



# Enforcement

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Sydney: 02 9262 6989

Northern Rivers: 1800 626 239

Rest of NSW: 1800 626 239

## How are environmental laws enforced?

Generally, environmental laws are enforced through:

- Statutory notices including penalty notices (on-the-spot fines) and stop work notices;
- Civil proceedings including court orders granting an injunctions or a court declaration of a breach of the law;
- Criminal prosecutions imposing sentences for fines and imprisonment.

In all States, the regulatory authorities that administer environmental legislation can appoint authorised officers that hold powers to enforce environmental laws. For example, in NSW authorised officers of the Environment Protection Authority (**EPA**) have broad investigative powers under the *Protection of the Environment Operations Act 1997* (**POEO Act**) including the power to issue infringement notices for contraventions of that Act.<sup>2</sup> In instances of serious environmental harm that warrant prosecution, it will usually be the regulatory authority that will undertake the investigation and commence the prosecution proceedings.

## Statutory notices

<sup>1</sup> [http://www.edonsw.org.au/legal\\_advice](http://www.edonsw.org.au/legal_advice)

<sup>2</sup> *Protection of the Environment Operations Act 1997* (NSW), ss 187 – 210E.

Statutory notices are generally used by a regulatory agency to enforce less serious breaches of environmental laws.<sup>3</sup> Public authorities can issue statutory notices for some offences, avoiding the time and cost of a Court hearing. Determining which regulatory authority is responsible for issuing the notice depends on the type of activity being regulated – it might be a local council or a government regulatory authority such as the Office of Environment and Heritage (**OEH**), or the EPA.

Under the POEO Act the EPA can issue environment protection notices which include a clean-up notice, prevention notice, prohibition notice, or penalty notice.<sup>4</sup> A clean-up notice is used to direct a person who is suspected of causing or having caused a pollution incident to take clean-up action within a certain timeframe as specified in the notice.<sup>5</sup> Clean-up directions may also be giving orally, which has the same effect as a notice in writing.<sup>6</sup>

A prevention notice is used to direct a person to take action to ensure that an activity is carried out in an 'environmentally satisfactory manner' to prevent environmental harm or breaches of the law from occurring.<sup>7</sup> For example, the prevention notice might direct a person conducting a waste management facility to store or transport waste in a particular manner.

A prohibition notice is used to direct a person to stop carrying on an activity that is causing or likely to harm to the environment or public health.<sup>8</sup>

A penalty notice is used to address offending on the spot. Penalty notices impose a fine that can be paid or can be defended in court. The maximum possible penalty that a penalty notice can impose must not exceed the maximum penalty that can be imposed by a court for the offence.<sup>9</sup> The offences that can be dealt with by way of a penalty notice are listed under the relevant legislation<sup>10</sup> and include:

- failure to comply with a clean-up notice or pay a clean-up notice fee;<sup>11</sup>
- failure to comply with a prevention notice or pay a prevention notice fee;<sup>12</sup>
- littering from vehicles;<sup>13</sup> and
- carrying out development that requires development consent without development consent.<sup>14</sup>

<sup>3</sup> See *Environmental Planning and Assessment Regulation 2000* (NSW), cl 284(1); *Protection of the Environment Operations Act 1997* (NSW), ss. 222-229; *Water Management Act 2000* (NSW), Chapter 7 Enforcement.

<sup>4</sup> *Protection of the Environment Operations Act 1997* (NSW), Chapter 4; Chapter 8.

<sup>5</sup> *Protection of the Environment Operations Act 1997*(NSW), s 91 (1).

<sup>6</sup> *Protection of the Environment Operations Act 1997* (NSW), s 93.

<sup>7</sup> *Protection of the Environment Operations Act 1997* (NSW), ss 95 and 96(2).

<sup>8</sup> *Protection of the Environment Operations Act 1997* (NSW), s 101.

<sup>9</sup> *Protection of the Environment Operations Act 1997* (NSW), s 227.

<sup>10</sup> See *Protection of the Environment Operations (General) Regulation 2009* (NSW), Schedule 6; *Environmental Planning and Assessment Regulation 2000* (NSW), Schedule 5.

<sup>11</sup> *Protection of the Environment Operations Act 1997*(NSW), s 91 (1).

<sup>12</sup> *Protection of the Environment Operations Act 1997* (NSW), ss 95 and 96(2).

<sup>13</sup> *Protection of the Environment Operations Act 1997* (NSW), s 145 & 146.

The penalty notice can be served personally or by post, or by leaving the notice on a vehicle, vessel or relevant premises.<sup>15</sup>

If a person fails to comply with a notice, the EPA may take the action required to mitigate or prevent harm to the environment and recover the costs by issuing a compliance cost notice to the person responsible.<sup>16</sup>

If the recipient complies with the notice within the specified time they can usually avoid more serious enforcement action and going to court. It is an offence not to comply with the notice, unless the person has a reasonable excuse.<sup>17</sup>

For more information on penalties and environment protection notices under pollution laws see our [Water, Air and Noise Pollution Fact Sheet](#).

### **Civil enforcement proceedings**

Most environmental laws in NSW can be enforced through civil proceedings in the courts. Civil proceedings to enforce environmental laws commonly involve a person alleging that there has been a breach of an environmental law and asks the court to make orders to remedy or restrain that breach. These types of cases are usually heard in the Land and Environment Court.

An important aspect of civil action is that it can be used to obtain court orders to prevent environmental harm from occurring, whereas criminal proceedings are generally reactive legal action taken after the damage has been done.

Examples of breach of environmental law that might be enforced through civil proceedings in the Land and Environment Court include:

- where a person causes pollution without an environment protection licence or in excess of the limit permitted by that licence;
- where a developer breaches the conditions of their development consent;
- where a person breaches wildlife protection provisions of the *National Parks and Wildlife Act 1974* (NSW) or the *Threatened Species Conservation Act 1995* (NSW); or
- where a person undertakes development without the required development consent.

An example where one might use civil proceedings to enforce environmental laws is to seek an injunction in the Land and Environment Court to prevent an incident that would cause environmental harm.

### **Judicial review**

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<sup>14</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 76A(1).

<sup>15</sup> *Protection of the Environment Operations Act 1997* (NSW), s 224; *Environmental Planning and Assessment Act 1979* (NSW) s 127A(3).

<sup>16</sup> *Protection of the Environment Operations Act 1997* (NSW), s 101.

<sup>17</sup> *Protection of the Environment Operations Act 1997* (NSW), s 91(5);

Judicial review proceedings are another type of legal action that can be used to enforce environmental laws. In judicial review proceedings, the Court reviews an administrative decision made under planning or environmental laws. In these matters the Court is not concerned with the merits of a proposal, that is, whether the decision was good or bad – it is only concerned with whether the decision was made in accordance with law.

However, even if the decision is found by the Court to be invalid, there is nothing to stop the applicant from reapplying for a development consent or licence and the consent authority reconsidering the application, this time ensuring that it follows the correct procedures.

Judicial review cases could include, for example, where a development consent is challenged because the decision was not made in accordance with the requirements of the EPA Act:

- failure to advertise a development application in accordance with the law ;
- failure to properly notify relevant people in accordance with legal requirements;
- failure to provide an Environmental Impact Statement or a Species Impact Statement when required;
- approval of a development in a zone where developments of that type are prohibited; or
- failure to take a mandatory relevant consideration into account when granting consent.

See below for more information about who can bring judicial review proceedings.

For more information on the correct procedures for dealing with development applications, see our [Development Applications and Consents Fact Sheets](#).

For more information on obtaining legal advice for litigation and going to court see our [Fact Sheets](#).

### ***Who can bring civil enforcement or judicial review proceedings?***

Many environmental laws allow any person (including a community group) to bring civil enforcement or judicial review proceedings.<sup>18</sup>

Other legislation such as the *Forestry Act 2012* does not offer ‘open standing’ to anyone to enforce the law through civil action. In these circumstances, you should report complaints and alleged breaches to the relevant Minister and government authority responsible for administering the relevant legislation and urge them to take enforcement action.

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<sup>18</sup> See *Environmental Planning and Assessment Act 1979* (NSW), s. 123; *Local Government Act 1993* (NSW), s. 674; *Protection of the Environment (Operations) Act 1997* (NSW), s. 252, 253. 40 *Land and Environment Court Act 1979* (NSW), s. 33(2).

For more information on where and how to report environmental incidents see our [Water, Air and Noise Pollution Fact Sheet](#).

### ***What orders can the Court make in enforcement and judicial review proceedings?***

Civil enforcement and judicial review proceedings are different from criminal proceedings in that the objective of civil proceedings is not to punish the person who has broken the law, but to restore compliance with the law.

The types of orders that the Court can make in civil enforcement and judicial review cases where the Court finds that there has been a breach of the law include:<sup>19</sup>

- Declarations – this is a legally binding statement by the Court that a breach of an Act has occurred, e.g. the Court could make a declaration that a development consent is invalid because it was issued in breach of the EPA Act;
- Injunctions – this is an order restraining somebody from doing something, e.g. from carrying out further work on a site;
- Demolition or removal orders;
- Remediation orders – e.g. an order directing a person to carry out remediation work on a site, such as replanting trees; and
- An order that the decision be sent back to the original decision-maker to make again, this time in accordance with the law. Note that the Court cannot make a fresh decision in judicial review cases, but must send it back to the original decision-maker if it finds that the decision must be re-made. If a person fails to comply with an order of the Court within the time specified in the order, then he or she may be in contempt of Court and liable to a fine, sequestration of property, or even imprisonment.<sup>20</sup>

Even if a breach of the law is proved, the Court has discretion about whether to make any orders at all.<sup>21</sup> Therefore, in addition to proving that a breach of the law has occurred, the applicant also needs to show that environmental harm will occur if the orders are not made and that the case is not just about a technical breach of the law.

### **Criminal prosecutions**

More serious environmental offences are usually enforced through criminal prosecutions. A prosecution is where the prosecutor (usually the EPA or a local council) attempts to show the court through evidence that an individual or a corporation has committed an offence and asks the Court to impose a penalty on that person or corporation. Most environmental crime cases are heard in the Land and Environment Court, although they may also be heard in the Local Court.

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<sup>19</sup> *Environmental Planning and Assessment Act 1979* (NSW), s. 124; *Land and Environment Court Act 1979* (NSW).

<sup>20</sup> *Land and Environment Court Rules 2007* (NSW), Rule 4.5.

<sup>21</sup> *Land and Environment Court Act 1979* (NSW), s. 23.

Examples of offences which can be prosecuted in the Land and Environment Court are:

- Polluting water without a pollution licence (or in breach of a licence),<sup>22</sup>
- Carrying out development without development consent (if consent is required) under the EPA Act,<sup>23</sup> and
- Clearing native vegetation in breach of the *Native Vegetation Act 2003*.<sup>24</sup>

If the defendant pleads guilty, then the Court will proceed to a hearing to determine what penalty it should impose – called a sentence. If the defendant pleads not guilty, the prosecutor must provide evidence to establish the offence, which the defendant can contradict. If the defendant is then found guilty, there will then be a further hearing to determine the sentence.

### **Penalties and Sentences**

In criminal matters, the courts have the power to make sentences imposing a penalty on the offender such as a fine. The Court may also have the power to order remediation of a site which has been damaged, such as the clean-up of pollution, or the replanting of trees.<sup>25</sup> In extreme cases, the Court can even order a term of imprisonment.<sup>26</sup> Courts also have the power to order:

- the prevention of further environmental damage;
- that an offender pay the prosecutor's investigation and legal costs;
- that an offender pay their fine directly to an environmental protection program.

The kinds of penalties which the Court can impose are set out in the law that has been breached. A number of factors are taken into consideration by the Court when determining an appropriate sentence, such as the extent of environmental harm caused by the offence, whether the offender has a history of offending, any financial benefit gained by the offender by committing the offence, and whether the offender tried to mitigate the harm or shows remorse.<sup>27</sup>

For more information on criminal proceedings in the Land and Environment Court, see our [Water, Air and Noise Pollution](#) Fact Sheet.

### **Who can bring a prosecution?**

Prosecutions are usually brought by the public authority responsible for the particular law which has been breached. For example, the EPA prosecutes breaches of pollution laws, local councils can prosecute certain breaches of planning laws under the EPA Act in their local government area, and the OEH prosecutes illegal clearing of native vegetation offences.

<sup>22</sup> *Land and Environment Court Act 1979* (NSW), s. 21(a).

<sup>23</sup> *Land and Environment Court Act 1979* (NSW), s. 21(f).

<sup>24</sup> *Land and Environment Court Act 1979* (NSW), s. 21(i); *Native Vegetation Act 2003* (NSW), s. 12

<sup>25</sup> *Protection of the Environment (Operations) Act 1997*(NSW), s 245; *Environmental Planning and Assessment Act 1979* (NSW), s. 126(3).

<sup>26</sup> *EPA v Charles Anthony Leslie Gardner* [1997] NSWLEC 169

<sup>27</sup> *Protection of the Environment (Operations) Act 1997*(NSW), s. 241.



A member of the public is only entitled to commence criminal proceedings in very limited circumstances such as where the EPA has failed to prosecute and the court agrees to the action.<sup>28</sup>

## Time Limits

Most environmental laws contain strict time limits for commencing court proceedings. Time limits apply to civil enforcement and judicial review proceedings, and to criminal proceedings. The specific time limit for each type of proceeding is usually set out in the legislation under which the offence or decision was made that the applicant wishes to enforce or challenge. For example, criminal proceedings for an offence against the EPA Act must be commenced within 2 years of the offence allegedly being committed, or of the offence first coming to the attention of an authorised officer.<sup>29</sup>

## Which courts hear environmental cases?

### ***Land and Environment Court of NSW***

If the case involves NSW environmental laws, the matter will probably be heard by the [NSW Land and Environment Court](#). This is a specialist court which has exclusive jurisdiction to deal with cases regarding the environment, planning, mining, development and local government, including both civil and criminal matters. The Court's jurisdiction is divided into eight different classes. The class that a matter falls under will depend on the type of case.<sup>30</sup> Different procedures apply to each class. Judicial review and civil enforcement matters are heard in Class 4 and environmental crime matters are heard in Class 5 of the Court's jurisdiction.

For more information on the Land and Environment Court, see our [Land and Environment Court](#) Fact Sheet or visit the [Land and Environment Court's website or go the Practitioner's Guide to the Land and Environment Court](#).

### ***NSW Local Court***

Sometimes proceedings for environmental offences are taken before a Local Court. For example, in the case of *EPA v Feodoroff*,<sup>31</sup> the EPA elected to prosecute offences relating to waste transport under the POEO Act in the Local Court at Ballina. The Local Court has criminal and civil jurisdiction, however the maximum monetary penalty that a Local Court can impose is \$110,000.<sup>32</sup> More serious offences are therefore usually heard in the Land and Environment Court as it is a higher jurisdiction.

For more information visit the [NSW Local Court website](#).

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<sup>28</sup> *Protection of the Environment (Operations) Act 1997*(NSW), s. 219.

<sup>29</sup> *Environmental Planning and Assessment Act 1979* (NSW), s. 127(5), (5A)

<sup>30</sup> *Land and Environment Court Act 1979* (NSW), Part 3.

<sup>31</sup> See <http://envlaw.com.au/feodoroff.html>

<sup>32</sup> *Environmental Planning and Assessment Act 1979* (NSW), s.127(3).

## **Federal Court of Australia and Federal Magistrates Court**

The [Federal Court of Australia](#) hears civil and criminal cases relating to breaches and enforcement of federal environmental laws, such as proceedings arising under the Commonwealth environmental law the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) (**EPBC Act**).

The Federal Minister for the Environment (through the [Department of Environment](#)) is responsible for bringing civil and criminal enforcement proceedings in the Federal Court for breaches of the EPBC Act. The EPBC Act provides a legal framework to protect 'matters of national environmental significance',<sup>33</sup> including certain flora, fauna, ecological communities and heritage places.

In some cases, it is possible for individuals to bring civil enforcement action in the Federal Court. An example of proceedings in this jurisdiction would include an 'interested person' seeking an injunction or challenging a decision made under the EPBC Act in the Federal Court.<sup>34</sup> The Federal Court can also impose significant civil penalties (fines) and criminal penalties (fines and imprisonment) for individuals and corporations who breach legislation.

The [Federal Circuit Court of Australia](#) also hears some appeals under Federal environmental laws.

For more information about the Federal Court see our [EPBC Act Fact Sheet](#) which deals with standing in the Federal Court for EPBC Act matters.

For more information on enforcing environmental laws, see [Have Your Say](#).

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<sup>33</sup> *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, s. 3.

<sup>34</sup> *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, s. 487.