Prosecuting and restraining environmental crimes in NSW

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Environment law access in NSW

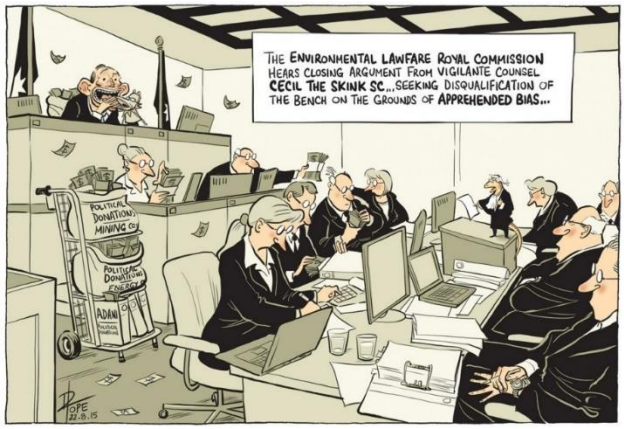
Twenty years ago, NSW had some of the best environmental legislation and open standing laws in the world. Sadly, many of the avenues for citizens to bring proceedings in the Land and Environment Court over breaches of those laws have diminished, as have some of the laws themselves.

Legal Aid, which provided individuals and non-profit groups with funding for lawyers and experts, as well as immunity to cost orders, should they lose, has been axed for environmental public interest litigation. Threatened Species Legislation has been watered down, and forestry operations and many other environmentally degrading activities have been provided with protection from prosecution by anyone other than government agencies.

But there are a number of avenues for courageous, some might say reckless, people and groups to drag environmental criminals to court and have them and their crimes dealt with by the system.

The Land and Environment Court

The NSW Land and Environment Court has broad, general order-making powers to remedy or restrain breaches or apprehended breaches of environmentally protective statutes. These powers are given for orders addressing offending conduct causing pollution or environmental impact such as breaches of land use planning regimes, broad-scale clearing of native vegetation, and damage to biodiversity and National Parks etc.



The orders can require rectification works, such as revegetation of areas where clearing has taken place, but can also encompass environmentally restorative orders mandating that a convicted environmental offender pay for the cost of community-benefiting restoration projects undertaken on public land. Necessarily, the imposition of, and scope for, such orders is discretionary and unfettered, save for tests of proportionality.

The POEO Act

The touchstone pollution statute in NSW is the *Protection of the Environment (Operations) Act 1997* (POEO Act). [1]

Criminal prosecution

It is a Tier I offence under the *POEO Act* for any person to pollute water with penalties up to $1,000,000 or 7 years' imprisonment. If committed by a corporation, the offence attracts a maximum penalty of $5,000,000 with special executive liability for directors or managers. Similar offences and penalties exist for air, noise, and land pollution. However, the elements of the offences are more restrictive. For example, for air pollution to be made out a fault in the machinery or its operation must be proved.

The POEO Act draws a distinction between penalties applied to Tier 1 offences committed willfully, and offences committed negligently – with the penalties for the former set much higher.

In the case of a corporation, the maximum penalty for a Tier 2 offence is a fine of $1,000,000 and a further fine of $120,000 for each day the offence continues. In the case of an individual, the maximum penalty for a Tier 2 offence is a fine of $250,000 and a further fine of $60,000 for each day the offence continues. For Tier 3 offences, the present range of infringement notice penalties which can be imposed by the EPA is between $80 and $15,000 for an individual and between $300 and $15,000 for a corporation. The penalties specified for nominated offences punishable by infringement notices are specified by regulation and are adjust from time to time

It is a defence against prosecution if the water pollution was regulated by an environment protection licence (EPL) and the conditions of that licence were not contravened.

[1] http://classic.austlii.edu.au/au/legis/nsw/consol_act/poteoa1997455/

The Court must give leave before a private citizen or group can prosecute a polluter, and the EPA must first be notified and decline to prosecute.

Criminal prosecution also requires a higher burden of proof - beyond reasonable doubt, which can be a high bar. However, a reverse onus of proof exists for air polluters found to have air pollution on their premises.

Section 252 Remedy or restraint of breaches

A much easier pathway for citizens wanting to hold polluters to account is a civil suit.

Any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act or the regulations.

Section 252 states:

> (1) Any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act or the regulations.
>
> (2) Any such proceedings may be brought whether or not proceedings have been instituted for an offence against this Act or the regulations.
>
> (3) Any such proceedings may be brought whether or not any right of the person has been or may be infringed by or as a consequence of the breach.
>
> (4) Any such proceedings may be brought by a person on the person's own behalf or on behalf of another person (with their consent), or of a body corporate or unincorporate (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.
>
> (5) Any person on whose behalf proceedings are brought is entitled to contribute to or provide for the payment of the legal costs and expenses incurred by the person bringing the proceedings.
>
> (6) If the Court is satisfied that a breach has been committed or that a breach will, unless restrained by order of the Court, be committed, it may make such orders as it thinks fit to remedy or restrain the breach.
>
> (7) Without limiting the powers of the Court under this section, an order under this section may suspend any environment protection licence.

(8) In this section:

"breach" includes a threatened or apprehended breach

Other environmental laws that provide for open standing

- *Native Vegetation Act 2003* - s41 Restraint of contraventions of this Act
- *Biodiversity Conservation Act* - s13.14 Civil proceedings to remedy or restrain breaches of this Act or regulations (or Part 5A or 5B of the *Local Land Services Act 2013*)
- *National Parks and Wildlife Act 1974* - s193 Restraint etc of breaches of Act or regulations
- Fisheries Management Act 1994- s282 Restraint of breaches of Act
- *Heritage Act 1977* -s153 Restraint etc of breaches of this Act
- *Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986* - s10 Restraint etc of breaches of Act
- *Environmental Planning and Assessment Act 1979* – s9.45 Restraint etc of breaches of this Act
- *Contaminated Land Management Act 1997* - s96 Restraint of breaches
- *Wilderness Act 1987* - 27 Restraint etc of breaches of this Act
- *Water Management Act 2000* - 336 Restraint of breaches of this Act

Lawyers and experts

Lawyers and experts can be expensive. Even the Environmental Defenders Office (EDO), an eNGO, will charge for certain costs, including solicitors and barristers fees and lodgments, unless the issue is one of the highest of public interests.

"I am a member of the legal profession, but I'm not a lawyer in the pejorative sense."

While the EDO can be very helpful in getting a case to court, as they have specialist expertise, they are overworked and underpaid. It can, therefore, sometimes be better, particularly if you think the case has a high chance of winning, to approach a "commercial" lawyer (hired gun) who has experience in the Land and Environment Court. Sometimes lawyers will accept a case "on spec", in which the solicitor speculates on wining and being paid by the environmental criminal, or pro bono (for the good) where they waive some or all of their fees. Although, even if they agree to accept the case on this basis, lodgments and filing fees for affidavits, subpoenas, discovery orders etc will need to be covered by the applicant.

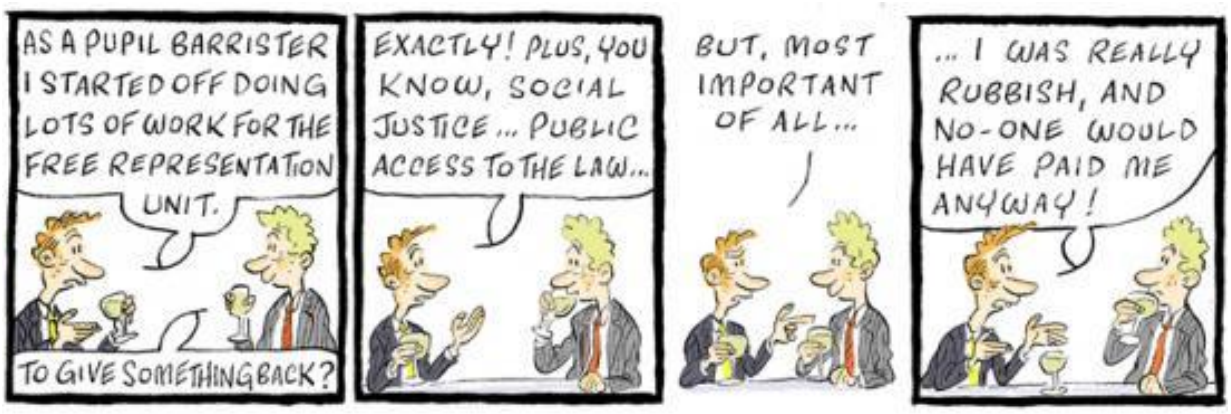
Lawyers can and do charge anything they want (often in direct proportion to the number of cases they win and their egos). Solicitors can bill at rates in excess of $250 an hour (in 15 minute chunks) and barristers often charge themselves out at $5000 a day or more. When you call them don't unnecessarily waste their time. Prepare what you are going to say and get to the point quickly. Something like:

> My name is Paul Winn, I have found a company polluting my local river with arsenic. I have water samples and an expert witness willing to testify that the discharge exceeds their licence limit and is having a causing significant environmental harm. I want to make an application to

the Land and Environment Court to retrain a breach of the POEO Act. I represent a small not for profit group, who will be the applicant and we have $3000. Can I come to talk you about putting a case together next week?

You generally need both a solicitor and a barrister. A barrister is a lawyer who appears before judges in court, and a solicitor deals with the administration of the case, such as filing applications, preparing witnesses etc. As barristers cost more than solicitors, it is often best to secure the barrister "on spec" or *pro bono* and then seek out a solicitor, who will be more easily convinced of the merit of the case if a barrister is secured to appear for you. You can also save a lot of money engaging a solicitor who will allow you to do most of the leg work.

Most large law firms have a *pro bono* department for public interest cases. Lawyers and law firms like media attention as much as everyone else and are often attracted to public interest litigation for this reason alone. So don't despair if the first half a dozen lawyers say no, keep trying and if your case has merit and is obviously in the public interest you're sure to find someone who will appear for you at a reduced rate or for even for free.



Expert witnesses

Expert witnesses are often needed in all but a few cases where, for example, the facts are not disputed and the case hinges on interpretation of law. In these cases the barrister is your expert. But for most environmental cases you need expert testimony to succeed. Sometimes you can find experts in the field that will appear *pro bono,* or with just their costs covered. This may take time, but experience has shown that experts are often very attached to their issues and many of the best experts in their field are more than willing to appear in court for the right public interest issue.

Adverse cost orders

Since the loss of Legal Aid and a number of open standing provisions the number of Land and Environment l cases taken by individuals and groups has diminished in NSW.

The loss of Legal Aid means that if you lose a court case, you can face having to pay the legal costs of the respondent (the environmental criminal). However, public interest is a factor taken into account by the

Court when awarding costs. Rule 4.2(1) of the Land and Environment Court Rules, which applies to proceedings in class 4 of the Court's jurisdiction (judicial review and civil enforcement), provides:

> *The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest.*

The Land and Environment Court has followed a consistent long line of authority that it is "in the interests of justice that members of the public have access to the courts to remedy or restrain breaches of public law".[2]

> *[22] … It is important, particularly for environmental matters that cost is not a barrier in pursuing environmental justice and that important questions of law are able to be resolved by the Court. Rule 4.2(1) of the LEC Rules is reflective of this principle, and allows for applicants to bring significant issues of public interest to the Court.*

The Court went on to acknowledge that the term 'public interest' is:

> *"a nebulous concept that is susceptible to competing interpretations. This is particularly apparent in the context of environmental law – where a development that requires clearing of land might be construed as being against the public interest on one hand because of the destruction of the natural environment, but in favour of the public interest on the other hand because of the jobs created by the development …"*.

The Court is more likely to followed this rule when a statutory body had not properly exercised its powers under statute, and when the Applicant had no pecuniary interest in the outcome of the proceedings.[3]

Public interest litigation is not for the feint hearted. Passionate motives and strongly held beliefs are often involved. The applicant is typically an individual or non-profit incorporated community action group, with limited financial resources, dedicated to preserving some environmental feature. However, whatever the well intentioned motives of the individual or action group in commencing proceedings in the Land and Environment Court, proper regard must be had to the criteria established by the Court in connection with what may constitute public interest litigation and, importantly, whether "something more" is being put before the Court.

One thing is certain, individuals and action groups considering commencing public interest litigation should not assume that their opponents will passively submit to an applicant's unsuccessful public interest claim that there be no order as to costs. If unsuccessful, a second Court case fought on costs is the likely outcome.

The applicant

There are ways, however, to lessen the likelihood that you will have to go bankrupt or lose your savings and possessions should you lose a challenge to an adverse cost order on public interest grounds.

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[2] *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 238.

[3] *Millers Point Fund Incorporated v Lendlease (Millers Point) Pty Ltd (No 2) [2017]* NSWLEC 29

The first is to make the application to the court to restrain a breach etc under a registered incorporated association. Anyone can register an incorporated association by applying to NSW Department of Fair Trading.[4] An incorporated associated (like HCEC) limits the liability of its members to cost orders and civil suits etc associated with progressing the association's objectives, such as protecting the environment. The association will need to have some money (a few thousand) in its bank account and have been formed a reasonable time (about 6 months) before the application to the court is made. Should the court case be lost the adverse costs cannot exceed the association's means. The worst that can happen is the association will be "wound up".

The second way of avoiding a very large adverse cost order is to seek a preliminary cost order from the court before proceeding commence. In other words seek leave from the Court to assess the likely costs of both sides, taking into account its public interest, and make an order on the maximum costs you may be liable for. At least if the case is unsuccessful you know what you are likely to have to pay before significant legal costs accrue.

[4] https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/starting-an-association