty for Auen Grain was set at $300,000.
- The Court also ordered remediation works to be carried out, and the cost of these to be borne by Mr Greentree and Auen Grain.