The law of proportionality and the sentencing of environmental crimes in the Land and Environment Court of New South Wales

Andrew Burke
BScLLB LLM

Macquarie Law School
Macquarie University

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Abstract

Proportionality in criminal sentencing is a deceptively simple concept, so deeply embedded within modern notions of justice that it can be seen as mere common sense: the punishment should fit the crime. The superficial simplicity of the concept masks the complex definitional, statutory and practical challenges of implementing proportionate sentencing in a specialist environmental court. This thesis analyses criminal sentencing carried out by the Land and Environment Court of New South Wales ("LEC") from 2004-2013. A critical examination of written sentence judgments from this period forms the basis of this study.

A new test for proportionality in the sentencing of environmental crimes is presented, created by synthesising the common law definitions of proportionality developed by the High Court of Australia, the Supreme Court of New South Wales and the LEC itself. This thesis then applies that test to evaluate the proportionality of the penalties imposed for four of the most frequently occurring offence types over the ten-year period. The findings reveal that, whilst sentencing is reasonably proportionate in the majority of cases, there are numerous and diverse causes of disproportionality in the LEC's sentencing. Further, the inherent characteristics of environmental crimes can lead to difficulties with evaluating the harm to the victim of the crime, the environment, thereby jeopardising proportionality. On the basis of of these findings the thesis concludes by outlining a range of possible reforms to environmental statutes and LEC practice to address the causes of disproportionality in the LEC's sentencing of environmental crimes.

Candidate's Declaration

This thesis contains no material which has been submitted for a higher degree to any other university or institution. To the best of the author's knowledge, it contains no material previously published or written by another person, except where due reference is made in the text.

Andrew Burke

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Table of statute abbreviations

Clean Air Act	*Clean Air Act 1961* (NSW), repealed by *Protection of the Environment Operations Act 1997* (NSW) sch 3
Clean Waters Act	*Clean Waters Act 1970* (NSW), repealed by *Protection of the Environment Operations Act 1997* (NSW) sch 3
Contaminated Land Management Act	*Contaminated Land Management Act 1997* (NSW)
Crimes (Appeal and Review) Act	*Crimes (Appeal and Review) Act 2001* (NSW)
Crimes (Sentencing Procedure) Act	*Crimes (Sentencing Procedure) Act 1999* (NSW)
Dangerous Goods (RRT) Act	*Dangerous Goods (Road and Rail Transport) Act 2008* (NSW)
Environmental Offences & Penalties Act	*Environmental Offences and Penalties Act 1989* (NSW), repealed by *Protection of the Environment Operations Act 1997* (NSW) sch 3
EP&A Act	*Environmental Planning and Assessment Act 1979* (NSW)
Fisheries Management Act	*Fisheries Management Act 1994* (NSW)
Land and Environment Court Act	*Land and Environment Court Act 1979* (NSW)
Marine Parks Regulation	*Marine Parks Regulation 1999* (NSW), renamed *Marine Estate Management Regulation 2009* (NSW) from 19/12/2014
Marine Pollution Act	*Marine Pollution Act 1987* (NSW), repealed by the *Marine Pollution Act 2012* (NSW) s 250
National Parks and Wildlife Act	*National Parks and Wildlife Act 1974* (NSW)
Native Vegetation Act	*Native Vegetation Act 2003* (NSW)
Native Vegetation Conservation Act	*Native Vegetation Conservation Act 1997* (NSW), repealed by the *Native Vegetation Act 2003* (NSW) s 52
Pesticides Act	*Pesticides Act 1999* (NSW)
POEO Act	*Protection of the Environment Operations Act 1997* (NSW)
POEO (Clean Air) Regulation 2002	*Protection of the Environment Operations (Clean Air) Regulation 2002* (NSW), repealed by the *Subordinate Legislation Act 1989* (NSW) from 1/9/2010
Rivers & Foreshores Improvement Act	*Rivers and Foreshores Improvement Act 1948* (NSW), repealed by the *Water Management Act 2000* (NSW) sch 7
Road & Rail Transport (DG) Act	*Road and Rail Transport (Dangerous Goods) Act 2008* (NSW), repealed by the *Dangerous Goods (Road and Rail Transport) Act 2008* (NSW) s 74
Threatened Species Conservation Act	*Threatened Species Conservation Act 1995* (NSW)
Water Management Act	*Water Management Act 2000* (NSW)

Chapter 1: Introduction

Chapter abstract

Whilst environmental crime is a topic of significant interest to both scholars and the general public, there is a dearth of studies of sentencing practice. This Chapter reviews the relevant scholarship and identifies how this thesis sits within it. It finds that three themes emerge from the scholarship: a concern that criminal penalties for environmental crimes are in some way inadequate, an interest in the notion of harm, and the potential for specialist, problem-solving courts to engage in a restorative justice approach. Three research questions are then developed which allow these themes to be explored in the context of an empirical study of criminal sentencing in the Land and Environment Court of New South Wales.

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Section 1 Introduction

Environmental crime is a topic of importance to both scholars and society at large. This is demonstrated by the significant volume of both published scholarship and public commentary on the topic generally.[1] Despite this, there have been few studies that have considered any aspect of the sentencing of environmental crimes, particularly in the Australian context.[2] As this thesis is concerned with sentencing, environmental crime is defined in legal terms: breaches of environmental statutes which are punishable by criminal conviction and penalty.

This thesis seeks to address the lack of scholarly consideration given to the sentencing of environmental crime, with a particular focus upon proportionality between crime and punishment.[3] At the most general level, proportionality can be understood as "punishment that fits the crime"; its legal definition is far less straightforward and there is a need to clarify uncertainties around its conceptualising and application in practice.[4] A core contribution that this thesis makes to the literature is to explore and clarify the legal definition of proportionality. It does so by considering how the common law and the relevant statutes define proportionality in the context of environmental crime in New South Wales.

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[1] For recent scholarship, see for example: Reece Walters, Diane Westerhuis and Tanya Wyatt (eds), *Emerging Issues in Green Criminology: Exploring Power, Justice and Harm* (Palgrave Macmillan, 2013); for public commentary generally, see for example the extensive media interest in the sentencing of serial offender Dib Hanna: Vikki Campion, *Toxic fury as 'cowboy' dumper Dib Hanna sidesteps prosecution* The Daily Telegraph <http://www.dailytelegraph.com.au/news/nsw/toxi-fury-as-8216cowboy8217-dumper-dib-hanna-sidesteps-prosecution/story-fni0cx12-1226710906555>; Karl Hoerr, *Dib Hanna, serial dumper, fined $225k for leaving asbestos waste at Picnic Point* ABC News <http://www.abc.net.au/news/2014-09-23/serial-dumper-fined-over-asbestos-waste/5762332>.

[2] Notable exceptions include: Robyn Bartel, 'Sentencing For Environmental Offences: An Australian exploration' (Paper presented at the Sentencing Conference, National Judicial College of Australia / ANU College of Law, 2008); Robyn L Bartel, 'Compliance and complicity: an assessment of the success of land clearance legislation in New South Wales' (2003) 20 *Environmental Planning and Law Journal* 116; Diane Solomon Westerhuis, 'A Harm Analysis of Environmental Crime' in Reece Walters, Diane Westerhuis and Tanya Wyatt (eds), *Emerging Issues in Green Criminology: Exploring Power, Justice and Harm* (Palgrave Macmillan, 2013) 197.

[3] Throughout this thesis the terms "proportionality", "proportionate", "disproportionality" and "disproportionate" should be read as "proportionality between crime and punishment", "proportionate to the crime", and so on.

[4] Mirko Bagaric and Richard Edney, 'The Proportionality Thesis in Australia: Application and Analysis' (2008) 4(2) *International Journal of Punishment and Sentencing* 38; Richard G Fox, 'The Meaning of Proportionality in Sentencing' (1993-1994) 19 *Melbourne University Law Review* 489.

Proportionality has been chosen as the lens through which this thesis will consider the sentencing of environmental crimes for two reasons. Firstly, it is at the heart of the sentencing process. Proportionality has been described by McHugh J in the High Court of Australia as "one of the fundamental principles of sentencing law" and "the ultimate control on judicial sentencing discretion".[5] Any significant error in the evaluation of a proportionate sentence will likely produce a punishment that is not only unjust, but also inconsistent with other sentences for like offences.[6] There is a well-established public interest in the attainment of proportionality in criminal sentencing, both in terms of justice and consistency.[7]

Secondly, proportionality is closely associated with the concept of environmental harm. In the context of environmental crime, the law requires punishment to be proportionate to the environmental harm caused by the offence, with some allowance for other sentencing considerations. Environmental harm is a concept of significant interest to the growing field of green criminology.[8] Whilst green criminology lacks a universally accepted definition, White notes that the term has come to refer to the study by criminologists of environmental harms, environmental laws and environmental regulation.[9] The adoption of proportionality as the lens through which this thesis considers the sentencing of environmental crimes allows this thesis to make a contribution to the green criminology literature.

This thesis considers the sentencing of environmental crimes in the Land and Environment Court of New South Wales ("LEC"). The LEC offers a number of

[5] *Markarian v The Queen* [2005] HCA 25 at [69] and [83].
[6] Hon JJ Spigelman, 'Consistency and sentencing' (2008) 82 *Australian Law Journal* 450 at 451. Spigelman, a former Chief Justice of the Supreme Court of New South Wales, describes proportionality as "the central principle of Australian sentencing law" and argues that "wherever two sentences can be said to be inconsistent … then at least one and perhaps both, must offend the principle of proportionality".
[7] See *Lowe v The Queen* [1984] 154 CLR 606 at [610]-[611] per Mason J: "Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice."
[8] See for example: Rob White, 'Prosecution and sentencing in relation to environmental crime: Recent socio-legal developments' (2010) 53(4) *Crime, Law and Social Change* 365 ; Westerhuis, above n 2.
[9] Rob White, 'The Conceptual Contours of Green Criminology' in Reece Walters, Diane Westerhuis and Tanya Wyatt (eds), *Emerging Issues in Green Criminology: Exploring Power, Justice and Harm* (Palgrave Macmillan, 2013) 17 at 19.

advantages for such a study. It is the oldest and largest specialist environmental court in Australia, established in 1980 and with a full-time bench of six judges. It is where the most serious environmental crimes are prosecuted in New South Wales, the most populous state of Australia. The LEC offers the greatest depth and breadth of environmental sentencing in Australia, and as a superior court all of its judgments are readily available. The LEC operates in a highly specialised statutory context, much of which is relevant to proportionality.

Adopting Warner's categorisation of Australian sentencing scholarship, this thesis is in parts doctrinal, empirical and critical/reform.[10] Warner adopts a definition of doctrinal research as "the systematic exposition, analysis and critical evaluation of legal rules and their interrelationships".[11] Accepting this definition, Chapter 3 is doctrinal, exploring the range of common and statutory law relevant to proportionality in the LEC. This culminates in the development of a single test for proportionality in the LEC's criminal sentencing.

This doctrinal research in Chapter 3 then informs the empirical research into sentencing practice contained in Chapters 4, 5, 6 and 7. Warner adopts a definition of empirical research in law as "… the study, through direct rather than secondary sources, of the institutions, rules, procedures and personnel of the law, with a view to understanding how they operate and what effects they have."[12] The empirical research undertaken for this thesis falls within this definition, considering the operation and effects of both the rules of proportionality and the sentencing procedures of the LEC. The method for this empirical research is discussed in depth in Chapter 2.

Chapter 8 then discusses possible reforms to improve the proportionality of criminal sentencing in the LEC. This falls within Warner's critical/reform category of

[10] Kate Warner, 'Sentencing Scholarship in Australia' (2007) 18(2) *Current Issues in Criminal Justice* 241.
[11] Ibid 243.
[12] J Baldwin and G Davis, 'Empirical Research in Law' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) at 880-881.

sentencing research, which she defines as "research concerned with what is wrong with what the law says or does".[13]

Three distinct areas of scholarship are relevant, and this thesis seeks to make a contribution to all three. The first two fall into the category of traditional legal studies. First is Australian scholarship regarding criminal sentencing generally, which both considers Australian practice and contributes broadly to theoretical debates regarding the meaning and role of proportionality in criminal sentencing.[14] The second is analysis of environmental crime from a legal studies perspective, both in Australia and in other jurisdictions.[15] The existing literature in this second area fails to consider the definition and application of proportionality to the particular context of environmental crime.[16]

The third relevant area of scholarship is green criminology.[17] Green criminology refers to a broad umbrella of scholarship, and as White notes it is increasingly used to denote generic interest in the study of environmental crime, with particular emphasis on the study by criminologists of environmental harms, environmental laws and environmental regulation.[18] This thesis adopts a fundamentally legal, rather than criminological, perspective. Environmental crime is defined in narrow, legal terms: actions harmful to the environment which are prohibited by statute and punishable by criminal conviction and penalty. Nonetheless, it draws upon aspects of green criminology for inspiration and seeks to make a contribution to that growing field by exploring the role of environmental harm in the sentencing of environmental crimes.

These three distinct areas of relevant scholarship disclose common themes. First is a concern that criminal penalties for environmental crimes are in some way

[13] Warner, above n 10, 250.
[14] See for example: Austin Lovegrove, 'An empirical study of sentencing disparity among judges in an Australian criminal court' (1984) 33(1) *Applied Psychology* 161; Bagaric and Edney, above n 4.
[15] See for example: The Hon. Justice Brian J Preston, 'Principled Sentencing for Environmental Offences' (Paper presented at the 4th International IUCN Academy of Environmental Law Colloquium; Compliance and Enforcement: Toward More Effective Implementation of Environmental Law, White Plains, New York, 2006); Julie Adshead and Tim Andrew, 'Environmental Crime and the Role of the Magistrates' Courts' (Paper presented at the COBRA 2009, University of Cape Town, 2009).
[16] See, for example: Bagaric and Edney, above n ; Lovegrove, above n 14.
[17] See for example: White, above n 9.
[18] Ibid 17-19.

inadequate, whether too lenient, inconsistent, disproportionate or ineffective.[19] Second is an interest in the notion of harm, which is both fundamental to the debate over the meaning of proportionality and central to green criminology.[20] The third identifiable theme is the ability for specialist, problem-solving courts such as the LEC to engage in a restorative justice approach, utilising broad and innovative sentencing powers.[21] Restorative justice, defined by Preston as a victim-centred, holistic solution to crime which seeks to understand and address the dynamics of criminal behaviour, its causes and consequences, has been used only occasionally by the courts in dealing with environmental crime despite being far more widely used in relation to more traditional types of crime.[22]

These themes inform the research questions for this thesis. The first research question was determined by the need to define proportionality so that it can be evaluated. It asks: what does proportionality mean in the context of criminal sentencing in the LEC? The second and third research questions ask: is the sentencing of environmental crimes in the LEC proportionate in practice; and, if the sentencing of the LEC is in some way disproportionate, what can be done by way of remedy?

The purpose of this Chapter is to introduce the thesis, to review the relevant scholarship and to develop the research questions. It proceeds in six sections, the first of which is this Introduction. Section 2 briefly introduces the LEC. Section 3 considers the related concepts of consistency and proportionality, and discusses why proportionality was adopted as the central concept of this thesis. Section 4 considers the relevant areas of scholarship in detail and discusses how this thesis relates to each. Section 5 explores the research gaps that emerge from the earlier discussion, and develops research questions to address them, before Section 6 concludes this Chapter.

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[19] See, for example: Evan Hamman, Reece Walters and Rowena Maguire, 'Environmental Crime and Specialist Courts: The case for a 'One-Stop (Judicial) Shop' in Queensland' (2015) 27(1) *Current Issues in Criminal Justice* ; Julie Adshead, 'Doing Justice to the Environment' (2013) 77 *The Journal of Criminal Law* 215.
[20] See, for example: Westerhuis, above n 2.
[21] See, for example: Hon Justice Brian J Preston, 'The use of restorative justice for environmental crime' (2011) 35(3) (June) *Criminal Law Journal* 136; Reece Walters and Diane Solomon Westerhuis, 'Green crime and the role of environmental courts' (2013) 59 *Crime Law Soc Change* 279.
[22] Preston, above n 21, 136.

Section 2 The Land and Environment Court

Specialist environmental courts present an excellent opportunity to study proportionality in the sentencing of environmental crime. In addition to the relatively large number of cases they deal with, their specialist nature allows them to develop specific lines of authority on harm and proportionality in the environmental context.

The LEC is a specialist environmental court. It was established in 1980 by the *Land and Environment Court Act 1979* (NSW), making it one of the oldest specialist environmental courts in the world. It currently consists of six judges, as well as seven commissioners and fourteen acting commissioners.[23] Only judges can preside over criminal cases within the court.

The LEC has a wide range of functions and powers. Its criminal jurisdiction represents only a small portion of its work. It deals with planning matters including development appeals, tree disputes, Aboriginal land claims, valuation of land disputes, civil enforcement, judicial review of decisions under planning or environmental laws and mining matters, in addition to criminal prosecutions and criminal appeals from the Local Court.[24] This thesis' study of sentencing is of course only concerned with the LEC's criminal jurisdiction.

Only relatively serious environmental crimes are prosecuted in the LEC. Less serious offences are prosecuted in the Local Court, a generalist court presided over by magistrates. The court in which offences are to be prosecuted is stipulated by each individual piece of legislation, and generally bestows upon prosecuting agencies a discretion to choose between the Local Court and the LEC. Generally speaking, the relevant legislation also stipulates higher maximum penalties if offences are prosecuted in the LEC. For reasons discussed below, this thesis does not consider Local Court sentencing for environmental offences in NSW.

[23] *Judicial officers and decision makers* Land and Environment Court <http://www.lec.justice.nsw.gov.au/Pages/about/judicial_officers.aspx>.
[24] *Types of cases* Land and Environment Court <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/types_of_disputes.aspx>.

Importantly, the LEC acts as a court of appeal for environmental offences prosecuted in the Local Court. This appeal mechanism to the specialist court provides a safeguard against error by generalist magistrates who may lack the necessary expertise in environmental matters.

Criminal matters may be appealed from the LEC to the Court of Criminal Appeal, the highest criminal court in New South Wales.

Section 3 Proportionality

This Section establishes the case for evaluating the sentencing of environmental crime in terms of proportionality.

Proportionality as a principle of criminal sentencing is embedded in society's notion of justice. As von Hirsch has argued:

> "Why should the principle of proportionality have this crucial role – as a principle that any sanctioning theory needs to address? It is because the principle embodies, or seems to embody, notions of justice. People have a sense that punishments scaled to the gravity of offenses are fairer than punishments that are not. Departures from proportionality – although perhaps eventually justifiable – at least stand in need of defense."[25]

Proportionality is fundamental to the common law of sentencing in Australia. The High Court of Australia has endorsed its significance in the cases of *Veen v The Queen* and *Veen v The Queen (No 2)*.[26] The Supreme Court of New South Wales has developed its line of authority on proportionality over several decades, beginning with the 1936 case of *R v Geddes*.[27] In the context of environmental crime, the 1993 case of *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority*, an appeal from the LEC to the Court of Criminal Appeal, established the common law rule that "the more serious the lasting environmental harm the more serious the offence and, ordinarily, the higher the penalty."[28] All of these cases will be considered in depth in Chapter 3.

Proportionality in the sentencing of environmental crime also has a statutory basis in New South Wales for certain offence types. The *Protection of the Environment Operations Act 1997*, which regulates pollution and waste disposal, stipulates that in imposing a penalty for an offence against that Act a court must consider "the extent of the harm caused or likely to be caused to the environment by the commission of the

[25] Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55 at 56.
[26] *Veen v The Queen [No 2]* (1988) 164 CLR 465; *Veen v R* [1979] HCA 7.
[27] *R v Geddes* [1936] NSWStRp 35.
[28] *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) NSWLR 683 at [701].

offence".[29] The *National Parks and Wildlife Act 1974*, which in addition to establishing a reserve system also protects threatened species, populations and communities on private land, has an identical provision.[30]

Proportionality has also been endorsed by major reports undertaken by public agencies considering sentencing practice at the state and federal levels of government in Australia.[31] The Australian Law Reform Commission in its 2006 report "Same Crime, Same Time; Sentencing of Federal Offenders" found that:

> "The principle of proportionality is the primary mechanism for ensuring that sentences imposed on offenders are fair. It operates to 'restrain excessive, arbitrary and capricious punishment'. It is of paramount importance to sentencing law and is a principle that is 'rooted in respect for the basic human rights of those before the court'. Indeed, grossly disproportionate punishments could violate provisions of international human rights instruments that prohibit the imposition of cruel, inhuman or degrading punishment. The principle of proportionality reflects common sense and intuitive notions of justice, preserves the legitimacy of the sentencing system, and gives practical guidance to judicial officers."[32]

Proportionality is thus at the heart of both the sentencing process and social expectations of criminal punishment. Described by McHugh J in the High Court of Australia as "one of the fundamental principles of sentencing law" and "the ultimate control on judicial sentencing discretion", proportionate sentencing is both a legal requirement and a social expectation.[33]

3.1 Relationship to consistency

[29] *Protection of the Environment Operations Act 1997* (NSW) s 241(1)(a).
[30] *National Parks and Wildlife Act 1974* (NSW) s 194(1)(a).
[31] Fox, above n 4, 492.
[32] ALRC, 'Same Crime, Same Time; Sentencing of Federal Offenders' (Australian Law Reform Commission, 2006) at 150.
[33] *Markarian v The Queen* [2005] HCA 25 at [69] and [83].

Proportionality is closely related to the concept of consistency in criminal sentencing. There is a well-established public interest in consistent sentencing. The Judicial Commission of New South Wales, an independent statutory corporation established by the *Judicial Officers Act 1986* (NSW), has as one of its three statutory functions to "assist the courts to achieve consistency in sentencing".[34] The Australian Law Reform Commission's "Same Crime, Same Time; Sentencing of Federal Offenders" report described sentencing as "fundamental to maintaining a just and equitable criminal justice system", and declared that "inconsistency in sentencing has the potential to erode public confidence in the criminal justice system".[35]

This language reflects the oft-quoted dictum of Mason J in the High Court of Australia case of *Lowe v The Queen* that:

> "Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice." [36]

As argued by Spigelman, the former Chief Justice of the Supreme Court of New South Wales, inconsistency and disproportionality overlap in that if two sentences for similar crimes are inconsistent, then at least one of them must be disproportionate. [37]

It is therefore clear that proportionality in criminal sentencing is important not only on its own terms, but also because of the likelihood that disproportionality will lead to inconsistency, which is associated with injustice and unfairness.

3.2 Proportionality involves consideration of harm

[34] *Welcome to the Judicial Commission of New South Wales* Judicial Commission of New South Wales <http://www.judcom.nsw.gov.au/>.
[35] ALRC, above n 32, 153-154.
[36] *Lowe v The Queen* [1984] 154 CLR 606 at [610]-[611].
[37] Spigelman, above n 6, 451.

A key distinction between proportionality and consistency also has broader relevance. Proportionality is closely associated with the concept of harm. In the context of environmental crime, proportionality requires the punishment to be proportionate to the environmental harm caused by the offence, with some allowance for other sentencing considerations.

Consistency is not linked to the notion of harm. Consistency compares a sentence only with one or more other sentences for a like offence. Proportionality compares a sentence to the harm caused by the crime. Consistency-based analysis can reveal if a sentence is correct compared to other sentences for the same offence. Proportionality-based analysis can reveal if a sentence fits the crime. This distinction leads to proportionality being a more meaningful concept than consistency.

The role of harm in determining proportionality also makes proportionality relevant to the growing field of green criminology in a way that consistency is not. The study of environmental harms is a core interest of green criminology.[38] White, a prolific Australian author in this field, has usefully summarised the main tendencies within green criminology, discussed further below, and the somewhat different way in which each understands environmental harm.[39] Whilst this thesis is what White describes as "a conventional legal approach to the study of environmental crime as a violation of criminal law – basically legal studies with environmental crime as the object of analysis", consideration of the role that judicial evaluation of harm plays in causing disproportionate sentencing inevitably leads to consideration of the role and nature of environmental harm more broadly.[40] Chapter 8 considers this issue in some depth.

The linkages that can be made to green criminology, and the potential to contribute to the green criminology literature, provide a further justification for the adoption of proportionality as the central concept of this thesis.

Section 4 Relevant scholarship

[38] See for example: White, above n 9; Westerhuis, above n 2.
[39] White, above n 9.
[40] Ibid 18.

Addressing the three research questions posed by this thesis will contribute to a number of areas of scholarship. Those research questions are: what does proportionality mean in the context of criminal sentencing in the LEC; is the sentencing of environmental crimes in the LEC proportionate in practice; and, if the sentencing of the LEC is in some way disproportionate, what can be done by way of remedy?

This Section assesses the relevant literature in each area. There is of course some overlap, with certain literature relevant to more than one area.

4.1 Australian sentencing scholarship

This is a broad area of literature which considers sentencing issues in a range of contexts. The methods and findings tend to be specific to the context being addressed. It includes studies of sentencing in particular courts and contributions to theoretical and normative debates. Whilst none of the literature in this area specifically considers environmental crime, it forms a body of Australian literature that is concerned with criminal sentencing. This thesis will add to it with consideration of a specialist environmental court.

Warner's 2006 comprehensive analysis of the nature and scope of Australian sentencing scholarship remain an invaluable resource in the field.[41] The nature of the research that was undertaken for this thesis was influenced by it. Her belief that "…there is a continuing role for doctrinal sentencing scholarship, for synthesising information, offering critical reflection, employing theory, a knowledge of the context and empirical research to criticise doctrine and to propose or oppose changes in the law and policy" effectively provided a road map for this thesis to follow.[42]

Lovegrove has exerted considerable influence as a sentencing scholar over many years, and his contributions have indeed influenced this thesis. His empirical study of sentencing disparity in the County Court in Victoria in 1984 remains one of the few

[41] Warner, above n 10.
[42] Ibid 259.

credible attempts to empirically assess sentencing consistency in Australia.[43] He found evidence of inconsistency, with "marked and consistent individual differences … between the practices of the Victoria County Court judges" with respect to the preferred maximum and minimum lengths of custodial sentences.[44] In a similar 1992 study into the sentencing of drink driving offenders, Homel and Lawrence also found evidence of inconsistency: "At the most basic level, the statistical analysis confirmed beyond reasonable doubt the substantial contributions of both court context and individual sentencing-style to the determination of penalties in drink-driving cases."[45] Such studies, although rare, establish an empirical foundation for claims of inconsistency (and by logical extension, disproportionality) in criminal sentencing in Australia.

Lovegrove's critique of the use of databases of sentencing statistics to promote consistency was prescient, coming several years before the High Court of Australia provided its own critique in *Wong v The Queen* and *Hili v The Queen*, and contributed to the decision to conduct the research for this thesis by means of studying the text of each judgment.[46]

Lovegrove has also contributed to the global debate on the meaning of proportionality, reflecting upon the role of personal mitigation in proportionality theory and considering whether it is consistent with the public's sense of justice.[47]

Bagaric has been a prolific contributor to the Australian scholarship on proportionality in criminal sentencing. Bagaric's radical critiques of sentencing law are normative, in contrast to the approach of this thesis, setting out how proportionality should be defined rather than seeking to better understand how the

[43] Lovegrove, above n 14.
[44] Ibid 172.
[45] Ross J. Homel and Jeanette A. Lawrence, 'Sentencer Orientation and Case Details: An Interactive Analysis' (1992) 16(5) *Law and Human Behavior* 509 at 530.
[46] Austin Lovegrove, 'Statistical Information Systems as a Means to Consistency and Rationality in Sentencing' (1999) 7(1) *International Journal of Law and Information Technology* 31; *Wong v R* [2001] HCA 64; *Hili v The Queen; Jones v The Queen* [2010] HCA 45.
[47] Austin Lovegrove, 'Proportionality Theory, Personal Mitigation, and the People's Sense of Justice' (2010) 69(2) *Cambridge Law Journal* 321.

existing law defines it. Nonetheless they have influenced this thesis, adding impetus to the focus upon environmental harm and how judges evaluate it.

Bagaric and Edney have argued that, whilst proportionality should be the main consideration in determining offence severity, the principle is poorly defined and understood and distorted by the application of a large number of misguided aggravating and mitigating considerations.[48] They have argued for simplifying sentencing law to a primary theory of punishment, reduced judicial discretion and greater use of empirical evidence to determine which punishments are effective.[49] Bagaric has advocated for fixed penalty systems, akin to mandatory penalties, and with McConvill has argued that the proportionate relationship between offence and penalty ought to be measured scientifically, by reference to the level of unhappiness or pain stemming from the offence.[50]

Edney, writing solo, has very usefully charted the development of the High Court of Australia's sentencing jurisprudence, from the original strong reluctance to consider sentence appeals to its latter-day mild reluctance to do so.[51] Fox has similarly described and analysed the development of the proportionality principle in the High Court.[52] Both were of great benefit in understanding and contextualising the High Court's authorities.

Spigelman's conference address and subsequent article from 2008, whilst he was Chief Justice of the Supreme Court of New South Wales, is valuable for the insight it provides into how sentencing judges understand proportionality, consistency and justice.[53] His wide-ranging address reflected upon the relevant High Court and

[48] Bagaric and Edney, above n 4.
[49] Mirko Bagaric and Richard Edney, 'The Sentencing Advisory Commission and the Hope of Smarter Sentencing' (2004-2005) 16 *Current Issues in Criminal Justice* 125.
[50] Mirko Bagaric, 'Consistency and Fairness in Sentencing' (2000) 2(1) *Berkeley Journal of Criminal Law* 1; Mirko Bagaric and James McConvill, 'Giving content to the principle of proportionality: Happiness and pain as the universal currency for matching offence seriousness and penalty severity' (2005) 69(1) *Journal of criminal law* 50.
[51] Richard Edney, 'In Spite of Itself?: The High Court and the Development of Australian Sentencing Principles' (2005) 2 *University of New England Law Journal* 1; Richard Edney, 'High Court Sentencing Jurisprudence' (2007) 3(4) *High Court Quarterly Review* 139.
[52] Fox, above n 4; Richard G Fox, 'The Killings of Bobby Veen: The High Court on Proportion in Sentencing' (1988) 12(6) *Criminal Law Journal* 339.
[53] Spigelman, above n 6.

Supreme Court authorities relevant to both consistency and proportionality. The tension that Spigelman describes between individualised justice and broader systemic concerns such as proportionality and consistency is relevant to this thesis, as are related scholarly contributions which followed.[54] The role that individualised justice plays in sentencing – through sentencing considerations such as the impecuniosity of an offender or the remorse expressed by an offender – is a theme of Chapters 3 through 7.

Reports written by government agencies into criminal sentencing form a category of their own, and provide valuable oversight of the field. The Australian Law Reform Commission's 2006 report "Same Crime, Same Time; Sentencing of Federal Offenders" thoroughly summarises and describes Australian sentencing law, including proportionality.[55] In a similar vein, the 2004 report of the New South Wales Sentencing Council, "How Best to Promote Consistency in Sentencing in the Local Court" provides comprehensive consideration of consistency in both theory and practice.[56] This thesis seeks to build upon those thorough, albeit essentially descriptive, reports by applying the knowledge that they provide to an evaluation of actual sentencing practice in the under-studied area of environmental crime.

4.2 Analysis of environmental crime from a legal studies viewpoint

4.2.1 Australian empirical studies

Empirical studies of the sentencing of environmental crimes in Australian courts, undertaken for any purpose, are rare. The studies that have been published, discussed below, tend to exist in isolation from each other in the scholarship, failing to refer to or build upon one another.

[54] See for example: Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76 *Law and Contemporary Problems* 265.
[55] ALRC, above n 32.
[56] 'How Best to Promote Consistency in Sentencing in the Local Court' (NSW Sentencing Council, 2005).

Bartel's 2003 study into the enforcement of land clearing laws in NSW is an important empirical study of environmental sentencing.[57] She examined all of the prosecutions for land clearing offences that had occurred to that date, considering their frequency, the penalty imposed, the subjective and objective factors for each offender, the prosecutorial culture and the attitude of the sentencing judges. Her analysis examined all prosecutions, albeit the relatively small total of sixteen at that stage of inquiry, which allowed her to identify and consider each in detail. She concluded that the criminalisation of land clearing had been a regulatory failure, with insufficient monitoring and enforcement and a public prosecutorial agency which was highly adverse to prosecutions. Further, she found that sentencing judges of the LEC tended towards lenient fines, which consequently had a very low deterrent effect.[58]

In 2008 Bartel updated her research in a paper delivered to a conference held by the National Judicial College of Australia.[59] She found that there had been little or no enforcement action in the period from 2003 – 2007, though in 2007 this had begun to change after amendments to the statute. She concluded that the primary reason for regulatory failure was the lack of universal acceptance of the moral culpability of the offence. Most offenders were otherwise leading members of their communities with prior good character. Low penalties only served to reinforce the perception that the offence was trivial, but high penalties would have been out of step with community expectations and would have generated resistance.

Bartel's study is considered in depth in Chapter 6, which analyses land clearing offences. Bartel's methodology of analysing fines on a dollar per hectare cleared basis is adopted in that Chapter to allow comparison between her study and the findings of this thesis, effectively updating her study to cover the period up to and including 2013.

[57] Bartel, above n 2.
[58] Ibid 19.
[59] Bartel, above n 2.

Hain and Cocklin in 2001 examined the courts' role in maximising the effectiveness of environmental offence provisions in New South Wales and Victoria.[60] They found that whilst decisions of the courts had on the whole achieved the intention of the relevant legislation, conviction and fine rates did not reflect "the seriousness afforded to environmental protection by the legislature".[61] Their study was limited to examining collected data on conviction rates and penalty size rather than individual sentence judgments.

More recently, Westerhuis' analysis of the types of crime that are prosecuted in the LEC provides valuable insight.[62] She identified a need to improve the LEC's performance at reducing the harm caused by offences, including increased use of additional orders and new statutory powers such as the ability for a sentencing judge to suspend or cancel a pollution licence held by an offender. Whilst her study included empirical research, selecting and analysing the judgments in 100 sentences, her analysis is written from the perspective of green criminology and is therefore concerned more with the nature and incidence of harm than it is with legal principles such as proportionality.

In a similar vein, Walters and Westerhuis' recent study of the LEC provides new and useful insights into the workings of the court.[63] The authors studied the operation of the court via observation, case analysis and interviews with relevant court personnel. They found the LEC to be unique amongst criminal courts in that "the foci of justice are environmental harms, scientific evidence to assess such harms, and attempts at reparation".[64] These characteristics of the court are reflected throughout this thesis. This study is particularly valuable for the insights that it provides into the practical workings of the court, insights that are otherwise unobtainable, particularly with regard to informal discussions, negotiations and restorative justice processes that occur prior to and during sentencing hearings but are not described in the written sentence judgments. Again, this study was undertaken from a green criminology

[60] Monique Hain and Professor Chris Cocklin, 'The Effectiveness of the Courts in Achieving the Goals of Environment Protection Legislation' (2001) 18(3) *Environmental and Planning Law Journal* 319.
[61] Ibid 338.
[62] Westerhuis, above n 2.
[63] Walters and Westerhuis, above n 21.
[64] Ibid 285.

perspective and is therefore more concerned with harms, and the court's restorative justice approach that is manifested through additional orders, than it is with legal sentencing principles. It does not address, as this thesis does, the potential and actual conflict between additional orders and proportionality.

It is clear from this review of this area of the literature that studies of environmental crime in Australia are limited, both in number and in scope. Bartel's study, whilst valuable, covered a relatively short period of years and its findings may now be out of date. Updating her study to cover the period to and including 2013 will allow changes over time to be identified and considered. Whilst Bartel's study is in effect concerned with proportionality – although she prefers terms such as adequate or lenient – none of the literature in this area considers the common and statute law on proportionality that is specific to the LEC context.

4.2.2 Australian literature on environmental crime

There has been a range of commentators on environmental crime in Australia. For example, Martin in 2005 sought to identify trends in environmental prosecutions.[65] In the same year Abbot contributed an essentially descriptive piece on the Australian experience in regulating pollution control laws.[66] However, one of the most significant contributors to the literature on environmental crime in Australia is the current Chief Justice of the LEC. In his tenure as Chief Justice, which covered nearly all of the 2004-2013 research period, Chief Justice Preston has been responsible for significant developments in the jurisprudence of his court.

Preston in two articles in 2007 set out his schema for the principled sentencing of environmental offences, essentially a summary of the relevant law with his particular emphases added.[67] That the sitting Chief Justice would use a peer-reviewed journal to

[65] Rosemary Martin, 'Trends in Environmental Prosecution' (2005) 2 *National Environmental Law Review* 38.
[66] Carolyn Abbot, 'The regulatory enforcement of pollution control laws: the Australian experience' (2005) 17(2) *Journal of Environmental Law* 161.
[67] Justice Brian J Preston, 'Principled sentencing for environmental offences - Part 1: Purposes of sentencing' (2007) 31(2) (April) *Criminal Law Journal* 91; Justice Brian J Preston, 'Principled sentencing for environmental crimes - Part 2: Sentencing considerations and options' (2007) 31(3) (June) *Criminal Law Journal* 137.

develop the jurisprudence of his court perhaps indicates the immature state of the law in this area. The articles provide a useful summary of the law.

In a similar vein, in a 2011 article Preston considered the use of restorative justice for environmental crime.[68] He noted the range of sentencing options available under the *POEO Act* which can be considered restorative in character, in addition to the standard criminal penalties provided by section 21A of the *Crimes (Sentencing Procedure) Act* 1999.[69] Preston examined the potential for those provisions to be used more frequently in order to achieve restorative outcomes.[70] This article is significant because it explicitly frames the various additional orders that can be attached to penalties under certain environmental legislation as restorative justice.[71] Cole has also contributed to this debate, arguing that additional orders are likely to be a more effective deterrent to corporate offenders than a mere fine.[72]

Preston has also made several contributions on the topic of sentencing statistics, and specifically the inclusion of statistics from his court in the sentencing database administered by the Judicial Commission of New South Wales, known as the Judicial Information Resource System (JIRS).[73]

It is enormously useful, for both scholars and legal practitioners, to have such access to the intellect of the Chief Justice. However, Preston's primary contribution is descriptive in character, rather than developing hypotheses or drawing conclusions. Whilst this is appropriate to his judicial role, it leaves substantial space for scholars to

[68] Preston, above n 21.
[69] *Protection of the Environment Operations Act 1997* (NSW); *Crimes (Sentencing Procedure) Act 1999* (NSW); Preston, above n 21.
[70] Preston, above n 21.
[71] At the time of Preston's article the *POEO Act* did not refer explicitly to "restorative justice", although a number of the additional orders provided for by the Act were plainly restorative in character. The *Protection of the Environment Legislation Amendment Act 2014*, which commenced from 1st January 2015, inserts a new section 250(1A) which provides for orders for offenders to carry out restorative justice activities.
[72] David Cole, 'Creative sentencing - Using the sentencing provisions of the South Australian Environment Protection Act to greater community benefit' (2008) 25 *Environmental and Planning Law Journal* 94.
[73] Brian Preston and Hugh Donnelly, 'The establishment of an environmental crime sentencing database in New South Wales' (2008) 32(4) *Criminal Law Journal* 214; The Honourable Justice BJ Preston, 'A Judge's Perspective on Using Sentencing Databases' (2010) 9(4) (March) *The Judicial Review* 421.

scrutinise sentencing in the LEC to ascertain if it achieves the Chief Justice's stated goals.

4.2.3 The experience of other jurisdictions

There is a significant volume of relevant scholarship originating from jurisdictions other than Australia.[74] It is not possible, for reasons of space, to analyse it all, and nor is it necessary to do so in order to set out the scholarly context in which this thesis sits.

Particular attention has been paid to England and Wales, as a relatively comparable jurisdiction which deals with environmental crime in a different manner to New South Wales.[75] Adshead has usefully described the contemporary issues and themes in the sentencing of environmental offenders in England and Wales.[76] Her 2013 contribution builds upon the earlier work of Adshead and Andrew.[77] Long-standing criticism of low penalties, particularly in the generalist magistrates' courts, is attributed to both a lack of specialist expertise and ongoing perceptions that such offences are only quasi-criminal. Magistrates lack expertise, in part, because prosecutions are so rare that relevant experience is difficult to gain.[78] Adshead notes that broader sentencing powers, akin to additional orders under relevant New South Wales legislation, had been proposed but not introduced at that time, and concludes by advocating for both such powers and the training of specialist magistrates.

Adshead has not been alone in bemoaning the low rate of prosecutions and lenient penalties imposed for environmental crimes in England and Wales. De Prez in 2000 analysed the manner in which offenders and their counsel sought to minimise their offending conduct, reinforcing the social construction of environmental offences as

[74] See for example: Michael M. O'Hear, 'Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime' (2004) 95(1) *The Journal of Criminal Law & Criminology* 133; Carole M. Billiet, Thomas Blondiau and Sandra Rousseau, 'Punishing environmental crimes: An empirical study from lower courts to the court of appeal' (2014) 8(4) *Regulation & Governance* 472; Adshead, above n 19.
[75] Adshead and Andrew, above n 15, illustrates both the similarities and differences between the two jurisdictions.
[76] Adshead, above n 19.
[77] Adshead and Andrew, above n 15.
[78] Adshead, above n 19, 223.

not truly criminal.[79] She also called for greater sentencing guidance and consideration of specialist courts or judicial officers. Malcolm in 2002 expressed similar concerns and advocated for similar solutions.[80] Watson in 2005 called for more prosecutions and the increased use of civil and administrative penalties as substitution for excessively lenient fines in criminal cases.[81] Parpworth in 2008 joined the call for sentencing guidelines for environmental cases in order to address the inexperience of magistrates and judges and the incidence of fines being reduced by large percentages on appeal.[82]

There has plainly been a significant degree of academic agreement regarding the inadequacy of prosecution and penalties in England and Wales. In that context it is interesting to note that an earlier effort at improving the sentencing practices of magistrates in England and Wales in environmental cases does not appear to have allayed concerns. “Costing the Earth; guidance for sentencers” was first published in 2003, and updated in 2009, by the Magistrates’ Association to guide the sentencing of magistrates.[83] It includes guidance on how to evaluate the seriousness, or harm, of environmental offences within a sustainable development paradigm.

Adshead in her 2013 contribution noted that the Sentencing Council of England and Wales had commenced work on a draft guideline for environmental offences. That sentencing guideline is now in place, and is discussed in some depth in Chapter 8.[84] It provides an example of how environmental harm can perhaps be measured more consistently by sentencing judges and magistrates. It is too soon to be able to ascertain if the Guideline will remedy the long-standing criticism of low penalties.

[79] Paula de Prez, 'Excuses, excuses: the ritual trivialisation of environmental prosecutions' (2000) 12(1) *Journal of Environmental Law* 65.
[80] Rosalind Malcolm, 'Prosecuting for environmental crime: does crime pay?' (2002) 14(5) *Environmental law & management* 289.
[81] Michael Watson, 'Environmental Offences: the Reality of Environmental Crime' (2005) 7 *Environmental Law Review* 190.
[82] Neil Parpworth, 'Environmental offences: the need for sentencing guidelines in the Crown Court' (2008) 1 *Journal of Planning & Environmental Law* 18.
[83] 'Costing the Earth; guidance for sentencers ' (Magistrates' Association, 2009).
[84] The Sentencing Council for England and Wales, 'Environmental Offences Definitive Guideline' (2014) <https://www.sentencingcouncil.org.uk/publications/item/environmental-offences-definitive-guideline/>.

Elsewhere in Europe, in a series of three recent publications, Billiet, Blondiau and Rousseau have described empirical studies into the sentencing of environmental crimes in Belgium. They have found that prison terms are used so rarely that the credibility of the threat of imprisonment for offenders is imperilled.[85] Close examination of judicial sentencing practices found that penalties were generally proportionate to harm, and also raised questions regarding the need for specialised courts and to encourage restorative justice by means of remedial orders.[86] Finally, sophisticated comparison of offences sentenced criminally with those punished administratively, allowing for selection bias, revealed that administrative punishments are no more severe than criminal sanctions, and lack the moral force of the criminal law, thereby reducing their deterrent potential.[87] These studies demonstrate the potential for empirical analysis in this area to contribute to public policy development and a deeper understanding of current practices and trends.

Du Rees' influential 2001 article, considering in detail the enforcement and prosecution of environmental crime in Sweden, identified, among other factors, lenient penalties and unsympathetic courts as contributing to a failure of environmental law to protect the environment.[88] In this respect it mirrors much of the literature from England and Wales, and adds weight to arguments for both proportionate penalties and specialist courts.

Fisher and Verry's 2005 contribution examines the potential for a restorative justice approach to environmental crimes in New Zealand, utilising that country's *Resource Management Act 1991*.[89] They compare those provisions to the additional orders that can be imposed under New South Wales law, and conclude that restorative justice is a promising way of dealing with offences and reducing harm. This analysis was

[85] Carole M. Billiet and Sandra Rousseau, 'How real is the threat of imprisonment for environmental crime?' (2014) 37(2) *European Journal of Law and Economics* 183.
[86] Billiet, Blondiau and Rousseau, above n 74.
[87] Thomas Blondiau, Carole Billiet and Sandra Rousseau, 'Comparison of criminal and administrative penalties for environmental offences' (2015) 39(1) *European Journal of Law and Economics* 11.
[88] Helena Du Rees, 'Can Criminal Law Protect the Environment?' (2001) 2(2) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 109 at 115.
[89] RM Fisher and JF Verry, 'Use of restorative justice as an alternative approach in prosecution and diversion for enviromental offences' (2005) 11 *Local Government Law Journal* 48.

updated by Hamilton in 2008.[90] This is indicative of the growing trend of the previous decade to see environmental restorative justice in a positive light. The authors do not consider the potential for restorative justice measures to distort a proportionate relationship between penalty and the environmental harm caused by an offence.

4.3 Criminological analysis of environmental crime

It is in the field of green criminology that the literature has progressed most rapidly in recent years, particularly with regard to Australian contributors. Although this thesis adopts a fundamentally legal, rather than criminological, perspective it draws upon aspects of green criminology for inspiration and seeks to make a contribution to this growing field.

Most green criminologists are critical of accepting official or legal definitions of environmental crime and environmental harm, arguing that most harm is lawful and excluded from consideration by legalistic approaches.[91] Grabosky in 2003 asserted the need to look beyond the criminal justice system to address eco-criminality.[92] Halsey in 2004 argued that "there is a serious problem … with the way in which enforcement bodies envision, speak about, and frame environmental harm."[93] Passas in 2005 expressed it as follows: "By concentrating on what is officially defined as illegal or criminal, an even more serious threat to society is left out. This threat is caused by a host of company practices that are within the letter of the law…".[94] Gibbs et al in 2010 criticised strict legalistic perspectives for failing to recognise that the current regulatory system is anthropocentric and assuming that environmental harms result from a failure of the existing system.[95]

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[90] Mark Hamilton, 'Restorative justice intervention in an environmental law context: Garrett v Williams, prosecutions under the Resource Management Act 1991 (NZ), and beyond' (2008) 25 *Environmental and Planning Law Journal* 263.
[91] See for example: Avi Brisman, 'Of Theory and Meaning in Green Criminology' (2014) 3(2) *International Journal for Crime, Justice and Social Democracy* 21 at 21.
[92] Peter Grabosky, 'Eco-criminality; Preventing and controlling crimes against the environment' (2003) 41(1-2) *International annals of criminology* 225.
[93] Mark Halsey, 'Against 'Green' Criminology' (2004) 44 *British Journal of Criminology* 833 at 837.
[94] Nikos Passas, 'Lawful but awful: 'Legal Corporate Crimes'' (2005) 34(6) *The Journal of Socio-Economics* 771 at 773.
[95] Carole Gibbs et al, 'Introducing Conservation Criminology; towards interdisciplinary scholarship on environmental crimes and risks' (2010) 50 *British Journal of Criminology* 124 at 126.

Hall, in a recent article, has defended the role of legalistic perspectives within green criminology in a manner that is relevant to this thesis.[96] He argues that green criminology is developing as an interdisciplinary, inclusive field of interest rather than a restrictive body of scholarship adhering to set paradigms, and the incorporation of a more legalistic perspective is not only desirable for green criminology but is in fact vital if the field is to realise its ambitions as a force for environmental good.[97] Hall acknowledges that for legal commentators, the difficulty with a field that is apparently so wide is that it sits uncomfortably with classic legal ideals of certainty and predictability.[98]

It is clear, as Hall argues, that a legalistic focus as adopted by this thesis is not capable of representing all of the relevant perspectives in green criminology. The limitations of the legalistic perspective are acknowledged. This does not mean that it does not have a contribution to make. Whilst lawful harm is a deserving priority of green criminology, how the criminal justice system deals with unlawful harm remains of importance and an area where shortcomings ought to be addressed. It is one aspect, an important aspect, of the complete picture. As Hall concludes, green criminology should incorporate legal analysis as an essential feature of its overall project.[99]

White has lent further support to this inclusive understanding of green criminology. He argued in 2013 that green criminology is increasingly used to denote generic interest in the study of environmental crime, and refers to the study by criminologists of environmental harms, environmental laws and environmental regulation.[100] White argues:

> "By its very nature, the development of green criminology as a field of sustained research and scholarship will incorporate many different approaches and strategic emphases. For some, the point of academic concern and practical application will be to reform aspects of the present system.

[96] Matthew Hall, 'The Roles and Use of Law in Green Criminology' (2014) 3(2) *International Journal for Crime, Justice and Social Democracy* 96.
[97] Ibid 96-97.
[98] Ibid 98.
[99] Ibid 106.
[100] White, above n 9, 17-19.

> Critical analysis, in this context, will consist of thinking of ways to improve existing methods of environmental regulation and perhaps to seek better ways to define and legally entrench the notion of environmental crime."[101]

This thesis conforms to this strain of green criminology that White identifies.

White has been responsible for a number of publications that influenced the development of this thesis. All of them fit within the green criminology label. One particularly important contribution examines recent socio-legal developments in the prosecution and sentencing of environmental crime.[102] In this article White makes a number of important observations. Firstly, that weak enforcement of environmental offences derives from the definition of sustainable development; the need to balance environmental and economic considerations leads to inconsistent compliance and selective enforcement.[103] Secondly, that once an environmental harm has been done, factors which impinge upon the capacity and will of prosecutors to prosecute include a lack of independent scientific expertise, the complexity of corporate structures and ideological attachments against state intervention, particularly with regard to private land ownership.[104] Thirdly, that as a result the prosecutions that do occur tend to target relatively vulnerable defendants: smaller businesses and government agencies. White relies upon research from the USA to support this conclusion.[105] It is not a proposition that has been tested against New South Wales data. Fourthly, that research shows that the judiciary is unlikely to apply severe penalties, particularly in lower courts where magistrates are likely to be unfamiliar with environmental offences. White here relies upon research from England and Wales, as well as Bartel.[106] Finally, White observes that how courts sentence, in terms of sanction used and severity, strongly influences enforcement practices.[107] Prosecutors in part take their lead from the judiciary and will be discouraged by lenient sentences, or by remarks on sentence that indicate that a low value has been attributed to

[101] Ibid 28.
[102] White, above n 8.
[103] Ibid 367.
[104] Ibid 372.
[105] Ibid 373.
[106] Ibid 377.
[107] Ibid 378.

environmental harm. White notes the recent availability of the JIRS statistical database in New South Wales, and explicitly identifies a number of areas where more research is required. These are: preferential targeting of vulnerable defendants in NSW, overly lenient penalties in NSW local courts, how each Australian jurisdiction deals with different types of environmental crime and how the 'value' of an offence is perceived by the judiciary and reflected in a sentence.[108] To the extent that 'value' is synonymous with 'harm', this thesis seeks to address the research gap regarding how 'value' is perceived by the judiciary and reflected in sentences.

White and Halsey's 1998 paper on the nature of environmental harm, categorising perspectives on harm as anthropocentric, biocentric or ecocentric, informed the discussion of judicial approaches to harm in Chapter 8 by providing a means to understand the possible range of judicial attitudes.[109] More recently, White has considered the nature and role of problem-solving environmental courts, or environmental specialisation within a generalist court, of which the LEC is of course a leading example.[110] He acknowledges the role of additional orders in addressing the harm caused by the offence, noting that "how this burgeoning range of sentencing options translates into particular sentencing outcomes warrants ongoing and close scrutiny".[111] Chapters 4 through 7 of this thesis seek to provide such scrutiny. How the restorative or problem-solving potential of additional orders can be reconciled with proportionality, on the occasions when they are in conflict, is a recurring concern of this thesis.

Recent contributions from Westerhuis, and Walters and Westerhuis, have been described above as empirical studies of environmental crime. It is noteworthy that both contribute to the focus upon harm and both, like White, consider the LEC in terms of its problem-solving or restorative functions. Hamman, Walters and Maguire

[108] Ibid.
[109] Mark Halsey and Rob White, 'Crime, Ecophilosophy and Environmental Harm' (1998) 2 *Theoretical Criminology* 345.
[110] Rob White, 'Environmental crime and problem-solving courts' (2013) 59 *Crime, Law and Social Change* 267.
[111] Ibid 273.

have also reflected positively upon these qualities of the LEC, calling for the institution of a comparable court in Queensland.[112]

Other criminological contributions to the literature have come in the form of reports commissioned by the Australian Institute of Criminology. Bricknell's authoritative 2010 report, "Environmental crime in Australia", is so thorough that it could function as a text-book on the topic.[113] Bricknell concludes by identifying research gaps, which include more analysis of sentencing trends for environmental offences and further exploration of alternate means of addressing environmental harm within the criminal justice system.[114] This thesis' examination of the use of additional orders responds in part to that identified research need.

[112] Hamman, Walters and Maguire, above n 19.
[113] Samantha Bricknell, 'Environmental crime in Australia' (Australian Institute of Criminology, 2010).
[114] Ibid 116.

Section 5 Research questions and contributions to the literature

The relevant bodies of scholarship disclose certain themes. First is a concern that criminal penalties for environmental crimes are in some way inadequate, whether too lenient, inconsistent, disproportionate or ineffective. Second is an interest in the notion of harm, which is both fundamental to the debate over the meaning of proportionality and the purpose of criminal sentencing and central to green criminology. The third identifiable theme is the potential for specialist, problem-solving courts such as the LEC to engage in a restorative justice approach, utilising broad and innovative sentencing powers.

It is also clear from the scholarship that there is a need for closer examination of environmental sentencing in practice. Empirical studies are few, and of those that do exist most were conducted at a much earlier stage in the development of environmental sentencing.

One issue that emerges from the third theme of the scholarship is the compatibility, or otherwise, of a restorative justice approach with proportionality. Ashworth, for example, has argued that "the principle of proportionality goes against victim involvement in sentencing decisions because the views of victims may vary".[115] Defenders of restorative justice often reject the necessity or desirability of proportionality; Morris has argued that "desert theory is silent on why equal justice for offenders should be a higher value than equal justice for victims".[116] Chapters 4 to 7 examine the effects of additional orders, which are generally restorative in character, upon proportionate sentencing, and Chapter 8 discusses potential reforms which could render such orders compatible with proportionality. These additional orders are provided for by statute, and allow a sentencing LEC judge to impose an order in addition to, or as a substitute for, a pecuniary or custodial penalty. Examples include publication orders, requiring offenders to place advertisements publicising their offences, and restoration orders, requiring offenders to restore the harm caused

[115] Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 *British Journal of Criminology* 578 at 586.
[116] Allison Morris, 'Critiquing the Critics; A Brief Response to Critics of Restorative Justice' (2002) 42 *British Journal of Criminology* 596 at 610. Note that 'desert theory' is a term for 'retributive justice', a criminological theory of punishment underpinned by proportionality between crime and punishment.

by their offence. It must be noted in this context that whilst most additional orders are plainly restorative in character, they do not possess all of the features of restorative justice. In particular, they do not involve the victim in the sentencing process.[117]

From this basis, three research questions for this thesis can be determined. The first is: what does proportionality mean in the context of criminal sentencing in the LEC of New South Wales? The proportionality of sentencing in practice cannot be assessed without first defining this principle, a complex doctrinal task which is undertaken in Chapter 3. This research question also involves consideration of environmental harm.

The second research question asks: is the sentencing of environmental crimes in the LEC proportionate in practice? This research question addresses the general concern from the scholarship that penalties are in some way inadequate. It also allows detailed analysis of how additional orders under New South Wales legislation, the sentencing powers that allow for a restorative justice approach, affect the proportionality of sentencing.

The third research question asks: if the sentencing of the LEC is in some way disproportionate, what can be done by way of remedy? This research question allows for consideration of how proportionality and restorative justice might be reconciled, further considers the role of harm and seeks remedies to any identified causes of disproportionality.

These three research questions will allow this thesis to make a number of contributions to the literature. The first contribution will be to understand the law of proportionality in the context of the sentencing of environmental crime in the LEC. Others contributions emerge from the findings of empirical research in Chapters 4 to 7, and the law reform discussion of Chapter 8. These findings demonstrate that the majority of sentences imposed by the LEC during the research period had a

[117] During the research period 2004-2013 this was the case. The *Protection of the Environment Legislation Amendment Act 2014*, which commenced from 1st January 2015, inserts a new section 250(1A) which provides for orders for offenders to carry out restorative justice activities. These activities are likely to be determined through a restorative justice process which involves victims.

proportionate relationship between penalty and environmental harm. In the remainder of the sentences, a number of specific causes of disproportionality can be identified, and solutions proposed.

Section 6 Conclusion

The function of this Chapter has been three-fold: to introduce the thesis, to set out the relevant scholarship and establish how this thesis sits within it, and to develop the research questions.

From the scholarship certain themes have emerged, and these themes have been refined into three research questions that can be considered in the context of an empirical study of sentencing practice in the LEC. What does proportionality mean in the context of the sentencing of environmental crimes in New South Wales? Is sentencing in the LEC proportionate in practice? If the sentencing of the LEC is in some way disproportionate, what can be done by way of remedy?

The structure of the thesis reflects these three research questions. Chapters 1 and 2 provide the introduction, literature view and method. Chapter 3 addresses the first research question. Chapters 4 to 7 address the second research question. Chapter 8 addresses the third research question.

The next step, Chapter 2, is to consider the appropriate method for conducting an empirical study to evaluate proportionality in the criminal sentencing of the LEC.

Chapter 2: Empirical Method

Chapter abstract

The second research question of this thesis asks whether the sentencing of environmental crimes in the LEC is proportionate in practice. This Chapter considers the most appropriate method to conduct such a study. In doing so it traverses a range of theoretical and practical considerations. It determines that comparison between groups of like sentences is the most effective method to evaluate proportionality. In order to facilitate this comparison, this Chapter then reduces the total body of research - ten years of the LEC's criminal sentencing - to offence types which occurred with sufficient frequency to allow valid comparison. This results in the identification of four offence types from four different statutes. These offence types will be analysed in depth in following Chapters.

Contents

Section 1 Introduction

The previous Chapter identified the research questions for this thesis, in the context of the relevant literature and research gaps. It concluded with three research questions: what does proportionality mean in the context of criminal sentencing in the LEC; is the LEC's sentencing proportionate in practice; and how can proportionality in the LEC's sentencing be improved. The purpose of this Chapter is to determine the most appropriate research method to address the second of those research questions.

This Chapter proceeds in eight sections. Section 1 provides this Introduction, Section 2 considers whether the research is qualitative or quantitative, Section 3 considers the applicability of the case study method to the research, Section 4 argues for the comparison of sentences as the best method to assess proportionality, Section 5 outlines the scope of the research, Section 6 explains certain inclusions and exclusions from the research scope, Section 7 further refines the body of research to a manageable size that maximises the likelihood of robust findings in accordance with the research questions, Section 8 considers the method of data analysis, and Section 9 concludes this chapter.

Section 2 Qualitative or quantitative

Quantitative legal research has been defined by Chui as follows:

> "In contrast to qualitative research, quantitative research is used to test or verify the appropriateness of existing theories to explain the behaviour or phenomenon one is interested in as opposed to developing new insights or constructing new theories in order to understand the social phenomenon or behaviour. Quantitative research deals with numbers, statistics or hard data whereas qualitative data are mostly in the form of words. … While qualitative research is influenced by the researcher's personal values and bias, quantitative research seeks to report the findings objectively and the role of researcher is neutral."[118]

A comparison of criminal sentences may appear, upon initial consideration, to be quantitative research. Sentences are expressed numerically, most commonly in dollar terms in the LEC, or alternatively in hours of community service or months of imprisonment. Such numerical outcomes, it might be thought, ought to be amenable to statistical analysis and comparison.

This might be correct if sentence outcomes were to be compared with one another. The evaluation of proportionality however requires comparison of a numerical sentence outcome not only with another numerical sentence outcome, but also with the seriousness of the related offence. For environmental crime, the most important element in the seriousness of the offence is the extent of environmental harm, and in addition there are numerous other possible sentencing considerations depending upon the details of the case. The application of quantitative analysis to sentence outcomes would be unlikely to capture the various relevant contextual variables.

This then relates to a second aspect of Chui's definition, that "quantitative research seeks to report the findings objectively and the role of researcher is neutral." Any

[118] Wing Hong Chui, 'Quantitative Research in Law' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) at 48.

evaluation of the seriousness of a criminal offence inevitably involves a degree of subjectivity. No two cases are exactly alike and there are multiple relevant considerations. Whilst a researcher can strive to maintain as neutral a role as possible, it would be unrealistic to deny that personal values and bias play any role in the evaluation of the seriousness of criminal offences.

A third aspect of Chui's definition could suggest that the empirical research for this thesis is quantitative. Chui wrote that quantitative research seeks to "test or verify the appropriateness of an existing theory as opposed to developing new insights or constructing new theories in order to understand the social phenomenon or behaviour." This research is in effect seeking to test the theory that sentencing in the LEC's criminal jurisdiction is proportionate. However the empirical research for this thesis goes well beyond just testing a theory and seeks to develop new insights as to why sentencing is proportionate or disproportionate, as part of addressing research question three. These issues are more suited to qualitative enquiry, as explained below.

Qualitative legal research has been defined as "simply non-numerical", essentially defined as all research that is not quantitative.[119] Although the empirical research for this thesis involves some numerical values, overall it is not numerical in the sense of being hard data that is amenable to statistical analysis. At times however, particularly in Chapter 7 when sentences for land clearing offences are compared across the three Acts under which they are prosecuted, and Bartel's land clearing study is updated, the analysis is more numerical in character. Here quantitative research supplements the qualitative in order to produce more useful and robust findings.

[119] Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) at 17.

Section 3 Case study method

Consistent with the qualitative approach, this thesis adopts the case study method.

Creswell has explained when the case study method is appropriate:

> "A case study is a good approach when the inquirer has clearly identifiable cases with boundaries and seeks to provide an in-depth understanding of the cases or a comparison of several cases."[120]

The case for this study is the LEC and its sentencing practices. It is therefore a single case study rather than a multiple case study. In this context a multiple case study would involve the comparison of two or more specialist environmental courts which, as discussed at sub-section 5.2 below, is not possible because there are no other courts comparable to the LEC in Australia.

The LEC and its sentencing practices is a case that is is clearly identifiable and has defined boundaries. The research seeks a rich understanding of the case by means of consideration of the sentencing judgments themselves, the statutory context and the rules and procedures of the LEC. Yin argues that the case study method is appropriate when the questions being asked are explanatory, characterised by "how" and "why", which again is consistent with this study.[121]

The case study method has been defined as follows:

> "1. A case study is an empirical inquiry that
>
> a. Investigates a contemporary phenomenon in depth and within it's real-life context, especially when
>
> b. The boundaries between phenomenon and context are not clearly evident.

[120] John W. Creswell, *Qualitative Inquiry & Research Design; Choosing Among Five Approaches* (Sage Publications, Second Edition ed, 2007) at 74.
[121] Robert K. Yin, *Case Study Research; Design and Methods,* Applied Social Research Methods Series (Sage Publications, Fourth Edition ed, 2009) at 18.

2. The case study inquiry
    a. Copes with the technically distinctive situation in which there will be many more variables of interest than data points, and as one result
    b. Relies on multiple sources of evidence, with data needing to converge in a triangulating fashion, and as another result
    c. Benefits from the prior development of theoretical propositions to guide data collection and analysis."[122]

Yin, at 2b, argues that a case study should rely upon multiple sources of evidence, a contention that Creswell also supports.[123] The empirical research for this thesis relies predominantly upon one source of evidence, that being the text of the sentence judgment. This source is supplemented and contextualised by other sources, such as the multiple relevant sentencing statutes and the statutes and other documents that govern the operation of the LEC.

An approach was made in writing to the judges of the LEC, via the Chief Justice, affording an opportunity to comment upon draft research findings, either in writing or via interview. This could have provided a valuable source of evidence on the case. No response to the approach was received, and that avenue was therefore closed.

[122] Ibid.
[123] Creswell, above n 120, 75.

Section 4 Why comparison between cases is essential to evaluate proportionality

For this study, comparison between cases is essential because otherwise it is not possible to evaluate proportionality. Evaluating proportionality in the context of a single, isolated case is highly problematic. This is because there is no objective, universal method by which to measure the seriousness of the offence.

Bagaric and Edney have argued convincingly that a weakness of the legal concept of proportionality is that there is no universal standard by which offence seriousness can be measured.[124] There is no stipulated method to measure the harm caused by water pollution or illegal land clearing, for example. Such a method could in theory be provided by guideline judgments, which exist in NSW although none apply to environmental crime, or by statutory reforms such as mandatory sentencing.[125] In the absence of such methods, which are themselves problematic and criticised by much of the literature, it is left to each judge to measure harm as best as he or she is able to.[126]

There has been extensive academic debate over several decades over the purpose of criminal sentencing. Proportionality in sentencing, considered at the general level of "the punishment should fit the crime", is consistent with the retributive or just deserts theory of punishment. Various models have been proposed by retributivist theorists as to how harm could be measured.[127] The purpose of this thesis is not to develop theoretical models for proportionate or retributive sentencing of environmental crime, but rather to assess proportionality in practice using the legal definition of the term. As such the literature on retributivism has limited relevance beyond confirming that proportionality lacks a standard by which offence

[124] Bagaric and Edney, above n 4.
[125] *Crimes (Sentencing Procedure) Act 1999* (NSW), Part 3 Division 4 makes provision for guideline judgments. Six guideline judgments are currently in force. For further information see: http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/sentencing_guidelines.html.
[126] See for example: Michael Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38(1) *Crime and Justice* 65, Austin Lovegrove, 'Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments' (2002-2003) 14 *Current Issues in Criminal Justice* 182.
[127] See for example: Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11(1) *Oxford Journal of Legal Studies* 1, Bagaric and McConvill, above n 50.

seriousness can be measured. That is the current reality of criminal sentencing in the LEC.

For this reason, if a single sentence is considered in isolation then it is very difficult to determine if the penalty is proportionate to the crime. Certainly in extreme examples disproportionality may be self-evident. Consider a hypothetical water pollution offence with a maximum penalty of $500,000. If, for example, an entire river was poisoned by a toxic chemical spill and the penalty was a $100 fine, then that penalty would be self-evidently disproportionate. Such extreme examples are rare in reality, however. A more realistic hypothetical scenario would see a moderate pollution incident, with some short-term harm to aquatic life, and a fine of perhaps $50,000. Whether that fine is proportionate to that crime (in the context of the maximum applicable penalty) is impossible to empirically assess because there is no objective standard against which to measure it. In isolation, proportionality is a subjective judicial decision and analysis of individual cases risks doing no more than substituting the opinion of the researcher for that of the judge.

This difficulty can be partially overcome by case comparison. If sentences for like offences are compared to each other, then greater objectivity can be introduced into the analysis. The characteristics of one case can be compared to the characteristics of another, and should a less serious crime receive a higher penalty than a more serious crime then a finding of disproportionality can be made.[128] The finding would be that the penalty in a certain case is disproportionate *by comparison to another case or cases*. This is an imperfect solution because it cannot determine if the entire sentencing scale is too lenient or too severe, only if a sentence is proportionate relative to other cases. Despite this limitation, comparison between cases does provide a standard by which proportionality can be measured.

Whilst numerous studies have been conducted into criminal sentencing in Australia, very few have considered either proportionality in practice or environmental

[128] This is of course subject to the role of sentencing considerations other than environmental harm. Chapter 3 considers this issue in depth.

crime.[129] Even fewer have considered both. The study most comparable to this thesis is Bartel's 2003 study of land clearing sentences in the LEC, updated in 2008. Whilst Bartel considered sentences in terms of severity rather than proportionality, in practice there is significant commonality with this thesis. Her study also compared sentences, adopting a method of dividing the fine imposed by the number of hectares illegally cleared to calculate a dollars per hectare number.[130] This study is considered in detail in Chapter 6.

Accordingly this thesis will assess proportionality in practice by means of case comparison. In order for such comparison to be meaningful, the cases will need to be for like or very similar offences. How the categories of comparison are to be determined, and how the cases are to be selected, is discussed below. Prior to that step, it is necessary to define the research scope and parameters.

[129] Notable exceptions include: Westerhuis, above n 2: Abbot, above n 2.
[130] Bartel, above n 2; Bartel, above, n 2.

Section 5 Research scope and parameters

5.1 Research period

A period of ten years from 2004-2013 was used to examine LEC sentences. This period was selected in order to capture a sufficient quantity of sentences to allow for meaningful analysis of sentencing practices and trends. This period of sentencing has been little studied; Bartel's 2008 study of land clearing sentences overlaps very slightly at the beginning of the ten-year period, and more recently Westerhuis' study of harm in the LEC's sentencing considers a number of overlapping cases at the end of the period.[131]

Consideration was given to lengthening the research period. From a practical perspective, extending the research period would have risked taking on more research than the time available for this thesis could realistically allow. A prioritisation process was required to reduce the total number of sentences to a smaller number that could manageably be assessed for proportionality, as discussed further below in Section 7 of this Chapter.

5.2 Court selection

The LEC was chosen as the subject for this thesis because it is the largest specialist environment court in Australia. It is a superior court of record, with a long-established criminal jurisdiction.

There are no other courts comparable to the LEC in Australia. Queensland's Planning and Environment Court has no criminal jurisdiction, functioning solely as a civil court.[132] The Environment, Resources and Development Court of South Australia, established in 1994 has a criminal jurisdiction which is significantly less active that the Land and Environment Court, with only two judges who also sit in District Court

[131] Bartel, above n 2; Westerhuis, above n 2.
[132] Queensland Courts, *Planning and Environment Court* <http://www.courts.qld.gov.au/courts/planning-and-environment-court>.

and Equal Opportunity Tribunal matters.[133] The LEC, by comparison, has six full-time judges available to hear criminal matters.

Although many of the offences for which sentences are considered by this thesis can also be prosecuted in the Local Court in New South Wales, the inclusion of Local Court sentences was not possible because they are not readily available. Only a small minority of Local Court decisions are reported. For the remainder, the only way to obtain the magistrate's remarks on sentence is to apply to a court registry for a transcript, a lengthy process that also requires the payment of a fee. The complexity of this task was beyond the scope of this thesis. Nonetheless, a comparison of sentencing practice between the two jurisdictions, namely the LEC and the Local Court, remains a research gap and an area deserving of future research attention.

Similarly, comparison of sentencing practice between the LEC and the Federal Court, which has jurisdiction for Commonwealth environmental offences, is beyond the scope of this thesis. Such comparison is highly complex because Commonwealth offences are prosecuted under Commonwealth law. A comparison of sentencing practice at the LEC and the Local Court in NSW would be relatively straightforward given that the same NSW offence provisions apply in both courts; the only distinction between them is the discretion given to prosecutors to prosecute more serious offences in the LEC and more minor offences in the Local Court. In contrast, a comparison of sentencing practice between the LEC and the Federal Court would consider how different courts apply different legislation, a far more complex task. There is insufficient space in this thesis to tackle that significant challenge.

5.3 Case selection

LEC sentences were identified and accessed by means of the NSW government's Caselaw website.[134] All criminal prosecutions were initially included, subject to the exclusions below, and were identified as either Class 5 proceedings (the Court's criminal jurisdiction) or Class 6 proceedings (appeals from criminal proceedings in

[133] 'Annual Report 2013-2014' (Courts Administration Authority, 2013-2014) at 25.
[134] *New South Wales Caselaw* New South Wales government <http://www.caselaw.nsw.gov.au/landenv/index.html>.

the Local Court) either by means of the file number (Class 5 proceedings have a file number that begins with a 5 and Class 6 proceedings have a file number that begins with a 6) or by the appearance of the word "Prosecution" in the Key Issues section near the top of each judgment.

This process identified 226 sentence judgments. Those sentences are listed in Table 2.1, sorted by year. Annual totals were cross-checked against the LEC's Annual Reviews, which identify the number of cases in each jurisdiction, in order to ensure that the case identification process was not defective.[135]

[135] Land and Environment Court, *Annual Reviews* <http://www.lec.justice.nsw.gov.au/Pages/publications/annual_reviews.aspx>.

Table 2.1 Complete list of sentences comprising the scope of the research for this thesis, sorted by year, and including the Act and section of that Act against which the offence occurred

No	Case	Citation	Act	Section
1	Environment Protection Authority v Hines	[2004] NSWLEC 107	POEO	48(2)
2	Environment Protection Authority v Metalcorp Recyclers Pty Limited	[2004] NSWLEC 14	POEO	64(1)
3	Filipowski v Schiffsbeteiligungsges m.b.H. & Co KG; Filipowski v Kleemann	[2004] NSWLEC 207	MP	8(1)
4	Environment Protection Authority v Floyd	[2004] NSWLEC 214	POEO	144(1)
5	Newcastle City Council v Pepperwood Ridge Pty Limited	[2004] NSWLEC 218	EP&A	125(1)
6	Filipowski v Dayton Corporation; Sang-Tae	[2004] NSWLEC 325	MP	8(1)
7	Environment Protection Authority v Cargill Australia Limited	[2004] NSWLEC 334	POEO	129(1)
8	Environment Protection Authority v Cupitt	[2004] NSWLEC 362	Pest	13
9	Environment Protection Authority v BHP Steel (AIS) Pty Limited	[2004] NSWLEC 37	POEO	120(1), 64(1) x 3
10	Environment Protection Authority v BlueScope Steel (AIS) Pty Limited	[2004] NSWLEC 400	POEO	64(1)
11	Council of Camden v Tax	[2004] NSWLEC 448	EP&A	125(1)
12	Filipowski v Bak and Anor	[2004] NSWLEC 498	MP	18(1)
13	Environment Protection Authority v Coffs Harbour Hardwoods (Trading) Pty Limited	[2004] NSWLEC 563	POEO	64(1)
14	Sutherland Shire Council v Nustas	[2004] NSWLEC 608	EP&A	125(1)
15	Environment Protection Authority v Robinson	[2004] NSWLEC 629	POEO	144(1)
16	Environment Protection Authority v S J Perry	[2004] NSWLEC 715	POEO	115(1)
17	Environment Protection Authority v Forestry Commission of New South Wales	[2004] NSWLEC 751	POEO	120(1)
18	Environment Protection Authority v Yolarno Pty Limited	[2004] NSWLEC 764	POEO	126(1)
19	Environment Protection Authority v Slade, A H	[2004] NSWLEC 773	POEO	144(1)
20	Greater Taree City Council v Haritomeni Nominees Pty Limited	[2004] NSWLEC 775	POEO	120(1)
21	Environment Protection Authority v Biosolids Management Pty Limited	[2004] NSWLEC 90	POEO	64(1)
22	Shoalhaven City Council v DP Druce P/L	[2005] NSWLEC 123	POEO	120(1)
23	Filipowski v Mediterranean Shipping Company SA and Ors	[2005] NSWLEC 159	MP	8(1)
24	Environment Protection Authority v Obaid	[2005] NSWLEC 171	POEO	144(1) x 4

No	Case	Citation	Act	Section
25	Environment Protection Authority v Pannowitz; Environment Protection Authority v Steepleton Pty Limited	[2005] NSWLEC 175	POEO	143(1)(a)
26	Environment Protection Authority v Coe Drilling Australia Pty Limited	[2005] NSWLEC 179	POEO	120(1)
27	Environment Protection Authority v Goulburn Wool Scour Pty Limited	[2005] NSWLEC 206	POEO	120(1)
28	Environment Protection Authority v Sydney Ship Repair and Engineering Pty Limited	[2005] NSWLEC 236	POEO	64(1) x 2
29	The Council of the City of Gosford v Tauszik	[2005] NSWLEC 266	EP&A	125(1)
30	Environment Protection Authority v Illawarra Coke Company Pty Limited	[2005] NSWLEC 296	POEO	120(1)
31	Environment Protection Authority v Eljo Pty Limited; Environment Protection Authority v Solo Waste Aust. Pty Limited	[2005] NSWLEC 341	POEO	64(1)
32	Minister administering the Ports Corporatisation and Waterways Management Act 1995 v Hakim (No 4)	[2005] NSWLEC 344	R&F	22B, 22D
33	Environment Protection Authority v Cut and Fill Pty Limited	[2005] NSWLEC 401	POEO	120(1)
34	Newcastle City Council v Pace Farm Eggs Products Pty Limited (No 3)	[2005] NSWLEC 423	POEO	120(1)
35	Active Tree Services Pty Limited v Ku-ring-gai Municipal Council	[2005] NSWLEC 431	EP&A	125(1)
36	Environment Protection Authority v Tyco Water Pty Ltd	[2005] NSWLEC 453	POEO	120(1)
37	Environment Protection Authority v Olex Australia Pty Ltd	[2005] NSWLEC 475	POEO	120(1)
38	Environment Protection Authority v Allied Industrial Services Pty Ltd	[2005] NSWLEC 501	POEO	120(1)
39	Environment Protection Authority v Hochtief; Thiess Pty Ltd	[2005] NSWLEC 506	POEO	120(1)
40	Filipowski v Cadem Shipping Pty Limited & Anor	[2005] NSWLEC 552	MP	8(1)
41	Environment Protection Authority v Orica Australia Pty Limited	[2005] NSWLEC 621	POEO	64(1)
42	Filipowski v Frey	[2005] NSWLEC 661	MP	8(1)
43	Bentley v Gordon	[2005] NSWLEC 695	NPW	118A(2)
44	Byron Shire Council v Fletcher	[2005] NSWLEC 706	EP&A	125(1)
45	Filipowski v Island Maritime Limited; Majgaonkar	[2005] NSWLEC 73	MP	8(1)
46	Hawkesbury City Council v Memorey	[2005] NSWLEC 735	EP&A	125(1)
47	Environment Protection Authority v Australian Waste Recyclers 1 Pty Ltd	[2005] NSWLEC 739	POEO	64(1)
48	Barbara Filipowski v Vopak Terminals Sydney Pty Limited	[2006] NSWLEC 104	MP	27
49	Environment Protection Authority v Patrick Distribution Pty Ltd	[2006] NSWLEC 123	RRT (DG)	97

No	Case	Citation	Act	Section
50	Environment Protection Authority v Integral Energy Australia Pty Ltd	[2006] NSWLEC 141	POEO	120(1)
51	Environment Protection Authority v Barnes	[2006] NSWLEC 2	POEO	143(1)(a) x 2
52	Environment Protection Authority v Hochtief AG	[2006] NSWLEC 200	POEO	64(1) x 2
53	Murray Irrigation Limited v ICW Pty Limited and Anor.	[2006] NSWLEC 23	WM	346(1)(b) x 2, 347(1) x 2; 346(1)(b), 347(1)
54	Gittany Constructions Pty Limited v Sutherland Shire Council	[2006] NSWLEC 242	EP&A	125(1) x 3
55	Environment Protection Authority v Arenco Pty Limited	[2006] NSWLEC 244	POEO	120(1) x 2
56	Environment Protection Authority v Ballina Shire Council	[2006] NSWLEC 289	POEO	64(1)
57	Environment Protection Authority v Caltex Refineries (NSW) Pty Limited	[2006] NSWLEC 335	POEO	124(b)
58	Bentley v BGP Properties Pty Limited	[2006] NSWLEC 34	NPW	118A(2)
59	Environment Protection Authority v Waste Recycling and Processing Corporation	[2006] NSWLEC 419	POEO	120(1)
60	Cameron v Eurobodalla Shire Council	[2006] NSWLEC 47	EP&A	125(1)
61	Advanced Arbor Services Pty Ltd v Strathfield Municipal Council	[2006] NSWLEC 485	EP&A	125(1)
62	Council of Camden v Runko	[2006] NSWLEC 486	EP&A	125(1)
63	Garrett on behalf of the Director-General of the Department of Conservation and Environment v House	[2006] NSWLEC 492	NPW	98(2)(a)
64	Kari & Ghossayn Pty Limited v Sutherland Shire Council	[2006] NSWLEC 532	EP&A	125(1) x 3
65	Environment Protection Authority v D F Herbert Pty Limited	[2006] NSWLEC 575	POEO	64(1)
66	Environment Protection Authority v Mark Peters	[2006] NSWLEC 612	Pest, POEO	112(1) x 2, 211(2)
67	Environment Protection Authority v Sell and Parker Pty Limited	[2006] NSWLEC 626	POEO	64(1)
68	Garrett, Stephen v Langmead, Patsy	[2006] NSWLEC 627	NPW	118A(2)
69	Environment Protection Authority v Shoalhaven Starches Pty Ltd	[2006] NSWLEC 685	POEO	129(1)
70	Fairfield City Council v Florence Flowers Pty Limited	[2006] NSWLEC 707	POEO	120(1)
71	Environment Protection Authority v Rohan John Williams	[2006] NSWLEC 722	Pest	10(1)(a)
72	Environment Protection Authority v Centennial Newstan Pty Ltd	[2006] NSWLEC 732	POEO	120(1)
73	Barbara Filipowski v Island Maritime Limited; Barbara Filipowski v Sachin Kulkarini	[2006] NSWLEC 750	MP	8
74	Garrett v Williams	[2006] NSWLEC 785	NPW	118A(2) x 2
75	Ballina Shire Council v Ian Watson	[2006] NSWLEC 827	EP&A	125(1)
76	Eurobodalla Shire Council v Wheelhouse	[2006] NSWLEC 98	EP&A	125(1)

No	Case	Citation	Act	Section
77	Environment Protection Authority v Hochtief AG and Thiess Pty Limited	[2007] NSWLEC 177	POEO	120(1)
78	Hornsby Shire Council v Devaney	[2007] NSWLEC 199	EP&A	125(1)
79	Environment Protection Authority v MacDermid Overseas Asia Ltd	[2007] NSWLEC 225	RRT (DG)	37(1)
80	Environment Protection Authority v Leafair Pty Ltd	[2007] NSWLEC 228	Pest	10(1)(a)
81	Port Stephens Council v Robinsons Anna Bay Sand Pty Limited	[2007] NSWLEC 240	EP&A	125(1)
82	Ryde City Council v Craig Fry	[2007] NSWLEC 253	EP&A	125(1)
83	Eurobodalla Shire Council v Tip It Today Broulee Pty Ltd	[2007] NSWLEC 274	POEO	143
84	Environment Protection Authority v Hardt	[2007] NSWLEC 284	POEO	144(1)
85	Environment Protection Authority v Colenden Pty Ltd	[2007] NSWLEC 289	POEO	120(1)
86	Environment Protection Authority v Cargill Australia Limited	[2007] NSWLEC 337	POEO	120(1)
87	Filipowski Barbara v Magnavia Schiffahrtsgesellschaft MBH & Co Kommanditgesellschaft, Pablo Dion and Suzanic Branco	[2007] NSWLEC 404	MP	8(1)
88	Sidhom v Robinson	[2007] NSWLEC 408	MPR	7(1)(a)
89	Morrison v Mahon	[2007] NSWLEC 416	MP	8
90	Morrison v Defence Maritime Services Pty Ltd and Coates	[2007] NSWLEC 421	MP	8
91	Council of Camden v Poyntz, John	[2007] NSWLEC 439	EP&A	125(1)
92	Environment Protection Authority v Cleary Bros (Bombo) Pty Limited	[2007] NSWLEC 466	POEO	120(1)
93	Director-General of the Department of Environment and Climate Change v Taylor	[2007] NSWLEC 530	NVC	21
94	Garrett v Williams	[2007] NSWLEC 56	NPW	118A(2) x 3
95	Plath v Fletcher	[2007] NSWLEC 596	NPW	118A(2)
96	Eurobodalla Shire Council v Leth	[2007] NSWLEC 599	POEO	144
97	Environment Protection Authority v Sell and Parker Pty Ltd	[2007] NSWLEC 64	POEO	64(1)
98	Environment Protection Authority v Caltex Australia Petroleum Pty Limited	[2007] NSWLEC 647	POEO	120(1), 148
99	Environment Protection Authority v Lithgow City Council	[2007] NSWLEC 695	POEO	64(1)
100	Environment Protection Authority v Abigroup Contractors Pty Limited	[2007] NSWLEC 712	POEO	120(1)
101	Environment Protection Authority v Nalco Australia Pty Ltd	[2007] NSWLEC 831	POEO	120(1)
102	Environment Protection Authority v Hogan	[2008] NSWLEC 125	POEO	144(1)
103	Eurobodalla Shire Council v Christenssen	[2008] NSWLEC 134	EP&A	125(1)
104	Environment Protection Authority v Nowra Chemical Manufacturers Pty Ltd	[2008] NSWLEC 187	POEO	120(1)
105	Environment Protection Authority v Caltex Refineries NSW Pty Limited	[2008] NSWLEC 194	POEO	64(1)

No	Case	Citation	Act	Section
106	George Kenneth Kwong v Baulkham Hills Shire Council	[2008] NSWLEC 199	EP&A	125(1)
107	Fairfield City Council v Hong Son Ngo	[2008] NSWLEC 200	POEO	120(1) x 6
108	Fairfield City Council v TT Rubbish Removal Pty Limited; Fairfield City Council v Kim Thu Nguyen	[2008] NSWLEC 201	POEO	120(1) x 6
109	Environment Protection Authority v CSR Building Products Limited	[2008] NSWLEC 224	POEO	120(1)
110	Environment Protection Authority v Coastal Recycled Cooking Oils Pty Limited	[2008] NSWLEC 242	POEO	64(1) x 2
111	Environment Protection Authority v Snowy Hydro Ltd	[2008] NSWLEC 264	POEO	120(1)
112	Environment Protection Authority v Fulton Hogan Pty Ltd	[2008] NSWLEC 268	POEO	120(1)
113	Environment Protection Authority v Baiada Poultry Pty Limited	[2008] NSWLEC 280	POEO	120(1)
114	Jason Pett v The Council of Camden	[2008] NSWLEC 289	EP&A	125(1) x 3
115	Wollongong City Council v Belmorgan Property Development Pty Limited	[2008] NSWLEC 291	POEO	120(1)
116	Environment Protection Authority v Hanson Precast Pty Limited	[2008] NSWLEC 295	POEO	120(1)
117	Blue Mountains City Council v Carlon	[2008] NSWLEC 296	EP&A	125(1)
118	Director-General Department of Environment and Climate Change v Wilton	[2008] NSWLEC 297	NVC	21(2)
119	Wills v Ianelli & Others	[2008] NSWLEC 300	R&F	22B(1); 22B(1)
120	Morris v Department of Environment and Climate Change	[2008] NSWLEC 309	NPW	98(2)(a), 133(4)
121	Manly Council v Taheri	[2008] NSWLEC 314	EP&A	125(1) x 3
122	Great Lakes Council v Mood (No. 2)	[2008] NSWLEC 68	POEO	211(2)
123	Garrett v Freeman (No. 5); Garrett v Port Macquarie Hastings Council; Carter v Port Macquarie Hastings Council	[2009] NSWLEC 1	NPW; NPW; FM	118D(1) x 2; 118D(1) x 3; 200
124	Filipowski v Hemina Holdings S.A.; Filipowski v Rajagopalan (No 2)	[2009] NSWLEC 104	MP	8
125	Environment Protection Authority v Delta Electricity	[2009] NSWLEC 11	POEO	64(1)
126	Pittwater Council v Scahill	[2009] NSWLEC 12	EP&A	125(1)
127	Environment Protection Authority v Werris Creek Coal Pty Ltd; Environment Protection Authority v Holley	[2009] NSWLEC 124	POEO	64(1)
128	Director-General of the Department of Environment and Climate Change v Rae	[2009] NSWLEC 137	NV	12(1)
129	Thomson v Hawkesbury City Council	[2009] NSWLEC 151	EP&A	125(1) x 2
130	Gerondal v Eurobodalla Shire Council	[2009] NSWLEC 160	POEO	144
131	Environment Protection Authority v Causmag Ore Company Proprietary Limited	[2009] NSWLEC 164	POEO	64(1)

No	Case	Citation	Act	Section
132	Environment Protection Authority v Albury City Council	[2009] NSWLEC 169	POEO	120(1)
133	Plath v Rawson	[2009] NSWLEC 178	NPW	118A(2) x 7
134	Environment Protection Authority v Bowport All Roads Transport Pty Limited	[2009] NSWLEC 180	POEO (CA)	19(1) x 5
135	Environment Protection Authority v Ghossayn	[2009] NSWLEC 181	POEO	126(1), 144
136	Director-General, Dept of Environment and Climate Change v Calman Australia Pty Ltd; Iroch Pty Ltd; GD & JA Williams Pty Ltd t-as Jerilderie Earthmoving	[2009] NSWLEC 182	NV	12(1)
137	Blue Mountains City Council v Tzannes	[2009] NSWLEC 19	EP&A	125(1)
138	The Hills Shire Council v Suciu (No 3)	[2009] NSWLEC 192	POEO	143
139	Department of Environment & Climate Change v Sommerville; Department of Environment & Climate Change v Ianna	[2009] NSWLEC 194	NPW	118A(2)
140	Plath v Chaffey	[2009] NSWLEC 196	NPW	118A(1) x 4, 98(2)(a)
141	Environment Protection Authority v Smart Skip (NSW) Pty Ltd	[2009] NSWLEC 204	POEO	144(1)
142	Director-General, Department of Environment and Climate Change v Mario Mura	[2009] NSWLEC 233	NV	12(1)
143	Environment Protection Authority v Boral Australian Gypsum Limited	[2009] NSWLEC 26	POEO	120(1)
144	Campbelltown City Council v Josevski	[2009] NSWLEC 29	EP&A	125(1)
145	Environment Protection Authority v Buchanan (No 2)	[2009] NSWLEC 31	POEO	64(1)
146	Environment Protection Authority v Pal	[2009] NSWLEC 35	POEO	115(1)
147	Environment Protection Authority v Ross	[2009] NSWLEC 36	POEO	120(1)
148	Director-General of the Department of Environment and Climate Change v Hudson	[2009] NSWLEC 4	NV	12(1), 36(4)
149	Hawkesbury City Council v Johnson; Hawkesbury City Council v Johnson Property Group Pty Limited (No 2)	[2009] NSWLEC 6	EP&A	125(1)
150	Environment Protection Authority v Forgacs Engineering Pty Limited	[2009] NSWLEC 64	POEO	64(1)
151	Gosford City Council v Australian Panel Products Pty Ltd	[2009] NSWLEC 77	POEO	120(1)
152	Director General, Department of the Environment and Climate Change v Olmwood (No 2)	[2010] NSWLEC 100	NV	12
153	Director General, Department of the Environment Climate Change and Water v Ian Colley Earthmoving Pty Ltd	[2010] NSWLEC 102	NV	12

No	Case	Citation	Act	Section
154	Environment Protection Authority v Straits (Hillgrove) Gold Pty Ltd	[2010] NSWLEC 114	POEO	120(1)
155	Plath v Glover	[2010] NSWLEC 119	NPW	156A(1)(b)
156	Environment Protection Authority v George Weston Foods Ltd	[2010] NSWLEC 120	POEO	120(1)
157	Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd	[2010] NSWLEC 144	NPW	118D(1); 118D(1)
158	Minister for Planning v Moolarben Coal Mines Pty Ltd	[2010] NSWLEC 147	EP&A	125(1)
159	Betland v Environment Protection Authority	[2010] NSWLEC 183	NPW	110
160	Director-General, Department of Environment Climate Change and Water v Vin Heffernan Pty Limited	[2010] NSWLEC 200	NV	12
161	Environment Protection Authority v Centennial Newstan Pty Ltd	[2010] NSWLEC 211	POEO	120(1)
162	Environment Protection Authority v Ramsey Food Processing Pty Ltd	[2010] NSWLEC 23	POEO	120(1) x 2, 148(4)
163	Environment Protection Authority v Wattke; Environment Protection Authority v Geerdink	[2010] NSWLEC 24	POEO	115(1), 120(1); 115(1), 120(1)
164	Environment Protection Authority v Chillana Pty Ltd	[2010] NSWLEC 255	POEO	120(1)
165	Plath v Hunter Valley Property Management Pty Limited	[2010] NSWLEC 264	NPW	118A(2)
166	Cessnock City Council v Quintaz Pty Limited; Cessnock City Council v McCudden	[2010] NSWLEC 3	POEO	91(5); 211(1)
167	Director-General, Department of Environment and Climate Change v Jack & Bill Issa Pty Ltd (No 6)	[2010] NSWLEC 43	NV	12
168	Environment Protection Authority v State of New South Wales (Department of Environment, Climate Change and Water)	[2010] NSWLEC 67	POEO	64(1)
169	Environment Protection Authority v Transpacific Industries Pty Limited; Environment Protection Authority v Transpacific Refiners Pty Limited	[2010] NSWLEC 85	POEO	64(1) x 2, 66(2); 64(1)
170	Parramatta City Council v Sua trading as Foxy Tree Services	[2010] NSWLEC 93	EP&A	125(1) x 2
171	Parramatta City Council v Cheng	[2010] NSWLEC 94	EP&A	125(1) x 2
172	Environment Protection Authority v Hanna	[2010] NSWLEC 98	POEO	143 x 4
173	Director-General, Department of Environment, Climate Change and Water v Forestry Commission of New South Wales	[2011] NSWLEC 102	NPW	175(1)(a)
174	Burwood Council v Jarvest Pty Ltd	[2011] NSWLEC 109	EP&A	125(1)
175	Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 4)	[2011] NSWLEC 119	NV	12(1)

No	Case	Citation	Act	Section
176	Environment Protection Authority v Unomedical Pty Limited (No 4)	[2011] NSWLEC 131	POEO	128(2)
177	Terrey v Department of Environment, Climate Change and Water	[2011] NSWLEC 141	NPW	175(1)
178	Director-General of the Department of Environment, Climate Change and Water v Graymarshall Pty Ltd (No. 2)	[2011] NSWLEC 149	NV	12(1)
179	Environment Protection Authority v Sibelco Australia Limited	[2011] NSWLEC 160	POEO	120(1)
180	Manly Council v Lee	[2011] NSWLEC 166	EP&A	125(1)
181	JJ and ABS Investments Pty Ltd v Environment Protection Authority	[2011] NSWLEC 199	POEO (CA)	9
182	Plath v Vaccount Pty Ltd t/as Tableland Timbers	[2011] NSWLEC 202	NPW	156A(1)(b)
183	Environment Protection Authority v Port Stephens Council	[2011] NSWLEC 209	POEO	48(2)
184	Environment Protection Authority v Austar Coal Mine Pty Ltd	[2011] NSWLEC 252	POEO	120(1)
185	Director General, Department of Environment, Climate Change and Water v Linklater	[2011] NSWLEC 30	NVC	21(2)
186	Environment Protection Authority v Huntsman Corporation Australia Pty Ltd	[2011] NSWLEC 39	POEO	64(1)
187	Gordon Plath of the Department of Environment, Climate Change and Water v Lithgow City Council	[2011] NSWLEC 8	NPW	118A(2) x 2
188	Environment Protection Authority v Big River Group Pty Ltd	[2011] NSWLEC 80	POEO	120(1)
189	Chief Executive of the Office of Environment and Heritage v Lampo Pty Ltd; Chief Executive of the Office of Environment and Heritage v Lani	[2012] NSWLEC 115	NPW	118D(1); 118D(1)
190	Chief Executive of the Office of Environment and Heritage v Bombala Investments Pty Ltd; Chief Executive of the Office of Environment and Heritage v Rinaldo (Nino) Lani	[2012] NSWLEC 115	NPW	118D(1); 118D(1)
191	Environment Protection Authority v Djura	[2012] NSWLEC 122	CLM	57(1), 48(1)(a)
192	Chief Executive, Office of Environment and Heritage, Department of Premier and Cabinet v Powell	[2012] NSWLEC 129	NV	12(1)
193	Chief Executive, Office of Environment and Heritage v Kennedy	[2012] NSWLEC 159	NV	12(1)
194	Environment Protection Authority v Pipeline Drillers Group Pty Ltd	[2012] NSWLEC 18	POEO	120(1) x 2
195	Environment Protection Authority v Shannongrove Pty Ltd (No 2)	[2012] NSWLEC 202	POEO	143(1)
196	Environment Protection Authority v Queanbeyan City Council (No 3)	[2012] NSWLEC 220	POEO	120(1)

No	Case	Citation	Act	Section
197	Environment Protection Authority v Ravensworth Operations Pty Limited	[2012] NSWLEC 222	POEO	120(1)
198	Warringah Council v Bonanno	[2012] NSWLEC 265	EP&A	125(1)
199	Chief Executive, Office of Environment and Heritage v Rummery	[2012] NSWLEC 271	NV	12(1)
200	Environment Protection Authority v Wyong Shire Council	[2012] NSWLEC 36	POEO	144(1) x 2
201	Chief Executive, Office of Environment and Heritage v Coffs Harbour Hardwood Sales Pty Ltd	[2012] NSWLEC 52	NPW	118A(2), 156A(1)
202	Chief Executive, Office of Environment and Heritage v Kyluk Pty Limited (No 3)	[2012] NSWLEC 56	NPW	118A(2)
203	Environment Protection Authority v Moolarben Coal Operations Pty Ltd	[2012] NSWLEC 65	POEO	120(1)
204	Environment Protection Authority v BMG Environmental Group Pty Ltd & Barnes	[2012] NSWLEC 69	POEO	115(1)
205	Corbyn v Walker Corporation Pty Ltd	[2012] NSWLEC 75	NV	12(1)
206	Environment Protection Authority v Moolarben Coal Operations Pty Ltd (No 2)	[2012] NSWLEC 80	POEO	120(1)
207	Council of the Municipality of Kiama v Watkins	[2012] NSWLEC 87	EP&A	125(1)
208	Environment Protection Authority v Tea Garden Farms Pty Ltd	[2012] NSWLEC 89	POEO	120(1)
209	Lee v Office of Environment and Heritage	[2012] NSWLEC 9	NPW	98(2)(a) x 2
210	The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd & Kinnarney (No 2)	[2012] NSWLEC 95	POEO	143(1)
211	Environment Protection Authority v Forestry Commission of New South Wales	[2013] NSWLEC 101	POEO, NPW	120(1), 133(4)
212	Chief Executive, Office of Environment and Heritage v Leda Management Services Pty Ltd	[2013] NSWLEC 111	NPW	156A
213	Environment Protection Authority v Land Foam Australia Pty Ltd	[2013] NSWLEC 128	POEO	48(2)
214	Environment Protection Authority v Coal and Allied Operations Pty Ltd	[2013] NSWLEC 134	POEO	120(1)
215	Chief Executive, of the Office of Environment and Heritage v Newbigging	[2013] NSWLEC 144	NV	12(1)
216	Environment Protection Authority v Peak Gold Mines Pty Limited	[2013] NSWLEC 158	POEO	120(1)
217	Environment Protection Authority v George Weston Foods Limited	[2013] NSWLEC 16	RRT (DG)	9(1)
218	Mouawad v The Hills Shire Council; Mouawad v The Hills Shire Council	[2013] NSWLEC 165	POEO	143; 143

No	Case	Citation	Act	Section
219	Chief Executive of the Office of Environment and Heritage v Bombala Investments Pty Ltd	[2013] NSWLEC 185	NPW	118D(1) x 2
220	Kogarah City Council v Man Ho Wong	[2013] NSWLEC 187	POEO	143 x 4
221	Environment Protection Authority v Aargus Pty Ltd; Kariotoglou; Kelly	[2013] NSWLEC 19	POEO	144AA x 2; 144AA x 2; 144AA x 2
222	Environment Protection Authority v M A Roche Group Pty Ltd; Environment Protection Authority v Roche	[2013] NSWLEC 191	POEO	120(1) x 2; 211(3)
223	Chief Executive of the Office of Environment and Heritage v Humphries	[2013] NSWLEC 213	NV	12(1)
224	Environment Protection Authority v Kitco Transport Australia Pty Ltd	[2013] NSWLEC 39	RRT (DG)	6(1), 7(1), 9(1)
225	Willoughby City Council v Vlahos	[2013] NSWLEC 71	EP&A	125(1)
226	Hunters Hill Council v Gary Johnston	[2013] NSWLEC 89	EP&A	125(1)

The fourth column contains an abbreviation of the Act under which the sentence was imposed. Those abbreviations are as follows:

CLM	*Contaminated Land Management Act 1997* (NSW)
EP&A	*Environmental Planning and Assessment Act 1990* (NSW)
FM	*Fisheries Management Act 1994* (NSW)
MP	*Marine Pollution Act 1987* (NSW)
MPR	*Marine Pollution Regulation 2001* (NSW) *Marine Pollution Regulation 2006* (NSW)
NPW	*National Parks and Wildlife Act 1974* (NSW)
NV	*Native Vegetation Act 2003* (NSW)
NVC	*Native Vegetation Conservation Act 1997* (NSW)
Pest	*Pesticides Act 1999* (NSW)
POEO	*Protection of the Environment Operations Act 1997* (NSW)
POEO (CA)	*Protection of the Environment Operations (Clean Air) Regulation 2002* (NSW) *Protection of the Environment Operations (Clean Air) Regulation 2010* (NSW)
R&F	*Rivers and Foreshore Improvement Act 1948* (NSW)
RRT (DG)	*Road and Rail Transport (Dangerous Goods) Act 1997* (NSW)
WM	*Water Management Act 2000* (NSW)

Section 6 Inclusions and exclusions

Table 2.1 identifies the criminal sentences that constitute the total scope of the empirical research for this thesis. In determining this total scope of the research, certain categories of LEC decision that appeared potentially but not conclusively relevant were considered in depth. These categories are described below, along with the decision that was ultimately made to include or exclude them. The criterion when determining whether to include or exclude was relevance to the research questions as described in Chapter 1.

6.1 Offences under the Environmental Planning and Assessment Act 1979 *that do not involve environmental harm*

Sentences for offences under the *EP&A Act* that were considered to not involve any issue of environmental harm were excluded from the research.

A range of offences under the *EP&A Act* were sentenced in the LEC during the research period. Section 125(1) of that Act captures a wide range of conduct of which environmental harm (either actual or potential) is not a necessary element. The sub-section states:

> "125 Offences against this Act and the regulations
>
> (1) Where any matter or thing is by or under this Act, other than by or under the regulations, directed or forbidden to be done, or where the Minister, the Director-General, a council or any other person is authorised by or under this Act, other than by or under the regulations, to direct any matter or thing to be done, or to forbid any matter or thing to be done, and that matter or thing if so directed to be done remains undone, or if so forbidden to be done is done, a person offending against that direction or prohibition shall be guilty of an offence against this Act."

The actions most commonly sentenced under section 125(1) are development without consent and development other than in accordance with consent. To determine if a sentence involves an issue of environmental harm requires consideration of the individual factual circumstances and the decision of the responsible judge. For example, a breach of a development consent involving a change to the internal layout of a building is unlikely to involve environmental harm; a breach of consent removing trees that were required to be retained is likely to involve environmental harm.[136]

All offences under section 125(1) of the *EP&A Act* involve harm to the planning system. The focus of this thesis is on environmental harm, and the relationship between that harm and proportionate sentencing. As such, following careful consideration of the facts and the judge's remarks in each instance, those sentences not involving environmental harm were excluded from the body of research. In the interests of transparency, Table 2.2 lists the sentences excluded on this basis, with a brief description of the relevant facts.

Table 2.2 Sentences imposed under the *EP&A Act* and excluded from the research on the basis that the facts of the case and the judge's remarks on sentence did not disclose an issue of environmental harm

No	Case	Citation	Facts
1	Hornsby Shire Council v Surace	[2004] NSWLEC 716	Damage heritage property without consent
2	Willoughby City Council v Revelas	[2004] NSWLEC 747	Build garden retaining wall without consent
3	Pittwater Council v Walters	[2004] NSWLC 75	Renovations within pre-existing building envelope without consent
4	Warringah Shire Council v Sahade	[2004] NSWLEC 333	Use site as car wash without consent
5	Woollahra Municipal Council v Samadi	[2004] NSWLEC 564	Build habitable roof top structure without consent
6	Fairfield City Council v Cavasinni Constructions Pty Limited	[2005] NSWLEC 187	Build prior to obtaining construction certificate

[136] The standard for environmental harm here is a legal one: that the presiding judge found there to be no issue of environmental harm. That is not to say that no actual harm, albeit very slight, could possibly have occurred in some excluded cases.

No	Case	Citation	Facts
7	Canterbury City Council v Daoud	[2007] NSWLEC 135	Build prior to obtaining construction certificate
8	Fairfield City Council v Hanna, Samir	[2007] NSWLEC 343	Build prior to obtaining construction certificate
9	Holroyd City Council v Ghannoum	[2007] NSWLEC 351	Construct basement to dwelling house contrary to approval
10	Holroyd City Council v Shi	[2007] NSWLEC 797	Convert factory to brothel without consent
11	Ku-Ring-Gai Council v Vinci	[2007] NSWLEC 283	Breach consent condition to retain heritage roof
12	The Council of the Municipality of Kiama v Gerringong Developments Pty Limited	[2007] NSWLEC 257	Refurbishment of existing building without consent
13	Woollahra Municipal Council v JPS Development & Construction Pty Limited	[2007] NSWLEC 595	Breach consent condition to retain facade
14	Camden Council v Batasty Pty Limited	[2008] NSWLEC 206	Breach consent condition to complete carparking & landscaping works within required time
15	Holroyd City Council v El-Khouri	[2008] NSWLEC 83	Occupy dwelling without occupation certificate
16	Hunter's Hill Council v Touma	[2008] NSWLEC 227	Build second floor without consent
17	Maitland City Council v Link Building Services Pty Limited	[2008] NSWLEC 71	Works to heritage hotel without consent
18	Minister for Planning v Coalpac Pty Limited	[2008] NSWLEC 271	Breach consent condition relating to rate of coal extraction
19	Woollahra Municipal Council v Kincorp (NSW) Pty Ltd and Terence John Daly	[2008] NSWLEC 218	Demolition of part of a terrace without consent
20	Council of the Municipality of Kiama v Furlong	[2009] NSWLEC 139	Renovations to house without consent
21	Council of the Municipality of Kiama v Micallef	[2009] NSWLEC 202	Development prior to consent becoming operative & without construction certificate
22	Minister for Planning v Fancott Pty Ltd	[2009] NSWLEC 170	Build prior to obtaining construction certificate
23	The Council of the City of Ryde v Felici	[2009] NSWLEC 27	Alteration to existing dwelling without consent
24	The Council of the Municipality of Kiama v Pacific Real Estate (Warilla) Pty Limited	[2009] NSWLEC 191	Development of ride at Jamberoo water park without consent
25	Campbelltown City Council v Mhanna	[2010] NSWLEC 57	Build prior to obtaining construction certificate
26	Kiama Municipal Council v Gerroa Boat Fisherman's Club Ltd	[2010] NSWLEC 72	Use of function room prior to consent being operational

No	Case	Citation	Facts
27	Liverpool City Council v Leppington Pastoral Co Pty Ltd	[2010] NSWLEC 170	Demolition of heritage items without consent
28	Minister for Planning v Hunter Quarries Pty Ltd	[2010] NSWLEC 246	Breach consent condition relating to rate of coal extraction
29	Willoughby City Council v BCPD Pty Limited	[2010] NSWLEC 163	Demolition of house without consent
30	Willoughby City Council v Finlay (No. 2)	[2010] NSWLEC 233	Demolition of house with consent only for partial demolition
31	Great Lakes Council v Spalding	[2011] NSWLEC 257	Use shed as dwelling house without consent
32	Holroyd City Council v Khoury (No 3)	[2011] NSWLEC 210	Fail to comply with order to demolish building
33	Hurstville City Council v Naumcevski	[2011] NSWLEC 226	Build prior to obtaining construction certificate
34	Lane Cove Council v Wu	[2011] NSWLEC 43	Build other than in accordance with consent
35	Cessnock City Council v Bimbadgen Estate Pty Ltd (No 2)	[2011] NSWLEC 140	Earthworks to increase crowd capacity at live events. No native vegetation harmed.
36	Ku-ring-gai Council v Abroon (No 3)	[2012] NSWLEC 12	Build with consent but prior to deferred commencement
37	Director-General, Department of Planning & Infrastructure v Integra Coal Operations Pty Ltd	[2012] NSWLEC 255	Height of waste rock emplacement exceeded that allowed by consent condition
38	Burwood Council v Doueihi	[2013] NSWLEC 196	Develop boarding house without consent
39	Burwood Council v Matthews	[2013] NSWLEC 23	Renovations to dwelling without consent
40	North Sydney Council v Perini (No 2)	[2013] NSWLEC 91	Dwelling built not in accordance with consent
41	Port Macquarie-Hastings Council v Notley (No 2)	[2013] NSWLEC 220	Build dwelling without consent on agricultural land, no native vegetation harmed

These forty-one sentences were excluded from the body of research and do not appear in Table 2.1.

6.2 Appeals

6.2.1 Appeals from the Local Court to the Land and Environment Court

All appeals from the Local Court which required the LEC to engage in a sentencing exercise were included in the research, provided that the appeals did not fall within a category, for example no issue of environmental harm, that was otherwise excluded.

The LEC functions as an appeal court for environmental criminal proceedings heard in Local Courts in NSW. The *Land and Environment Court Act* grants the LEC jurisdiction to hear and dispose of appeals under the *Crimes (Appeal and Review) Act* in the Court's Class 6 jurisdiction.[137] Section 31 of the *Crimes (Appeal and Review) Act* allows a person who has been convicted or sentenced by a Local Court with respect to an environmental offence an appeal as of right to the LEC. Such an appeal can be against conviction, against the severity of the sentence imposed, or both.

Moreover, the *Crimes (Appeal and Review) Act* allows the Environment Protection Authority (EPA) an appeal to the LEC as of right against the leniency of a sentence imposed by a Local Court; other prosecutors, such as Councils, may only do so on a point of law. Any prosecution appeal against a Local Court order dismissing a matter (that is, a verdict of not guilty) can only be on a point of law.[138]

Each statute considered by this thesis stipulates which jurisdiction offences are to be prosecuted in. Commonly the prosecutor has a discretion to determine which jurisdiction to commence proceedings in. The *POEO Act*, for example, provides that all offences bar Tier 1 pollution offences (the most serious category) may be dealt with either before the Local Court or the LEC; the only practical difference is that the maximum penalty before the Local Court is limited to 1,000 penalty units ($110,000).[139] Tier 1 offences may be dealt with before the LEC or on indictment before the Supreme Court; if the EPA opts for the LEC then the maximum penalty for individuals of seven years imprisonment is limited to two years.[140] The EPA has never chosen to pursue a Tier 1 prosecution in the Supreme Court.

The *National Parks and Wildlife Act*, *Native Vegetation Act*, *Pesticides Act*, *EP&A Act*, *Marine Pollution Act*, *Rivers and Foreshores Improvement Act*, *Road and Rail Transport (DG) Act, Fisheries Management Act* and the *Water Management Act* all allow for prosecutions to be initiated in the Local Court or the LEC, with lower maximum

[137] *Land and Environment Court Act 1979* (NSW), s 21A.
[138] *Crimes (Appeal and Review) Act 2001* (NSW), s 42.
[139] *Protection of the Environment Operations Act 1997* (NSW), s 215.
[140] Ibid, s 214.

penalties in the Local Court.[141] The *Contaminated Land Management Act*, like the *POEO Act*, stipulates that the most serious offences must be prosecuted in the LEC, with a discretion between the LEC and the Local Court for less serious offences.[142]

All appeals from the Local Court which required the LEC to engage in a sentencing exercise were included in the research. This included both appeals by the offender against the severity of sentence and appeals by the Crown against the leniency of a sentence. Sentence appeals were included whether they were successful or not as an evaluation process to determine the appropriate sentence, including considerations of harm and proportionality, is required before the Court can either uphold or dismiss an appeal. Sentence appeals on a point of law were included where the identified legal error was manifest inadequacy, requiring a fresh sentencing exercise.

An unexpected development introduced a further complication with regards to appellants who were not disputing their guilt but were seeking a dismissal pursuant to section 10 of the *Crimes (Sentencing Procedure) Act*. If an offence is found to be proven but dismissed pursuant to section 10 then no conviction is recorded. In a number of cases beginning with *Advanced Arbor Services Pty Ltd v Strathfield Municipal Council* in 2006, Preston CJ interpreted the *Crimes (Appeal and Review) Act* to mean that on an appeal against sentence the LEC does not have the power to quash a conviction and impose an order under s 10, arguing that the Act defined 'sentence' as orders that flowed from a conviction.[143] Although the provisions relating to an appeal from the Local Court to the District Court are essentially identical to those relating to an appeal from the Local Court to the LEC, the District Court continued with the contrary interpretation.[144] Although Preston CJ appears to have been correct as a matter of statutory interpretation, the LEC had adopted a different approach to the remainder of the NSW criminal justice system.

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[141] *National Parks and Wildlife Act 1974* (NSW), s 189; ibid; *Native Vegetation Act 2003* (NSW), s 42; *Environmental Planning and Assessment Act 1979* (NSW), s 127; *Pesticides Act 1999* (NSW), s 71; *Marine Pollution Act 2012* (NSW), s 234; *Rivers and Foreshores Improvements Act 1948* (NSW), s 26; *Dangerous Goods (Road and Rail Transport) Act 2008* (NSW), s 47; *Fisheries Management Act 1994* (NSW), s 277; *Water Management Act 2000* (NSW), s 364.
[142] *Contaminated Land Management Act 1997* (NSW), ss 91-92.
[143] *Advanced Arbor Services Pty Ltd v Strathfield Municipal Council* [2006] NSWLEC 485.
[144] 'Statutory Review of the Crimes (Appeal and Review) Act 2001 - August 2008' (New South Wales Government Attorney General's Department, 2008).

This was resolved by the *Crimes (Appeal and Review) Amendment Act 2009*, which inserted a new section 3 (3A) to stipulate that "a power conferred on an appeal court under this Act to vary a sentence includes the power to make an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999*".

The practical consequence of Preston CJ's interpretation was that, during the period from *Advanced Arbor Services* to the commencement of the amending legislation, appellants seeking a section 10 dismissal needed to mount an appeal against conviction rather than an appeal against sentence severity. A conviction appeal would usually only be undertaken if a defendant was found guilty at first instance and wished to be found not guilty on appeal. Such appeals would normally not have been considered for the research because they do not involve a sentencing exercise, but rather a determination of guilt. However, as a result of Preston CJ's interpretation of the Act, the research has had to include those conviction appeals where the appellant was in fact not disputing guilt but rather seeking a non-conviction pursuant to section 10. Although technically conviction appeals, they in fact have all the characteristics of sentencing severity appeals.

The research identified thirty-six relevant appeals from the Local Court. Of these, eighteen were excluded: seventeen for not involving any issue of environmental harm and one because the charge was contempt. These were excluded for the reasons discussed at 6.1 above and 6.4 below. Table 2.3 lists the appeals and identifies those excluded by shading them in grey. The abbreviations of the Acts are the same as for Table 2.1 above.

Table 2.3 Appeals from the Local Court to the Land and Environment Court from the research period which required a fresh sentencing exercise, indicating with grey shading those sentences which were excluded from the research because they a) do not involve an issue of environmental harm, or b) are for contempt

No	Case	Citation	Act	Facts
1	Bayley v Leichhardt Municipal Council	[2005] NSWLEC 34	EP&A	Did not fulfill order from Council to undertake fire safety works to building
2	Active Tree Services Pty Limited v Ku-ring-gai Municipal Council	[2005] NSWLEC 431	EP&A	Contravene Tree Preservation Order
3	Carlino v Leichhardt Municipal Council	[2005] NSWLEC 198	EP&A	Breached condition of consent relating to retention of heritage streetscape
4	Kyriakidis v Ashfield Municipal Council	[2005] NSWLEC 738	POEO	Failed to comply with notice to cease parking truck on residential street
5	Kari & Ghossayn Pty Limited v Sutherland Shire Council	[2006] NSWLEC 532	EP&A	Breach development consent by removing trees & bushland
6	Gittany Constructions Pty Limited v Sutherland Shire Council	[2006] NSWLEC 242	EP&A	Breach development consent by removing trees & bushland
7	Cameron v Eurobodalla Shire Council	[2006] NSWLEC 47	EP&A	Removed dead tree & branches of live tree in public reserve
8	Advanced Arbor Services Pty Ltd v Strathfield Municipal Council	[2006] NSWLEC 485	EP&A	Removed tree without consent
9	Byres v Leichhardt Municipal Council	[2006] NSWLEC 82	EP&A	Alterations to sub-floor area of dwelling without consent
10	Eurobodalla Shire Council v Wheelhouse	[2006] NSWLEC 98	EP&A	Removed three trees from neighbouring property without consent
11	David Lahood v Strathfield Municipal Council; David Lahood Holdings Pty Ltd v Strathfield Municipal Council	[2007] NSWLEC 714	EP&A	Demolished dwelling without consent
12	Franks v Woollahra Municipal Council	[2007] NSWLEC 461	EP&A	Carried out modifications to dwelling without consent
13	Sidhom v Robinson	[2007] NSWLEC 408	MPR	Attempted to harm animals in a sanctuary zone
14	Nasser v Hurstville City Council	[2007] NSWLEC 720	EP&A	Alterations to boat shed, constructions of deck, stairs & balustrade without consent

No	Case	Citation	Act	Facts
15	Jason Pett v The Council of Camden	[2008] NSWLEC 289	EP&A	Removed 172 trees without consent
16	Morris v Department of Environment and Climate Change	[2008] NSWLEC 309	NPW	Culled kangaroos contrary to licence
17	Ryding v Kempsey Shire Council	[2008] NSWLEC 306	POEO	Failed to pay prescribed fee
18	Eurobodalla Shire Council v Christenssen	[2008] NSWLEC 134	EP&A	Cleared bushland without consent
19	George Kenneth Kwong v Baulkham Hills Shire Council	[2008] NSWLEC 199	EP&A	Filled bushland without consent
20	Choices Manufacturing Pty Ltd v Fairfield City Council	[2009] NSWLEC 72	EP&A	Traded as retail shop without consent
21	Gerondal v Eurobodalla Shire Council	[2009] NSWLEC 160	POEO	Used land as waste facility without authority
22	Krizner, Alex v Manly Council; Kirzner, Natalia v Manly Council	[2009] NSWLEC 13	EP&A	Converted single dwelling to two separate dwellings without consent
23	Thomson v Hawkesbury City Council	[2009] NSWLEC 151	EP&A	Removed trees without consent
24	Zhou v Auburn City Council; Chen v Auburn City Council	[2009] NSWLEC 75	EP&A	Failed to comply with orders to remove unauthorised changes to internal lay-out of flats
25	Zhu v Auburn Council	[2009] NSWLEC 97	EP&A	Altered existing dwelling without consent
26	Camilleri v Wollondilly Shire Council	[2009] NSWLEC 136	EP&A	Operated dog kennel without consent
27	Betland v Environment Protection Authority	[2010] NSWLEC 183	Pest & NPW	Used pesticide in manner which harmed non-target animals, used prescribed substance to harm bird without permission
28	Dunia v Fairfield City Council	[2010] NSWLEC 217	EP&A	Operated smash repair business without consent
29	Nguyen v Canterbury City Council	[2010] NSWLEC 55	EP&A	Extension to dwelling without consent
30	JJ and ABS Investments Pty Ltd v Environment Protection Authority	[2011] NSWLEC 199	POEO (CA)	Truck emitted excessive air impurities
31	Terrey v Department of Environment, Climate Change and Water	[2011] NSWLEC 141	NPW	Failed to comply with condition of licence to cull flying-foxes
32	Gerondal v Eurobodalla Shire Council (No 6)	[2011] NSWLEC 132		Excluded - contempt
33	Md Abdul Halim Miah v Canterbury City Council	[2012] NSWLEC 193	EP&A	Replaced granny flat without consent
34	Loel v Warringah Council	[2012] NSWLEC 11	EP&A	Commenced construction of approved building without construction certificate
35	Lee v Office of Environment and Heritage	[2012] NSWLEC 9	NPW	Killed protected birds

No	Case	Citation	Act	Facts
36	Mouawad v The Hills Shire Council; Mouawad v The Hills Shire Council	[2013] NSWLEC 165	POEO	Unlawfully transport waste to place that cannot lawfully be used as waste facility

It was considered that appeals from the Local Court would not disclose any useful information as regards differences in approach to sentencing between the two jurisdictions, as there is no way of determining that those sentences appealed are a representative sample of all Local Court sentences. On the contrary, those subject to appeal may well be the most extreme or atypical sentences.

6.2.2 Appeals from the Land and Environment Court to the Court of Criminal Appeal

The *Criminal Appeal Act 1912* allows defendants to appeal decisions of the LEC to the Court of Criminal Appeal ("CCA") against conviction and/or sentence.[145] The EPA may appeal to the CCA against a sentence imposed by the LEC in proceedings where the EPA was the prosecutor.[146]

The CCA judgments most relevant to this thesis are those which have provided authority for the evaluation of harm or the attainment of proportionality. Such authorities are relevant because they strongly influence the decision-making processes of LEC judges. Those authorities are discussed in detail in Chapter 3.

Consideration was given to whether the research should exclude cases for which the sentence imposed in the LEC was subsequently overturned on appeal to the Court of Criminal Appeal. Given the focus of this thesis upon how judges of the LEC sentence, it was decided not to exclude such cases because they remain capable of revealing sentencing practice. Further, successful appeals against sentence are not necessarily attributable to any error in the evaluation of harm or in the imposition of a proportionate sentence; appeals can be upheld on a wide variety of grounds, many of which are irrelevant to the considerations of this thesis.

[145] *Criminal Appeal Act 1912* (NSW), ss 5AA-5AB.
[146] *Criminal Appeal Act 1912* (NSW), s 5D.

6.3 Civil enforcement

Civil enforcement cases (Class 4 Land and Environment Court proceedings) were not included, despite frequently having similar factual scenarios and considerations of harm as Class 5 and 6 matters. Civil enforcement proceedings are not criminal in the true sense, and do not contain the key element of criminal sanction. In civil enforcement proceedings the applicant will generally seek a court order to restrain or remedy a breach of an Act. The relationship between harm and penalty, and the proportionality of penalties, are therefore not relevant considerations in civil enforcement proceedings.

6.4 Contempt

Sentences imposed for contempt were not included in the research. This is because contempt is an offence against the Court itself rather than against the environment, and as such quite different sentencing considerations are brought to bear. Environmental harm is not the central consideration.

In the LEC contempt proceedings generally arise from the breach of an order previously made by a judge, or an undertaking made by a party to proceedings. In Class 4 proceedings for civil enforcement, orders are commonly made to remedy or restrain a breach of an Act, and in Class 5 proceedings additional orders are frequently made with regards to publication, remediation or some other purpose allowed by statute. Whilst the breach of such an order or undertaking may involve environmental harm, in practice the sentencing process does not give great weight to any such harm. Instead the focus is placed squarely upon the degree to which the offender has defied the authority of the Court.[147]

6.5 Aboriginal Cultural Heritage

[147] See for example: *Environment Protection Authority v Ableway Waste Management Pty Limited* [2005] NSWLEC 469 at [28].

The research identified a small number of sentences for the offence of harming or desecrating an Aboriginal object. The *National Parks and Wildlife Act* Part 6 regulates the protection of Aboriginal cultural heritage, with the consequence that offences are prosecuted in either the Local Court or the LEC.

These sentences are excluded from the research. They are not primarily concerned with environmental harm but rather with the protection of Aboriginal cultural heritage.

Table 2.4 lists the sentences excluded on this basis.

Table 2.4 Sentences from the research period for offences involving harm to Aboriginal cultural heritage and not environmental harm

1	*Garrett v Williams, Craig Walter* [2007] NSWLEC 96
2	*Plath v O'Neill* [2007] NSWLEC 553
3	*Chief Executive, Office of Environment and Heritage v Ausgrid* [2013] NSWLEC 51

This Section has considered whether certain categories of cases should be included or excluded from the research. The result of these decisions is Table 2.1, the 226 sentences that comprise the total body of research. Section 4 determined that proportionality is best evaluated by means of comparison between sentences. How this comparison process can best work in practice is considered in the following section, Section 7.

Section 7 Selection of particular offence types for further comparison

The inclusions and exclusions having been explained in Section 6, the research consists of the 226 sentences listed in Table 2.1. All of those sentences are potentially relevant to the research questions.

Having determined to assess proportionality by means of comparing sentences, the next step is to consider the most sensible means of doing so. Different environmental offences have quite distinct characteristics, including different statutory contexts and different types of environmental harm. Therefore this thesis will compare specific offence types, that is specific offences under single sections or sub-sections of an Act. Sentences for water pollution offences will be compared with other water pollution sentences and so on.

For this reason, the 226 sentences in Table 2.1 are categorised by offence type in Table 2.5 below. Whilst there are 226 sentences in Table 2.1, Table 2.5 totals 233 offences because some offenders were charged with more than one offence type. Table 2.5 allows ready identification of how often each offence type occurred. It demonstrates that some offence types occurred very rarely, and many only once during the ten-year research period. Those which occurred only once cannot, self-evidently, be compared to another case. It is also clear from Table 2.5 that only a small number of offence types occurred frequently.

Table 2.5 The sentences categorised by offence type

Act	Section	Total
POEO Act	120	57
EP&A Act	125	37
POEO Act	64	24
Native Vegetation Act *Native Vegetation Conservation Act* [148]	12 21	19
National Parks and Wildlife Act	118	18
Marine Pollution Act	8	11
POEO Act	144	10

[148] Offences against section 12 of the *Native Vegetation Act* should be considered together with offences against section 21 of the *Native Vegetation Conservation Act*, which is the Act which preceded it. As discussed in depth in Chapter 6, the offence provision remained essentially unchanged when the *Native Vegetation Act* replaced the *Native Vegetation Conservation Act*.

Act	Section	Total
POEO Act	143	9
National Parks and Wildlife Act	156	4
POEO Act	211	4
POEO Act	115	4
POEO Act	48	3
National Parks and Wildlife Act	98	3
National Parks and Wildlife Act	175	2
Pesticides Act	10	2
POEO Act	148	2
POEO Act	126	2
POEO Act	129	2
Rivers & Foreshores Improvement Act	22B	2
Contaminated Lands Management Act	57	1
Marine Parks Regulation	7	1
National Parks and Wildlife Act	110	1
Pesticides Act	112	1
Pesticides Act	113	1
POEO Act	124	1
POEO Act	128	1
POEO Act	95	1
POEO (Clean Air) Regulation	9	1
POEO (Clean Air) Regulation	19	1
POEO Act	133	1
Water Management Act	346	1
Road & Rail Transport (DG) Act	97	1
Road & Rail Transport (DG) Act	37	1
Dangerous Goods (RRT) Act	6	1
Dangerous Goods (RRT) Act	9	1
Marine Pollution Act	18	1
Marine Pollution Act	27	1

The decision as to which offence types will be selected for comparison will be made according to two criteria. The first is that it is preferable to select those offence types which occur most frequently, because they are the offence types of greatest relevance to the sentencing of environmental crime in New South Wales. Should the comparison yield any insights, those insights will be more valuable, with greater potential for impact, if they apply to frequently rather than rarely occurring offence types.

The second criterion is that it is preferable to consider a wider range of legislation rather than to focus upon one or two Acts in particular. Creswell refers to "purposeful maximal sampling" in the design of case study research, arguing that it is preferable to "show different perspectives on the problem, process or event" in question.[149] This approach is adopted here. Further, consideration of a wider range of legislation is better able to address the research questions. The three research questions for this

[149] Creswell, above n 120, 75.

thesis ask: what does proportionality mean in the context of criminal sentencing in the LEC; is the LEC's sentencing proportionate in practice; and how can how can proportionality in the LEC's sentencing be improved? If the findings of this thesis are to address the LEC's practices broadly then it is preferable that the broadest possible range of legislation is considered.

Following these criteria, only the most frequently occurring offence type from each statute will be considered. This is most relevant for the *POEO Act* which, as Table 2.5 reveals, has four of the eight most frequently occurring offence types.

The first two offence types listed in Table 2.5 occurred significantly more often than other offence types. Sentences for breaches of section 120 of the *POEO Act* (water pollution) ranked first in frequency during the research period, with fifty-seven occurrences, and sentences for breaches of section 125 of the *EP&A Act* ranked second, with thirty-seven instances. All offences against the *EP&A Act* are breaches of section 125.

The offence type which ranked third in frequency was the offence of contravening a condition of an Environmental Protection Licence under section 64 of the *POEO Act*. This offence type is excluded because the *POEO Act* is already represented by section 120.

This was followed by offences against section 12 of the *Native Vegetation Act* and section 21 of the *Native Vegetation Act*, which occurred nineteen times in total. Next in order was offences against section 118 of the *National Parks and Wildlife Act*. Section 118(A) protects threatened species, populations and communities against harm, and section 118D protects the habitat of threatened species and populations against harm. There are eighteen sentences for offences against section 118 in total.

The next practical difficulty lies in determining how many offence types in total to compare. Constraints of time and space dictate that not all Acts can be included. These constraints dictated that the 233 sentences comprising the research need to be reduced by approximately 50%. Further, following the logic of the first criterion

above, as the frequency of offence type decreases so does the value and potential impact of any insights that comparison might yield. There is a large step from eighteen sentences for section 118 of the *National Parks and Wildlife Act* to the next most frequently occurring offence type, section 8 of the *Marine Pollution Act* with eleven sentences. Eleven sentences in a ten-year period indicates that the offence is relatively infrequent.

This process therefore leaves four offence types to be considered in depth in the following chapters: section 120 of the *POEO Act* (water pollution), offences against the *EP&A Act*, section 118 of the *National Parks and Wildlife Act* (harm to threatened species, populations and communities, or to their habitat) and offences against the *Native Vegetation Conservation Act* and the *Native Vegetation Act* (which can be considered in combination due to their similarity). The four offence types selected come from four different Acts and cover 131 (or 56%) of the 233 sentences comprising the research.

Section 8 Conclusion

This Chapter has considered the most appropriate method to address the second research question. A case study approach is adopted, within which sentences will be assessed for proportionality by means of comparison with sentences imposed for other like or very similar offence types. The scope of the research has been defined by reference to the research questions, and further refined by reference to set criteria. Consequently four offence types will be considered across the four available chapters. Before that can happen however it is necessary to determine what "proportionate" means in the context of criminal sentencing in the LEC. That is the purpose of the following Chapter.

Chapter 3: What does "proportionality" mean in the context of the Land and Environment Court?

Chapter abstract

Proportionality is so fundamental to criminal sentencing as to seem axiomatic. The superficial simplicity of the concept masks the complex definitional challenges of determining which case characteristics a sentence should be proportionate to and how proportionality should be measured. This Chapter seeks to understand what "proportionality" means in practice in the context of the LEC. It does so by combining consideration of the common law development of proportionality with research undertaken into LEC criminal sentencing over a ten year period 2004-2013. It finds that judges of the LEC must consider proportionality in two distinct respects: the common law proportionality principle and a rule specific to this jurisdiction, *Camilleri's* rule. These two forms of proportionality are explored in depth. Ultimately it is possible to combine the two parts to formulate one test for proportionality in criminal sentencing in the LEC. This provides a practical test for proportionality that is consistent with all the relevant law.

Contents

Section 1 Introduction

The purpose of this thesis is to assess whether or not there is proportionality in sentencing for criminal offences in the LEC. This assessment cannot be undertaken without first determining what "proportionality" means. That task is the purpose of this Chapter. Proportionality is a deceptively simple concept, so deeply embedded within modern notions of justice that it can be seen as mere common sense: the punishment should fit the crime. Yet when a judge sentences a criminal offender, determining a proportionate sentence is far from straightforward. This Chapter explores the law on proportionality that an LEC judge must apply, and finds that it consists of two distinct parts. The parts have different origins, use different terms and are capable of producing different sentence outcomes. Each part is encumbered with its own complexities and both parts suffer a lack of definitional clarity. The first part consists of the common law on proportionality developed by both the High Court of Australia and the Supreme Court of New South Wales and which applies to criminal sentencing in all criminal courts. This part is referred to as the "proportionality principle". The second part is a rule of sentencing specific to the LEC jurisdiction, which stipulates that penalty should ordinarily be proportionate to environmental harm. This part is referred to as "*Camilleri's* rule" after the case from which it emerged.[150] This Chapter examines and compares the origins, development and meaning of these two distinct parts and considers how they are applied in practice.

This Chapter proceeds in five sections. Section 2 briefly outlines the role of maximum penalty in proportionality in sentencing. Section 3 considers the proportionality principle and Section 4 considers *Camillieri's* rule. Section 5 concludes the Chapter by resolving all of the law on proportionality that LEC judges apply into a single proportionality test, in order to facilitate the analysis of sentencing in practice that occurs in chapters 4 through 7.

[150] *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) NSWLR 683.

Section 2 The role of the maximum penalty

It is important to note at the outset that proportionality between crime and punishment must always be understood in the context of the maximum penalty. The maximum penalty, which is always provided by statute for environmental offences, establishes the range within which proportionality operates.

The role of maximum penalties in sentencing was explored by the High Court in *Markarian v The Queen*, in which Gleeson CJ, Gummow, Hayne and Callinan JJ at [31] stated:

> "… careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick".[151]

In the LEC context, numerous sentences considered in the research for this thesis refer to Kirby J in *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* at [29]:

> "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 (NSWCCA) 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 Hansard, New South Wales Parliamentary Debates (Legislative Assembly), 20 November 1990 at 10038. The task of a court is to assess the relative seriousness of the offender's particular offence in relation to a worst case for which the maximum penalty is provided. Having determined the relative seriousness of the offence, the penalty to be imposed is that which

[151] *Markarian v The Queen* [2005] HCA 25.

> approximately correlates upon the scale of penalty set by the legislature from zero to the maximum."

Thus the maximum penalty is an ever-present and essential element of proportionality in criminal sentencing. The maximum penalty for a specific offence establishes the range in which a penalty proportionate to environmental harm must lie; somewhere between zero and the stipulated maximum, depending upon the seriousness of the offence. Consequently, it is more difficult to compare penalties imposed for offences with different maximum penalties than it is to compare penalties imposed for the same offence type, or for different offence types with the same maximum penalty. It is for this reason that the empirical section of this thesis compares sentences for specific offence types, one per chapter.

Maximum penalties are particularly relevant to certain research findings in chapters 5, 6 and 7, and in these contexts the role of the concept will be explored further.

Section 3 The first part: the proportionality principle

Proportionality has existed as a legal concept for centuries. Its modern existence in Australian common law derives from our European legal heritage. The 1688 English Bill of Rights outlawed "cruell and unusuall punishments".[152] In both Canada and the United States of America, nations that share Australia's legal heritage, constitutional prohibitions on cruel and unusual punishments apply to grossly disproportionate sentences.[153] In the 1981 Australian High Court case of *Silvery v The Queen* at [14] Murphy J argued that the English Bill of Rights forms 'part of the Australian constitutional fabric'.[154] In 2005 McHugh J of the High Court described proportionality as "one of the fundamental principles of sentencing law".[155]

To place this discussion in context, it is important to understand that whilst proportionality is a "fundamental principle" as McHugh J stated, with the implication that it will override or control other factors, proportionality is not the only element of sentencing law that a sentencing judge must consider. The factors relevant to sentence are very numerous. A 1980 study conducted in the Victorian Magistrates' Courts identified between 200 and 300 factors relevant to sentencing.[156] Some factors such as proportionality are described as principles, whilst others are best characterised as rules or statutory considerations. The full range of factors includes, but is not limited to, the objective characteristics of the offence itself, the subjective characteristics of the offender, general deterrence, specific deterrence, rehabilitation, denunciation, and the protection of society from the offender.

The High Court of Australia and the Supreme Court of New South Wales have each developed the common law of proportionality over many decades. To a significant

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[152] AustLII, *BILL OF RIGHTS 1688 1 WILL AND MARY SESS 2 C 2 - SECT 10* AustLII <http://www.austlii.edu.au/au/legis/act/consol_act/bor16881wams2c2306/s10.html>.
[153] *Eighth Amendment* Cornell University Law School Legal Information Institute <https://www.law.cornell.edu/constitution/eighth_amendment>; *Justice Laws Website: Constitution Act 1982* Government of Canada <http://laws-lois.justice.gc.ca/eng/const/page-15.html>.
[154] *Sillery v The Queen* [1981] HCA 34; D. van Zyl Smit, 'Constitutional Jurisprudence and Proportionality in Sentencing' (1995) 3 *European Journal of Crime, Criminal Law and Criminal Justice* 369.
[155] *Markarian v The Queen* [2005] HCA 25 at [69].
[156] Roger Douglas, Tom Weber and EK Baybrook, *Guilty, Your Worship: A study of Victoria's Magistrates' Courts* (Legal Studies Department, La Trobe University, 1980).

degree they have done so in isolation from each other. Consequently they have developed somewhat different expressions of the proportionality principle. As a result it is easier to consider the evolution of the common law in each Court separately.

3.1 The High Court

The High Court has traditionally been reluctant to consider sentence appeals. In the 1936 case of *House v The King* the Court established a judicial review approach to criminal appeals, characterised by great respect for the original sentence and great reluctance to interfere with it.[157] This judicial review approach meant that the High Court would only consider an appeal on the basis of legal error by the sentencing judge, and would never grant leave to appeal solely on the merits of the original sentence. From that time onwards the Court considered criminal cases very rarely.

In the 1970s and 1980s the attitude of the High Court towards criminal appeals began to soften, and the Court began to hear a trickle of such appeals.[158] Consequently the High Court's line of authority on proportionality in sentencing is relatively recent.

The High Court case law on proportionality in criminal sentencing begins with the remarkable two cases of Bobby Veen, a man who twice stabbed a person to death, twice was charged with murder, twice was found guilty of manslaughter, twice was sentenced to life imprisonment and twice appealed his sentence in the High Court.[159] In the 1979 case of *Veen v R*, the first occasion on which the High Court encountered Veen, the Court overturned a sentence of life imprisonment imposed by the trial judge after the NSW Court of Criminal Appeal had denied leave to appeal. The life sentence had been imposed on the basis of protecting the community from the risk of Veen re-offending upon release. Veen had relied upon diminished responsibility to defeat a murder charge at trial; on being sentenced for manslaughter this defence was

[157] *House v The King* (1936) 55 CLR 499.
[158] Fox, above n 4.
[159] *Veen v R* [1979] HCA 7; *Veen v The Queen [No 2]* (1988) 164 CLR 465.

turned on Veen as the trial judge found that his diminished responsibility meant an increased likelihood of reoffending.[160]

The High Court in *Veen v R* unanimously allowed the appeal, but their reasons for doing so varied. Mason J saw no conflict between a life sentence to protect the community and proportionality, but did not consider the evidence sufficient to justify such a life sentence in this case. Murphy J adopted a quite different position, declaring the sentence to be 'preventive detention' and quoted Cicero from his 44BC essay *De Officiis*: "take care that the punishment does not exceed the guilt". Jacobs J occupied ground somewhere between Mason and Murphy JJ, finding that the Court of Criminal Appeal had erred in adopting English authorities on community protection without appreciating the statutory differences, in proceeding upon limited evidence and in ignoring the finding of the trial judge that the offence was not in the worst category of manslaughter. Clearly an element common to all positions was the view that the sentence imposed upon Veen in this instance was disproportionate. The Court was unanimous that the risk of recidivism did not justify extending Veen's sentence beyond what was justified by the offence. Jacobs J expressed it thus:

> "I do not think that the applicant's history is such that any punishment should be awarded which is not strictly proportionate to the gravity of the offence."[161]

Veen v R is therefore important for its assertion of the primacy of proportionality over other sentencing considerations, in this case the protection of the community from recidivism. However some aspects of proportionality remained unresolved. Jacobs J suggested that a sentence should be proportionate to the "gravity of the offence" but did not explain how the gravity of the offence is to be measured. Further, as the quote above from Jacobs J makes clear, and with the possible exception of Murphy J, the Court left open the possibility that punishment disproportionate to the gravity of the offence could be justified in some cases.

[160] Fox, above n 4.
[161] *Veen v R* [1979] HCA 7 at [25].

Only nine years later, in 1988, the High Court found itself considering *Veen No. 2*, perhaps the most important case in the Court's consideration of proportionality. Veen had been released after eight years of a twelve year sentence, but was at liberty for only ten months before being again charged with murder.[162] Sentenced to life imprisonment for manslaughter, Veen appealed for a second time to the High Court. A quite differently constituted court – only Mason J, now Mason CJ, was in common with the five-judge *Veen v R* bench – denied the appeal 4:3, and provided significantly re-worked authority on proportionality.

In *Veen No. 2* the majority emphasised the role of proportionality, claiming that "the principle of proportionality is now firmly established in this country".[163] They re-stated the primacy of proportionality over protecting society from the risk of recidivism, declaring that whilst the antecedent criminal history of an offender is a relevant consideration on sentence, it cannot be given such weight "as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence" because "to do so would be to impose a fresh penalty for past offences".[164] The court was unanimous in rejecting the permissibility of preventive detention, at least absent statutory authority that would override the common law. This established proportionality as a dominant sentencing principle which limits the weight given to other considerations on sentence, such as antecedent criminal history.

The majority found a way to support lengthening a sentence to protect society from recidivism without retreating from their support for proportionality, by arguing that the protection of society is a proper consideration in determining a proportionate sentence:

> "It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention,

[162] Fox, above n 4, 11.
[163] *Veen v The Queen [No 2]* (1988) 164 CLR 465 at [8].
[164] Ibid [14].

> which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible."[165]

The High Court therefore established that there is a range over which a sentence remains proportionate to the gravity of the offence, and that factors such as the protection of society can move the sentence to the very top of the range if necessary.

The succeeding High Court authorities reinforced *Veen No. 2's* articulation of proportionality without providing significant development or clarification. The following cases were all decided in a two-year period after *Veen (No. 2)*:

> "The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender." *Chester v R*, per Mason CJ, Brennan, Deane, Toohey and Gaudron JJ.[166]

> "…a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances." *Hoare v R*, per Mason CJ, Deane, Dawson, Toohey and McHugh JJ. [167]

> "That principle (totality) cannot, however, justify the imposition of a heavier sentence for the particular offence than that which is justified as such punishment." *Griffiths v R*, per Deane J.[168]

A decade later, the 2001 case of *Wong v R* further fleshed out the High Court's understanding of proportionality.[169] *Wong v R* saw the High Court strike down a NSW guideline judgment applying to drug importation offences. The guideline judgment tied sentence severity to the weight of the drug involved. Gaudron, Gummow and Hayne JJ found the guideline judgment to violate the proportionality principle:

[165] Ibid [9].
[166] *Chester v R* [1988] HCA 62 at [20].
[167] *Hoare v R* [1989] HCA 33 at [7].
[168] *Griffiths v R* [1989] HCA 39 at [8].
[169] *Wong v R* [2001] HCA 64.

> "…numerical guidelines cannot address considerations of proportionality. Their application cannot avoid outcomes which fail to reflect the circumstances of the offence *and* the offender (with absurd and unforeseen results) if they do not articulate and reflect the principles which will lead to the just sentencing of offenders whose offending behaviour is every bit as diverse as is their personal history and circumstances."[170]

This language indicates, for the first time, that proportionality is to be measured by the "the circumstances of the offence and the offender". As the Court had already established that proportionality is to be measured by reference to the gravity of the offence, there are two possible interpretations. Either the gravity of the offence is synonymous with "the circumstances of the offence and the offender", or the gravity of the offence is synonymous with "the circumtances of the offence" and must be considered in combination with "the circumstances of the offender." Irrespective, *Wong v R* establishes a broad definition of proportionality under which the diverse circumstances of the offence and the offender are relevant.

Further instructive authority comes from the judgment of McHugh J in the 2005 case of *Markarian v The Queen*.[171] *Markarian* is well known in Australian criminal law as the case which confirmed the importance of an approach to sentencing referred to as "instinctive synthesis" by the High Court.[172] Instinctive synthesis stands in opposition to an arithmetic approach in which a judge starts with a certain penalty and then makes arithmetic additions to or subtractions from that penalty in order to reflect characteristics of the case. The New South Wales Court of Criminal Appeal had followed the latter approach, defined by McHugh J in *Markarian* as "...the method of sentencing by which a judge first determines a sentence by reference to the "objective circumstances" of the case...then increases or reduces this hypothetical sentence incrementally or decrementally by reference to other factors, usually, but not always,

[170] Ibid [78].
[171] *Markarian v The Queen* [2005] HCA 25.
[172] *Purposes of sentencing* Judicial Commission of New South Wales <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/purposes_of_sentencing.html>.

personal to the accused."[173] The High Court allowed the appeal and repudiated the arithmetic approach.

In *Markarian* McHugh J described proportionality as "one of the fundamental principles of sentencing law", and linked it to the instinctive synthesis approach:

> "The principle of proportionality requires ... a value judgment, based on experience and instinct, derived after taking into account all the facts and circumstances of the case.[174]

McHugh J's remarks in *Markarian* are significant for two reasons. Firstly, he confirmed the broad range of matters relevant to the assessment of proportionality: "all the facts and circumstances of the case". Secondly, he indicated how proportionality should be assessed: a value judgment based on experience and instinct, rather than an arithmetic approach which assigns specific numerical value to invididual case characteristics.

The more recent 2013 case of *Magaming v The Queen* introduces a new element to the High Court's consideration of proportionality.[175] In this case the Court affirmed the primacy of statute over common law sentencing principles, rejecting a challenge to mandatory minimum sentencing based, in part, upon the potential for mandatory sentencing to distort proportionality. In doing so the majority defined the proportionality principle as follows:

> "The sentence imposed must be proportionate in the sense that it properly reflects the personal circumstances of the particular offender and the particular conduct in which the offender engaged when those circumstances and that conduct are compared with other offenders and offending."[176]

[173] *Markarian v The Queen* [2005] HCA 25 at [51].
[174] Ibid [69].
[175] *Magaming v The Queen* [2013] HCA 40.
[176] Ibid [51].

Thus the Court yet again confirmed its broad definition of the proportionality principle. It also added a new element to the Court's understanding of the principle, the comparison of the offender's circumstances and conduct to other offenders and offending. This supports the decision of this thesis, outlined in Section 4 of Chapter 2 which considered empirical method, that comparison between cases is necessary to evaluate proportionality.

3.2 Supreme Court of New South Wales

The NSW case law on proportionality can be traced back to the 1936 case of *R v Geddes*, a Crown appeal against the inadequacy of a sentence imposed for manslaughter.[177] In that case, Jordan CJ adopted the civil rule as to the relationship between the amount awarded and the loss sustained:

> "The analogy is not exact; but I think that a Court of Criminal Appeal should intervene if the sentence appears to it to be out of reasonable proportion to the circumstances of the crime, having regard to the facts proved in evidence at the trial."[178]

The 1991 case of *R v Dodd* is an often cited NSW authority on proportionality.[179] In this case the Court of Criminal Appeal declared that disproportionality (in the form of excessive leniency) can arise from giving undue weight to persuasive subjective considerations, that is mitigating factors personal to the offender, over the objective seriousness of the offence itself:

> "...there is sometimes a risk that attention to persuasive subjective considerations may cause inadequate weight to be given to the objective circumstances of the case... In our view the requirement of reasonable proportionality with the circumstances of the crime called for a significant full time-time custodial sentence."[180]

[177] *R v Geddes* [1936] NSWStRp 35.
[178] Ibid 556.
[179] *R v Dodd* (1991) 57 A Crim R 349.
[180] Ibid.

The link from *R v Geddes* to *R v Dodd* is apparent, both cases referring to "reasonable proportion to the circumstances of the crime" or "reasonable proportionality with the circumstances of the crime".

R v Dodd remains good law in NSW, cited in numerous recent cases which explain the NSW approach to proportionality:

> "Another case where such leniency has been given very significant weight was *R v Dodd*. There the offender voluntarily walked into a police station and confessed to the manslaughter of a woman some ten years after the event and at a time when there was no chance of his guilt being discovered. Yet this Court held, allowing a Crown appeal, that a sentence commensurate with the objective seriousness of the offence had to be imposed notwithstanding the leniency to which the offender was entitled." Per Latham J, *R v Safteli*.[181]

> "He (the sentencing judge) had regard to the principle that a sentence must not reflect undue weight to an offender's subjective circumstances and result in something that is not reasonably proportionate to the gravity of the offence, citing *R v Dodd*... ." Per Hulme J, *Linney v R*.[182]

> "It is well established that there ought to be a reasonable proportionality between a sentence and the circumstances of the crime." Per Hall J, *R v Ball Judd Ashton*.[183]

The use of different terminology between the two jurisdictions – the "gravity of the offence" in the High Court, "reasonable" proportionality, "objective gravity" or "objective seriousness" in the NSW Supreme Court – is a potential cause of confusion, particularly given that these terms are not well explained or defined by the courts. Whether the terms are interchangeable or whether they have subtly different meanings is difficult to determine.

[181] *R v Safteli* [2013] NSWSC 1096.
[182] *Linney v R* [2013] NSWCCA 251.
[183] *R v Ball Judd Ashton* [2013] NSWCCA 126.

The Supreme Court authorities generally refer to proportionality as a control upon leniency, whereas the High Court authorities generally refer to proportionality as a control upon severity. Most likely this flows from the original authorities in each jurisdiction: *R v Dodd* was a case involving excessive leniency, and *Veen v R* a case involving excessive severity. As the authorities from both jurisdictions apply in the LEC, it is clear that the proportionality principle applies to both the lower and upper ends of the sentence range.

Having considered the development of the common law on proportionality in both the High Court and the Supreme Court, a reasonably clear picture emerges. The principle is a dominant sentencing principle, capable of limiting other sentencing considerations. It controls both the upper and lower boundaries of a sentence, and tolerates variation within those boundaries.

The purpose of this Chapter is to explore what proportionality means in the context of a judge of the LEC sentencing a criminal offender. The next logical step in that exploration is to examine how judges of the LEC understand the common law.

3.3 Land and Environment Court's interpretation

The case law in the LEC demonstrates that its judges have combined the High Court and Supreme Court authorities to construct their own coherent understanding of the proportionality principle.

The LEC case law refers to limits, using the term specifically to refer to how proportionality controls the upper and lower boundaries of a sentence. LEC judges usually rely on *Veen No. 2* as authority for the upper limit and Supreme Court judgments as authority for the lower limit. Numerous recent LEC cases adopt the same or similar language:

> "It is a fundamental principle of sentencing law that the sentence for an offence reflect and be proportionate to both the objective circumstances of the

offence and the subjective circumstances of the defendant. The primary factor to be considered is the objective gravity of the offence; it fixes both the upper and lower limits of proportionate punishment. It fixes the upper limit because a sentence should never exceed that which can be justified as appropriate or proportionate to the gravity of the offence considered in light of its objective circumstances (*Veen v The Queen (No 2)*. It fixes the lower limit because allowance for the subjective factors of the case, particularly of the offender, cannot produce a sentence which fails to reflect the objective gravity or seriousness of the offence (*R v Dodd*)." Craig J, *Minister for Planning v Moolarben Coal Mines Pty Ltd*.[184]

"The primary factor to consider in determining sentence is the objective gravity or seriousness of the offence. It fixes both the upper and lower limits of proportionate punishment. It fixes the upper limit insofar as the sentence must not exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances. It fixes the lower limit because allowance for the subjective factors of the case ought not produce a sentence which fails to reflect the objective gravity or seriousness of the offence." Pepper J, *Environment Protection Authority v Transpacific Industries Pty Limited*.[185]

"The objective gravity or seriousness of the crimes fixes both the upper and lower limits of proportionate punishment. It fixes the upper limit because a sentence should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances: *Veen v R (No 2)*... It fixes the lower limit because allowance for the subjective factors of the case, particularly of the offender, cannot produce a sentence which fails to reflect the objective gravity or seriousness of the offence: *R v Dodd*..." Preston CJ, *Gittany Constructions Pty Limited v Sutherland Shire Council*. [186]

[184] *Minister for Planning v Moolarben Coal Mines Pty Ltd* [2010] NSWLEC 147 at [47].
[185] *Environment Protection Authority v Transpacific Industries Pty Limited; Environment Protection Authority v Transpacific Refiners Pty Limited* [2010] NSWLEC 85 at [88].
[186] *Gittany Constructions Pty Limited v Sutherland Shire Council* [2006] NSWLEC 242 at [109].

Numerous other examples exist of judgments using similar or identical language.[187] The terms "objective gravity", "seriousness of the offence" and "objective circumstances" appear to be used interchangeably and have the same meaning as the "gravity of the offence." In a 2006 conference address, Preston CJ of the LEC, stated: "the principle of proportionality operates as a limiting, but not as a defining, principle in determining the appropriate sentence."[188]

LEC judges also consider the penalties imposed in comparable cases. Most sentences contain a section on 'evenhandedness', a sentencing principle that is analogous to consistency. The authority often relied upon by LEC judges is the 1982 Court of Criminal Appeal case of *R v Visconti*, in which Street CJ quoted his own judgment from the earlier, unreported case of *R v Oliver*:

> "The second initial consideration is the ascertainment of the existence of the general pattern of sentencing by criminal courts for offences such as those under consideration. The task of the sentencing judge, no less than the task of an appellate court, is to pursue the ideal of evenhandedness in the matter of sentencing."[189]

LEC sentences frequently also refer to the 1993 appeal from the LEC to the Court of Criminal Appeal of *Axer Pty Ltd v Environment Protection Authority*, in which Badgery-Parker J stated:

> "Counsel for the applicant has provided us with a schedule summarizing some 50 similar cases in the Land and Environment Court, a proportion of which came in due course to this Court on appeal. There is always a difficulty in attempting to compare the penalty in one case with the penalty in another because of the wide divergence of facts and circumstances."[190]

[187] See for example: *Plath v Rawson* [2009] NSWLEC 178; *Environment Protection Authority v BMG Environmental Group Pty Ltd & Barnes* [2012] NSWLEC 69.
[188] Preston, above n 15.
[189] *R v Visconti* (1982) 2 NSWLR 104 at 107.
[190] *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at 365.

A typical example of the consideration of penalties in comparable cases is the 2009 LEC case of *Director-General, Dept of Environment and Climate Change v Calman Australia Pty Ltd; Iroch Pty Ltd; GD & JA Williams Pty Ltd t-as Jerilderie Earthmoving*, Pain J stated at [61]:

> "*Evenhandedness*
>
> The principle of evenhandedness requires that the Court consider if there is any sentencing pattern for like offences in order to determine a consistent approach to penalty. This principle must always be applied subject to the particular circumstances of the case before the Court; see *Axer* at 365."

LEC discussion on evenhandedness never includes explicit reference to proportionality. Nonetheless the consideration of sentencing patterns that evenhandedness requires is relevant to proportionality. The comparison of sentence outcomes to case characteristics, amongst which environmental harm is invariably prominent, across a number of comparable sentences has a great deal in common with the empirical component of this thesis.

Section 4 *Camilleri's* rule

Having considered the common law on proportionality, the next step is to consider the second part of the law of proportionality applicable to criminal sentencing in the LEC: *Camilleri's* rule.

4.1 The case itself

The 1993 Court of Criminal Appeal judgment in *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* ("*Camilleri's Stock Feeds*") is the origin of the proportionality rule that this thesis refers to as *Camilleri's* rule. This case was cited often in the LEC sentences throughout the research period.[191] The case itself was an appeal against a fine imposed in the LEC for an odour offence against the *Clean Air Act 1961* (NSW) ("*Clean Air Act*"), breaches of which were sentenced according to the *Environmental Offences and Penalties Act 1989* (NSW) ("*Environmental Offences and Penalties Act*"). Both Acts were repealed and replaced by the *POEO Act*.

Camilleri's Stock Feeds provides authority for a number of principles relevant to the sentencing of environmental crime. Relevantly to the current discussion, it provides authority for the proposition that proportionality should be measured by reference to environmental harm. The key passage is at [701] where Kirby J states, with Cameron and James JJ concurring:

> "The odour was non-toxic. There was no serious and lasting environmental harm. Cf The Council of the City of Shoalhaven v The State Pollution Control Commission (1991) 52 A Crim R 291 (NSWCCCA) at 295. In environmental matters the Court has previously exercised its discretion in relation to penalty on the principle that the more serious the lasting environmental harm the more serious the offence and, ordinarily, the higher the penalty. See Environment Protection Authority v Ampol Ltd (unreported, Land and Environment Court, 22 June 1992); The State Pollution Control Commission v

[191] *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) NSWLR 683.

> Shell Refinery (Australia) Pty Ltd (unreported, Land and Environment Court, 23 March 1992)."

In the above passage Kirby J asserts that there ought to be a proportionate relationship between lasting environmental harm and offence seriousness and, ordinarily, between lasting environmental harm and penalty. Although he did not use the word "proportionate" Kirby J described a proportionate relationship: the more serious the harm, the more serious the offence and (ordinarily) the higher the penalty. Clearly the three elements of harm, offence and penalty are bound together in a proportionate relationship.

In order to thoroughly understand Kirby J's meaning in the above passage from *Camillieri's Stock Feeds* it is instructive to consider the other cases to which he makes reference. The case with which Kirby J invites comparison - *The Council of the City of Shoalhaven v The State Pollution Control Commission* - was a successful appeal against a fine imposed in the Land and Environment Court by Stein J for a water pollution offence.[192] On appeal to the Court of Criminal Appeal the Council of the City of Shoalhaven successfully argued that the fine was too severe. Clarke J, with Enderby and Loveday JJ concurring, reduced the fine in part because the harm was low at [295]:

> "Against the fine which was actually imposed there is a fact which is not unimportant, that is that although the Authority was alerted by the possibility of very serious damage that would have occurred if the sludge had reached Curly's Bay and damaged the oyster leases there, upon his Honour's findings that did not occur and the possibility it would occur was remote in the extreme. The damage or possible or potential environmental damage caused was, it seems to me, quite limited."[193]

[192] *The Council of the City of Shoalhaven v The State Pollution Control Commission* (1991) 52 A Crim R 291 (NSWCCA).
[193] Ibid [295].

The significance of this case in this context is clear: in a scenario where enviromental harm was low, and the risk of serious harm was also low, a severe penalty could not be justified.

It is also instructive to consider the two LEC cases which Kirby J relied upon to support his assertion that "the Court has previously exercised its discretion in relation to penalty on the principle that the more serious the lasting environmental harm the more serious the offence and, ordinarily, the higher the penalty". The first, *Environment Protection Authority v Ampol Ltd*, was a prosecution under the *Clean Waters Act 1970* (NSW) ("*Clean Waters Act*") (also repealed by the *POEO Act* and, like the *Clean Air Act* also sentenced under the *Environmental Offences and Penalties Act*) for the release of approximately 80,000 litres of petrol from a depot at South Grafton. In relation to the harm caused by the offence, Bignold J stated:

> "Although a massive amount of motor spirit was involved (some 80,000 litres) and the escape had the potential of creating an environmental disaster, fortunately because of the swift and effective remedial action taken by the Fire Brigade, Police, Grafton Council and the State Pollution Control Commission, the escaped motor spirit did not enter any waters, and [the] escaped motor spirit did not explode. Nonetheless, there was a real risk that these disastrous events could have occurred."[194]

The penalty imposed was a fine of $30,000. At a time when the maximum penalty for the pollution of waters was only $40,000, a fine of 75% of the maximum must be considered a relatively severe penalty.

This creates a conundrum. It is at first glance difficult to understand how this case – where the actual lasting environmental harm was close to zero although the penalty was severe – supports the proposition that penalty ought ordinarily to be proportionate to lasting environmental harm. The most likely explanation is that Kirby J meant, although did not explicitly state, that lasting environmental harm

[194] *Environment Protection Authority v Ampol Limited* (Unreported, Land and Environment Court of New South Wales, Bignold J, 22 June 1992) 1.

includes the risk of lasting environmental harm in addition to actual harm. Certainly, as Bignold J made clear, the risk of lasting environmental harm in *Environmental Protection Authority v Ampol Ltd* was high. This would also be consistent with section 9 of the *Environmental Offences and Penalties Act* (later section 241 of the *POEO Act*) that "the court is to take into consideration ... the extent of the harm caused or likely to be caused to the environment by the commission of the offence". In that respect also this case can be distinguished from *The Council of the City of Shoalhaven v The State Pollution Control Commission*, in which the risk of harm was low as Clarke J stated: "The damage or possible or potential environmental damage caused was, it seems to me, quite limited."[195]

Camilleri's rule should therefore be understood as: the greater the harm (actual harm or the risk of harm), the more serious the offence and, ordinarily, the higher the penalty.

The second case upon which Kirby J relied, *State Pollution Control Commission v Shell Refinery (Australia) Pty Limited*, is more straightforward.[196] Cripps J found that the two offences – one under the *Clean Waters Act* and one under the *Clean Air Act* – caused only a potential for harm, rather than proven actual harm, and that the potential for harm was very low. Ultimately Cripps J imposed relatively lenient fines of $1,500 and $100. In passing sentence Cripps J linked harm to penalty, stating:

> "Bearing in mind the evidence of potential for environmental pollution, or lack of it, I do not think it is particularly serious in the context of the pollution control legislation."

4.2 The statutory foundation for Camilleri's *rule*

[195] *The Council of the City of Shoalhaven v The State Pollution Control Commission* (1991) 52 A Crim R 291 (NSWCCA) at [295].
[196] *State Pollution Control Commission v Shell Refinery (Australia) Pty Limited* (Unreported, Land and Environment Court of New South Wales, Cripps J, 23 March 1992).

Kirby J's remarks in *Camilleri's Stock Feeds* did not emerge from nowhere. Indeed his remarks were in essence an observation regarding the established practice of the LEC.

There was at that time, and continues today, a statutory basis for the proposition that penalty should be proportionate to environmental harm. The offender in *Camilleri's Stock Feeds*, and the offenders in the other cases to which Kirby J made reference, were sentenced under the *Environmental Offences and Penalties Act*, which at the time provided the sentencing framework for offences under a range of environmental legislation.

Section 9 of that Act contained a list of matters to be considered in imposing penalty:

> "Matters to be considered in imposing penalty
>
> 9. In imposing a penalty for an offence against this Act, the court is to take into consideration (in addition to any other matter the court considers relevant):
>
> (a) the extent of the harm caused or likely to be caused to the environment by the commission of the offence; and
> (b) the practical measures which may be taken to prevent, control, abate or mitigate that harm; and
> (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; and
> (d) the extent to which the person who committed the offence had control over the causes which gave rise to the offence; and
> (e) whether, in committing the offence, the person was complying with orders from an employer or a supervising employee."

Sub-section (a) above stipulated that the extent of the harm caused, or likely to be caused, by the offence was a consideration when determining penalty. In 1993, when the judgment in *Camilleri's Stock Feeds* was handed down, this provision had been in place for three to four years and was most likely the basis for the established practice of the Court that Kirby J observed.

4.3 Harm in environmental legislation today

The *Environmental Offences and Penalties Act* was relatively short-lived, being repealed by the *POEO Act* in 1999. Its provisions on harm live on however in a range of contemporary environmental legislation.

A number of Acts in NSW contain provisions concerning environmental harm: the *POEO Act*, the *National Parks and Wildlife Act*, the *Contaminated Land Management Act*, the *Pesticides Act* and the *Water Management Act*.

It is important to note that not all environmental legislation in NSW contains provisions related to harm. In particular, the *EP&A Act* and the *Native Vegetation Act* do not. Thus of the four Acts for which offence types are considered in depth by this thesis, two contain a version of section 9 of the *Environmental Offences and Penalties Act* and two do not.

Section 241 of the *POEO Act* is essentially unchanged from section 9 of the *Environmental Offences and Penalties Act*:

> "241 Matters to be considered in imposing penalty
>
> (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."

The stipulation that the extent of harm caused or likely to be caused to the environment by the offence is a consideration on penalty carried over unchanged, from the previous section 9 (a) to the new section 241 (1) (a).

Section 194 of the *National Parks and Wildlife Act* is similar, but not identical, to section 9 of the *Environmental Offences and Penalties Act*. It includes all the considerations from section 9, and adds several more. Section 194 of the *National Parks and Wildlife Act* is relatively new, and was not in place for the majority of the research period. It was inserted by the *National Parks and Wildlife Amendment Act 2010* (NSW) and commenced on 2nd July 2010. It states:

"194 Sentencing – matters to be considered in imposing penalty

(1) In imposing a penalty for an offence under 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 by the commission of the offence,

(b) the significance of the reserved land, Aboriginal object or place, threatened species or endangered species, population or

ecological community (if any) that was harmed, or likely to be harmed, by the commission of the offence,

(c) the practical measures that may be taken to prevent, control, abate or mitigate that harm,

(d) the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused by the commission of the offence,

(e) the extent to which the person who committed the offence had control over the causes that gave rise to the offence,

(f) in relation to an offence concerning an Aboriginal object or place or an Aboriginal area – the views of the Aboriginal persons who have an association with the object, place or area concerned,

(g) whether, in committing the offence, the person was complying with an order or direction from an employer or supervising employee,

(h) whether the offence was committed for commercial gain.

(2) The court may take into consideration other matters that it considers relevant."

4.4 Harm in criminal sentencing generally

In addition, and for the sake of thoroughness, it should be noted that there is a statutory basis beyond environmental legislation for the consideration of harm in criminal sentencing generally. Here the meaning of harm is context-specific; its meaning can include harm to a person, to property, to society generally, to an animal or to the environment.

Harm is a statutory consideration in the sentencing of all criminal offences in NSW. The *Crimes (Sentencing Procedure) Act* applies to criminal sentencing generally in NSW and includes harm as one of numerous sentencing considerations. Section 3A of that Act sets out seven purposes of sentencing, without a hierarchy or prioritisation, of which one is "to recognise the harm done to the victim of the crime and the

community".[197] Section 21A provides long lists of both aggravating and mitigating factors that a court must take into account. One aggravating factor is if "the injury, emotional harm, loss or damage caused by the offence was substantial", and one mitigating factor is if "the injury, emotional harm, loss or damage caused by the offence was not substantial".[198]

As such, the harm provisions contained in certain environmental statutes are not necessary for harm to be a sentencing consideration. For environmental offences under legislation that does not contain harm provisions, such as the *EP&A Act* and the *National Parks and Wildlife Act*, a judge of the LEC is entitled to rely upon the *Crimes (Sentencing Procedure) Act* to consider the environmental harm caused by an offence.

It is important to note that the harm provisions in environmental legislation, where they appear, do not displace the *Crimes (Sentencing Procedure) Act* but rather sit alongside it. It is quite possible for a single Land and Environment Court sentence judgment to consider harm in terms of both the relevant environmental legislation and the *Crimes (Sentencing Procedure) Act*.

For example, in the 2005 LEC case of *Bentley v Gordon*, Preston CJ stated at [70]-[71]:

> "The culpability of the defendant depends in part on the seriousness of the environmental harm. In *Camilleri's Stock Feeds Pty Limited v Environment Protection Authority* (1993) 32 NSWLR 683 at 701, Kirby P, said:
>
> > "In environmental matters the Court has previously exercised its discretion in relation to penalty on the principle that the more serious the lasting environmental harm involved the more serious the offence and, ordinarily, the higher the penalty."

[197] *Crimes (Sentencing Procedure) Act 1999*, s 3A(g).
[198] *Crimes (Sentencing Procedure) Act 1999*, s 21A(2)(g); *Crimes (Sentencing Procedure) Act 1999*, s 21A(3)(a).

> "If the harm is substantial, this objective circumstance is an aggravating factor: see s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act* 1999. It is a factor to be taken into account in determining the appropriate sentence."

4.5 Use of the rule in the LEC case law

Camilleri's rule is frequently referred to in sentencing during the research period. Its validity as a rule of sentencing in the LEC appears to well settled.[199]

Given the origin of *Camilleri's* rule in the statutory requirement to consider the extent of environmental harm in determining penalty, one relevant question is whether the rule applies only to offences under an Act that contains that requirement. The consequence would be that sentencing for offences under the *POEO Act* and the *National Parks and Wildlife Act* (but only since the insertion of section 194 on the 2nd July 2010) would be subject to *Camilleri's* rule, and that sentencing for offences under the *EP&A Act* and the *Native Vegetation Act* would not.

Whilst it is difficult to resolve this question completely, the case law provides evidence that *Camilleri's* rule can apply to offences under Acts that do not contain the requirement that the court consider the extent of the environmental harm caused. The 2005 LEC case of *Bentley v Gordon* was an offence of picking a vulnerable plant species, *Tetratheca juncea*, under the *National Parks and Wildlife Act*. In 2005 the *National Parks and Wildlife Act* did not contain the current section 194 and therefore there was no requirement to consider the extent of environmental harm caused. Preston CJ nonetheless invoked *Camilleri's* rule at [70]:

> "The culpability of the defendant depends in part on the seriousness of the environmental harm. In *Camilleri's Stock Feeds Pty Limited v Environment Protection Authority* (1993) 32 NSWLR 683 at 701, Kirby P, said ..."

[199] See for example: *Environment Protection Authority v Coe Drilling Australia Pty Limited* [2005] NSWLEC 179 at [158]; *Environment Protection Authority v George Weston Foods Ltd* [2010] NSWLEC 120 at [31]; *Chief Executive of the Office of Environment and Heritage v Bombala Investments Pty Ltd* [2012] NSWLEC 185 at [72].

Similarly, the 2005 LEC case of *Byron Shire Council v Fletcher* was a sentence for an offence under the *EP&A Act*, an Act which has never contained a requirement to consider the extent of environmental harm. Preston CJ at [53]:

> "The culpability of the defendant depends, in part, on the seriousness of the environmental harm. In *Camilleri's Stock Feeds Pty Limited v Environment Protection Authority* (1993) 32 NSWLR 683 at 701, Kirby P, said ..."

It appears therefore that, whilst *Camilleri's* rule had its origins in section 9 of the *Environmental Offences & Penalties Act*, it is now a rule that applies in any sentence proceeding in the Land and Environment Court. The only limitation to this must be, presumably, sentences for offences which do not involve environmental harm.

4.6 Conclusion

Camilleri's rule appears to be a well settled rule of sentencing in the LEC jurisdiction. It can be expressed as follows: the more serious the lasting environmental harm or alternatively the risk of such harm, the more serious the offence and, ordinarily, the higher the penalty.

Camilleri's rule differs from the proportionality principle in that it assesses proportionality more narrowly. The proportionality principle assesses proportionality by reference to all the characteristics of both the offender and the offence. The harm caused by an offence – in this case environmental harm – is only one specific characterisic of a crime.

It is clear however that *Camilleri's* rule allows for considerations of characteristics other than environmental harm. Kirby J used the word 'ordinarily' in *Camilleri's Stock Feeds* in relation to the proportionate relationship between offence seriousness and penalty. The word is open to different interpretations. It could mean a default or starting position. Under this interpretation, the starting point on sentence – a proportionate relationship between harm and penalty – would be adjusted to take into account other sentencing considerations peculiar to a given case. Given the

diversity of offence and offender characteristics, this could lead to the proportionate relationship being adjusted relatively often. An alternative interpretation of the word 'ordinarily' is that it means "most of the time". Under this interpretation a proportionate relationship between harm and penalty should exist in the ordinary or typical case, with exceptions occurring relatively less often.

Without further information it is impossible to know precisely what Kirby J meant by "ordinarily". The important point is that the term allows for departure from a strictly proportionate relationship between offence seriousness and penalty. How far the penalty can be varied is unclear; the rule does not impose limits, unlike the proportionality principle.

A final observation on *Camilleri's* rule is that it appears to understand environmental harm as having two elements: extent and duration. The phrase "the more serious the lasting environmental harm the more serious the offence" conveys both that the extent (how serious it is) and the duration (how lasting it is) of the harm determine the seriousness of the offence. This duration element of environmental harm in *Camilleri's* rule is significant in practice. The clear implication is that short-term harm is to be regarded as less serious than long-term harm.

Section 5 Proportionality test

The two parts of the law on proportionality that an LEC judge must consider – the proportionality principle and *Camilleri's* rule – have different origins and use different terminology. They approach proportionality from different perspectives and there are clear differences between them. The complexity and uncertainty that flows from proportionality existing in two distinct parts is undesirable because it raises the possibility that different judges may apply proportionality in different ways.

Yet in practice the difference between them may be less than it first appears. The proportionality principle controls the upper and lower limits of punishment. Proportionality is measured according to the characteristics of the offence and the offender. In a sentence for an environmental offence, the harm to the environment caused by the offence is bound to play a major, if not dominant, role when the offence is evaluated. The harm to the environment is, after all, the basis of the offence.

Camilleri's rule says that penalty should be proportionate to harm, but then allows variation through the somewhat ambiguous term "ordinarily". Regardless of the precise meaning of the word in this context, it allows other sentencing considerations to play a role in determining penalty. The final penalty can be adjusted upwards or downwards to make allowance for considerations other than environmental harm.

The result is that both the proportionality principle and *Camilleri's* rule are likely to produce similar sentence outcomes in practice. Environmental harm plays a major, if not dominant, role in the former, and a dominant role in the latter. Both allow other sentencing considerations a role in addition to environmental harm. If the same judge were to consider the same offence, first using one part and then the other, in all likelihood that judge would arrive at much the same sentence on each occasion.

For the task of assessing proportionality, it would be ideal if the two parts of the law could be combined into a single formulation that is consistent with both. Given their similarity in practice it makes little sense to assess proportionality twice, first using one part and then the other.

In developing a single test for proportionality, the proportionality principle as it is applied in the LEC will be used. As discussed above, there is some variation in how the proportionality principle is applied in the High Court, the Supreme Court of New South Wales and the LEC. As it is LEC sentencing that is to be analysed, it is appropriate to use the LEC's understanding of the principle. To do otherwise would be unfair to the judges of the LEC who apply the law according to the precedents in their jurisdiction.

This thesis will adopt a three-step test for proportionality. The first step asks whether the penalty is reasonably proportionate to the environmental harm caused by the offence, measured by comparison to other sentences for like or very similar offence types.

If the answer is yes, then the sentence is deemed to be proportionate and there is no need to proceed further. In this scenario the penalty will fall within the range established by the objective gravity of the offence, thereby satisfying the proportionality principle, and will also conform with *Camilleri's* rule.

Of course if a sentence is reasonably proportionate to the environmental harm caused, this does not in itself prove that the judge accurately assessed the harm of the offence. It may be the case, for example, that the judge assessed the harm inaccurately, but then adjusted the penalty either upwards or downwards to accommodate another sentencing consideration, and consequently happened to arrive to arrive at a penalty that falls within the range established by the objective gravity. Such hypothetical errors in judicial reasoning are not always possible to discern from the text of sentence judgments, because judicial reasoning can only be understood to the extent that it is explained and some judgments are too concise to reveal all the steps in the judicial thought process. On a more fundamental level, such hypothetical errors are unimportant for this study because the second research questions asks whether or not LEC criminal sentencing is proportionate in practice. If the sentence outcomes comply with the law of proportionality as it applies in the LEC context then they are, in practice, proportionate.

If the answer to the question posed by the first step is no, then the second step is to ask whether the disproportionality between penalty and environmental harm is justified by sentencing considerations other than environmental harm. If the answer is no, then the sentence is disproportionate and there is no need to proceed further. In this scenario the penalty will contravene *Camilleri's* rule because there would be no basis for the leeway that the term "ordinarily" in that rule potentially provides.

If the answer to the second step is yes, then the third step is to ask whether the penalty is nonetheless more severe or more lenient than the objective gravity of the offence demands. If the answer is yes then the sentence is disproportionate, if the answer is no then the sentence is proportionate. In this scenario the penalty would not necessarily contravene *Camilleri's* rule because the term "ordinarily" in that rule potentially allows significant leeway. The sentence would however contravene the proportionality principle because it would be outside the limits created by the objective gravity of the offence.

Section 6 Conclusion

This Chapter has explored all of the common and statute law relevant to proportionality in sentencing in the LEC. It has established that there are two parts of the law of proportionality in the LEC: the proportionality principle and *Camilleri's* rule. Despite a lack of definitional clarity in some respects, each part can be understood as a coherent area of law. Although there are differences between the two parts, in pratice those differences are likely less significant than they may seem. At the completion of this process of exploration, it is possible to formulate a test for proportionality in criminal sentencing in the LEC which satisfies both parts of the law of proportionality. The next step is to apply that test to the selected offence types in chapters 4 through 7.

Chapter 4: Sentences under the *Environmental Planning and Assessment Act (1979)* (NSW) which involve environmental harm

Chapter abstract

When judges of the LEC sentence criminal offenders the law requires them to impose penalties which conform with the law of proportionality in criminal sentencing. This Chapter considers whether the sentences imposed by the Court under the *Environmental Planning and Assessment Act (1979)* (NSW) during the research period so conform. It does so using the test for proportionality in sentencing developed in Chapter 3. Four findings result. Firstly, the majority of sentences have a reasonably proportionate relationship between penalty and environmental harm. Secondly, in a small number of cases disproportionality between penalty and environmental harm is found and cannot be explained. Thirdly, views cases – in which vegetation is harmed in order to improve a view from a residence – form a sub-category of cases prone to disproportionality. Finally, orders for legal costs and orders for remediation both have the potential to distort or obscure proportionality in sentencing.

Contents

Section 1 Introduction

1.1 Introduction

In the previous chapter, this thesis examined the law on proportionality in the context of criminal sentencing in the LEC, with the intention of determining what "proportionality" means. It concluded by formulating a three-step test for proportionality in sentencing. This Chapter is the first of four chapters which apply that test to a specific offence type. This Chapter considers whether or not the sentences imposed for offences under the *EP&A Act* in the LEC during the research period conform with the law on proportionality in sentencing. In doing so it addresses the second research question, namely whether criminal sentences imposed by the LEC are proportionate in practice.

The test for proportionality is a three-step test. The first step asks whether the penalty is reasonably proportionate to the environmental harm caused by the offence, measured by comparison to other sentences for like or very similar offence types. In order to implement this first step, the sentences considered by this Chapter will be ranked by penalty severity and then categorised by environmental harm, allowing relatively straightforward comparison between them. This first step identifies a number of sentences as having a disproportionate relationship between penalty and environmental harm.

For these sentences, the second step is to ask whether the disproportionality between penalty and environmental harm appears to be justified by sentencing considerations other than environmental harm. If the answer is no, then the sentence is disproportionate. This requires consideration of the detail of the sentences.

If the answer to the second step is yes, then the third step is to ask whether the penalty is nonetheless more severe or more lenient than the objective gravity of the offence demands. If the answer is yes then the sentence is disproportionate, if the answer is no then the sentence is proportionate.

This Chapter proceeds in four sections. Section 1 provides this introduction as well as an introduction to the *EP&A Act*. Section 2 applies step one of the proportionality test to the sentences under consideration and identifies certain difficulties in doing so. Section 3 applies step two and where necessary step three of the proportionality test before Section 4 concludes this Chapter.

1.2 The EP&A Act

This Chapter considers the sentences imposed upon thirty-eight offenders during the research period for offences against the *EP&A Act*. Other sentences imposed under the *EP&A Act* were excluded on the basis that the offence did not involve environmental harm, as discussed in Chapter 2.

Assessing the relationship between penalty and environmental harm is more complex than it may at first appear. Each of the Acts considered in depth by this thesis has its own unique characteristics which provide the context in which the assessment between penalty and harm must be made.

The *EP&A Act* is the predominant Act which regulates planning and land use in NSW. Its objects are diverse, and are as concerned with economic and social outcomes as with environmental protection. They include "the proper management, development and conservation of natural and artificial resources", "the promotion and co-ordination of the orderly and economic use and development of land", "the provision and co-ordination of community services and facilities" and "the protection of the environment".[200]

The offence provisions of the *EP&A Act* are relatively simple compared to other Acts considered by this thesis. All breaches are prosecuted under the one section: section 125 declares any breach of the Act an offence, and section 126 specifies a maximum penalty of $1,100,000 and a maximum daily penalty of $110,000 for continuing offences. A daily penalty was not imposed in any of the sentences identified by the research. There are no custodial penalties available under the *EP&A Act*.

[200] *Environmental Planning and Assessment Act 1979* (NSW), s 5.

Section 126 of the *EP&A Act* makes provision for remediation orders. A judge may impose, as part of a sentence, an order that a person guilty of an offence, involving harm to a tree or vegetation, plant and maintain new trees or vegetation. A remediation order may be imposed either in addition to, or in substitution for, a fine.

Section 2 Step one: Is the penalty reasonably proportionate to the environmental harm caused by the offence?

This Section applies the first step of the proportionality test – the assessment of whether or not penalty is disproportionate to environmental harm – to the sentences considered by this Chapter.

2.1 Evaluating penalty

In order to compare penalty to environmental harm it is first necessary to understand the quantum of the penalty in each sentence. In the majority of the cases considered under the *EP&A Act* the sentencing judge imposed a fine expressed in dollar terms, which is straightforward to understand. The total penalty however is broader in scope than the fine alone. Understanding the quantum of the total penalty is complicated by two factors: orders for the offender to pay the legal costs of the prosecutor ("costs orders"), and remediation orders.

2.1.1 Costs orders

Costs orders were awarded against the offender in thirty-five out of the thirty-eight sentences considered by this Chapter. In three cases the judgment does not state whether costs were awarded or not, and the remaining case was an unsuccessful Crown appeal in which the offender, as the winner of the appeal hearing, would not have been liable for costs.

Unlike other criminal jurisdictions in NSW, the LEC routinely imposes orders for legal costs upon offenders. As a matter of policy, and despite their legal rights, in NSW the police, the Commonwealth Director of Public Prosecutions and the Office of the Director of Public Prosecutions do not ordinarily apply for costs against offenders who have been successfully prosecuted in the generalist criminal courts.[201] The

[201] Judcom, *Costs in criminal matters* Judicial Commission of New South Wales <http://www.judcom.nsw.gov.au/publications/benchbks/local/costs_in_criminal_matters.html>. The Office of the Director of Public Prosecutions is the public prosecutor in higher courts in New South Wales. Police prosecutors serve this role in the Local Court.

prosecutors active in the specialist LEC – the Environment Protection Authority, local Councils, the Office of Environment and Heritage and so on – have a different policy and it is very rare for no cost application to be made against an offender in the LEC.

Legal costs orders are usually substantial, and frequently are higher than the fine imposed by a sentence. Of the thirty-four instances of a costs order being made against an offender, in seventeen cases the costs amount was specified either precisely or as an estimate in the written judgment. In the remaining seventeen cases the quantum of costs was left to be determined as agreed or assessed in due course. Of those seventeen occasions when it was specified, on eight occasions the costs order was a greater sum than the fine imposed. On an additional five occasions a costs order was made against an offender even when that offender had been dealt with under section 10 of the *Crimes (Sentencing Procedure) Act*. Section 10A allows a judge to record a criminal conviction but take no further action. Section 10(1) allows a judge to find an offender guilty but dismiss the charge without proceeding to conviction, so that the offender avoids a criminal record. Sub-section 10(1)(a) is a straightforward dismissal without conviction. Sub-section 10(1)(b) puts the offender on a good behaviour bond for a maximum of two years; should the offender fail to be of good behaviour within the required period then the bond can be revoked and the offender re-sentenced.

Legal costs are relevant to the assessment of proportionality because in 2006 the Court of Criminal Appeal in *Environment Protection Authority v Barnes* endorsed the decision of Pain J in the LEC to take costs into consideration when setting fines.[202] *Environment Protection Authority v Barnes* has been taken since by the LEC as authority for the proposition that costs orders are a relevant consideration when determining a penalty. As such, fines are routinely reduced in recognition of costs orders.

The complexity that this introduces for proportionality is that costs are not necessarily proportionate to the severity of the offence. Rather, costs are proportionate to the amount of legal work that the prosecutor has been required to

[202] *Environment Protection Authority v Barnes* [2006] NSWCCA 246.

do to prosecute the case. Consequently costs will generally be higher in long running matters than in short running matters, so if an offender enters a guilty plea on the eve of a hearing then costs will be higher than if the plea is entered at the first opportunity. Costs will be higher again if an offender is found guilty by verdict following a hearing. Costs will also generally be higher for matters that are legally and factually complex because such matters usually require more preparation time for the prosecutor; often complex matters will be relatively serious, but this is not necessarily the case.

Further, when a costs order is made but the quantum of costs remains unknown to a sentencing judge at the time of sentencing, that judge can take the costs order into account in determining the fine even though he or she does not know with any certainty how much the costs will be.

In the 2010 case of *Liverpool City Council v Leppington Pastoral Co Pty Ltd*, Biscoe J argued for a departure from the established practice of the LEC regarding costs.[203] This case was considered for the research but ultimately excluded as not involving an issue of environmental harm. It is nonetheless relevant to the costs issue.

Whilst conceding that in *Environment Protection Authority v Barnes* the Court of Criminal Appeal had said that the prosecutor's costs are an important aspect of the punishment, Biscoe J argued at [50]:

> "… payment of the prosecutor's costs is a constant aspect of punishment such that it is embedded in the general pattern of sentencing for all offences. Therefore, *of itself*, it does not generally seem to be a reason for reducing a penalty in a particular case lower than that suggested by the general pattern of sentencing for the relevant offence. Something more would seem to be required."

The difficulty with this argument is that the general pattern of sentencing will be an unreliable guide due to the impact of costs orders. Because costs are not necessarily

[203] *Liverpool City Council v Leppington Pastoral Co Pty Ltd* [2010] NSWLEC 170.

proportionate to offence severity, fines will not have been reduced by an equal percentage in each case. The reduction in the size of the fine is not related to the size that the fine began at.

The general pattern of sentencing for a particular offence type could perhaps be a more reliable guide to LEC judges (and researchers) if detailed consideration of the full context of each sentence would reveal the precise relationship between offence severity, the quantum of costs and the extent to which the penalty was mitigated due to the costs order. All too often however judges will not make it clear by how much the fine has been reduced due to costs, and if costs have not been agreed then judges themselves will only be able to make an educated guess as to how much costs are likely to total. It is quite common for a judge to make a general statement that costs have been taken into account in setting the fine. This is the case across the range of Acts under which sentences occur. For example, in the 2011 case of *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 4)*, Pepper J found that the offence was of moderate objective gravity before going on to consider costs in the light of *Liverpool City Council v Leppington Pastoral Co Pty Ltd* at [119 - 122]:

> "Walker does not oppose an order that it pay the prosecutor's reasonable costs. The costs, it must be acknowledged, although not quantified are likely to be considerable.
>
> "The payment of a prosecutor's costs is an aspect of punishment (*Environment Protection Authority v Barnes* [2006] NSWCCA 246 at [78]; *Rae* at [68]). …
>
> "In *Liverpool City Council v Leppington Pastoral Co Pty Ltd* [2010] NSWLEC 170 Biscoe J noted that in this jurisdiction an order for costs against a defendant is routinely made. …
>
> "I do not construe his Honour's comments as resiling from the general principle stated in *Barnes* that the payment of a prosecutor's costs may be considered in the determination of the appropriate penalty, including as a

> factor that acts in reduction of any penalty imposed. I have therefore taken this factor into account."[204]

It is impossible to discern from the text of this judgment how much the ultimate fine was reduced due to costs. It becomes merely one more factor to be taken into account by the judge.

Although this passage is not taken from a sentence considered by this Chapter, it is noteworthy for its rejection of Biscoe J's arguments as to costs, and the *Barnes* costs rule continues to be the established practice of the LEC.

As such, costs orders must be considered to be part of the total penalty. This is despite the inherent difficulty that arises when costs are unquantified. Costs are an "aspect of the punishment", as the Court of Criminal Appeal said in *Barnes*.[205] Further, if a fine has been reduced in recognition of a costs order, the sum of the fine and the costs order is a more accurate indication of the penalty that the judge wished to impose than the fine alone. For these reasons costs orders will be considered part of the total penalty for the purpose of step one of the disproportionality test applied by this Chapter to the thirty-eight *EP&A Act* sentences under consideration.

2.1.2 Remediation orders

The second factor which complicates understanding the quantum of the total penalty is remediation orders.

Remediation orders have their legal basis in section 126(3) of the *EP&A Act*:

> "Where a person is guilty of an offence involving the destruction of or damage to a tree or vegetation, the court dealing with the offence may, in addition to or in substitution for any pecuniary penalty imposed or liable to be imposed, direct that person:

[204] *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 4)* [2011] NSWLEC 119.
[205] *Environment Protection Authority v Barnes* [2006] NSWCCA 246 at [78].

> (a) to plant new trees and vegetation and maintain those trees and vegetation to a mature growth, and
> (b) to provide security for the performance of any obligation imposed under paragraph (a)."

Remediation orders were imposed in twelve of the thirty-eight *EP&A Act* sentences considered by this Chapter. In only two of those cases did the order provide an estimate of the financial cost to the offender of the required remediation.

It is quite likely the case that remediation orders make sentencing under the *EP&A Act* more effective if, for example, a landowner is required to remediate native vegetation rather than merely pay a fine. This type of order does however create a significant challenge when it comes to evaluating the quantum of a penalty.

The challenge that remediation orders present is that – unless they are quantified in dollar terms in the order – it is impossible to know precisely the additional financial penalty that they impose upon an offender. The size of the remediation task will vary significantly depending upon the details of the offence and the terms of the order. A remediation order generally specifies the work to be done rather than the cost to the offender. The cost to the offender, both in terms of dollars and in terms of the time required to be dedicated to the task, is left open-ended and must be sufficient to complete the remediation task to a satisfactory standard.

Remediation orders must be considered a part of the total penalty. The logic of *Barnes* applies to remediation orders as well as it does to costs orders: they are an "aspect of the punishment" and as such a valid consideration for a judge when determining the size of the accompanying fine. This is confirmed by the language of section 126(3), which states that "the court dealing with the offence may, in addition to or in substitution for any pecuniary penalty imposed" impose a remediation order. It is therefore up to the sentencing judge as to whether or not to reduce a fine due to a remediation order. In practice the sentencing judge will not always make clear in his or her written judgment which option has been taken. When a fine is reduced to reflect that a remediation order has been imposed, it is worth noting that the judge is

usually doing so without knowing with any accuracy the financial cost to the offender of the order, given that, as noted above, of the twelve remediation orders imposed in the sentences considered by this Chapter the cost to the offender was stated only twice.

For example, in *Council of Camden v Tax* McClellan J stated at [19]-[20]:

> "The defendant has also offered to mitigate the environmental harm occasioned by his actions by offering to fence and protect from rabbits and stock 1 acre of the land and to plant 40 seedlings to replace the trees which have been lost. The proposal is that the trees will be maintained until they reach a height of 3 metres and stock and other animals will be excluded until that occurs.
>
> "The precise area to be fenced has not yet been agreed between the parties, but I anticipate that agreement will be reached. Accordingly, I propose today to provide for the penalty which will ultimately be imposed, mindful of the fact that orders by way of mitigation will also be imposed in addition to any penalty. I will invite the parties to bring in appropriate short minutes when I have concluded these reasons."[206]

It is clear therefore that at the time of sentence McClellan J was unaware of the cost to the offender of the order, because the final boundaries had not been agreed. Nevertheless at [32]-[33] he took the proposed remediation order into account as a mitigating factor:

> "I must also have regard to the fact that an order will be imposed which requires the rehabilitation of a one acre portion of the property which will enable, with time, appropriate trees to re-grow.
>
> "In my opinion, the seriousness of the offence and the fact that I am satisfied beyond any doubt that the defendant knew that in authorising the activity he

[206] *Council of Camden v Tax* [2004] NSWLEC 448.

> was breaching the law, would have required the imposition of a penalty of $45,000. However, having regard to the mitigating factors, including the early plea, contrition and co-operation, and the fact that rehabilitation works will be undertaken, I believe it is appropriate to reduce that penalty. But, in order to ensure that the necessary message of general deterrence is communicated to the community, that penalty should be reduced to the sum of $30,000."[207]

It is clear that remediation orders are an aspect of punishment and must be considered part of the total penalty. Usually they cannot be quantified precisely in dollar terms, although fines are often reduced in recognition of the burden that such orders place upon offenders. If total penalties are to be understood, so that they can be compared to environmental harm, then this limitation of the data must be overcome.

2.1.3 Ranking by penalty

In order to facilitate comparison between penalty size and environmental harm it is desirable to rank the penalties by size. This will make the comparison with environmental harm more straightforward.

Table 4.1 ranks the thirty-eight *EP&A Act* sentences by penalty size. In doing so the financial burden to the offender of both costs and remediation orders has been included in the total amount as far as it is possible to do so. This is done on the basis that both costs and remediation orders are aspects of punishment and form part of the total penalty.

The challenge of this ranking process is that the quantum of the total penalty cannot be precisely known in each case. The ranking process is imperfect because the information upon which it is based is incomplete. Given incomplete information, to rank each case individually – that is, in order from one to thirty-eight – would be to postulate a degree of accuracy which does not exist. For that reason the cases are instead sorted into four categories: high, moderate and low penalty, plus a fourth

[207] Ibid.

category where no conviction is recorded under section 10 of the *Crimes (Sentencing Procedure) Act*. The high penalty category is defined as a penalty that totals, or is very likely to total, more than $100,000. The moderate penalty category is a penalty that totals, or is very likely to total, between $50,000 and $100,000. The low penalty category is a penalty that totals, or is very likely to total, below $50,000.

The eleven remediation orders for which no cost estimate was provided in the written judgment have each been footnoted, and a brief summary of the order provided in the footnote, in order to allow the reader to assess the likely scope of the works required.

As it forms a category in Table 4.1, it is appropriate to repeat the sentencing options provided to judges by section 10 of the *Crimes (Sentencing Procedure) Act*. Section 10A allows a judge to record a criminal conviction but take no further action. Section 10(1) allows a judge to find an offender guilty but dismiss the charge without proceeding to conviction, so that the offender avoids a criminal record. Sub-section 10(1)(a) is a straightforward dismissal without conviction. Sub-section 10(1)(b) puts the offender on a good behaviour bond for a maximum of two years; should the offender fail to be of good behaviour within the required period then the bond can be revoked and the offender re-sentenced.

Table 4.1 – Sentences imposed under the *EP&A Act* in the research period ranked by penalty size in total dollar amounts, in four categories: high penalty, moderate penalty, low penalty, and no conviction recorded. Estimations of costs orders are as indicated in the text of the sentence judgment. Assumptions as to costs orders are based on comparisons undertaken by the author.

No	Case	Citation	Penalty
HIGH PENALTY			
1	Port Stephens Council v Robinsons Anna Bay Sand Pty Limited	[2007] NSWLEC 240	$100,000 plus unstated costs
2	Hawkesbury City Council v Johnson; Hawkesbury City Council v Johnson Property Group Pty Limited (No 2)	[2009] NSWLEC 6	$18,000 (Johnson) $22,000 (Johnson Property Group) plus costs $74,000 each
3	Manly Council v Taheri	[2008] NSWLEC 314	$65,000 plus remediation order estimated at $35,000 plus costs estimated at $80,000
4	Minister for Planning v Moolarben Coal Mines Pty Ltd	[2010] NSWLEC 147	$70,000 plus costs $55,000
5	Thomson v Hawkesbury City Council	[2009] NSWLEC 151	$75,000 plus unstated costs which are assumed to exceed $25,000 based upon comparison with similar cases
6	Newcastle City Council v Pepperwood Ridge Pty Ltd	[2004] NSWLEC 218	$68,000 plus unstated costs which are assumed to exceed $32,000 based upon comparison with similar cases
MODERATE PENALTY			
7	Kari & Ghossayn Pty Limited v Sutherland Shire Council	[2006] NSWLEC 532	$52,000 plus unstated costs
8	Burwood Council v Jarvest Pty Ltd	[2011] NSWLEC 109	$45,000 plus remediation order plus unstated costs, the total of which is assumed to exceed $5,000 based on comparison with similar cases.[208]
9	Hunters Hill Council v Gary Johnston	[2013] NSWLEC 89	$40,000 plus unstated costs which are assumed to exceed $10,000 based on comparison with similar cases
10	Warringah Council v Bonnano	[2012] NSWLEC 265	$37,500 plus unstated costs which are assumed to exceed $12,500 based on comparison with similar cases
11	Council of Camden v Tax	[2004] NSWLEC 448	$30,000 plus remediation order. No decision on costs in judgment. Assumption made that costs awarded at later date. Total of remediation order and costs assumed to exceed $20,000

[208] Remediation order: an order to maintain to maturity 13 replacement trees it had already planted.

No	Case	Citation	Penalty
			based on comparison with similar cases.[209]
12	Gittany Constructions Pty Limited v Sutherland Shire Council	[2006] NSWLEC 242	$30,000 plus unstated costs which are assumed to exceed $20,000 based on comparison with similar cases
13	The Council of the City of Gosford v Tauszik	[2005] NSWLEC 266	$25,000 plus remediation order plus unstated costs, the total of which is assumed to exceed $25,000 based on comparison with similar cases.[210]
14	Hornsby Shire Council v Devaney	[2007] NSWLEC 199	$20,000 plus half cost of Bushland Restoration Plan plus unstated costs, the total of which is assumed to exceed $30,000 based on comparison with similar cases[211]
LOW PENALTY			
15	Byron Shire Council v Fletcher	[2005] NSWLEC 706	$20,000 plus costs $13,000
16	Pett v The Council of Camden	[2008] NSWLEC 289	$15,000 plus remediation order plus costs $2,000. Cost of remediation order assumed to be less than $33,000 based on the details of the case.[212]
17	Willoughby City Council v Vlahos	[2013] NSWLEC 71	$12,500 plus unstated costs which are assumed to be less than $37,500 based on comparison with similar cases
18	Council of the Municipality of Kiama v Watkins	[2012] NSWLEC 87	$12,000 plus costs $15,000
19	Sutherland Shire Council v Nustas	[2004] NSWLEC 608	$11,000 plus remediation order plus unstated costs, the total of which is assumed to be less than $39,000 based on comparison with similar cases and the details of the remediation order[213]
20	Pittwater Council v Scahill	[2009] NSWLEC 12	$11,000 plus costs $13,000
21	Ballina Shire Council v Ian Watson	[2006] NSWLEC 827	$10,500 plus unstated costs which are assumed to be less than $39,500 based on comparison with similar cases
22	Campbelltown City Council v Josevski	[2009] NSWLEC 29	$10,000 plus remediation order plus costs estimated by judge at $15,000-

[209] Remediation order: the offender to fence, and protect from rabbits and stock, 4,000m^2 of land and to plant 40 seedlings to replace lost trees. Trees to be maintained, and stock excluded, until trees reach a height of 3 metres.

[210] Remediation order: the offender to within 30 days plant to Norfolk Island Pine tress of no less than 3 metres height in specific locations, to maintain the trees to mature growth and to lodge with Council $10,000 to be held by Council by way of security.

[211] Remediation order: to pay half the cost of preparation of a Bushland Restoration Plan. The Plan is to be prepared by a suitably qualified bush regenerator, addressing specified criteria, and a schedule of works over a timeframe of 5 years minimum for restoration, all subject to approval by the prosecuting Council. Note: this offender is not required to pay for the carrying out of the restoration works specified by the Plan, only half the cost of the Plan's preparation.

[212] Remediation order: the offender was sentenced in Camden Local Court, and this case is an appeal against that sentence. The appeal was dismissed. The LEC judgment makes reference to the order but does not provide its terms. The sentence was for unlawfully clearing 172 trees. The burden of the order is shared with the offender's brother, who was also sentenced in the Local Court.

[213] Remediation order: to plant 3 trees, to maintain those trees until they reach a stem diameter of 100mm as measured at 500mm above ground level, and to lodge a bond with the prosecutor of $15,000 refundable when that size is reached.

No	Case	Citation	Penalty
			$20,000. Remediation order assumed to cost less than $30,000-35,000 based on the details of the order.[214]
23	George Kenneth Kwong v Baulkham Hills Shire Council	[2008] NSWLEC 199	$10,000. No decision on costs in the judgment. Assumed costs of less than $40,000 awarded at later date based on comparison with similar cases.
24	Eurobodalla Shire Council v Wheelhouse	[2006] NSWLEC 98	$10,000 plus costs $7,000
25	Active Tree Services Pty Limited v Ku-ring-gai Municipal Council	[2005] NSWLEC 431	$10,000. No decision on costs in the judgment. Assumed costs of less than $40,000 awarded at later date based on comparison with similar cases.
26	Advanced Arbor Services v Strathfield Municipal Council	[2006] NSWLEC 485	$10,000 plus costs $7,000
27	Cameron v Eurobodalla Shire Council	[2006] NSWLEC 47	$10,000 plus unstated costs assumed to be less than $40,000 based on to comparison with similar cases
28	Manly Council v Lee	[2011] NSWLEC 166	$7,200 plus costs estimated by judge at $30,000
29	Parramatta City Council v Sua trading as Foxy Tree Services	[2010] NSWLEC 93	$6,000 plus unstated costs assumed to be less than $44,000 based on comparison with similar cases
30	Council of Camden v Poyntz, John	[2007] NSWLEC 439	$3,500 plus remediation order plus costs $10,000. Cost of remediation order assumed to be less than $36,500 based on the details of the order and the case.[215]
31	Ryde City Council v Craig Fry	[2007] NSWLEC 253	$1,500 plus costs $4,500
32	Eurobodalla Shire Council v Christenssen	[2008] NSWLEC 134	$750. Costs not applicable as unsuccessful Crown appeal.
33	Blue Mountains City Council v Carlon	[2008] NSWLEC 296	S10A(1) conviction plus unstated costs assumed to be less than $50,000 based on comparison with similar cases
NO CONVICTION RECORDED			
34	Hornsby Shire Council v Benson	[2007] NSWLEC 199	S10(1)(b) dismissal plus remediation order plus unstated costs[216]
35	Council of Camden v Runko	[2006] NSWLEC 486	S10(1)(a) dismissal plus remediation order plus costs $8,000[217]
36	Blue Mountains City Council	[2009] NSWLEC 19	S10(1)(a) dismissal plus remediation

[214] Remediation order: to plant 6 trees and maintain those trees for a period of 3 years.
[215] Remediation order: to prepare and implement a Bushland Restoration Plan. The Plan is to be prepared by a suitably qualified bush regenerator, addressing specified criteria, and a schedule of works over a timeframe of 5 years minimum for restoration, all subject to approval by the prosecuting Council. The area affected is not described in square metres in the judgment, although it is specified that 13 trees were removed.
[216] Remediation order: to pay half the cost of preparation of a Bushland Restoration Plan, and the full cost of implementing the Plan. The Plan is to be prepared by a suitably qualified bush regenerator, addressing specified criteria, and a schedule of works over a timeframe of 5 years minimum for restoration, all subject to approval by the prosecuting Council. The area to be remediated is 4,200m^2.
[217] Remediation order: to remediate a 400m^2 area by means of stock-proof fencing, weed and rubbish removal, the planting of 30 trees, the maintenance of those trees until they reach a height of 3m and to pay a $8,000 bond to the prosecutor, refundable when the trees reach that height.

No	Case	Citation	Penalty
	v Tzannes		order estimated at $13,500-$15,000 plus costs $30,000[218]
37	Hawkesbury City Council v Memorey	[2005] NSWLEC 735	S10(1)(a) dismissal plus costs $2,500
38	Parramatta City Council v Cheng	[2010] NSWLEC 94	S10(1)(a) dismissal plus costs $10,000

As presented in Table 4.1, seven cases fall into the high penalty category, eight cases into the moderate penalty category, twenty into the low penalty category and five into the category where no conviction was recorded under section 10 of the *Crimes (Sentencing Procedure) Act*.

The total penalties having been determined, at least in broad terms, the next step in completing the task of comparing penalty to environmental harm is to evaluate the harm in each case.

2.2 Evaluating environmental harm

The environmental harm that each offence causes can generally be evaluated based upon the written sentence judgment. In the great majority of LEC sentences the judge relies upon expert scientific evidence to quantify harm. To the extent that the written judgment summarises that evidence, a researcher can also rely upon this expert opinion to form his or her own view as to the extent of harm. In all cases the facts upon which the offender is being sentenced are included in the written judgment and specify the harm caused by the offence, and in simpler cases (such as removing a single tree) this can be sufficient to evaluate harm even without expert opinion.

It is not always straightforward to evaluate environmental harm, and often not possible to do so precisely. Even when offences are categorised according to offence type, the comparison is not necessarily of like with like. There is inevitably a degree of subjectivity in determining whether, for example, removing one tree that forms part of an Endangered Ecological Community (EEC) is more harmful than removing

[218] Remediation order: the terms of the order are not provided in the written judgment, but the cost to the offender is estimated at $13,500-$15,000. The area of bushland to be remediated is approximately 4,000m^2.

ten trees that do not.[219] There is also the practical difficulty that written sentence judgments do not always express the harm caused by the offence with sufficient precision, for example describing an area cleared as "small" rather than in square metres or stating that "50-100" trees were cleared rather than a specific number.

Remediation orders are relevant to the evaluation of environmental harm, in addition to their relevance to determining the total penalty. They are relevant because their intention is to reduce over time the environmental harm caused by the offence. In the context of determining whether penalty is proportionate to harm, the question that remediation orders give rise to is: should the penalty be proportionate to the harm caused by the offence at the time of the commission of the offence, or to the harm caused by the offence at a future time when the remediation has (presumably) been successfully completed. The judges of the LEC generally adopt the latter approach: when a remediation order forms part of a sentence, the sentencing judge will usually proceed on the assumption that the order will be effective in reducing both the extent and the duration of the harm caused by the offence. As discussed in Chapter 3, *Camilleri's* rule understands environmental harm as having two elements: extent of harm and duration of harm.[220] This thesis will evaluate harm in the same way as LEC judges and assume that remediation orders, once made, will be successful in reducing both the extent and the duration of the environmental harm caused by the offence.

This introduces a degree of imprecision, because it cannot be known in advance whether or not remediation orders are in fact successful at reducing environmental harm over time, or how often they are successful. This is an area for future research in this field. Relevant factors are likely to include the attitude of the offender, whether the order provides for independent scrutiny of compliance, the diligence of any independent scrutiny and the feasibility of the order itself, that is, whether it is realistic and achievable in practice. Questions have been raised by experts in the field

[219] An EEC is declared under section 12 of the *Threatened Species Conservation Act (1995)* (NSW) if, in the opinion of the Scientific Committee, it is facing a very high risk of extinction in NSW in the near future.
[220] Chapter 3, Section 3.6.

as to whether remediation of Endangered Ecological Communities can ever be completely effective, for example.[221]

In the absence of such information this thesis will proceed on the assumption that environmental harm is reduced over time by a remediation order, without seeking to quantify the extent of the reduction in harm. This introduces a degree of imprecision into the process of evaluating harm because there is no basis to assume that harm will be reduced by a specific amount (for example, 50% or 100%), but only to assume that it will be reduced in general terms.

For these reasons, and similarly to ranking by penalty severity, to place each of the thirty-eight cases into an individual rank order based upon environmental harm would be to pretend that there is a degree of accuracy that cannot in fact be achieved. Nevertheless clear distinctions can be drawn between cases based upon the details of the offence, as contained in the written judgment. The unlawful clearing of 1,000m^2 of native vegetation is clearly more harmful than the removal of a single tree of a common species type, for example. Consequently the cases are divided into four categories of environmental harm: serious, moderate, low and negligible. Table 4.2 below builds upon the information contained in Table 4.1 by highlighting harm in shades of grey. It includes a brief summary of the environmental harm associated with each case. The serious harm category is the darkest shade and the negligible harm category has no shading. This allows harm to be compared against the penalty categories of high, moderate, low, and no conviction recorded.

It is important to note that the categories of environmental harm are not standardised across the four offence types considered in detail by this and the following three Chapters. Whilst standard penalty size categories are applied across all of the Acts considered in depth in this thesis, such a standardised approach is not possible for environmental harm. The categories of harm differ for each offence type. This is because the severity of harm differs widely between Acts. If standardised categories of harm were applied then all of the sentences for one offence type might,

[221] S Wilkins, DA Keith and P Adam, 'Measuring Success: Evaluating the Restoration of a Grassy Eucalypt Woodland on the Cumberland Plain, Sydney, Australia' (2003) 11(4) *Restoration Ecology* 489.

for example, be categorised as "serious". A table with all of the sentences in the one category would not serve any useful function. Consequently the categorisations of harm in Table 2.1 are relative to other offences in Table 2.1 and not relative to offences under other Acts.

Table 4.2 – Sentences imposed under the *EP&A Act* during the research period ranked by penalty severity and categorised for environmental harm into serious (dark grey), moderate (grey), low (light grey) and negligible (no shading)

No	Case	Citation	Penalty	Environmental Harm
HIGH PENALTY				
1	Port Stephens Council v Robinsons Anna Bay Sand Pty Limited	[2007] NSWLEC 240	$100,000 plus unstated costs	Mined sand on 20,000m^2 Crown land without consent, spread waste over 5,900m^2 of that land. Vegetation loss unspecified.
2	Hawkesbury City Council v Johnson; Hawkesbury City Council v Johnson Property Group Pty Limited (No 2)	[2009] NSWLEC 6	$18,000 (Johnson) $22,000 (Johnson Property Group) plus costs $74,000 each	Cleared approx. 200 native trees, not high value ecologically.
3	Manly Council v Taheri	[2008] NSWLEC 314	$65,000 plus remediation order estimated at $35,000 plus costs estimated at $80,000	Three counts of breaching TPO, total 67 trees some of which were in a public reserve, to enhance views.
4	Minister for Planning v Moolarben Coal Mines Pty Ltd	[2010] NSWLEC 147	$70,000 plus costs $55,000	Cleared approx. 41,000m^2 in excess of approval, some EEC. Remediation already required by modified consent condition.
5	Thomson v Hawkesbury City Council	[2009] NSWLEC 151	$75,000 plus unstated costs	Unauthorised earthworks over unspecified but significant area including loss of vegetation. Two counts of removing trees (7, 24) contrary to TPO.
6	Newcastle City Council v	[2004] NSWLEC	$68,000 plus	110-164 native

No	Case	Citation	Penalty	Environmental Harm
	Pepperwood Ridge Pty Ltd	218	unstated costs	trees removed plus underscrubbing of other vegetation, cleared watercourse buffer zone.
MODERATE PENALTY				
7	Kari & Ghossayn Pty Limited v Sutherland Shire Council	[2006] NSWLEC 532	$52,000 plus unstated costs	Clear area of remnant bush contrary to consent condition (area unspecified), remove 2 trees contrary to consent condition.
8	Burwood Council v Jarvest Pty Ltd	[2011] NSWLEC 109	$45,000 plus remediation order plus unstated costs	Removed 13 mature trees at Nissan dealership on Parramatta Rd. Replacements planted & protected by remediation order.
9	Hunters Hill Council v Gary Johnston	[2013] NSWLEC 89	$40,000 plus unstated costs	Removed 4 trees contrary to consent to enhance views.
10	Warringah Council v Bonnano	[2012] NSWLEC 265	$37,500 plus unstated costs	Cleared 123m^2 of native veg from Crown Reserve to enhance view.
11	Council of Camden v Tax	[2004] NSWLEC 448	$30,000 plus remediation order. No decision on costs in the judgment.	Cleared approx. 40 trees
12	Gittany Constructions Pty Limited v Sutherland Shire Council	[2006] NSWLEC 242	$30,000 plus unstated costs	Clear area of remnant bush contrary to consent condition (area unspecified), remove 2 trees contrary to consent condition.
13	The Council of the City of Gosford v Tauszik	[2005] NSWLEC 266	$25,000 plus remediation order plus unstated costs	Removed 2 trees to enhance views.
14	Hornsby Shire Council v Devaney	[2007] NSWLEC 199	$20,000 plus half cost of Bushland Restoration Plan plus unstated costs	4,200m2 fully cleared of trees and vegetation. Vulnerable species in close proximity. Remediation order.
LOW PENALTY				

No	Case	Citation	Penalty	Environmental Harm
15	Byron Shire Council v Fletcher	[2005] NSWLEC 706	$20,000 plus costs $13,000	Cleared approx. 50 trees which were regrowth and not high value ecologically.
16	Pett v The Council of Camden	[2008] NSWLEC 289	$15,000 plus remediation order plus costs $2,000	Three counts of remove trees without consent (18, 35, 119 trees). Remediation order.
17	Willoughby City Council v Vlahos	[2013] NSWLEC 71	$12,500 plus unstated costs	Removed one tree contrary to consent condition.
18	Council of the Municipality of Kiama v Watkins	[2012] NSWLEC 87	$12,000 plus costs $15,000	Pruned one tree in public reserve, tree subsequently died.
19	Sutherland Shire Council v Nustas	[2004] NSWLEC 608	$11,000 plus remediation order plus unstated costs	Three trees removed, two damaged, contrary to consent. Remediation order.
20	Pittwater Council v Scahill	[2009] NSWLEC 12	$11,000 plus costs $13,000	Removed 2 trees which were part of an EEC.
21	Ballina Shire Council v Ian Watson	[2006] NSWLEC 827	$10,500 plus unstated costs	Clear unspecified but significant area of littoral rainforest EEC.
22	Campbelltown City Council v Josevski	[2009] NSWLEC 29	$10,000 plus remediation order plus costs estimated at $15,000-$20,000	Removed 6 mature trees which were part of an EEC. Remediation order.
23	George Kenneth Kwong v Baulkham Hills Shire Council	[2008] NSWLEC 199	$10,000. No decision on costs in the judgment.	Spread fill over approx. 250m^2, affecting an unspecified number of trees.
24	Eurobodalla Shire Council v Wheelhouse	[2006] NSWLEC 98	$10,000 plus costs $7,000	Removed 3 mature trees on neighbour's property.
25	Active Tree Services Pty Limited v Ku-ring-gai Municipal Council	[2005] NSWLEC 431	$10,000. No decision on costs in the judgment.	Removed one tree. Contractor.
26	Advanced Arbor Services v Strathfield Municipal Council	[2006] NSWLEC 485	$10,000 plus costs $7,000	Removed one tree. Contractor.
27	Cameron v Eurobodalla Shire Council	[2006] NSWLEC 47	$10,000 plus unstated costs	Lopped 7-10 branches off tree in public reserve to enhance views.
28	Manly Council v Lee	[2011] NSWLEC 166	$7,200 plus costs estimated at $30,000	Pruned tree in school adjacent to offender. Agreed to pay for

No	Case	Citation	Penalty	Environmental Harm
				replacement.
29	Parramatta City Council v Sua trading as Foxy Tree Services	[2010] NSWLEC 93	$6,000 plus unstated costs	Removed 3 trees, lopped 1, contrary to TPO. Contractor.
30	Council of Camden v Poyntz, John	[2007] NSWLEC 439	$3,500 plus remediation order plus costs $10,000	Cleared 13 trees which were part of an EEC. Remediation order.
31	Ryde City Council v Craig Fry	[2007] NSWLEC 253	$1,500 plus costs $4,500	Pruned tree in public park of branches overhanging his property.
32	Eurobodalla Shire Council v Christenssen	[2008] NSWLEC 134	$750. Costs n/a as unsuccessful Crown appeal.	Cleared 19,126m^2 in excess of approval.
33	Blue Mountains City Council v Carlon	[2008] NSWLEC 296	S10A(1) conviction plus unstated costs	Fully cleared 4,000m^2 plus some other trees. Vegetation was regrowth and not highly valuable.
NO CONVICTION RECORDED				
34	Hornsby Shire Council v Benson	[2007] NSWLEC 199	S10(1)(b) dismissal plus remediation order plus unstated costs	4,200m^2 fully cleared of trees and vegetation. Vulnerable species in close proximity. Remediation order.
35	Council of Camden v Runko	[2006] NSWLEC 486	S10(1)(a) dismissal plus remediation order plus costs $8,000	Removed 30 trees. Trees were growing through dangerous waste that offender had been ordered to remove. Remediation order.
36	Blue Mountains City Council v Tzannes	[2009] NSWLEC 19	S10(1)(a) dismissal plus remediation order plus costs $30,000	Fully cleared 4,000m^2 plus some other trees. Vegetation was regrowth and not highly valuable. Remediation order.
37	Hawkesbury City Council v Memorey	[2005] NSWLEC 735	S10(1)(a) dismissal plus costs $2,500	Cut approx. 8 tonnes sandstone on densely vegetated property without consent.
38	Parramatta City Council v Cheng	[2010] NSWLEC 94	S10(1)(a) dismissal plus costs $10,000	Removed 3 trees, lopped 1, contrary to TPO. Property owner.

Table 4.2 allows relatively straightforward comparison of penalty to environmental harm. The final task required to complete step one of the proportionality test is to identify sentences or types of sentence where the relationship between penalty and harm appears disproportionate. Those sentences will then be considered in detail in step two of the test, to examine whether or not the disparity between penalty and harm can be justified by sentencing considerations other than environmental harm.

2.3 Identification of sentences with prima facie disproportionality

In most of the thirty-eight cases in Table 4.2 the penalty appears to be proportionate to environmental harm, or at least approximately so.

Based upon Table 4.2, three sentences appear to have a penalty which is too severe and another four sentences appear to have a penalty which is too lenient, relative to environmental harm and in comparison to the other sentences. These sentences can be said to have prima facie disproportionality, that is they appear disproportionate at first sight, and are therefore deserving of closer scrutiny.

The three sentences in which the penalty appears too severe are: *Burwood Council v Jarvest Pty Ltd*, *Hunters Hill Council v Gary Johnston* and *The Council of the City of Gosford v Tauszik*.[222] The four sentences in which the penalty appears too lenient are: *Eurobodalla Shire Council v Christenssen*, *Blue Mountains City Council v Carlon*, *Hornsby Shire Council v Benson* and *Blue Mountains City Council v Tzannes*.[223]

These sentences will be considered in detail in the following Section.

[222] *Burwood Council v Jarvest Pty Ltd* [2011] NSWLEC 109; *Hunters Hill Council v Gary Johnston* [2013] NSWLEC 89; *The Council of the City of Gosford v Tauszik* [2005] NSWLEC 266.
[223] *Eurobodalla Shire Council v Christenssen* [2008] NSWLEC 134; *Blue Mountains City Council v Carlon* [2008] NSWLEC 296; *Hornsby Shire Council v Devaney* [2007] NSWLEC 199; *Blue Mountains City Council v Tzannes* [2009] NSWLEC 19.

Section 3 Steps two and three: Can the disparity between penalty and harm be justified, and if so does it exceed the range established by the objective seriousness?

3.1 Burwood Council v Jarvest Pty Ltd

As identified in Section 2 above, the penalty in *Burwood Council v Jarvest Pty Ltd* appears severe, relative to environmental harm and by comparison to the other sentences.[224] In this case a Nissan dealership on Parramatta Rd in Burwood, Sydney, a main road in a long-established part of the city, removed thirteen mature trees without permission. The trees provided a visual barrier between the dealership and adjacent residences, and no doubt generally enhanced the visual amenity of this heavily developed area. The trees were however landscaping rather than remnant native vegetation, having been planted along the property boundary, and not part of an ecosystem upon which other native flora and fauna depended.[225] Further, replacement trees were planted and then protected by a remediation order.[226] As such the environmental harm caused by the offence was very low.

Sheahan J found numerous mitigating factors in Jarvest's favour which reduced the penalty from his starting point of $60,000. Jarvest had no prior offences, was otherwise of good corporate character, had pleaded guilty, shown remorse and co-operated with the prosecutor.[227] Two aggravating factors were also identified: that the offender had a financial motivation in that by avoiding the approval process it saved financial cost and inconvenience, and that it was a planned and deliberate offence.[228]

The ultimate penalty in this case was $45,000, plus the remediation order and unstated costs, placing it in the moderate penalty category. It is difficult to conclude

[224] *Burwood Council v Jarvest Pty Ltd* [2011] NSWLEC 109.
[225] Ibid [3].
[226] Ibid [8].
[227] Ibid [27].
[228] Ibid [26].

that the sentencing considerations other than environmental harm were sufficient to justify such a relatively severe penalty. Whilst there were aggravating factors, there were also numerous mitigating factors.

The relative severity of the penalty in *Burwood Council v Jarvest Pty Ltd* is illustrated by comparison with other cases in Table 4.2 which attracted substantially lesser penalties despite involving greater harm. *Warringah Council v Bonanno* saw the offender fined $37,500 plus unstated costs, less than Jarvest Pty Ltd, for clearing 123m^2 of native vegetation from a Crown Reserve.[229] Expert evidence in the sentence hearing established that the vegetation had provided habitat for bandicoots, possums, flying foxes and native birds, in contrast to the thirteen trees in *Jarvest*.[230] Sheahan J found the offence in *Bonanno* to be "objectively serious" and the environmental harm "substantial, and is likely never to be fully remediated". Although the offender was of good character with no prior convictions, had pleaded guilty early and co-operated with the prosecutor, Sheahan J also found that Bonanno's motivation was to increase the sale price of his house.

The sentence in *Hornsby Shire Council v Devaney* saw a contractor fined $20,000, plus half the cost of preparing a Bushland Restoration Plan, for clearing approximately 4,200m^2 of native vegetation.[231] Whilst the cost to Devaney of the Bushland Restoration Plan was not stated in the judgment, it is important to note that it was merely a plan for restoration works and not the actual restoration itself, and as such the cost to Devaney would most likely be relatively minor. The penalty in *Devaney* was therefore approximately half that imposed in *Jarvest*.

In terms of proportionality between penalty and environmental harm, *Jarvest* cannot be reconciled with *Bonnano* and *Devaney*. Either *Jarvest* is too severe or *Bonnano* and *Devaney* are too lenient. At least one of the sentences must be disproportionate.

3.2 Views

[229] *Warringah Council v Bonanno* [2012] NSWLEC 265.
[230] Ibid [17].
[231] *Hornsby Shire Council v Devaney* [2007] NSWLEC 199.

A number of the cases in Table 4.2 comprise a sub-category of *EP&A Act* cases: those where a tree or trees have been removed, or merely pruned, in order to enhance a view from a residence. These cases are characterised by relatively low environmental harm and relatively severe penalties. The environmental harm is relatively low because views cases usually involve harm to a single tree or small number of trees in an urban context. Urban trees have environmental value, providing habitat for birds and other wildlife, in addition to anthropocentric qualities such as beauty, shade and privacy. The two cases considered here both fall into the "moderate penalty" range. The other cases in that range, with the exception of *Burwood Council v Jarvest Pty Ltd* which was discussed above, all involve relatively greater environmental harm.

The relatively severe penalties given in these cases can be explained by the need for strong general deterrence given the potential financial reward for committing the offence. The financial reward derives from the enhanced view, which studies have found is likely to lead to increased property value.[232] A small financial penalty might be dwarfed by the increase in the value of a property, thereby allowing an offender to profit from his or her offence.

Views cases pose a challenge for proportionality in sentencing. In a views case proportionality points towards a low penalty because the environmental harm is relatively low, yet a penalty that is proportionate to environmental harm will be ineffective at protecting the environment if it is too low to provide an effective deterrent. As discussed in Chapter 3, and as stated by Craig J in *Minister for Planning v Moolarben Coal Mines Pty Ltd*, proportionality "fixes the upper limit because a sentence should never exceed that which can be justified as appropriate or proportionate to the gravity of the offence considered in light of its objective circumstances".[233] In views cases general deterrence may lead to penalties which exceed what is proportionate to the gravity of the offence.

[232] Academic studies in Hong Kong and Minnesota, USA support the contention that attractive views can increase property value: C.Y.Jim and Wendy Y. Chen, 'Value of scenic views: Hedonic assessment of private housing In Hong Kong' (2009) 91(4) *Landscape and Urban Planning* 226; Heather A. Sander and Stephen Polasky, 'The value of views and open space: Estimates from a hedonic pricing model for Ramsey County, Minnesota, USA' (2009) 26(3) *Land Use Policy* 837; Eddie C.M. Hui, Jia Wei Zhong and Ka Hung Yu, 'The impact of landscape views and storey levels on property prices' (2012) 105(1-2) *Landscape and Urban Planning* 86.
[233] *Minister for Planning v Moolarben Coal Mines Pty Ltd* [2010] NSWLEC 147 [47].

The previous Section identified two views cases as exhibiting prima facie disproportionality where the penalties seem too severe by comparison to other sentences: *Hunters Hill Council v Gary Johnston* and *The Council of the City of Gosford v Tauszik*.[234] In *Hunters Hill Council v Gary Johnston* the offender Johnston was fined $40,000 plus unstated costs for removing four trees in order to enhance views across the Parramatta River from his home in Hunters Hill, Sydney.[235] In addition, as the judgment noted, Johnston forfeited a $20,000 bond that he had paid to Hunters Hill Council to ensure the protection of the four trees.[236] The four trees were hoop pines, native to northern NSW but not to Sydney, and hence were not remnant native vegetation.[237]

In *Hunters Hill Council v Gary Johnston* Craig J held that the four trees not only had "intrinsic significance", but also were significant in a "broader environmental sense".[238] Craig J found that their broader significance was demonstrated in a number of ways: their prominence in the local landscape, the effect which they had in mitigating the impact of the new dwelling when viewed from the River, the property's location within the Foreshore Scenic Protection Area (a conservation area and in the vicinity of identified heritage items) and in the importance which the Council had attributed to their retention.[239] He held that the removal of the four trees had "a substantial impact that was objectively harmful" and "that harm is to be taken into account as an aggravating factor under s 21A(2)(g) of the CSP Act".[240] As regards the offender's state of mind, Craig J held that the offence was intentional and intended to "improve the amenity of his property".[241]

It is clear that Craig J's argument with regards to the offender's state of mind was well-founded. The fact that Johnston had paid a substantial bond to the Council to

[234] *Hunters Hill Council v Gary Johnston* [2013] NSWLEC 89; *The Council of the City of Gosford v Tauszik* [2005] NSWLEC 266.
[235] *Hunters Hill Council v Gary Johnston* [2013] NSWLEC 89.
[236] Ibid [28].
[237] Ibid [72].
[238] Ibid [63].
[239] Ibid [65]-[70].
[240] Ibid [70]-[74].
[241] Ibid [84]-[86].

ensure the protection of the trees is more than sufficient to establish that the offence was an intentional and likely calculated breach of the law. This sentencing consideration is a valid reason for the penalty to be higher than would otherwise be proportionate to environmental harm.

In *The Council of the City of Gosford v Tauszik* the offender Tauszik removed two Norfolk Island Pines from outside his residence at Pearl Beach on the Central Coast of NSW in order to enhance his coastal views, and was fined $25,000 plus a remediation order plus unstated costs.[242] Although McClellan J found that the removed trees had been mature and had formed "a significant component of the local landscape", again they were not native trees and there was no evidence that they provided habitat for native fauna.[243] The harm was diminished further by the imposition of a remediation order requiring that two trees be planted in the place of the two which were removed.[244]

McClellan J found beyond reasonable doubt that the offender knew that consent was required to remove the trees, and that he knew that he did not have that consent.[245] The offender's state of mind was thus a valid reason for the penalty to be higher than would otherwise be proportionate to environmental harm.

McClellan J referred to the need for strong general deterrence in such cases at [11]:

> "It is also important when sentencing the offender to bear in mind the need to deter others who may be minded to commit a similar offence. In this respect there is evidence before me of difficulties which have been experienced in a number of council areas with persons apparently, destroying trees without consent."

[242] *The Council of the City of Gosford v Tauszik* [2005] NSWLEC 266. It should be noted that this sentence was over-turned on appeal. It is included nonetheless because the objective of this thesis is to assess how judges of the LEC assess proportionality.
[243] Ibid [5].
[244] Ibid [9].
[245] Ibid [6].

The environmental harm caused by these two offences was lesser than the other sentences in the "moderate penalty" range in Table 4.2: *Kari & Ghossayn Pty Limited v Sutherland Shire Council* and *Gittany Constructions Pty Limited v Sutherland Shire Council* involved the clearing of an unspecified area of remnant native vegetation, *Warringah Council v Bonnano* involved the clearing of 123m^2 of native vegetation as previously described, *Council of Camden v Tax* involved the removal of approximately forty trees, and *Hornsby Shire Council v Devaney* involved the clearing of 4,200m^2 of native vegetation.[246]

The demonstrated need for strong general deterrence with views cases is a sentencing consideration which justifies a departure from a proportionate relationship between penalty and harm. Whilst the environmental harm is relatively low in such cases, a proportionate penalty may provide an inadequate deterrent given the potential benefits for offenders.

These two cases then proceed to step three. The issue to be determined is whether or not the need for strong general deterrence has pushed penalties so high that they exceed the range established by the objective circumstances of the offence. Such a determination inherently involves a degree of subjectivity, given the difficulty with establishing precise boundaries to the range. Whilst the penalties are relatively high when compared to environmental harm, and by comparison to other sentences, the evidence that they are outside the range established by the objective circumstances is not conclusive. Nonetheless, in views cases there is at least the potential for general deterrence to drive penalties so high that they do exceed the range established by the objective circumstances of the offence, a finding which will be considered further in Chapter 8.

3.3 Eurobodalla Shire Council v Christenssen

[246] *Gittany Constructions Pty Limited v Sutherland Shire Council* [2006] NSWLEC 242; *Kari & Ghossayn Pty Limited v Sutherland Shire Council* [2006] NSWLEC 532; *Warringah Council v Bonanno* [2012] NSWLEC 265; *Council of Camden v Tax* [2004] NSWLEC 448; *Hornsby Shire Council v Devaney* [2007] NSWLEC 199.

Perhaps the most striking instance of prima facie disproportionality between penalty and environmental harm from Table 4.2 is the case of *Eurobodalla Shire Council v Christenssen*.[247] In this case the offender Christenssen was fined only $750 despite clearing in excess of 19,000m^2 of native vegetation without approval. Christenssen did have approval to clear 15,660m^2 of rural land but instead cleared 34,676m^2.[248] The case was an appeal by the prosecuting Council against the $750 fine which had been imposed by a magistrate in the Local Court, and as such the prosecutor had to establish that the sentence was obviously or manifestly outside the available sentencing range before the judge would entertain a new sentence. Jagot J held that this threshold had not been met. In arriving at this conclusion, Her Honour at [10] appeared to find that this offence was, because it was unintentional or at worst negligent in her view, in fact less serious than cases involving the wilful removal of small numbers of trees:

> "Cases of wilful removal of large trees (particularly on neighbouring or public land) without consent are not analogous to unintentionally (or at worst negligently) clearing a rural property in excess of that authorised by a consent. For example, in *Wheelhouse*, the offence was cutting down three mature trees on a neighbour's land without consent and in breach of a tree preservation order. The defendant's explanation for the offence was unsatisfactory. Apparently, the neighbours had some emotional attachment to the trees, which were large. The offence was deliberate. Those facts are very different to the present case. *Hornsby Shire Council v Devaney* involved the clearing of trees and vegetation on rural land without consent (including, probably, a vulnerable species). One defendant was an experienced earthworks contractor who told the other defendant, a young and inexperienced person of limited means, that no consent was required. The other defendant instructed the contractor to proceed and about 0.42 hectares of land was cleared…"

Jagot J thus appeared to give great weight to the offender's state of mind as a sentencing consideration in mitigation, to a degree that overwhelmed the

[247] *Eurobodalla Shire Council v Christenssen* [2008] NSWLEC 134.
[248] Ibid [7].

environmental harm caused by the offence. The harm was significant as the area cleared, in excess of 19,000m^2, would likely have included some hundreds of trees. Further, as argued by the prosecutor, the harm was increased by the fact that all of the clearing was carried out by machine when the consent stipulated that clearing within 40m of a drainage gully must be done manually.[249] There were mitigating factors in addition to the offender's state of mind, including the offender being visually impaired and on a pension, having no prior offences, an early plea of guilty and the offender voluntarily agreeing to remediate the land, although no details of the remediation were provided in the judgment.[250]

In *Eurobodalla Shire Council v Wheelhouse*, also an appeal, the appeal was upheld and the offender fined $10,000 for removing three mature trees.[251] Plainly the degree of environmental harm was far less in *Wheelhouse* than in *Christenssen.* In *Wheelhouse* Lloyd found that a fine of $600 imposed in the Local Court was manifestly inadequate despite the fact that the offence involved only three trees. The *Wheelhouse* judgment provides little detail regarding the trees beyond that they were mature, two were gum trees and the third a cedar, and they were in a neighbour's property.

It is important to note that in *Christenssen* the prosecution appears to have erred by failing to introduce evidence about the nature and significance of the vegetation cleared, or about environmental harm at all beyond the number of square metres affected.[252] Further, Jagot J held that not all of the trees and understory were cleared, a finding which would reduce the extent of harm.[253]

The disparity between penalty and environmental harm in this case is so great that it cannot be explained by the mitigating factors which Jagot J took into consideration. The environmental harm in the case of *Christenssen* is amongst the highest for all the cases considered by this Chapter, and the fine at $750 is amongst the lowest penalties. The relationship between penalty and environmental harm in this case is disproportionate, by comparison to the other cases on Table 4.2.

[249] Ibid [7].
[250] Ibid [11].
[251] *Eurobodalla Shire Council v Wheelhouse* [2006] NSWLEC 98.
[252] *Eurobodalla Shire Council v Christenssen* [2008] NSWLEC 134 at [11].
[253] Ibid.

3.4 Remediation orders and uncertainty

Two cases, *Hornsby Shire Council v Benson* and *Blue Mountains City Council v Tzannes*, illustrate the uncertainty that remediation orders can create for the assessment of proportionality, particularly when the remediation projects are relatively complex.[254]

In *Hornsby Shire Council v Benson* the offender Benson pleaded guilty to carrying out development without consent, the development being the clearing of trees and vegetation on rural land.[255] Benson was the property leasee and she engaged her co-offender Devaney as a contractor to carry out the work. Devaney used an excavator to clear trees, vegetation and bushland over an area of approximately 4,200m^2 for the purpose of constructing a horse arena.[256] The area was left devoid of vegetation and topsoil.[257] A vulnerable plant species was found in adjacent bushland and probably had also been present in the cleared area.[258] The environmental harm caused by the offence was therefore significant and was categorised as severe in Table 4.2.

Biscoe J held the offence to be "objectively, … fairly serious" before going on to find numerous mitigating factors to which he attributed great weight.[259] These included that Benson was an inexperienced and trusting young person, that she was of "the highest character", that she had no prior criminal convictions, that she had relied upon the advice of her contractor, that she was remorseful, that she was genuinely committed to regenerating the site and her limited financial means.[260] There was evidence of Benson's efforts to remediate the damage, and consultants' reports to indicated that the bushland was regenerating naturally.[261]

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[254] *Hornsby Shire Council v Devaney* [2007] NSWLEC 199; *Blue Mountains City Council v Tzannes* [2009] NSWLEC 19.
[255] *Hornsby Shire Council v Devaney* [2007] NSWLEC 199 at [1].
[256] Ibid [5].
[257] Ibid.
[258] A vulnerable species is declared under section 10(4) of the *Threatened Species Conservation Act (1995)* (NSW) if, in the opinion of the Scientific Committee, it is facing a high risk of extinction in NSW in the medium-term future.
[259] *Hornsby Shire Council v Devaney* [2007] NSWLEC 199 at [6].
[260] Ibid [79]-[80].
[261] Ibid.

The penalty ultimately imposed was as low as legally possible, with the charge being dismissed pursuant to section 10. This meant that Benson avoided a criminal conviction and that she was not required to pay any fine. She was however made subject to a remediation order which would have carried a substantial financial cost, requiring her to engage qualified bush regenerators to remediate the site over five years.[262] Her co-offender Devaney, the contractor who carried out the clearing, was convicted, fined $20,000 and required to pay for a small portion of the remediation.[263]

It is impossible to know the financial cost to Benson of the remediation order, and similarly she was ordered to pay legal costs of an unspecified amount. It is possible that the total of these two orders may have pushed her penalty up into the moderate penalty range, that is $50,000-$100,000, had she been convicted. Equally it is possible that the total financial cost was less than $50,000, and therefore in the low penalty range. In summary therefore it is not possible to estimate the total penalty imposed upon Benson with any confidence.

The mitigating factors for Benson were numerous and persuasive, and capable of justifying a financial penalty which was less than proportionate to the environmental harm caused by the offence. The additional and complicating factor in this case however is the use of section 10 of the *Crimes (Sentencing Procedure) Act* which allowed Benson to escape a criminal conviction. A criminal conviction is a significant moral condemnation of an offender which also carries adverse practical implications. A criminal conviction can cause a person to be excluded from certain areas of employment and can cause difficulty with overseas travel to certain nations.[264] It can also be an aggravating factor on sentence for any future breaches of the law.[265] Avoiding a criminal conviction carries considerable benefit for an offender.

It is difficult to understand how the dismissal of the charge without conviction can be proportionate to the harm in this case, being the mechanical clearing of 4,200m^2 of

[262] Ibid Annexure "A".
[263] Ibid [87].
[264] Bronwyn Naylor, 'Living down the past: why a criminal record should not be a barrier to successful employment' (2012) November/December *Employment Law Bulletin* 115.
[265] *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(d).

bushland, probably containing a vulnerable flora species, unless it is assumed that the remediation program will be highly successful. This cannot be known until the five year period of the order has expired. The remediation of a bushland ecosystem, involving numerous species of native flora as well as the need to control weeds, is a vastly more complex task than a remediation order which requires the planting of a small number of individual trees.

The case of *Blue Mountains City Council v Tzannes* has relevant similarities. Tzannes (the land-owner) was responsible for the clearing of approximately 4,000m^2 of native vegetation.[266] The offence resulted in a sentence of a section 10(1)(a) dismissal plus remediation order plus costs of $30,000.[267] The cost of the remediation was estimated at $13,500-$15,000 in the judgment.[268]

Lloyd J held that Tzannes had relied upon advice from the Rural Fire Service that the clearing was needed and verbal advice from Council officers that no consent was required, and had not been present nor had any knowledge when her contractor Carlon cleared beyond what was necessary.[269] Further Tzannes was of excellent character, had voluntarily implemented a remediation plan and would carry a significant burden by having to pay the prosecutor's costs.[270] In terms of environmental harm, Lloyd J took an usual approach of considering the harm at the catchment level, finding that the harm would not damage the catchment as a whole.[271] This approach appears to downplay the harm occasioned to the 4,000m^2 in question.

Whilst numerous persuasive mitigating factors were present in *Tzannes*, and the offence was clearly not a deliberate breach of the law, it is again difficult to see how the dismissal of the charge without conviction can be proportionate to the harm, being the clearing of 4,000m^2 of bushland, unless it is assumed that the remediation

[266] *Blue Mountains City Council v Tzannes* [2009] NSWLEC 19 at [8]-[10].
[267] *Blue Mountains City Council v Carlon* [2008] NSWLEC 296; *Blue Mountains City Council v Tzannes* [2009] NSWLEC 19.
[268] *Blue Mountains City Council v Tzannes* [2009] NSWLEC 19 at [54].
[269] Ibid [52].
[270] Ibid [48]-[50], [53]-[54].
[271] Ibid [51].

order will be highly successful. Such an assumption may be sound or it may prove false with time.

There is therefore too much uncertainty associated with the remediation orders in *Benson* and *Tzannes* to be able to form a view as whether the sentences are proportionate or not. The financial cost to Benson is unknown, and to Tzannes is estimated only. The degree to which the harm caused by the offence was reduced by the remediation order cannot be known with any certainty for a period of years after the sentence date. A comparison of penalty with harm is then a comparison of one unknown with another unknown.

3.5 Blue Mountains City Council v Carlon

Carlon was the co-offender to Tzannes, sentenced in separate proceedings.[272] Whilst Tzannes was the landowner, Carlon was the contractor who carried out the clearing. In *Blue Mountains City Council v Carlon* Biscoe J again placed great weight upon the offender's mitigating characteristics: honest, unblemished character, a long history of volunteer community service, a genuine belief that the property owner had permission for the work, and very limited financial means.[273] In addition, Biscoe J found that the cleared bushland appeared to be regenerating well of its own accord, thereby reducing the harm caused by the offence.[274]

Carlon was convicted of the offence but, pursuant to section 10A of the *Crimes (Sentencing Procedure) Act*, no further penalty was imposed. He was required to pay legal costs of undetermined quantum, which Biscoe J stated would far exceed his historical annual income.[275] Of course as he did not have legal control over the affected land he could not be made subject to a remediation order.

The mitigating factors relevant to Carlon's sentencing were numerous. He was inexperienced in this type of contracting work, undertaking it mainly as a favour to

[272] *Blue Mountains City Council v Carlon* [2008] NSWLEC 296.
[273] Ibid [73].
[274] Ibid [49].
[275] Ibid [75].

Tzannes.[276] Whilst it would have been prudent for Carlon to make inquiries with Council, or to ask Tzannes to see paperwork confirming that the work was lawful, Biscoe J held that he genuinely and rationally believed from what Tzannes had told him that she had obtained any necessary approval.[277] Carlon was otherwise of excellent character and of very limited means. These factors all justify the imposition of a penalty less than what would otherwise be proportionate to the environmental harm caused by the offence.

The difficulty with this case is that the disparity between penalty and environmental harm is so great. Although Carlon was convicted, there was no other penalty other than the imposition of an order for legal costs. It is difficult to reconcile this with numerous other cases in Table 4.2 which saw offenders penalised many thousands of dollars for offences which harmed one tree or a small number of trees. A significant uncertainty is the unknown sum of legal costs which Carlon was ordered to pay, and which Biscoe J indicated would pose a substantial burden for the offender to pay given his limited income.

[276] Ibid [73].
[277] Ibid [73]-[74].

Section 4 Conclusion

Whilst the majority of the sentences considered by this Chapter appear to have a proportionate relationship between penalty and environmental harm in comparison to other cases, some do not. The sentences in *Burwood Council v Jarvest Pty Limited* and *Eurobodalla Shire Council v Christenssen* cannot be reconciled with other cases considered by this Chapter, and either they, or the cases with which they cannot be reconciled, exhibit disproportionality between penalty and environmental harm.

A sub-category of cases – views cases – has been identified through consideration of the sentences in *Hunters Hill Council v Gary Johnston* and *Gosford City Council v Tauszik*. Views cases pose a particular challenge for proportionality in sentencing because a penalty that lies within the range established by the objective circumstances of the offence is likely to be too low to provide an effective deterrent. Potential solutions to this challenge will be discussed in Chapter 8.

This Chapter has also identified the way in which both remediation orders and legal costs orders introduce uncertainty into the assessment of proportionality. Both types of order complicate the calculation of the total penalty, and remediation orders also complicate the evaluation of environmental harm. At times – and as seen in the sentences in *Hornsby Shire Council v Benson*, *Blue Mountain City Council v Tzannes* and *Blue Mountains City Council v Carlon* – this uncertainty can be so great that proportionality cannot be assessed. Remediation orders are consistent with the objects of the *EP&A Act* – the protection of the environment – and likely make environmental sentencing more effective by preventing an offender from deriving benefit from his or her offence. Reforms which would retain remediation orders whilst resolving the uncertainty that they can create will be discussed in Chapter 8.

Chapter 5: Sentences for offences under sections 118A and 118D of the *National Parks and Wildlife Act 1974* (NSW)

Chapter abstract

When judges of the LEC sentence criminal offenders the law requires them to impose penalties which conform with the law of proportionality in criminal sentencing. This Chapter considers whether sentences for offences imposed by the LEC under section 118 of the *National Parks and Wildlife Act (1974)* (NSW) during the research period so conform. It does so using the test for proportionality in sentencing developed in Chapter 3. This Chapter also assesses whether penalties for each individual protected plant or animal harmed, in addition to the stipulated maximum penalty, facilitate proportionality in sentencing. Such additional penalties are unique to this Act. It is found that, due to practical barriers to their consistent implementation in practice, additional penalties not only do not facilitate proportionality in sentencing, but potentially may lead to sentencing with a disproportionate relationship between crime and punishment. Nevertheless, this Chapter finds that the sentences imposed for section 118 offences during the research period were reasonably proportionate to the crime, with few exceptions, suggesting that the inflated maximum penalties that additional penalties can create are disregarded or minimised by sentencing judges in practice.

Contents

Section 1 Introduction

1.1 Introduction

In Chapter 3 this thesis examined the law on proportionality in the context of criminal sentencing in the LEC, with the intention of determining what "proportionality" means. It concluded by formulating a three-step test for proportionality in sentencing. This Chapter is the second of four chapters which apply that test to a specific offence type. This Chapter considers whether sentences imposed for offences under section 118 of the *National Parks and Wildlife Act* in the LEC during the research period conform with the law on proportionality in sentencing. In doing so it contributes to addressing the second research question, namely whether criminal sentences imposed by the LEC are proportionate in practice.

The test for proportionality is a three-step test. The first step asks whether the penalty is reasonably proportionate to the environmental harm caused by the offence, measured by comparison to other sentences for like or very similar offence types. In order to implement this first step, the sentences considered by this Chapter will be ranked by penalty severity and then categorised by environmental harm, allowing relatively straightforward comparison between them. This first step identifies a number of sentences as having a disproportionate relationship between penalty and environmental harm.

For these sentences, the second step is to ask whether the disproportionality between penalty and environmental harm is justified by sentencing considerations other than environmental harm. If the answer is no, then the sentence is disproportionate. This requires consideration of the detail of the sentences.

If the answer to the second step is yes, then the third step is to ask whether the penalty is nonetheless more severe or more lenient than the objective gravity of the offence demands. If the answer is yes then the sentence is disproportionate, if the answer is no then the sentence is proportionate.

The *National Parks and Wildlife Act* is unique in that some offences, specifically those under section 118A, have penalties for each individual plant or animal harmed in addition to the stipulated maximum penalty. This can greatly inflate the applicable maximum penalty in a particular case. In theory these additional penalties should facilitate a proportionate relationship between penalty and environmental harm. This Chapter will consider whether or not this hypothesis holds in practice.

This Chapter proceeds in five sections. Section 1 provides this introduction as well as an introduction to the *National Parks and Wildlife Act*. Section 2 applies step one of the proportionality test to the sentences under consideration and in the process identifies issues relevant to proportionality. Section 3 applies step two and where necessary step three of the proportionality test. Section 4 considers whether additional penalties per individual plant or animal harmed do indeed facilitate proportionate sentencing, before Section 5 concludes the chapter.

1.2 The National Parks and Wildlife Act

The *National Parks and Wildlife Act* is one of the foremost environmental statutes in NSW. In addition to providing a legal framework for the creation and protection of natural areas within reserves on public land, it also protects species, populations and ecological communities which are listed under the *Threatened Species Conservation Act* and which exist on private land. It is this latter function of the Act with which this Chapter is concerned.

This Chapter considers twenty sentences for an offence against section 118A or 118D of the *National Parks and Wildlife Act* during the research period. Offences under the *National Parks and Wildlife Act* are relatively complex. For the reasons discussed in Chapter 2, the analysis in this Chapter is confined to offences under Part 8A of the Act, specifically sections 118A and 118D. Even within these confines there are complexities which require explanation prior to analysing the sentences.

Sections 118A and 118D use a number of specific terms, the definitions of which are provided in the *Threatened Species Conservation Act*. A species can be vulnerable,

endangered, critically endangered or presumed extinct. An ecological community (an assemblage of species occupying a particular area) can be vulnerable, endangered or critically endangered. A population of a particular species can be an endangered population. Species, populations or communities are listed as vulnerable, endangered, critically endangered or presumed extinct by the Scientific Committee, an independent committee of scientists with relevant expertise that is established under Part 8 of the *Threatened Species Conservation Act*.[278] The term 'threatened' is used as a catch-all term to describe any species, population or ecological community that is protected by the Act.

The *Threatened Species Conservation Act* sets out thresholds against which the Scientific Committee makes listing decisions. A species is eligible to be listed as a vulnerable species if it is facing a high risk of extinction in NSW in the medium-term future; as endangered if it is facing a very high risk of extinction in the near future; as critically endangered if it is facing an extremely high risk of extinction in NSW in the immediate future; and as a species presumed extinct if it has not been recorded in its known or expected habitat in NSW, despite targeted surveys, over a time frame appropriate to its life cycle and form.[279] Similarly, ecological communities can be listed as vulnerable if facing a high risk of extinction in NSW in the medium-term future, as endangered if facing a very high risk of extinction in NSW in the near future and as critically endangered if facing an extremely high risk of extinction in NSW in the immediate future. A population is eligible to be listed as an endangered population if it is facing a very high risk of extinction in NSW in the near future, and it is a population of a species not already listed as endangered or critically endangered.[280]

Section 118A creates two different offences, with matching two-tier penalty structures. The first offence – section 118A(1) – applies to harm to threatened animals and the second offence – section 118A(2) – to harm to threatened plants. For both offences the penalties are the same. If the animal or plant in question is a species that is presumed extinct, critically endangered or endangered, or part of an

[278] *Threatened Species Conservation Act 1995* (NSW), s 9.
[279] Threatened Species Conservation Act 1995 (NSW), s 10.
[280] Threatened Species Conservation Act 1995 (NSW), s 11.

endangered population or ecological community, then the maximum penalty is $220,000 and/or two years imprisonment, plus an additional $11,000 for each animal or plant that is harmed. If the animal or plant in question is a species that is vulnerable then the maximum penalty is $55,000 and/or twelve months imprisonment, plus an additional $5,500 for each animal or plant that is harmed.

The maximum penalty can differ in each case if the additional per animal or per plant harmed provisions are invoked. The maximum fines of $220,000 and $55,000 can therefore only be taken as starting maxima and the text of each sentence judgment must be consulted to determine the actual maximum penalty which the sentencing judge applied.

Section 118D is simpler. It protects habitat rather than individual animals or plants. For the habitat of threatened species, endangered populations and endangered ecological communities, 118D specifies that a person who damages such habitat, knowing that the habitat concerned is habitat of that kind, is liable to a maximum penalty of $110,000 and/or twelve months imprisonment. It is noteworthy that this is one of the few environmental offences for which the mental state of the offender is an element of the offence. Whilst the damage element of the offence remains one of strict liability (that is, the prosecution does not need to prove that a defendant intended to damage the habitat in question), the prosecution must prove beyond reasonable doubt that a defendant knew the legal status of the habitat when committing the offence.

Many of the offenders considered by this Chapter are corporations, and three sections of the Act relevant to corporate criminal offenders require explanation. Firstly, although a corporate offender cannot be imprisoned, section 175B pierces the corporate veil by creating "executive liability offences", which includes the offences under section 118 considered by this Chapter. Section 175B(2) provides:

> "A person commits an offence against this section if:
>
> (a) a corporation commits an executive liability offence, and

(b) the person is:

(i) a director of the corporation, or

(ii) an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation in relation to the commission of the executive liability offence, and

(c) the person:

(i) knows or ought reasonably to know that the executive liability offence (or an offence of the same type) would be or is being committed, and

(ii) fails to take all reasonable steps to prevent or stop the commission of that offence.

Maximum penalty: the maximum penalty for the executive liability offence if committed by an individual."

If the executive liability offence provision in section 175B is invoked, a director or manager of a corporate offender can be exposed to potential sentence of imprisonment.

The second provision of the Act relevant to corporate offenders is that, for executive liability offences, both a corporation and an individual involved in that corporation can be charged for the same offence.[281] Based upon the sentences considered by this thesis, it is not uncommon in the LEC to see a corporation and a director or manager of that corporation charged with the same offence as, in effect, co-offenders.

The third relevant provision is section 175C, which establishes how the state of mind of a corporation can be proven in court. This is important in the context of the offence under section 118D, which requires the prosecution to prove beyond reasonable doubt that a defendant knew the legal status of the habitat when committing the

[281] *National Parks and Wildlife Act 1974* (NSW) section 175B (5).

offence. Section 175C states that: "evidence from an officer, employee or agent of a corporation (whilst acting in his or her capacity as such) had, at any particular time, a particular state of mind, is evidence that the corporation had that state of mind."

Section 2 Step one: Is the penalty reasonably proportionate to the environmental harm caused by the offence?

This Section applies the first step of the proportionality test – the assessment of whether or not penalty is proportionate to environmental harm – to the sentences considered by this Chapter.

2.1 Evaluating penalty

In order to compare penalty to environmental harm it is first necessary to understand the quantum of the penalty in each sentence. In the majority of the cases considered under the *National Parks and Wildlife Act* the sentencing judge has imposed a fine expressed in dollar terms, which is straightforward to understand. The total penalty however is broader in scope than the fine alone. Understanding the quantum of the total penalty is complicated by two factors: orders for the offender to pay the legal costs of the prosecutor ("costs orders") as in Chapter 4, and additional orders (a range of orders under which a judge can order an offender to perform certain actions).

In three sentences the judge has imposed a Community Service Order (CSO). The *Crimes (Sentencing Procedure) Act* stipulates that certain penalties are available as non-custodial alternatives. Consequently those penalties, which include CSOs, are only available to a sentencing judge of the LEC when the maximum penalty for an offence is a term of imprisonment, and not when the maximum penalty is limited to a fine only. Under section 8 of that Act a judge may "instead of imposing a sentence of imprisonment on an offender … make a community service order directing the offender to perform community service work for a specified number of hours". This Chapter assumes that a CSO is a greater penalty than a fine because it is an alternative to imprisonment, and because a CSO effectively deprives a person of his or her liberty for a period of time during which he or she must follow instructions and work as directed.

Two sentencing judgments make use of section 10 of the *Crimes (Sentencing Procedure) Act*. As described in Chapter 4, Section 10A allows a judge to record a criminal conviction but take no further action. Section 10(1) allows a judge to find an offender guilty but dismiss the charge without proceeding to conviction, so that the offender avoids a criminal record. Sub-section 10(1)(a) is a straightforward dismissal without conviction. Sub-section 10(1)(b) puts the offender on a good behaviour bond for a maximum of two years; should the offender fail to be of good behaviour within the required period then the bond can be revoked and the offender re-sentenced.

2.1.1 Costs orders

Costs orders formed a part of the penalty in all twenty cases considered by this Chapter. The complexity which this introduces for proportionality, as discussed in Chapter 4 in the context of the *EP&A Act*, applies equally to sentences under the *National Parks and Wildlife Act*. It need not be repeated here.

2.1.2 Additional orders

The *National Parks and Wildlife Act* allows for a range of additional orders to be made against offenders. These are found in sections 200 and 205 of the Act. These are analogous to remediation orders under the *EP&A* Act but significantly more complex. Four types of additional order were utilised by sentencing judges in the sentences considered by this Chapter: section 200 orders, section 205(1)(a) orders, section 205(1)(c) orders and section 205(1)(d) orders.

The nature of these orders is best described by reference to the sections themselves. Section 200 of the *National Parks and Wildlife Act* states:

> "**200 Orders for restoration and prevention**
>
> (1) The court may order the offender to take such steps as are specified in the order, within such time as is so specified (or such further time as the court on application may allow):

> (a) to prevent, control, abate or mitigate any harm caused by the commission of the offence, or
>
> …
>
> (c) to make good any resulting damage, or
>
> (d) to prevent the continuance or recurrence of the offence."

Section 200 orders are therefore directed towards reducing the harm caused by the actual offence. In this respect they are the most similar to remediation orders under the *EP&A Act* of the four types of additional orders.

Section 205 describes the remaining orders as follows:

> "**205 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,
>
> …
>
> (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 pay a specified amount to the Environmental Trust established under the *Environmental Trust Act 1998*, or a specified organisation, for the purposes of a specified project for the restoration or enhancement of the environment or for general environmental purposes"

Section 205 also provides for further additional orders – 205(1)(b), 205(1)(e) and 205(1)(f) – no examples of which were imposed in the sentences considered by this Chapter.

Section 205(1)(a) orders are best described as publication orders. They usually require an advertisement to be placed in an appropriate newspaper or magazine, with the wording and dimensions of the advertisement specified in the judgment. Their intention is to ensure that the public is aware of the offender's actions, thereby embarrassing the offender and providing a further deterrent against offending. Section 205(1)(c) and 205(1)(d) orders are very similar to each other, the only difference being whether the offender must carry out the specified project him or herself or pay for a separate organisation to undertake it. They differ from section 200 orders in that they are not intended to reduce the harm caused by the offence itself but rather to improve the environment in some other location. As such, of the four types of additional order it is section 200 orders which are most relevant to proportionality because they alone seek to reduce the environmental harm caused by the offence itself.

It is important to note that these additional orders were only in place for a portion of the research period. Part 15 Division 3 (sections 198-206) of the *National Parks and Wildlife Act* was inserted by the *National Parks and Wildlife Amendment Act 2010* (NSW) and commenced on 2 July that year. Additional orders have been taken up with enthusiasm since their introduction, such that every sentence considered by this Chapter and imposed after their introduction contains one or more additional orders.

This introduces a complexity in terms of comparing sentences imposed before and after the introduction of additional orders. An additional order will in effect make a sentence more severe because it adds to the burden upon the offender, both financially and in terms of the time required to fulfil the order. There is therefore a likelihood that sentences will become more severe following the introduction of additional orders, unless the fine or CSO is reduced in mitigation.

These additional orders create the same difficulties for evaluating penalty as do remediation orders under the *EP&A Act*. They can render sentences difficult or impossible to compare, particularly when they are not quantified in monetary terms. None of the publication orders considered by this Chapter specify a dollar value for the order. It is easy to understand why that is the case: the Court does not know the

advertising rates for various newspapers, and in any event the rate could change between sentence and the advertisement being placed. Given that the cost of placing an advertisement in a regional or suburban newspaper is likely to be far less than it would cost to place the same advertisement in a major metropolitan newspaper, it is apparent that some publication orders must cost offenders more than others. Similarly, the 205(1)(c) orders considered by this Chapter do not specify dollar values either, instead merely describing the work to be undertaken. Of the two orders under section 200, one provides a broad estimate of the cost to the offender and one does not. Section 205(1)(d) orders are the exception; as the offender must pay a third party to undertake a specified project, the precise amount to be paid to the third party will often be specified in the order, and is specified in two sentences considered by this Chapter.

Further, additional orders can lead to penalties being reduced in a way that is not transparent, predictable or proportionate to the offence. Section 199(2) of the *National Parks and Wildlife Act* states that "orders may be made … in addition to any penalty that may be imposed or any other action that may be taken in relation to the offence", which suggests that they are additional to penalty. This would be in contrast to section 126 of the *EP&A Act* which allows them to be either additional or in substitution for a pecuniary penalty. However in *Chief Executive of the Office of Environment and Heritage v Bombala Investments Pty Ltd* Craig J treated an additional order as a mitigating factor on penalty, stating at [124]:

> "Taking account of other mitigating factors, in particular the undertaking of remedial work for which the Defendant accepts responsibility, a total discount of 30 percent is appropriate."[282]

This was the only case considered by this Chapter in which the sentencing judge explicitly reduced the penalty in light of an additional order. It is worth noting that Craig J did so despite not knowing the quantum of the financial cost to the offender of the order.

[282] *Chief Executive of the Office of Environment and Heritage v Bombala Investments Pty Ltd* [2012] NSWLEC 185.

2.1.3 Ranking by penalty

Table 5.1 below ranks the twenty sentences by penalty. In doing so the financial burden to the offender of both costs and additional orders has been included as far as it is possible to do so.

When seeking to compare two sentences in Table 5.1 it is important to consider that disparity in penalty relative to environmental harm may be caused by differing maximum penalties. As described above, the offences under consideration have three different maximum penalties, and in addition section 118A offences carry the potential for additional penalties per individual plant or animal harmed. In order to make the maximum applicable in each case as clear as possible, Table 5.1 includes the maximum penalty for that case, including additional per plant or per animal harmed penalties if applied. Where the offender was being sentenced for more than one offence the applied maximum is the total maximum pecuniary penalty, that is the sum of each maximum. The issue of how differing maximum penalties relate to proportionality will be discussed further in Section 4 of this Chapter.

It is acknowledged that the ranking process is imperfect because the information upon which it is based is incomplete. The financial cost to the offender of both costs orders and additional orders is often not accurately known. Given incomplete information, to rank each case individually – that is, in order from one to twenty – would be to postulate a degree of accuracy which does not exist. For that reason this Chapter uses the same method as was adopted in Chapter 4. The cases are sorted into four categories: high, moderate and low penalty, plus a fourth category where no conviction is recorded under section 10 of the *Crimes (Sentencing Procedure) Act*. The high penalty category is defined as a penalty that totals, or is very likely to total, more than $100,000. The moderate penalty category is a penalty that totals, or is very likely to total, between $50,000 and $100,000. The low penalty category is a penalty that totals, or is very likely to total, below $50,000.

Each additional order for which no cost was stipulated or estimated in the written judgment has each been footnoted, and a brief summary of the order provided in the footnote, in order to allow the reader to assess the likely financial cost to the offender.

When an offender was sentenced for more than one offence, this is indicated (for example, 118A x 2 indicates two offences against section 118A). The twenty sentences represent twenty-three offenders because co-offenders have been combined into one sentence when executive liability led to both a corporate offender and the owner of that corporation being prosecuted. Section 175B of the Act establishes executive liability for directors and managers of offending corporations. A person who is either a director of corporate offender or a person involved in the management of a corporate offender who was in a position to influence the conduct of the corporation in relation to the commission of the offence can be prosecuted, in addition to the corporation, under this provision. On three occasions:

- *Gordon Plath of the Department of Environment and Climate Change v Fish* and *Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd*;
- *Chief Executive of the Office of Environment and Heritage v Lampo Pty Ltd* and *Chief Executive of the Office of Environment and Heritage v Lani*;
- *Chief Executive of the Office of Environment and Heritage v Bombala Investments Pty Ltd* and *Chief Executive of the Office of Environment and Heritage v Rinaldo (Nino) Lani*

the co-offenders have been combined because the corporation and the owner were effectively the same entity.[283] In a further two cases the individual and corporate offenders are listed separately because the individual did not own the corporation but rather was an employee.[284]

[283] *Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd* [2010] NSWLEC 144; *Chief Executive of the Office of Environment and Heritage v Rinaldo (Nino) Lani* [2012] NSWLEC 115.
[284] *Garrett v Freeman (No. 5); Garrett v Port Macquarie Hastings Council; Carter v Port Macquarie Hastings Council* [2009] NSWLEC 1; *Bentley v Gordon* [2005] NSWLEC 695; *Bentley v BGP Properties Limited* [2006] NSWLEC 34.

Table 5.1 – Sentences imposed under sections 118A and 118D of the *National Parks and Wildlife Act* in the research period ranked by penalty size in total dollar terms into four categories: high penalty, moderate penalty, low penalty and no conviction recorded. Estimations of costs orders and additional orders are as indicated in the text of the sentence judgment. Assumptions as to costs orders are based on comparisons undertaken by the author.

No	Case	Citation	Section	Status	Applied Maximum	Penalty
HIGH PENALTY						
1	Garrett v Williams	[2007] NSWLEC 56	118A(2) x 3	Endangered	$660,000 and/or 6yrs	$330,000 plus CSO of 400 hours plus costs $85,000
2	Plath v Rawson	[2009] NSWLEC 178	118A(2) x 7	Vulnerable (4) & endangered (3)	$8,866,000 and/or 10yrs	$135,000 plus CSO of 200 hours plus unstated costs
3	Plath v Chaffey	[2009] NSWLEC 196	118A(1) x 4	Vulnerable	$220,000 and/or 4yrs	CSO of 80 hours plus unstated costs
4	Garrett v Dennis Charles Williams	[2006] NSWLEC 785	118A(2) x 2	Endangered	$968,000 and/or 2yrs	$180,000 plus unstated costs
5	Garrett v Freeman (No. 5)	[2009] NSWLEC 1	118D x 2		$220,000 and/or 2yrs	$57,000 plus costs $167,500
6	Chief Executive, Office of Environment and Heritage v Kyluk Pty Limited (No 3)	[2012] NSWLEC 56	118A(2)	Endangered	$220,000	s205(1)(d) order to value of $127,500 plus s205(1)(a)[285] order plus s200[286] order plus unstated costs

[285] To place a specified notice in the Campbelltown-Macarthur Advertiser within the first six pages at a minimum size of 18cm x 12cm.
[286] To carry out works to remediate the cleared area. To fence the area, exclude stock, remove weeds and spread out cleared vegetation currently in windrows. Duration of the order twenty years.

No	Case	Citation	Section	Status	Applied Maximum	Penalty
7	Garrett v Port Macquarie Hastings Council	[2009] NSWLEC 1	118D x 3		$330,000	$45,550 plus costs $114,000
8	Gordon Plath of the Department of Environment, Climate Change and Water v Lithgow City Council	[2011] NSWLEC 8	118A(2) x 2	Endangered	$1,287,000	s205(1)(d) order to value of $105,000 plus s205(1)(a)[287] order plus costs $25,000
9	Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd	[2010] NSWLEC 144	118D		$220,000 and/or 1yr	$15,000 plus s205(1)(c)[288] order plus s205(1)(a)[289] order plus costs $105,500
MODERATE PENALTY						
10	Chief Executive, Office of Environment and Heritage v Coffs Harbour Hardwood Sales Pty Ltd	[2012] NSWLEC 52	118A(2)	Endangered	$451,000	$45,000 plus s205(1)(a)[290] order plus s200[291] estimated to cost $12,500-$17,000 order plus costs $26,000, the total of which is assumed to be less than $100,000 based on comparison with other cases and the details of the orders.

[287] To place a specified notice in the first five pages of the Lithgow Mercury at a minimum size of 10cm by 25cm.
[288] To contribute to a sixteen-month koala habitat mapping project developed with Council and DECCW (NSW government department).
[289] To place a specified notice in the Local Government section of the Sydney Morning Herald at a minimum height of 9.6cm by width of 18cm. To place the same specified notice at the minimum size of a quarter of a page in the first twelve pages of the newsletter of the Ecological Consultants Association of NSW Inc.
[290] To place a specified notice in the Saturday edition of the Coffs Harbour Advocate and the Bellinger Courier Sun.
[291] To design and install posts and a gate on the track to the affected area with a sign saying "Trail closed for Rehabilitation". To develop a five-year plan for weed control in the cleared area to be undertaken by suitably qualified bush regenerators. To have a suitably qualified expert develop a plan for the mitigation and/or prevention of soil erosion in the cleared area. To carry out the works specified in the plans.

No	Case	Citation	Section	Status	Applied Maximum	Penalty
11	Plath v Fletcher	[2007] NSWLEC 596	118A(2)	Endangered	$220,000 and/or 2yrs	$46,000 plus costs estimated at $32,500
12	Bentley v BGP Properties Limited	[2006] NSWLEC 34	118A(2)	Vulnerable	$55,000	$40,000 plus unstated costs which are assumed to be less than $60,000 based on comparison with similar cases.
13	Plath v Hunter Valley Property Management Pty Limited	[2010] NSWLEC 264	118A(2)	Endangered	$220,000	$37,500 plus s205(1)(a)[292] order plus costs $20,000
14	Chief Executive of the Office of Environment and Heritage v Bombala Investments Pty Ltd	[2013] NSWLEC 185	118D		$110,000	$31,500 plus s205(1)(a)[293] order plus s205(1)(d)[294] order plus unstated costs, the total of which is assumed to be less than $100,000 based upon comparison with similar cases and the details of the orders.
15	Chief Executive of the Office of Environment and Heritage v Lani; Chief Executive of the Office of Environment and Heritage v Lampo Pty Ltd	[2012] NSWLEC 115	118D x 2		$220,000 and/or 1yr	$30,000 plus s205(1)(a)[295] order plus s205(1)(d)[296] order plus unstated costs, the total of which is assumed to be less than $100,000 based upon comparison with similar cases and the details of the orders.

[292] To place a specified notice in the first twelve pages of the early general news section of the Newcastle Herald at a minimum size of 8cm by 12cm.
[293] To place a specified notice within the first six pages of the Great Lakes Advocate newspaper at a minimum size of 10cm by 20cm.
[294] To retain consultants with expertise in bush regeneration, ecology and the threatened Squirrel Glider. To cause the consultants to prepare a remediation plan for a nominated area of 5,200m^2 for approval by the prosecutor. To cause the consultants to carry out all the works required by the remediation plan within the required timeframe.
[295] To place a specified notice within the first six pages of the Great Lakes Advocate newspaper at a minimum size of 10cm by 20cm.
[296] To retain consultants with expertise in bush regeneration, ecology and the threatened Squirrel Glider. To cause the consultants to prepare a remediation plan for a nominated area for approval by the prosecutor. To cause the consultants to carry out all the works required by the remediation plan within the required timeframe.

No	Case	Citation	Section	Status	Applied Maximum	Penalty
16	Chief Executive of the Office of Environment and Heritage v Bombala Investments Pty Ltd; Chief Executive of the Office of Environment and Heritage v Rinaldo (Nino) Lani	[2012] NSWLEC 115	118D x 2		$220,000 and/or 1 year	$23,000 plus s205(1)(a)[297] order plus s205(1)(d)[298] order plus unstated costs, the total of which is assumed to be less than $100,000 based upon comparison with similar cases and the details of the orders.
LOW PENALTY						
17	Department of Environment & Climate Change v Sommerville	[2009] NSWLEC 194	118A(2)	Endangered	$1,870,000 and/or 2yrs	$30,000 plus costs $15,000
18	Bentley v Gordon	[2005] NSWLEC 695	118A(2)	Vulnerable	$55,000 and/or 1yr	$30,000 plus costs $10,000
19	Department of Environment & Climate Change v Ianna	[2009] NSWLEC 194	118A(2)	Endangered	$1,870,000 and/or 2yrs	Section 10A(1) plus costs $15,000
NO CONVICTION RECORDED						
20	Garrett, Stephen v Langmead, Patsy	[2006] NSWLEC 627	118A(2)	Endangered	$220,000 and/or 2yrs	Section 10(1)(a) plus costs $20,000

[297] To place a specified notice within the first six pages of the Great Lakes Advocate newspaper at a minimum size of 10cm by 20cm.
[298] To retain consultants with expertise in bush regeneration, ecology and the threatened Squirrel Glider. To cause the consultants to prepare a remediation plan for a nominated area for approval by the prosecutor. To cause the consultants to carry out all the works required by the remediation plan within the required timeframe.

As demonstrated by Table 5.1, ten cases fall into the high penalty category, six cases into the moderate penalty category, three into the low penalty category and one into the category where no conviction was recorded under section 10 of the *Crimes (Sentencing Procedure) Act*. The penalties for this Act are overall greater than the penalties under the *EP&A Act* analysed in Chapter 4, half of which (twenty out of forty) were in the low penalty range, and a further five in the no conviction recorded category. This is despite the maximum penalty under the *EP&A Act* being $1.1 million for all offences.

2.2 Evaluating environmental harm

As discussed in Chapter 4, it is not always straightforward to quantify environmental harm and often not possible to quantify it precisely. There is inevitably a degree of subjectivity and also the practical difficulty that written sentence judgments do not always express the harm caused by the offence with sufficient precision.

The evaluation of environmental harm is also complicated by section 200 orders, which require the offender to carry out restoration or remediation works to reduce the environmental harm caused by the offence. This issue was discussed in Chapter 4 in the context of remediation orders under the *EP&A Act*. These type of orders introduce uncertainty to the evaluation of harm because it cannot be known in advance of time the extent to which the harm caused by the offence will be reduced. Of the twenty sentences contained in Table 5.1, only two include section 200 orders. As such this issue is of less significance that it was with regard to the *EP&A Act*.

For these reasons, the cases are divided into four categories of environmental harm: serious, moderate, low and negligible. Table 5.2 below builds upon Table 5.1 by introducing a brief description of t he environmental harm that accompanied each case, and then highlighting each category of harm in a different shade of grey. The serious harm category is the darkest shade and the negligible harm category is the lightest shade. This allows harm to be compared against the penalty categories of high, moderate, low and no conviction recorded.

Table 5.2 – Sentences imposed under the *National Parks and Wildlife Act* during the research period ranked by penalty size and categorised for environmental harm into serious (dark grey), moderate (grey), low (light grey) and negligible (no shading)

No	Case	Citation	Applied Max	Penalty	Environmental Harm
HIGH PENALTY					
1	Garrett v Williams	[2007] NSWLEC 56	$660,000 and/or 6yrs	$330,000 plus CSO of 400 hours plus costs $85,000	Cleared approx. 29,000m^2 of EECs. Permanent harm.
2	Plath v Rawson	[2009] NSWLEC 178	$8,866,000 and/or 10yrs	$135,000 plus CSO of 200 hours plus unstated costs	Cut and poisoned by hand approx. 1,200 trees comprising 4 endangered & 3 vulnerable species. Harm likely to last hundreds of years.
3	Plath v Chaffey	[2009] NSWLEC 196	$220,000 and/or 4yrs	CSO of 80 hours plus unstated costs	Oological collector who removed bird eggs from nests of vulnerable species on Lord Howe Island. 84 eggs total from 4 bird species.
4	Garrett v Dennis Charles Williams	[2006] NSWLEC 785	$968,000 and/or 2yrs	$180,000 plus unstated costs	Damaged EEC by removing 48 mature trees. Flow on effects included local disappearance of understorey species and loss of fauna habitat.
5	Garrett v Freeman (No. 5)	[2009] NSWLEC 1	$220,000 and/or 2yrs	$57,000 plus costs $167,500	Council manager responsible for building 1km road through habitat of 2 threatened species (Grass Owl & Eastern Chestnut Mouse). Damage to owl habitat minimal. Mouse not found at all in post-offence survey, other factors may have contributed to its disappearance.
6	Chief Executive, Office of Environment and Heritage v Kyluk Pty Limited (No 3)	[2012] NSWLEC 56	$220,000	s205(1)(d) order to value of $127,500 plus s205(1)(a) order plus s200 order plus unstated costs	124,500m^2 of EEC cleared.

No	Case	Citation	Applied Max	Penalty	Environmental Harm
7	Garrett v Port Macquarie Hastings Council	[2009] NSWLEC 1	$330,000	$45,550 plus costs $114,000	Co-offender to Garrett v Freeman (No. 5). Damage to habitat of same threatened species plus a third, Wallum Froglet.
8	Gordon Plath of the Department of Environment, Climate Change and Water v Lithgow City Council	[2011] NSWLEC 8	$1,287,000	s205(1)(d) order to value of $105,000 plus s205(1)(a) order plus costs $25,000	Road maintenance destroyed 77 endangered plants growing on road verge.
9	Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd	[2010] NSWLEC 144	$220,000 and/or 1yr	$15,000 plus s205(1)(c) order plus s205(1)(a) order plus costs $105,000	Cleared approx. 37,000m^2 of high quality koala habitat, koala being a threatened species. No evidence of physical harm to a koala.
MODERATE PENALTY					
10	Chief Executive, Office of Environment and Heritage v Coffs Harbour Hardwood Sales Pty Ltd	[2012] NSWLEC 52	$451,000	$45,000 plus s205(1)(a) order plus s200 $12,500-$17,500 order plus costs $26,000	Killed or damaged 21 individual plants of an endangered Acacia species in a nature reserve created to protect that species. At least 14,000 individual plants of that species in the reserve.
11	Plath v Fletcher	[2007] NSWLEC 596	$220,000 and/or 2yrs	$46,000 plus costs estimated at $32,500	Removed approx. 32 trees part of an EEC. Voluntarily planted approx. 3 times more than removed.
12	Bentley v BGP Properties Limited	[2006] NSWLEC 34	$55,000	$40,000 plus unstated costs	190,500m^2 of native vegetation cleared mechanically, including approx. 2,000 individual plants of a vulnerable species.
13	Plath v Hunter Valley Property Management Pty Limited	[2010] NSWLEC 264	$220,000	$37,500 plus s205(1)(a) order plus costs $20,000	Removed 210-260 individual plants of an endangered Acacia species. Subsequent Development Application approval included condition requiring remediation and protection of the species.

No	Case	Citation	Applied Max	Penalty	Environmental Harm
14	Chief Executive of the Office of Environment and Heritage v Bombala Investments Pty Ltd	[2013] NSWLEC 185	$110,000	$31,500 plus s205(1)(a) order plus s205(1)(d) order plus unstated costs	Mechanically cleared 5,200m^2 which was known habitat of 2 threatened species.
15	Chief Executive of the Office of Environment and Heritage v Lani; Chief Executive of the Office of Environment and Heritage v Lampo Pty Ltd	[2012] NSWLEC 115	$220,000 and/or 1yr	$30,000 plus s205(1)(a) order plus s205(1)(d) order plus unstated costs	Substantially cleared approx. 1,610m^2 of known habitat of Squirrel Glider. Area cleared approx. 3% of that area of glider habitat.
16	Chief Executive of the Office of Environment and Heritage v Bombala Investments Pty Ltd; Chief Executive of the Office of Environment and Heritage v Rinaldo (Nino) Lani	[2012] NSWLEC 115	$220,000 and/or 1 year	$23,000 plus s205(1)(a) order plus s205(1)(d) order plus unstated costs	Approx. 10,000m^2 of known habitat of Squirrel Glider affected by introduction of fill to depth of 1m and systematic removal of vegetation over a long period. Approx. 10 years before habitat regenerated.
LOW PENALTY					
17	Department of Environment & Climate Change v Sommerville	[2009] NSWLEC 194	$1,870,000 and/or 2yrs	$30,000 plus costs $15,000	20,000-24,000m^2 of EEC mechanically cleared to bare soil. Permanent harm.
18	Bentley v Gordon	[2005] NSWLEC 695	$55,000 and/or 1yr	$30,000 plus costs $10,000	190,500m^2 of native vegetation cleared mechanically, including approx. 2,000 individual plants of a vulnerable species.
19	Department of Environment & Climate Change v Ianna	[2009] NSWLEC 194	$1,870,000 and/or 2yrs	Section 10A(1) plus costs $15,000	20,000-24,000m^2 of EEC mechanically cleared to bare soil. Permanent harm.
NO CONVICTION RECORDED					
20	Garrett, Stephen v Langmead, Patsy	[2006] NSWLEC 627	$220,000 and/or 2yrs	Section 10(1)(a) plus costs $20,000	Approx. 6,000m^2 cleared, including approx. 7 trees part of an EEC. EEC on that site significantly degraded, full restoration not possible.

The final task required to complete step one of the proportionality test is to identify sentences or types of sentences where the relationship between penalty and harm appears disproportionate. Those sentences will then be considered in detail in step two of the test, to examine whether or not the disparity between penalty and harm can be justified by sentencing considerations other than environmental harm.

2.3 Identification of sentences with prima facie disproportionality

In the majority of the sentences in Table 5.2 the penalty appears to be reasonably proportionate to environmental harm.

However based upon Table 5.2 a number of cases appear to display prima facie disproportionality in that they appear disproportionate at first sight and deserving of closer scrutiny. *Garrett v Freeman (No. 5)* and *Garrett v Port Macquarie Hastings Council* and are both categorised as having low environmental harm despite falling into the high penalty range.[299] *Bentley v BGP Properties Limited* and *Bentley v Gordon* are both categorised as having high environmental harm yet fall into the moderate and low penalty ranges respectively.[300] Finally, *Department of Environment & Climate Change v Sommerville* and *Department of Environment & Climate Change v Ianna* are categorised as having moderate environmental harm yet fall into the low penalty range.[301]

These sentences will be considered in detail in the following Section.

[299] *Garrett v Freeman (No. 5); Garrett v Port Macquarie Hastings Council; Carter v Port Macquarie Hastings Council* [2009] NSWLEC 1.
[300] *Bentley v Gordon* [2005] NSWLEC 695; *Bentley v BGP Properties Limited* [2006] NSWLEC 34.
[301] *Department of Environment & Climate Change v Sommerville; Department of Environment & Climate Change v Ianna* [2009] NSWLEC 194; *Department of Environment & Climate Change v Ianna* [2009] NSWLEC 194.

Section 3 Steps two and three: Can the disparity between penalty and harm be justified by other sentencing considerations, and if so does it exceed the range established by the objective seriousness?

3.1 High costs orders can distort proportionality

The sentences in *Garrett v Freeman (No. 5)* and *Garrett v Port Macquarie Hastings Council* are categorised as low environmental harm despite being ranked as high penalty.[302] These were co-offenders to the same offence. Freeman was the Council manager responsible for Council's actions, and was prosecuted under the executive liability provision of section 175B of the *National Parks and Wildlife Act*.

The reason that these sentences were ranked as high penalty is that the prosecution's legal costs, which the offenders were ordered to pay, were unusually high. Freeman had to pay costs of $167,500, on top of a fine of $57,000, and Port Macquarie Hastings Council had to pay costs of $114,000 on top of a fine of $45,550. These unusually high legal costs pushed their total penalties over $100,000 and therefore into the high penalty range.

The reason that the prosecutor's legal costs in these matters were unusually high was that the court proceedings were relatively lengthy and the legal and factual issues in dispute relatively complex. The sentencing hearing (a joint hearing for the two offenders) occupied eleven days of court time, during which there was extensive evidence regarding the impacts of the offence upon the three threatened species in question.[303]

The legal costs for the prosecution of Freeman were particularly high because Freeman pleaded not guilty and the hearing to determine the charges was lengthy. The Council pleaded guilty to its charges at an early stage. Freeman's hearing ran for

[302] *Garrett v Freeman (No. 5); Garrett v Port Macquarie Hastings Council; Carter v Port Macquarie Hastings Council* [2009] NSWLEC 1.
[303] The written judgment provides dates of hearing: 28/04/08-01/05/08, 29/09/08-03/10/08, 7-8/10/08.

seventeen days, spread out across nine months from June of 2006 to March of 2007.[304] The hearing was lengthened by three procedural applications made by Freeman's legal representatives, all of which were resolved in favour of the prosecutor.[305] Freeman then appealed the refusal of two of those three procedural applications to the Court of Criminal Appeal, which also found in favour of the prosecutor.[306]

These sentences demonstrate the distortion to proportionality with environmental harm that can arise from the circumstance of offenders having to pay the prosecutor's legal costs. The high costs in these cases were unrelated to environmental harm. Freeman was entitled, as is any defendant, to plead not guilty and vigorously contest the prosecution case. The length and complexity of the sentence hearing occurred despite the environmental harm associated with the offence being relatively low for an offence of this type.

Lloyd J did take into account the legal costs in these cases in accordance with the rule in *Barnes v Environment Protection Authority*.[307] However the legal costs were so high that even if Lloyd had reduced the fines to zero the sentences would still have fallen into the high penalty range.

Given that legal costs are an "aspect of punishment" as stated in *Barnes*, they must be considered part of the penalty. The sentences then display disproportionality between penalty and environmental harm, because the disparity cannot be justified by any sentencing consideration. Given that Lloyd J was directed by law to award costs, this can be considered no-fault disproportionality in that the disproportionality derived from the law rather than judicial decision-making.

[304] *Garrett v Freeman (No. 4)* [2007] NSWLEC 389 at [8].
[305] *Stephen Garrett for and on behalf of the Director-General, Department of Environment and Conservation (NSW) v Freeman* [2006] NSWLEC 322; *Garrett v Freeman (No. 2)* (2006) LGERA 459; *Garrett v Freeman (No. 3)* [2007] NSWLEC 139.
[306] *Garrett v Freeman* (2006) 147 LGERA 96.
[307] *Garrett v Freeman (No. 5); Garrett v Port Macquarie Hastings Council; Carter v Port Macquarie Hastings Council* [2009] NSWLEC 1 at [176]; *Environment Protection Authority v Barnes* [2006] NSWCCA 246.

This serves to highlight the manner in which orders for legal costs can distort proportionality in sentencing. This issue will be considered further in Chapter 8.

3.2 High severity, low size

Two related sentences – *Bentley v BGP Properties Limited* and *Bentley v Gordon* – have penalties that appear to be disproportionately low relative to environmental harm.[308] These offenders were also co-offenders to the same offence, with Gordon prosecuted under the executive liability provision of section 175B as site manager for BGP Properties Limited.

These sentences illustrate well the difference between sentence severity and sentence size, and demonstrate the disproportionality with environmental harm that can arise from differing maximum penalties. There is a conceptual distinction between penalty size and penalty severity: size is an absolute concept and severity is a relative concept. Severity is relative to maximum penalty: a fine of $90 will be a severe penalty if the maximum is $100 but a lenient penalty if the maximum is $1,000. Penalties must therefore be seen in the context of the applicable maximum.

As the offences involved harm to a plant of a vulnerable species, the maximum penalty was $55,000, and for Gordon also the possibility of up to twelve months imprisonment. The offences were committed prior to the introduction of additional per plant or per animal harmed penalties in 2002, and so the additional penalties did not apply. Gordon was fined $30,000 and BGP Properties Limited $40,000. These fines were relatively severe given the maximum penalty of $55,000, indicating that the sentencing judge viewed the offences as being serious examples of this type of offence. Yet given the environmental harm involved – the destruction of approximately 2,000 individual plants – the penalties appear low compared to the other instances of environmental harm described in Table 5.2. The penalties are low in terms of size but quite high in terms of severity.

[308] *Bentley v Gordon* [2005] NSWLEC 695; *Bentley v BGP Properties Limited* [2006] NSWLEC 34.

These sentences are reasonably proportionate to the maximum penalty which applied. No fault can be attributed to the sentencing judges, who applied the law correctly. To the extent that the sentences are disproportionate to environmental harm, the fault lies with the maximum penalty being too low to allow a proportionate outcome. Had the offences taken place after the introduction of additional per plant or per animal harmed penalties in 2002 then the maximum penalty may have been far higher.

Similarly to sub-section 3.1 above, this can be considered no-fault disproportionality in that the disproportionality derived from the law rather than judicial decision-making.

3.3 Inexplicable disproportionality: Department of Environment & Climate Change v Ianna, Department of Environment & Climate Change v Sommerville

These two sentences are also related, Ianna and Sommerville being co-offenders to the same offence of harming plants that are part of an EEC contrary to section 118A.[309] Sommerville owned the land in question and contracted Ianna to undertake land clearing work for him. Their penalties fall into the low range – Ianna was convicted with no fine under section 10A of the *Crimes (Sentencing Procedure) Act* whilst Sommerville was fined $30,000, plus legal costs of $15,000 apiece – whilst the environmental harm associated with the offences is categorised as high.

The disproportionality in these cases appears to arise both from the environmental harm being under-valued and from too much weight being given to mitigating factors personal to the offenders.

The written sentence judgment is confused with regards to environmental harm in two respects. Firstly, inconsistencies in the evidence are not adequately resolved. According to the Statement of Agreed Facts (SoAF) which was agreed by both parties, Ianna cleared approximately 150 large paper bark trees (*Melaleuca quinquenervia*),

[309] *Department of Environment & Climate Change v Sommerville; Department of Environment & Climate Change v Ianna* [2009] NSWLEC 194.

as well as other native and some weed species.[310] He did so using a bulldozer, first to push over the large trees and then using a stick rake attachment to the bulldozer which removes all vegetation in its path.[311] According to the SoAF, when the prosecutor's officers arrived to investigate they observed fifteen windrows of cleared vegetation, each three to six metres high, thirty to sixty metres long and fourteen to twenty metres wide. They estimated the cleared area to be thirteen hectares (130,000m^2).[312]

In the sentence hearing the offenders claimed that the area cleared was in fact far smaller. Sommerville gave oral evidence in which he estimated that five to six acres (20,000-24,000m^2) had been cleared, and stated that much of the area observed by the investigating officers had been cleared prior to his purchase of the property.[313] Ianna swore two affidavits with differing estimates. In his first affidavit he indicated that he had cleared about eight or nine acres (32,000-36,000m^2), and then in his second affidavit reduced that to five to six acres.[314] He stated that he had in addition used the bulldozer to stick rake the previously cleared area to remove weeds.[315] To corroborate this evidence, the offenders also tendered an affidavit of a registered surveyor who had surveyed the areas which the offenders claimed had been cleared previously and found a total area of ten and a half hectares (105,000m^2).[316]

The offenders' claim that approximately 80% of the clearing described by the SoAF had in fact only been stick raking of a previously cleared area is highly relevant to the harm caused by the offence and therefore penalty. However it is not clearly resolved in the written judgment whether their claim was accepted by the court or not. Based on information already provided in the judgment, it appears likely that the claim could have been tested either by comparison with historic aerial photographs or by comparison with the volume and age of the cleared vegetation observed in windrows by the investigating officers. Further, Ianna's claim that he had stick raked the

[310] Ibid [8].
[311] Ibid.
[312] Ibid.
[313] Ibid [10]-[11].
[314] Ibid [13]-[14].
[315] Ibid [13].
[316] Ibid [18].

previously cleared area invites consideration of whether or not native vegetation regrowth was affected, although this issue was not addressed in the written judgment.

The second respect in which the written judgment is confused with regards to environmental harm is that, when determining penalty, Pain J appeared to consider the approximately 150 large paper bark trees to be the extent of the threatened vegetation cleared. Her Honour calculated an additional maximum penalty of $1.65 million based upon 150 trees.[317] An EEC however is by definition an assemblage of species, and every plant which formed part of that assemblage and which was harmed by the bulldozer forms part of the offence and is relevant to penalty. The 2004 final determination of the Scientific Committee with regards to Swamp Sclerophyll Forest EEC states that "the community is characterised by the following assemblage of species" and then lists fifty-nine plant species of which *Melaleuca quinquenervia* is only one.[318] Ianna in his affidavit had conceded clearing individuals of one other listed species, *Casuarina glauca*. Other species must have been present for the vegetation to meet the definition of Swamp Sclerophyll Forest EEC. The environmental harm of the offence was not merely the loss of 150 large trees but the loss of a significant area of endangered ecological community.

Even if the evidence most favourable to the offenders with regard to harm is adopted, the environmental harm associated with the offence is serious. The Swamp Sclerophyll Forest EEC in question was known to be remnant native vegetation rather than regrowth because aerial photography records determined it to be at least seventy-four years old.[319] An expert botanist prepared a report for the prosecutor which was admitted into evidence, and which established firstly that post-offence there was no EEC remaining on Sommerville's property, and secondly that the harm was permanent.[320] The permanent loss of 20,000-24,000m^2 of EEC is a serious degree

[317] Ibid [53].
[318] Office of Environment and Heritage, *Swamp sclerophyll forest on coastal floodplains of the NSW North Coast, Sydney Basin and South East Corner bioregions - endangered ecological listing* NSW Government <http://www.environment.nsw.gov.au/determinations/SwampSchlerophyllEndSpListing.htm>.
[319] *Department of Environment & Climate Change v Sommerville; Department of Environment & Climate Change v Ianna* [2009] NSWLEC 194 [8].
[320] Ibid [20].

of environmental harm. By way of comparison, in *Garrett v Williams* approximately 29,000m^2 of three different EECs was cleared, resulting in a sentence of $330,000, a CSO of eighty hours and costs of $85,000.[321]

In determining the sentences, Pain J gave great weight to a number of mitigating factors. She accepted that the offenders had been unaware of any legal restriction upon clearing, and also unaware that the vegetation was EEC, and that they had not acted intentionally, recklessly or negligently in failing to make inquiries of the relevant authorities as to whether or not consent was required. In light of the fact that Ianna was a professional land clearing contractor, with many years experience, it seems implausible that he would have been unaware of legal restrictions upon clearing native vegetation. Further, for a professional contractor to be unaware of the relevant law, if he indeed was unaware, is plainly negligent if not reckless. Further, Pain J held that neither offender was likely to re-offend and therefore there was no need to take account of specific deterrence. Given the earlier finding that Ianna was an experienced land clearing contractor who was entirely unaware of the legal restrictions upon land clearing, it is difficult to understand how Pain J felt such confidence in his future conduct. Finally, Pain J accepted that Ianna was of limited financial means and unable to pay a large fine.

The disparity between penalty and environmental harm in these sentences is high, and it cannot be justified by other sentencing considerations. These sentences appears to be disproportionate.

[321] *Garrett v Williams* [2007] NSWLEC 56.

Section 4 Additional penalties per individual plant or animal harmed: part of the problem or part of the solution?

Offences under section 118A carry additional penalties for each individual plant or animal harmed. There is an additional maximum penalty of $11,000 per endangered plant or animal, and an additional maximum penalty of $5,500 per vulnerable plant or animal. This method of structuring the maximum penalty is unusual and not found in the other Acts considered by this thesis. It creates complexity in terms of assessing proportionality because the maximum penalty is a fundamental consideration for a sentencing judge in determining the penalty to be imposed.

The seemingly obvious solution to the challenge of comparing sentences with different maximum penalties – to only compare sentences with others with the same maximum penalty – is in fact no solution at all for section 118A of the *National Parks and Wildlife Act* because the additional penalties per individual plant or animal harmed bring the potential for every offence against that section to have a different maximum penalty. There is unlimited scope for the maximum penalty to vary, and in cases where the number of individual plants or animals harmed is high then the maximum can be many multiples of the maximum in a case where only one plant or animal is harmed.

The role of maximum penalties in sentencing was explored in *Markarian v The Queen*, in which Gleeson CJ, Gummow, Hayne and Callinan JJ at [31] stated:

> "… careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick".[322]

The yardstick role of maximum penalties indicates that, all other things being equal, a higher maximum penalty should lead to a higher penalty.

[322] *Markarian v The Queen* [2005] HCA 25.

These differing maxima are in theory quite sensible from a proportionality perspective. Indeed Preston CJ in *Plath v Rawson* linked the differing maxima explicitly to proportionality at [61]-[62]:

> "First, the maximum penalties for an offence in respect of any endangered species, population or ecological community are greater than the maximum penalties for a vulnerable species. This shows that Parliament views an offence in respect of any endangered species, population or ecological community as being proportionately more serious than an offence in respect of a vulnerable species.
>
> "Secondly, Parliament has prescribed an additional penalty per whole plant that was affected by or concerned in the action that constituted the offence. The prescription by Parliament of an additional penalty is intended to enable the total penalty to be proportionate to the extent of harm caused by the actions constituting the offence."[323]

Preston CJ is undoubtedly correct that it was the intention of Parliament, in introducing additional penalties, to facilitate proportionate sentencing. In theory the proposition is sound because if the maximum penalty rises proportionately to environmental harm, then so should the actual penalty. The intention of this Section is to test this theory in practice.

Of the twenty sentences considered by this Chapter, additional per plant or per animal harmed penalties were applicable in twelve instances. For two sentences – *Bentley v Gordon* and *Bentley v BGP Properties Limited* – the offences were committed prior to the 2002 introduction of the additional penalties and so they did not apply.[324] The remaining six sentences are for offences against section 118D which carries no additional penalties. Of the twelve where the additional penalties were in play, a higher maximum penalty was applied by the sentencing judge on only five occasions.

[323] *Plath v Rawson* [2009] NSWLEC 178.
[324] *Bentley v Gordon* [2005] NSWLEC 695; *Bentley v BGP Properties Limited* [2006] NSWLEC 34.

The reason that the maximum penalty was not increased in other sentences is that, as a practical matter, it is often not possible to know how many individual plants or animals have been harmed. In a sentence hearing facts adverse to the offender must be proven beyond a reasonable doubt, so the evidence of individual plants or animals harmed must meet that standard. For the additional maximum penalty to apply, there must be admissible evidence of each individual plant or animal harmed, and that evidence must be capable of establishing the fact of harm to that individual animal or plant beyond reasonable doubt. If vegetation has been cleared, and was not photographed or surveyed prior to being cleared, then it may be impossible to ever gain an accurate understanding of what was lost. In *Garrett v Williams* approximately 29,000m^2 comprising three different endangered ecological communities was cleared of virtually all vegetation and the cleared vegetation was then mulched.[325] The number of affected plants would have been high. The evidence in the sentence hearing however did not quantify the number of affected plants, presumably because it was impossible to do so. The maximum pecuniary penalty remained at $220,000. In *Garrett v Langmead* there was evidence of clearing at three different sites on the property. The evidence as to the number of protected plants affected was vague, at [7]-[8]: "at least one, possibly two" at one site, "four or five" at another site and as for the third, "none of the species said to be removed for the purpose of the road are particularised in the summons".[326]

This can be contrasted to the much higher maximum penalties that were applied in other cases. In *Plath v Rawson* Preston CJ calculated the additional per plant harmed penalties for each of the seven offences and arrived at a total maximum pecuniary penalty of $8,866,000.[327] This involved a total of 1,279 individual affected plants across the seven offences, a number likely comparable to *Garrett v Williams* had individual counting been possible in that case. In *Gordon Plath of the Department of Environment, Climate Change and Water v Lithgow City Council* the parties agreed on

[325] *Garrett v Williams* [2007] NSWLEC 56.
[326] *Garrett, Stephen v Langmead, Patsy* [2006] NSWLEC 627.
[327] *Plath v Rawson* [2009] NSWLEC 178.

maximum penalties of $1,056,000 and $231,000 for the two offences.[328] The latter maximum concerned the harming of only one individual endangered plant, yet was higher than the maximum for clearing 29,000m^2 of endangered ecological community in *Garrett v Williams*.

The failure of additional per individual plant or animal harmed penalties to facilitate proportionate sentencing is demonstrated in two ways by Table 5.2. Firstly, the applied maximum penalties do not correlate to the categorisations of environmental harm. The three sentences in the serious harm category (excluding *Bentley v Gordon* and *Bentley v BGP Properties* because those offences were committed prior to the inclusion of additional penalties in the Act) have widely differing maximum pecuniary penalties. *Garrett v Williams* has an applied pecuniary maximum penalty of $660,000, *Plath v Rawson* has an applied pecuniary maximum of $8,866,000 and *Chief Executive, Office of Environment and Heritage v Kyluk Pty Ltd (No 3)* has an applied pecuniary maximum of $220,000.[329] The seven sentences in the moderate harm category have similarly variable maximum penalties: $220,000 (*Plath v Chaffey*, *Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd* and *Plath v Hunter Valley Property Management Pty Limited*), $968,000 (*Garrett v Charles Dennis Williams*), $1,287,000 (*Gordon Plath of the Department of Environment, Climate Change and Water v Lithgow City Council*) and $1,870,000 (*Department of Environment & Climate Change v Sommerville* and *Department of Environment & Climate Change v Ianna*).[330] The eight cases in the low harm category are more consistent than the other categories, but nevertheless range from $110,000 to $451,000.

[328] *Gordon Plath of the Department of Environment, Climate Change and Water v Lithgow City Council* [2011] NSWLEC 8.
[329] *Garrett v Williams* [2007] NSWLEC 56; *Plath v Rawson* [2009] NSWLEC 178; *Chief Executive, Office of Environment and Heritage v Kyluk Pty Limited (No 3)* [2012] NSWLEC 56.
[330] *Plath v Chaffey* [2009] NSWLEC 196; *Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd* [2010] NSWLEC 144; *Plath v Hunter Valley Property Management Pty Limited* [2010] NSWLEC 264; *Garrett v Dennis Charles Williams* [2006] NSWLEC 785; *Gordon Plath of the Department of Environment, Climate Change and Water v Lithgow City Council* [2011] NSWLEC 8; *Department of Environment & Climate Change v Sommerville; Department of Environment & Climate Change v Ianna* [2009] NSWLEC 194; *Department of Environment & Climate Change v Ianna* [2009] NSWLEC 194.

The introduction of additional maximum penalties was intended to facilitate a proportionate relationship between penalty and environmental harm, as the quote from Preston CJ in *Plath v* Rawson above makes clear. The fact that additional penalties are imposed inconsistently means that whilst this intention might be realised in specific individual cases, it cannot be achieved universally. Further, it introduces a potential for disproportionality when sentences are compared to each other. The inconsistency in imposing additional maximum penalties could result in offences with similar environmental harm having markedly different penalties, or a less harmful offence in fact having a higher penalty than a more harmful offence.

The second way in which the failure of additional penalties to facilitate proportionate sentencing is demonstrated by Table 5.2 is that comparison between sentences suggests that judges are disregarding the higher maximum penalties in practice. The sentences considered by this Chapter are, as discussed, generally proportionate subject to a limited number of exceptions. Of those exceptions, most can be categorised as no-fault disproportionality where the law, rather than judicial decision-making, is responsible. If additional maximum penalties are applied inconsistently, but the penalties are mostly proportionate to harm across all of the sentences considered by this Chapter, then the most likely explanation is that judges are in practice disregarding, or at least minimising, the yardstick role of a higher maximum penalty when it exists. They might do so in order to maintain consistency or evenhandedness with other sentences with comparable levels of environmental harm.

Section 5 Conclusion

Detailed consideration of the sentences imposed under section 118 of the *National Parks and Wildlife Act* during the research period reveals that the majority of sentences have a reasonably proportionate relationship between penalty and environmental harm. Of those that do not, most can be categorised as no-fault disproportionality, in that the law is responsible rather than judicial decision-making. The related sentences of *Sommerville* and *Ianna* however appear disproportionate to environmental harm and cannot be justified by reference to other sentencing considerations.[331]

The most distinctive aspect of the sentences considered by this Chapter is the inclusion of additional penalties for each individual plant or animal harmed, as well as to different maximum penalties for endangered as opposed to vulnerable species. These additional penalties are peculiar to the *National Parks and Wildlife Act*. They should facilitate a proportionate relationship between penalty and environmental harm, as asserted by Chief Justice Preston in *Plath v Rawson*, by linking maximum penalty size to the degree of environmental harm.[332] This Chapter has found that they fail to do so due to practical difficulties which lead to inconsistent implementation. The fact that sentencing is nonetheless reasonably proportionate suggests that judges are in practice disregarding or minimising the yardstick role of an increased maximum penalty in favour of pursuing consistency with other cases with comparable environmental harm.

[331] *Department of Environment & Climate Change v Sommerville; Department of Environment & Climate Change v Ianna* [2009] NSWLEC 194.
[332] *Plath v Rawson* [2009] NSWLEC 178.

Chapter 6: Sentences for offences under the *Native Vegetation Conservation Act 1997* (NSW) and the *Native Vegetation Act 2003* (NSW)

Chapter abstract

When judges of the LEC sentence criminal offenders the law requires them to impose penalties which conform with the law of proportionality in criminal sentencing. This Chapter considers whether sentences imposed by the LEC for offences under the *Native Vegetation Conservation Act 1997* (NSW) and the *Native Vegetation Act 2003* (NSW) during the research period so conform. It does so using the test for proportionality developed in Chapter 3. Whilst the majority of sentences appear to be reasonably proportionate, disproportionality between penalty and environmental harm is found in a number of sentences, chiefly due to undue weight being given to mitigating factors. This Chapter also assesses whether the penalties imposed under these Acts are proportionate to penalties imposed for land clearing offences under the *Environmental Planning and Assessment Act 1979* (NSW) and the *National Parks and Wildlife Act 1974* (NSW). This comparison reveals significant disparity. It appears that land clearing offences under the *Native Vegetation Conservation Act 1997* (NSW) and the *Native Vegetation Act 2003* (NSW) are sentenced more leniently than land clearing offences under the other Acts.

Contents

Section 1 Introduction

1.1 Introduction

In Chapter 3 this thesis examined the law on proportionality in the context of criminal sentencing in the LEC, with the intention of determining what "proportionality" means. It concluded by formulating a three-step test for proportionality in sentencing. This Chapter is the third of four chapters which apply that test to a specific offence type. This Chapter considers whether the sentences imposed for offences under the *Native Vegetation Act* and the *Native Vegetation Conservation Act* in the LEC during the research conform with the law on proportionality in sentencing. In doing so it contributes to addressing the second research question, namely whether criminal sentences imposed by the LEC are proportionate in practice.

The test for proportionality is a three-step test. The first step asks whether the penalty is reasonably proportionate to the environmental harm caused by the offence, measured by comparison to other sentences for like or very similar offence types. In order to implement this first step, the sentences considered by this Chapter will be ranked by penalty severity and then categorised by environmental harm, allowing relatively straightforward comparison between them.

For these sentences, the second step is to ask whether the disproportionality between penalty and environmental harm is justified by sentencing considerations other than environmental harm. If the answer is no, then the sentence is disproportionate. This requires consideration of the detail of the sentences.

If the answer to the second step is yes, then the third step is to ask whether the penalty is nonetheless more severe or more lenient than the objective gravity of the offence demands. If the answer is yes then the sentence is disproportionate, if the answer is no then the sentence is proportionate.

This Chapter completes the consideration of land clearing offences, which can also be prosecuted under the *EP&A Act* and the *National Parks and Wildlife Act* depending on

the circumstances. This provides the opportunity to consider whether the sentences imposed for land clearing offences are proportionate to harm across the different Acts. This comparison will be done by means of a dollar per square metre cleared method, the same method used by a previous study by Bartel, in order to allow ready comparison with that study.

This Chapter proceeds in five sections. Section 1 provides this introduction as well as an introduction to the *Native Vegetation Conservation Act* and the *Native Vegetation Act*. Section 2 applies step one of the proportionality test to the sentences under consideration and in the process identifies issues relevant to proportionality. Section 3 applies step two and where necessary step three of the proportionality test. Section 4 considers whether the sentences considered by this Chapter are proportionate to the sentences imposed for land clearing offences under the *EP&A Act* and the *National Parks and Wildlife Act*, before Section 5 concludes the chapter.

1.2 The Native Vegetation Conservation Act *and the* Native Vegetation Act

The *Native Vegetation Act*, just like its precursor the *Native Vegetation Conservation Act*, is a statutory instrument that regulates the clearing of native vegetation on privately-held rural land in NSW. It defines particular types of vegetation that can be cleared without approval as well as particular rural activities that can be undertaken without approval even if they involve clearing some native vegetation. Other native vegetation is protected by the Act and cannot be cleared without either development consent or an approved property vegetation plan. To clear native vegetation that is protected by the Act other than with development consent or in accordance with an approved property vegetation plan is a criminal offence.

The offence provisions in the *Native Vegetation Conservation Act* and the *Native Vegetation Act* are relatively straightforward, and the transition from the former Act to the latter does not complicate matters as much as might be expected.

The *Native Vegetation Conservation Act* was repealed by the *Native Vegetation Act* with effect from 1st December 2005. Consequently it was in place for almost all of the

first two years of the ten year research period, and offences committed prior to its repeal continued to be prosecuted under the older Act for some time after the new Act commenced. A total of twenty-one sentences were imposed in the LEC under these Acts during the research period. Of these twenty-one sentences, three are for offences under the now repealed *Native Vegetation Conservation Act* and eighteen are for offences under the current *Native Vegetation Act*. The frequency with which offenders were sentenced appears to have increased significantly with the new Act; there were only two sentences in the first half of the ten-year research period followed by nineteen in the second half.

All of the twenty-one sentences under these Acts were for essentially the same offence – the clearing of native vegetation without approval. The relevant offence provision changed little with the change of Act. Section 21(2) of the *Native Vegetation Conservation Act* stated:

> "21 Clearing native vegetation on land not subject to plan
>
> (2) A person must not clear native vegetation on any land except in accordance with:
>
> (a) a development consent that is in force, or
>
> (b) a native vegetation code of practice."

This was replaced by section 12(1) of the *Native Vegetation Act* which states:

> "12 Clearing requiring approval
>
> (1) Native vegetation must not be cleared except in accordance with:
>
> (a) a development consent granted in accordance with this Act, or
>
> (b) a property vegetation plan."

The maximum penalty remained unchanged, with both Acts stipulating that the maximum penalty is that provided for under section 126 of the *EP&A Act*, being $1,100,000 plus an additional $110,000 per day that the offence continues. None of the twenty-one sentences in question include additional daily penalties. In contrast to

the *National Parks and Wildlife Act* custodial penalties do not apply, despite the facts of the offences under these Acts being similar to the facts of many of the offences under the *National Parks and Wildlife Act*, being essentially offences of clearing native vegetation contrary to law.

The sentences under the *Native Vegetation Conservation Act* and the *Native Vegetation Act* can be distinguished from the sentences imposed under the other Acts considered in depth by this thesis – the *EP&A Act*, the *National Parks and Wildlife Act* and the *POEO Act* – in that none of them contain an additional order of any kind. All twenty-one sentences consist only of a fine and an order for legal costs.

The precursor to the *Native Vegetation Conservation Act* did include one category of additional orders: remediation orders. *State Environmental Planning Policy No 46 – Protection and Management of Native Vegetation* ("SEPP 46"), which was repealed by the *Native Vegetation Conservation Act* with effect from 1st January 1998, operated in tandem with the *EP&A Act* and section 126 of that Act therefore applied in its entirety. As discussed in Chapter 4, section 126 of the *EP&A Act* contains, in sub-section (3), provision for a court to direct an offender to "plant new trees and vegetation and maintain those trees and vegetation to a mature growth" in cases where the offence involves destruction of or damage to a tree or vegetation. Bartel's 2003 study of land clearing laws in NSW records that the LEC imposed section 126(3) remediation orders on a number of occasions for offences under SEPP 46.[333]

The *Native Vegetation Conservation Act* removed the LEC's power to impose remediation orders for land clearing offences, retaining the link to the *EP&A Act* in respect of the maximum penalty only. Section 17(2) of the *Native Vegetation Conservation Act* included only sub-section (1) of section 126, stating:

> "Section 126(1) of the EPA Act (Penalties) applies to any such offence in the same way as it applies to an offence against that Act."

[333] Bartel, above n 2.

Section 12(2) of the *Native Vegetation Act* is more ambiguous as to whether or not section 126(3) remediation orders can be applied. It states:

> "A person who carries out or authorises the carrying our of clearing in contravention of this section is guilty of an offence and is liable to the maximum penalty provided for under section 126 of the EPA Act for a contravention of that Act."

It is somewhat unclear whether section 12(2) of the *Native Vegetation Act* adopts only the maximum penalty from section 126 of the *EP&A Act* or whether it adopts the whole of section 126, effectively treating remedial orders under sub-section (3) as a component of the maximum penalty. Given that no such orders have been imposed however, and given the explicit rejection of such orders in the preceding Act, it is reasonable to assume that remediation orders are not part of the current Act.

This omission is curious given the capacity of native vegetation to regenerate, the objects of the *Native Vegetation Conservation Act* and the *Native Vegetation Act* (being essentially to protect native vegetation) and the inclusion of remediation orders in all comparable legislation. The absence of such orders, along with other types of additional order, does however greatly simplify the analysis of sentences.

Although the LEC does not have the power to impose them, remediation orders do exist under the *Native Vegetation Act*. Under section 38 of the Act, the Director-General of the relevant NSW government department can direct a landholder to carry out remediation work within a specified timeframe:

> "38 Directions for remedial work
>
> (1) If the Director-General is satisfied:
>
> (a) that any native vegetation has been cleared in contravention of this Act, or

> (b) that the clearing of native vegetation on any land has caused, or is likely to cause, on or in the vicinity of the land, any soil erosion, land degradation or siltation of any river or lake, or any adverse effect on the environment,
>
> the Director-General may, by notice in writing, direct the landholder, or the person having the control or management of the clearing, to carry out specified work in a specified manner and within a specified time."[334]

Failure to comply with such an order is an offence.[335] Similar provisions existed in the *Native Vegetation Conservation Act*.[336] In some cases, discussed in greater detail below, a remediation order has been imposed in combination with the instigation of a criminal prosecution. In such cases, judges have usually taken into account an offender's willing compliance with the remediation order as a mitigating factor on sentence.[337] A remediation order, assuming that it is complied with, should reduce the environmental harm caused by the offence and is therefore relevant to proportionality.

[334] The NSW government department responsible for enforcing the *Native Vegetation Conservation Act* and the *Native Vegetation Act* changed its name twice during the research period. It was known as the Department of Environment and Climate Change, the Department of Environment, Climate Change and Water and the Office of Environment and Heritage. All three names describe the same department. In the 2012 case of *Corbyn v Walker Corporation Pty Ltd*, Ms Lisa Corbyn was the Director-General of the Office of Environment and Heritage at the time. It is unknown why her name was used, rather than the name of her department, in this particular case.
[335] *Native Vegetation Act 2003* (NSW), section 38(4).
[336] *Native Vegetation Conservation Act 1997* (NSW), Part 6.
[337] See for example: *Director-General Department of Environment and Climate Change v Wilton* [2008] NSWLEC 297.

Section 2 Step one: Is the penalty reasonably proportionate to the environmental harm caused by the offence?

This Section applies the first step of the proportionality test – the assessment of whether or not penalty is disproportionate to environmental harm – to the sentences considered by this Chapter. In order to compare penalty to environmental harm it is first necessary to evaluate both.

2.1 Evaluating penalty

In order to compare penalty to environmental harm it is necessary to understand the quantum of the penalty in each sentence. In the sentences considered by this Chapter the sentencing judge has imposed a fine expressed in dollar terms, which is straightforward to understand. The total penalty however is broader in scope than the fine alone. Understanding the quantum of the total penalty is complicated by orders for the offender to pay the legal costs of the prosecutor ("costs orders").

2.1.1 Costs orders

Costs orders formed a part of the penalty in all of twenty-one sentences considered by this Chapter. The complexity which this introduces for proportionality, as discussed in Chapter 4 in the context of the *EP&A Act*, applies equally to sentences under the *Native Vegetation Conservation Act* and the *Native Vegetation Act*. It need not be repeated here.

2.1.2 Ranking by penalty

In order to facilitate comparison between penalty size and environmental harm it is desirable to rank the penalties by size. This will make the comparison with environmental harm more straightforward. This Chapter follows the method adopted in Chapters 4 and 5.

Table 6.1 below ranks the twenty-one sentences by penalty. In doing so the financial burden to the offender of costs orders has been included as far as it is known.

It is acknowledged that the ranking process is imperfect because the information upon which it is based is incomplete. Given incomplete information, to rank each case individually – that is, in order from one to twenty-one – would be to postulate a degree of accuracy which does not exist. For that reason the cases are instead sorted into four categories. These categories of penalty are the same as those applied to the *EP&A Act*, the *National Parks and Wildlife Act* and the *POEO Act*, thereby allowing comparison of penalty size between Acts: high, moderate and low penalty, plus a fourth category where no conviction is recorded under section 10 of the *Crimes (Sentencing Procedure) Act*. The high penalty category is defined as a penalty that totals, or is very likely to total, more than $100,000. The moderate penalty category is a penalty that totals, or is very likely to total, between $50,000 and $100,000. The low penalty category is a penalty that totals, or is very likely to total, below $50,000.

In Table 6.1 the Act under which the sentence was imposed is indicated as "NVC" (*Native Vegetation Conservation Act*) or "NV" (*Native Vegetation Act*). When an offender was sentenced for more than one offence in the one sentence then that is indicated (for example, NV x 2 indicates two offences against the *Native Vegetation Act*). The offenders Calman Australia Pty Ltd, Iroch Pty Ltd and GD & JA Williams Pty Ltd trading as Jerilderie Earthmoving, who are all co-offenders to the one offence and were sentenced in the one proceeding, have been listed as three separate sentences (numbers six, seven and eight on Table 6.1) because the three are separate entities with no cross-ownership.[338]

One offender was sentenced pursuant to section 10 of the *Crimes (Sentencing Procedure) Act*. As previously explained, there are a number of options provided to a judge by this section, including, relevantly for Table 6.1 below, section 10A which allows a judge to record a criminal conviction but take no further action.

[338] *Director-General, Dept of Environment and Climate Change v Calman Australia Pty Ltd; Iroch Pty Ltd; GD & JA Williams Pty Ltd t-as Jerilderie Earthmoving* [2009] NSWLEC 182.

Table 6.1 – Sentences imposed under the *Native Vegetation Conservation Act* and the *Native Vegetation Act* in the research period ranked by penalty size in total dollar terms in four categories: high penalty, moderate penalty, low penalty and no conviction recorded. Assumptions as to costs orders are based on comparisons undertaken by the author.

No	Case	Citation	Act	Penalty
HIGH PENALTY				
1	Director-General of the Department of Environment and Climate Change v Hudson	[2009] NSWLEC 4	NV	$400,000 plus unstated costs
2	Director-General of the Department of Environment, Climate Change and Water v Graymarshall Pty Ltd (No. 2)	[2011] NSWLEC 149	NV	$200,000 plus unstated costs
3	Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 4)	[2011] NSWLEC 119	NV	$200,000 plus unstated costs
4	Director-General of the Department of Environment and Climate Change v Rae	[2009] NSWLEC 137	NV	$160,000 plus unstated costs
5	Chief Executive, Office of Environment and Heritage, Department of Premier and Cabinet v Powell	[2012] NSWLEC 129	NV	$120,000 plus unstated costs
6	Chief Executive, of the Office of Environment and Heritage v Newbigging	[2013] NSWLEC 144	NV	$112,000 plus $45,000 costs
7	Director General, Department of the Environment and Climate Change v Olmwood (No 2)	[2010] NSWLEC 100	NV	$100,000 plus unstated costs
8	Director General, Department of Environment, Climate Change and Water v Linklater	[2011] NSWLEC 30	NVC	$82,500 plus $23,000 costs
9	Chief Executive, Office of Environment and Heritage v Rummery	[2012] NSWLEC 271	NV	$80,040 plus unstated costs which are assumed to exceed $19,960 based upon comparison with similar cases.
10	Corbyn v Walker Corporation Pty Ltd	[2012] NSWLEC 75	NV	$80,000 plus unstated costs which are assumed to exceed $20,000 based on comparison with similar cases
11	Chief Executive of the Office of Environment and Heritage v Humphries	[2013] NSWLEC 213	NV	$67,500 plus $34,000 costs
MODERATE PENALTY				
12	Director-General Department of	[2008] NSWLEC	NVC	$40,000 plus $30,000 costs

No	Case	Citation	Act	Penalty
	Environment and Climate Change v Wilton	297	x 2	
13	Chief Executive, Office of Environment and Heritage v Kennedy	[2012] NSWLEC 159	NV	$40,000 plus unstated costs which are assumed to be less than $60,000 based upon comparison with similar cases
14	Director-General, Department of Environment Climate Change and Water v Vin Heffernan Pty Limited	[2010] NSWLEC 200	NV	$30,150 plus $30,000 costs
LOW PENALTY				
15	Director-General, Dept of Environment and Climate Change v Calman Australia Pty Ltd	[2009] NSWLEC 182	NV	$22,000 plus $24,000 costs
16	Director-General, Dept of Environment and Climate Change v Iroch Pty Ltd	[2009] NSWLEC 182	NV	$22,000 plus $24,000 costs
17	Director-General, Dept of Environment and Climate Change v GD & JA Williams Pty Ltd t-as Jerilderie Earthmoving	[2009] NSWLEC 182	NV	$22,000 plus $24,000 costs
18	Director-General of the Department of Environment and Climate Change v Taylor	[2007] NSWLEC 530	NVC	$20,000 plus unstated costs which are assumed to be less than $30,000 based upon comparison with similar cases
19	Director General, Department of the Environment Climate Change and Water v Ian Colley Earthmoving	[2010] NSWLEC 102	NV	$5,000 plus $15,000 costs
20	Director-General, Department of Environment and Climate Change v Mario Mura	[2009] NSWLEC 233	NV	$5,000 plus unstated costs which are assumed to be less than $45,000 based upon comparison with similar cases
21	Director-General, Department of Environment and Climate Change v Jack & Bill Issa Pty Ltd (No 6)	[2010] NSWLEC 43	NV	Section 10A conviction plus unstated costs which are assumed to be less than $50,000 based upon comparison with similar cases

As demonstrated by Table 6.1, eleven cases fall into the high penalty category, three cases into the moderate penalty category and seven into the low penalty category. There are no sentences in the fourth category of no conviction recorded under section 10 of the *Crimes (Sentencing Procedure) Act*, although there is one case where a judge recorded a conviction with no further penalty under section 10A of that Act. The penalties for this Act are relatively high compared to the other Acts considered in this thesis, with more than half falling into the high penalty category.

The total penalties having been determined, at accurately as possible, the next step in completing the task of comparing penalty to environmental harm is to evaluate the harm in each case.

2.2 Evaluating environmental harm

As discussed in depth in Chapter 4, it is not always straightforward to quantify environmental harm and often not possible to quantify it precisely. There is inevitably a degree of subjectivity and also the practical difficulty that written sentence judgments do not always express the harm caused by the offence with sufficient precision.

For these reasons, the cases are divided into four categories of environmental harm: very serious, serious, moderate and low. Table 6.2 below builds upon Table 6.1 by introducing a brief description of the environmental harm that accompanied each case, and then highlighting each category of harm in a different shade of grey. The serious harm category is the darkest shade and the low harm category is the lightest shade. This allows harm to be compared against the penalty categories of high, moderate, low and no conviction recorded.

In assessing the degree of environmental harm in each case, consideration is given primarily to two factors. The first is the area of native vegetation cleared. The second is the conservation status of the cleared vegetation. Native vegetation that is part of an Endangered Ecological Community ("EEC") under the *Threatened Species*

Conservation Act, or that provides habitat for species of fauna that are listed as threatened under that Act, is considered more valuable than other native vegetation.

Table 6.2 – Sentences imposed under the *Native Vegetation Conservation Act* and the *Native Vegetation Act* during the research period ranked by penalty size and categorised for environmental harm into very serious (dark grey), serious (grey), moderate (light grey) and low (no shading)

No	Case	Citation	Act	Penalty	Harm
HIGH PENALTY					
1	Director-General of the Department of Environment and Climate Change v Hudson	[2009] NSWLEC 4	NV	$400,000 plus unstated costs	Cleared 4,860,000m^2 of native vegetation.
2	Director-General of the Department of Environment, Climate Change and Water v Graymarshall Pty Ltd (No. 2)	[2011] NSWLEC 149	NV	$200,000 plus unstated costs	Cleared 380,000m^2 of native vegetation, including approx. 20,000m^2 of EEC. Likely habitat for threatened fauna species.
3	Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 4)	[2011] NSWLEC 119	NV	$200,000 plus unstated costs	Cleared 230,000m^2 of native vegetation. Court found that regeneration was underway & the harm may be temporary in medium term.
4	Director-General of the Department of Environment and Climate Change v Rae	[2009] NSWLEC 137	NV	$160,000 plus unstated costs	2,150,000m^2 of native vegetation cleared either partially or completely, which was known habitat for threatened fauna. Remediation order imposed by Director-General.
5	Chief Executive, Office of Environment and Heritage, Department of Premier and Cabinet v Powell	[2012] NSWLEC 129	NV	$120,000 plus unstated costs	650,000m^2 of Red River Gum forest partially cleared. Known to be Koala habitat.

No	Case	Citation	Act	Penalty	Harm
6	Chief Executive, of the Office of Environment and Heritage v Newbigging	[2013] NSWLEC 144	NV	$112,000 plus $45,000 costs	Approx. 600,000m^2 of native vegetation cleared, known to be habitat for threatened fauna. Some of the vegetation was EEC.
7	Director General, Department of the Environment and Climate Change v Olmwood (No 2)	[2010] NSWLEC 100	NV	$100,000 plus unstated costs	Area cleared not precisely known but less than 100,000m^2. Vegetation had no particular conservation significance.
8	Director General, Department of Environment, Climate Change and Water v Linklater	[2011] NSWLEC 30	NVC	$82,500 plus $23,000 costs	Cleared 1,660,000m^2 of ecologically high value native vegetation. Known to be habitat for a number of threatened fauna species. Remediation order made by Director-General.
9	Chief Executive, Office of Environment and Heritage v Rummery	[2012] NSWLEC 271	NV	$80,040 plus unstated costs	Cleared 2,390,000m^2 of native vegetation, including some EEC. Estimated to comprise 18,000-20,000 trees.
10	Corbyn v Walker Corporation Pty Ltd	[2012] NSWLEC 75	NV	$80,000 plus unstated costs	Cleared 73,000m^2 of native vegetation, consisting of 42 larger trees plus understorey vegetation, including areas of two different EECs.
11	Chief Executive of the Office of Environment and Heritage v Humphries	[2013] NSWLEC 213	NV	$67,500 plus $34,000 costs	Cleared 890,000m^2 of EEC, which was known habitat for threatened fauna.
MODERATE PENALTY					
12	Director-General Department of Environment and Climate Change v Wilton	[2008] NSWLEC 297	NVC	$40,000 plus costs $30,000 plus	Approx. 310,000m^2 cleared, being native vegetation of no particular conservation significance. Known habitat for threatened bird species. Remediation order made by the Director-General.
13	Chief Executive, Office of Environment and Heritage v Kennedy	[2012] NSWLEC 159	NV	$40,000 plus unstated costs	Cleared 324,800m^2, comprising four distinct communities of native vegetation, one of which was EEC. Some was regrowth and degraded. Remediation order made by the Director-General.

No	Case	Citation	Act	Penalty	Harm
14	Director-General, Department of Environment Climate Change and Water v Vin Heffernan Pty Limited	[2010] NSWLEC 200	NV	$30,150 plus $30,000 costs	Cleared 220,000m^2 of native vegetation of no particular conservation significance. Remediation order made by the Director-General.
LOW PENALTY					
15	Director-General, Dept of Environment and Climate Change v Calman Australia Pty Ltd	[2009] NSWLEC 182	NV	$22,000 plus $24,000 costs	Cleared 210,000m^2 of red gum forest. No threatened plant species harmed. Forest was potential habitat for threatened birds. Remediation order made by the Director-General.
16	Director-General, Dept of Environment and Climate Change v Iroch Pty Ltd	[2009] NSWLEC 182	NV	$22,000 plus $24,000 costs	Cleared 210,000m^2 of red gum forest. No threatened plant species harmed. Forest was potential habitat for threatened birds. Remediation order made by the Director-General.
17	Director-General, Dept of Environment and Climate Change v GD & JA Williams Pty Ltd t-as Jerilderie Earthmoving	[2009] NSWLEC 182	NV	$22,000 plus $24,000 costs	Cleared 210,000m^2 of red gum forest. No threatened plant species harmed. Forest was potential habitat for threatened birds. Remediation order made by the Director-General.
18	Director-General of the Department of Environment and Climate Change v Taylor	[2007] NSWLEC 530	NVC	$20,000 plus unstated costs	Cleared 305,000m^2 of native vegetation in good condition that consisted of a number of EECs & habitat of 5 threatened fauna species.
19	Director General, Department of the Environment Climate Change and Water v Ian Colley Earthmoving	[2010] NSWLEC 102	NV	$5,000 plus $15,000 costs	Approx. 290,000m^2 woodland thinned by about 60%, 128 large trees removed, some species part of an EEC, high quality habitat for several threatened species.
20	Director-General, Department of Environment and Climate Change v Mario Mura	[2009] NSWLEC 233	NV	$5,000 plus unstated costs	High proportion of understorey and groundcover vegetation cleared over approx. 120,000m^2, canopy trees left. Included vegetation forming part of three EECs.
21	Director-General, Department of Environment and Climate Change v Jack & Bill Issa Pty Ltd (No 6)	[2010] NSWLEC 43	NV	Section 10A conviction only, plus unstated costs	High proportion of understorey and groundcover vegetation cleared over approx. 120,000m^2, canopy trees left. Included vegetation forming part of three EECs. Remediation order made by the Director-General.

The final task required to complete step one of the proportionality test is to identify sentences or types of sentences where the relationship between penalty and harm appears disproportionate. Those sentences will then be considered in detail in step two of the test, to examine whether or not the disparity between penalty and harm can be justified by sentencing considerations other than environmental harm.

2.3 Identification of sentences with prima facie disproportionality

Table 6.2 provides strong evidence of prima facie disproportionality. Whilst most cases conform to the expected pattern for proportionate sentencing, that is a progression down the table from darker shaded cases at the top to lighter shaded cases at the bottom, a number do not.

Those cases that display prima facie disproportionality will be considered in depth in the following Section. In the high penalty category, two cases appear to be prima facie disproportionate because they fall into the low environmental harm range: *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 4)* ("*Walker Corporation*") and *Director General, Department of the Environment and Climate Change v Olmwood (No 2)* ("*Olmwood*").[339] At the other end of Table 6.2, *Director-General of the Department of Environment and Climate Change v Taylor* ("*Taylor*") and *Director General, Department of the Environment Climate Change and Water v Ian Colley Earthmoving* ("*Ian Colley*") are categorised as having a serious level of environmental harm despite falling into the low penalty range.[340]

[339] *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 4)* [2011] NSWLEC 119; *Director General, Department of the Environment and Climate Change v Olmwood (No 2)* [2010] NSWLEC 100.
[340] *Director-General of the Department of Environment and Climate Change v Taylor* [2007] NSWLEC 530; *Director General, Department of the Environment Climate Change and Water v Ian Colley Earthmoving* [2010] NSWLEC 102.

Section 3 Steps two and three: Can the disparity between penalty and harm be justified, and if so does it exceed the range established by the objective seriousness?

3.1 Other sentencing considerations overwhelm environmental harm

For a number of the sentences which display prima facie disproportionality, closer examination of the judgments reveals that environmental harm has been overwhelmed by other sentencing considerations. Whilst these other considerations are valid and justify adjusting the penalty to some degree, they do not justify the degree of disparity between penalty and harm that these sentences display.

In *Walker Corporation* the offender was fined $200,000 plus unstated costs for clearing 230,000m^2, a relatively small area for offences under the *Native Vegetation Conservation Act* and the *Native Vegetation Act*. The fine of $200,000 was the equal second highest fine imposed for the sentences considered by this Chapter, although the environmental harm caused by this offence was categorised as low. The fine was significantly higher than that imposed for numerous other offences which involved harm to either a far greater area of native vegetation or more ecologically valuable vegetation, or both.

Whilst the native vegetation which was cleared was in good to very good condition and provided suitable habitat for a number of threatened species which had previously been recorded in the district, Pepper J held that the very good potential for recovery in the medium term meant that the harm was not of significant seriousness.[341] Her Honour found that the area cleared was analogous to the cases of *Director-General, Dept of Environment and Climate Change v Calman Australia Pty Ltd* (where the fine was $22,000) and *Director General, Department of the Environment Climate Change and Water v Ian Colley Earthmoving* (fine $5,000) but that a number of features distinguished it from those cases and led to a significantly higher

[341] *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 4)* [2011] NSWLEC 119 [93].

penalty.[342] Specifically, Walker Corporation committed the offence recklessly, it did not plead guilty, it did not express contrition or remorse, it did not cooperate with nor assist the prosecutor and there was no evidence of limited financial means.[343]

This combination of aggravating factors and the absence of mitigating factors, compared to comparable cases, appears to have pushed the penalty well out of proportion to the environmental harm caused by the offence. These aggravating and mitigating factors are valid and justify some disparity between penalty and environmental harm. The disparity between penalty and environmental harm is so marked however, in comparison to the other sentences in Table 6.2, that the penalty appears to lie outside the range established by the objective seriousness of the offence. Either this sentence is disproportionately severe, or the sentences with which it is compared are disproportionately lenient.

Walker Corporation is particularly difficult to reconcile with one other case which had the same penalty of $200,000 plus unstated costs: *Director-General of the Department of Environment, Climate Change and Water v Graymarshall Pty Ltd (No. 2)*.[344] The area cleared in *Graymarshall* was, at 380,000m^2, significantly greater, some 150,000m^2 more than in *Walker Corporation*, with 20,000m^2 of that area being EEC and so particularly valuable ecologically.[345] No findings were made by Sheahan J as to the potential for regeneration. The offender did not appear in court and so there was no evidence or submissions put on the offender's behalf to mitigate the penalty. Sheahan J held that the case was analogous to *Walker Corporation* despite the disparity in area cleared because more species of native vegetation were affected in *Walker Corporation*, a finding at odds with the fact that the loss of EEC in *Graymarshall* marks it as the more environmentally damaging offence.[346]

[342] *Director-General, Dept of Environment and Climate Change v Calman Australia Pty Ltd; Iroch Pty Ltd; GD & JA Williams Pty Ltd t-as Jerilderie Earthmoving* [2009] NSWLEC 182; *Director General, Department of the Environment Climate Change and Water v Ian Colley Earthmoving* [2010] NSWLEC 102.
[343] *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 4)* [2011] NSWLEC 119 at [98] and [115]-[118].
[344] *Director-General of the Department of Environment, Climate Change and Water v Graymarshall Pty Ltd (No. 2)* [2011] NSWLEC 149.
[345] Ibid [16].
[346] Ibid [28].

In *Olmwood* the offender was penalised $100,000 plus unstated costs for clearing an area that was not precisely quantified but was less than 100,000m^2. It was therefore one of the smallest areas of illegal clearing in Table 6.2. Further Pain J found that the vegetation was of "no particular conservation significance".[347] The offender had agreed to comply with a remediation order for an area of 20,000m^2.[348] However, in a similar vein to *Walker Corporation*, Olmwood Pty Limited had been found guilty at a hearing and therefore was not entitled to any discount for a plea of guilty.[349] The mitigating factors were limited to an absence of prior convictions and an expression of remorse.[350] This lack of mitigating factors appears to have pushed the penalty upwards and out of proportion to the environmental harm caused by the offence.

Again, it is instructive to compare *Olmwood* to another case with a similar penalty, in this case *Director General, Department of Environment, Climate Change and Water v Linklater*.[351] In *Linklater* the offender was fined less than in *Olmwood* - $82,500 compared to $100,000 – although the environmental harm appears to be significantly higher. The area cleared was 1,660,000m^2, at least 1,560,000m^2 more than in *Olmwood*, and it was of greater ecological value. The Statement of Agreed Facts tendered by consent of both parties at the sentence hearing recorded that the cleared vegetation of was of high ecological value, and that a number of threatened species were known to be in the area.[352] Preston CJ found the offender to have been reckless in carrying out the clearing.[353] However in *Linklater* the offender had the benefit of a number of mitigating factors: an early plea of guilty, an absence of prior offences, good character, remorse and cooperation with the prosecutor.[354]

At the other end of Table 6.2 in the low penalty category, *Director General, Department of the Environment Climate Change and Water v Ian Colley Earthmoving* is another case in which mitigating factors have played a dominant role in

[347] *Director General, Department of the Environment and Climate Change v Olmwood (No 2)* [2010] NSWLEC 100 [46].
[348] Ibid [73].
[349] Ibid [1].
[350] Ibid [69]-[73].
[351] *Director General, Department of Environment, Climate Change and Water v Linklater* [2011] NSWLEC 30.
[352] Ibid [18]-[20].
[353] Ibid [33].
[354] Ibid [57]-[70].

sentencing.[355] In *Ian Colley Earthmoving* the offender was a contractor operating under the instruction of the land owner, a fact which led Pain J to find that his culpability was low. There were further strong mitigating factors: the offender's control over the situation was low, he pleaded guilty at an early stage, cooperated with the authorities, was otherwise of good character, was unlikely to reoffend, expressed remorse and was of limited financial means. Nonetheless the penalty – a fine of $5,000 plus costs of $15,000 – is markedly disproportionate to the environmental harm caused by the offence. Approximately 290,000m^2 of native vegetation was thinned by about 60%, affecting a woodland EEC and high conservation value habitat for several threatened fauna species. Whilst the strong mitigating factors in the offender's favour are undeniable, the disparity between penalty and harm is so great that it cannot be justified by the characteristics of the case.

There is an important role for mitigating factors to play in sentencing. In these cases however it appears that the relationship between penalty and harm has been stretched so far that it is difficult to discern any sensible relationship between penalty and harm.

3.2 Inexplicable disparity: Director-General of the Department of Environment and Climate Change v Taylor

In *Director-General of the Department of Environment and Climate Change v Taylor* the offender was penalised $20,000 plus unstated costs, a penalty that appears disproportionately low relative to the environmental harm of the offence.[356] The area cleared was 305,000m^2 and according to expert scientific evidence it was ecologically valuable, being a "mosaic" of different EECs and providing habitat for five threatened fauna species.[357] As such the harm appears to be greater than in *Walker Corporation* where the fine was ten times larger at $200,000.

[355] *Director General, Department of the Environment Climate Change and Water v Ian Colley Earthmoving* [2010] NSWLEC 102.
[356] *Director-General of the Department of Environment and Climate Change v Taylor* [2007] NSWLEC 530.
[357] Ibid [16].

The disproportionately low penalty in *Taylor* can be attributed, in large part, to timing. The sentence was delivered in 2007, and it was imposed under the *Native Vegetation Conservation Act* because the commission of the offence pre-dated the 2003 repeal of that Act. In 2007 few land clearing sentences had been imposed with the higher $1.1 million maximum penalty in force, and so the prevalent pattern of sentencing for like offences contained mostly lower penalties imposed when the maximum penalty was lower. Lloyd J considered seven other cases in some detail, almost all of which had far lower maximum penalties of $100,000 or $110,000 and consequently low penalties.

The explanation for *Taylor* cannot be attributed totally to timing. One of the cases that Lloyd J considered was *Cameron v Eurobodalla Shire Council*, an *EP&A Act* sentence in which the offender was penalised $10,000 for removing one dead tree and some branches from live trees in a public reserve adjoining his residence.[358] The maximum penalty in that case was $1.1 million. It is difficult to understand why Lloyd J considered the destruction of 305,000m^2 of valuable native vegetation, presumably many thousands of trees and plants, to warrant a penalty only double that imposed for the relatively trivial offence in *Cameron v Eurobodalla Shire Council*. The sentence in *Taylor* is plainly disproportionate by comparison to other cases, as the disparity between penalty and environmental harm is markedly large, and there are no other sentencing considerations to justify this disparity.

[358] *Cameron v Eurobodalla Shire Council* [2006] NSWLEC 47.

Section 4 Comparison of land clearing offences across Acts

This Chapter completes the consideration of land clearing offences, which can also be prosecuted under the *EP&A Act* and the *National Parks and Wildlife Act* depending on the circumstances of the offence. This provides the opportunity to consider whether the sentences imposed for land clearing offences are proportionate across the different Acts. Such a comparison can only be undertaken for land clearing offences because it is the only type of offence can that be prosecuted under different Acts. This comparison will be done by means of a dollar per square metre cleared method, the same method used by a previous study by Bartel, in order to allow ready comparison with that study.[359]

4.1 Penalties relatively high, but harm even higher

Table 6.2 demonstrates that whilst the penalties under the *Native Vegetation Conservation Act* and the *Native Vegetation Act* are high relative to the penalties imposed under the other Acts considered so far, the environmental harm associated with those penalties is even higher.

The areas of vegetation cleared have been expressed in square metres in order to allow ready comparison with offences under other Acts, despite hectares being a more convenient and more conventional way of expressing large areas. The areas in Table 6.2 are very large compared to the areas unlawfully cleared under the *EP&A Act* and the *National Parks and Wildlife Act*, ranging from 4,860,000m^2 in *Director-General of the Department of Environment and Climate Change v Hudson* to 73,000m^2 in *Corbyn v Walker Corporation Pty Ltd*.[360] The average area illegally cleared across the twenty-one sentences is 776,324m^2.

In comparison, the offences that involve land clearing under the *EP&A Act* involve much smaller areas. The most serious of those – *Minister for Planning v Moolarben*

[359] Bartel, above n 2.
[360] *Director-General of the Department of Environment and Climate Change v Hudson* [2009] NSWLEC 4; *Corbyn v Walker Corporation Pty Ltd* [2012] NSWLEC 75.

Coal Mines Pty Ltd – involved the clearing of 41,000m^2.[361] Next is *Eurobodalla Shire Council v Christenssen* at 19,126m^2, whilst *Hornsby Shire Council v Devaney* and *Hornsby Shire Council v Benson* involved 4,200m^2 and *Blue Mountains City Council v Carlon* and *Blue Mountains City Council v Tzannes* involved 4,000m^2.[362] In *Warringah Council v Bonanno* the offender was fined $37,500 plus unstated costs for clearing 123m^2 of native vegetation, a comparatively tiny area, although the offence was aggravated by the land in question being Crown Reserve rather than private land.[363] Further, a number of offences under the *EP&A Act* involved harm to a small number of trees, as few as one tree in some cases such as *Willoughby City Council v Vlahos*.[364]

Whilst the contrast with the *National Parks and Wildlife Act* offences is not so stark, the offences that involve land clearing under that Act are also significantly smaller areas. The largest area cleared in an offence under that Act was 190,500m^2 in the cases of *Bentley v Gordon* and *Bentley v BGP Properties*.[365] *Chief Executive, Office of Environment and Heritage v Kyluk Pty Limited (No 3)* saw 124,500m^2 cleared, whilst others involved significantly smaller areas: *Garrett v Williams* (29,000m^2), *Department of Environment & Climate Change v Sommerville* and *Department of Environment & Climate Change v Ianna* (20,000-24,000m^2), *Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd* (37,000m^2) and so on.[366]

The environmental harm caused by a land clearing offence is more complicated than a simple calculation of the square metres involved. Some native vegetation is more valuable in ecological terms than other native vegetation. Land clearing offences

[361] *Minister for Planning v Moolarben Coal Mines Pty Ltd* [2010] NSWLEC 147.
[362] *Eurobodalla Shire Council v Christenssen* [2008] NSWLEC 134; *Hornsby Shire Council v Devaney* [2007] NSWLEC 199; *Hornsby Shire Council v Devaney* [2007] NSWLEC 199; *Blue Mountains City Council v Carlon* [2008] NSWLEC 296; *Blue Mountains City Council v Tzannes* [2009] NSWLEC 19.
[363] *Warringah Council v Bonanno* [2012] NSWLEC 265.
[364] *Willoughby City Council v Vlahos* [2013] NSWLEC 71.
[365] *Bentley v Gordon* [2005] NSWLEC 695; *Bentley v BGP Properties Limited* [2006] NSWLEC 34.
[366] *Chief Executive, Office of Environment and Heritage v Kyluk Pty Limited (No 3)* [2012] NSWLEC 56; *Garrett v Williams* [2007] NSWLEC 56; *Department of Environment & Climate Change v Sommerville; Department of Environment & Climate Change v Ianna* [2009] NSWLEC 194; *Department of Environment & Climate Change v Ianna* [2009] NSWLEC 194; *Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd* [2010] NSWLEC 144.

prosecuted under the *National Parks and Wildlife Act* will always involve native vegetation with a high conservation status or that is habitat for fauna with a high conservation status because that is the definition of those offences. Nonetheless, and bearing in mind that many offences under the *Native Vegetation Conservation Act* and the *Native Vegetation Act* also involve harm to valuable native vegetation such as EECs, it is clear that the environmental harm caused by the offences considered under these Acts is relatively higher than the harm caused by the offences considered under the *EP&A Act* and the *National Parks and Wildlife Act* which involved land clearing.

4.2 Proportionality between similar offences under different Acts

The fact that land clearing offences are prosecuted under three different Acts creates the potential to consider proportionality not only within an individual Act but also between Acts. The logic of proportionality – that penalty should be proportionate to environmental harm subject to other sentencing considerations – applies equally well to this comparison.

A complicating factor is different maximum penalties. Fortunately the *Native Vegetation Conservation Act*, the *Native Vegetation Act* and the *EP&A Act* all have the same maximum penalty. The *National Parks and Wildlife Act*, as discussed in depth in Chapter 5, has different maximum penalties depending upon the conservation status of the vegetation in question, and also provision for an additional penalty for each individual plant harmed. Given the 'yardstick' role of maximum penalties, as discussed by the High Court in *Markarian v The Queen*, the applicable maximum penalties must always be born in mind when comparing two sentences.[367]

Table 6.3 combines the sentences under the *Native Vegetation Conservation Act* and the *Native Vegetation Act* with the offences under the *EP&A Act* and the *National Parks and Wildlife Act* which involve land clearing. The offences under the *EP&A Act* which involve harm to a small number of trees, or a single tree, have been excluded because they are incompatible with a comparison on a dollar per square metre cleared basis.

[367] *Markarian v The Queen* [2005] HCA 25.

Table 6.3 ranks the sentences using a calculation of dollar per square metre cleared, that is the fine imposed divided by the number of square metres cleared. This calculation excludes the cost to the offender of legal costs or additional orders, because they can rarely be precisely quantified in dollar terms, which is an acknowledged limitation of this comparison. This limitation notwithstanding, this calculation nonetheless provides a useful, if somewhat imprecise, comparison between sentences to allow consideration of whether or not penalty is proportionate to environmental harm.

Also included is a brief indication of the conservation status of the vegetation cleared. In theory ecologically valuable native vegetation ought to be penalised more severely per hectare than native vegetation which is relatively abundant. Of course all of the offences under the *National Parks and Wildlife Act* involve threatened vegetation species, or harm to native vegetation which provides habitat for threatened fauna, as that is how the offences are defined.

Comparison based upon dollar per square metre also ignores the impact of other sentencing considerations, such as the state of mind of the offender or the offender's capacity to pay a fine. The comparison is incapable of reflecting the wide range of sentencing considerations. Some variation in dollar per square metre would be expected to reasonably occur as a consequence of the diverse characteristics of offences and offenders. Excessive variation however will suggest prima facie disproportionality.

Table 6.3: Sentences imposed under the *Native Vegetation Conservation Act* and the *Native Vegetation Act*, in addition to sentences imposed for land clearing offences under the *EP&A Act* and the *National Parks and Wildlife Act*. Sentences are ranked from highest to lowest on a dollar per square metre cleared basis.

No	Case	Citation	Act	Max. penalty	Fine	Area cleared	Fine/m^2
1	Warringah Council v Bonnano	[2012] NSWLEC 265	EP&A	$1.1m	$37,500	123m^2 from Crown Reserve	$304.88
2	Chief Executive of the Office of Environment and Heritage v Lani; Chief Executive of the Office of Environment and Heritage v Lampo Pty Ltd	[2012] NSWLEC 115	NPW	$220,000	$30,000	1,610m^2, squirrel glider habitat.	$18.63
3	Garrett v Williams	[2007] NSWLEC 56	NPW	$660,000	$330,000 plus CSO	29,000m^2 of EECs.	$11.38 (plus CSO)
4	Chief Executive of the Office of Environment and Heritage v Bombala Investments Pty Ltd	[2013] NSWLEC 185	NPW	$110,000	$31,500	5,200m^2, habitat of 2 threatened species.	$6.06
5	Hornsby Shire Council v Devaney	[2007] NSWLEC 199	EP&A	$1.1m	$20,000	4,200m^2, probably incl vulnerable species	$4.76
6	Chief Executive of the Office of Environment and Heritage v Bombala Investments Pty Ltd; Chief Executive of the Office of Environment and Heritage v Rinaldo (Nino) Lani	[2012] NSWLEC 115	NPW	$220,000	$23,000	10,000m^2, squirrel glider habitat.	$2.30
7	Minister for Planning v Moolarben Coal Mines Pty Ltd	[2010] NSWLEC 147	EP&A	$1.1m	$70,000	41,000m^2, some EEC.	$1.71
8	Department of Environment & Climate Change v Sommerville	[2009] NSWLEC 194	NPW	$1,870,000	$30,000	20,000-24,000m^2 of EEC.	$1.25-$1.50

No	Case	Citation	Act	Max. penalty	Fine	Area cleared	Fine/m^2
9	Corbyn v Walker Corporation Pty Ltd	[2012] NSWLEC 75	NV	$1.1m	$80,000	73,000m^2 including 2 EECs.	$1.10
10	Chief Executive, Office of Environment and Heritage v Kyluk Pty Limited (No 3)	[2012] NSWLEC 56	NPW	$220,000	$127,500 (s205(1)(d) order in lieu of fine)	124,500m^2 of EEC.	$1.02
11	Director General, Department of the Environment and Climate Change v Olmwood (No 2)	[2010] NSWLEC 100	NV	$1.1m	$100,000	Less than 100,000m^2	Less than $1.00
12	Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 4)	[2011] NSWLEC 119	NV	$1.1m	$200,000	230,000m^2	$0.87
13	Director-General of the Department of Environment, Climate Change and Water v Graymarshall Pty Ltd (No. 2)	[2011] NSWLEC 149	NV	$1.1m	$200,000	380,000m^2 (20,000m^2 of EEC). Likely habitat for threatened fauna species.	$0.53
14	Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd	[2010] NSWLEC 144	NPW	$220,000	$15,000	37,000m^2, koala habitat.	$0.41
15	Bentley v BGP Properties Limited	[2006] NSWLEC 34	NPW	$55,000	$40,000	190,500m^2, incl. approx. 2000 threatened plants.	$0.21
16	Chief Executive, of the Office of Environment and Heritage v Newbigging	[2013] NSWLEC 144	NV	$1.1m	$112,000	600,000m^2, some EEC. Habitat for threatened fauna.	$0.19
17	Chief Executive, Office of Environment and Heritage, Department of Premier and Cabinet v Powell	[2012] NSWLEC 129	NV	$1.1m	$120,000	650,000m^2. Koala habitat.	$0.18

No	Case	Citation	Act	Max. penalty	Fine	Area cleared	Fine/m^2
18	Bentley v Gordon	[2005] NSWLEC 695	NPW	$55,000	$30,000	190,500m^2, incl. approx. 2000 threatened plants.	$0.16
19	Director-General, Department of Environment Climate Change and Water v Vin Heffernan Pty Limited	[2010] NSWLEC 200	NV	$1.1m	$30,150	220,000m^2	$0.14
20	Director-General Department of Environment and Climate Change v Wilton	[2008] NSWLEC 297	NVC x 2	$2.2m	$40,000	310,000m^2, habitat for threatened bird species.	$0.13
21	Chief Executive, Office of Environment and Heritage v Kennedy	[2012] NSWLEC 159	NV	$1.1m	$40,000	324,800m^2 incl. some EEC.	$0.12
22	Director-General, Dept of Environment and Climate Change v Calman Australia Pty Ltd	[2009] NSWLEC 182	NV	$1.1m	$22,000	210,000m^2, potential habitat for threatened birds.	$0.10
23	Director-General, Dept of Environment and Climate Change v Iroch Pty Ltd	[2009] NSWLEC 182	NV	$1.1m	$22,000	210,000m^2, potential habitat for threatened birds.	$0.10
24	Director-General, Dept of Environment and Climate Change v GD & JA Williams Pty Ltd t-as Jerilderie Earthmoving	[2009] NSWLEC 182	NV	$1.1m	$22,000	210,000m^2, potential habitat for threatened birds.	$0.10
25	Chief Executive of the Office of Environment and Heritage v Humphries	[2013] NSWLEC 213	NV	$1.1m	$67,500	890,000m^2 of EEC, habitat for threatened fauna.	$0.08
26	Director-General of the Department of Environment and Climate Change v Hudson	[2009] NSWLEC 4	NV	$1.1m	$400,000	4,860,000m^2	$0.08
27	Director-General of the Department of Environment and Climate Change v Taylor	[2007] NSWLEC 530	NVC	$1.1m	$20,000	305,000m^2 of a number of EECs & habitat of 5 threatened fauna species.	$0.07

No	Case	Citation	Act	Max. penalty	Fine	Area cleared	Fine/m^2
28	Director-General of the Department of Environment and Climate Change v Rae	[2009] NSWLEC 137	NV	$1.1m	$160,000	2,150,000m^2. Known habitat for threatened fauna.	$0.07
29	Director General, Department of Environment, Climate Change and Water v Linklater	[2011] NSWLEC 30	NVC	$1.1m	$82,500	1,660,000m^2 of high ecological value native vegetation. Habitat for a number of threatened fauna species.	$0.05
30	Director-General, Department of Environment and Climate Change v Mario Mura	[2009] NSWLEC 233	NV	$1.1m	$5,000	120,000m^2, high proportion of understorey and groundcover vegetation cleared, canopy trees left. Three EECs.	$0.04
31	Eurobodalla Shire Council v Christenssen	[2008] NSWLEC 134	EP&A	$1.1m	$750	19,126m^2	$0.04
32	Chief Executive, Office of Environment and Heritage v Rummery	[2012] NSWLEC 271	NV	$1.1m	$80,040	2,390,000m^2 including some EEC.	$0.03
33	Director General, Department of the Environment Climate Change and Water v Ian Colley Earthmoving	[2010] NSWLEC 102	NV	$1.1m	$5,000	290,000m^2 thinned by about 60%, some species part of EEC, high quality habitat for several threatened species.	$0.02
34	Director-General, Department of Environment and Climate Change v Jack & Bill Issa Pty Ltd (No 6)	[2010] NSWLEC 43	NV	$1.1m	Section 10A conviction	120,000m^2, high proportion of understorey and groundcover vegetation cleared, canopy trees left. Three EECs.	N/A
35	Blue Mountains City Council v Carlon	[2008] NSWLEC 296	EP&A	$1.1m	Section 10A conviction	4,000m^2	N/A
36	Hornsby Shire Council v Benson	[2007] NSWLEC 199	EP&A	$1.1m	Section 10(1)(b)	4,200m^2	N/A
37	Blue Mountains City Council v Tzannes	[2009] NSWLEC 19	EP&A	$1.1m	Section 10(1)(a)	4,000m^2	N/A
38	Department of Environment & Climate Change v Ianna	[2009] NSWLEC 194	NPW	$1,870,000	Section 10A conviction	20,000-24,000m^2 of EEC.	N/A
39	Garrett, Stephen v Langmead, Patsy	[2006] NSWLEC 627	NPW	$220,000	Section 10(1)(a)	6,000m^2, incl approx. 7 trees part of an EEC.	N/A

Table 6.3 demonstrates that the sentences imposed under the *Native Vegetation Conservation Act* and the *Native Vegetation Act*, despite being relatively high in absolute terms, are relatively low on a dollar per square metre basis in comparison to the sentences imposed for land clearing offences against the *EP&A Act* and the *National Parks and Wildlife Act*. This is reinforced when it is remembered that the fines imposed under the *EP&A Act* and the *National Parks and Wildlife Act* would be larger if the cost to the offender of additional orders was included.

Table 6.3 also demonstrates that there is a very broad range of fines when considered on a dollar per square metre basis, from a high of $304.88 to a low of $0.02. Even if the highest fine per square metre of $304.88 is excluded as an outlier, the range still extends from $18.63 to $0.02 per square metre cleared, a ratio of almost one thousand to one. This degree of disparity appears extraordinary and likely greater than can be justified by reference to other sentencing considerations.

4.3 Comparison to Bartel's study

As discussed in Chapter 1, very few Australian studies have been conducted into sentencing for environmental offences. One such study is Bartel's 2003 analysis of sentencing for land clearing offences under SEPP 46 and the *Native Vegetation Conservation Act* in the LEC.[368] The analysis and findings in this Chapter allow comparison with Bartel's observations and findings.

Bartel considered eight LEC sentences in which a fine was imposed. She found that the penalties imposed were likely too low to provide an effective deterrent, particularly given the potential for economic return from the unlawfully cleared land. Her study considered the fines imposed on a dollar per hectare basis, easily converted into a dollar per square metre format for comparison with Table 6.3. For the eight cases in which a fine was imposed the dollar per square metre calculation produces very low figures: $0.03 per square metre in the cases of *Department of Land and Water Conservation v Stanley Arthur Jones* and *Department of Land and Water Conservation v Duncan Maxwell Cameron*, $0.01 in the case of *Director-General Land &*

[368] Bartel, above n 2.

Water Conservation v Tony Rial, and less than $0.01 in the remaining five cases.[369] In one case, the lowest figure of the eight, the dollar per square metre value was $0.0008 or less than one tenth of a cent.[370] By comparison, the lowest dollar per square metre value in Table 4 is $0.02. This demonstrates that fines have become larger since 2003, although it does not reveal whether this rise was due to the increase in the maximum penalty or a change in sentencing practice, or both.

Bartel attributed these low fines in part to excessive weight being given to mitigating factors, as few offenders were recidivists and many were considered pillars of their communities.[371] This supports the finding of this Chapter that proportionality is being distorted by excessive weight being given to mitigating factors in sentencing.

In an updated version of her paper published in 2008, Bartel considered the then recent sentence in *Taylor*, criticised above for a disproportionately low penalty.[372] *Taylor* is the only sentence considered both by this Chapter and by Bartel. In her 2008 paper Bartel noted that *Taylor* was the highest fine yet imposed, on a dollar per hectare basis, and expressed optimism that it might be "a sign that a more moral-based regard for illegal land clearance is developing, and that sentencing is moving through a transition phase of norm development from status quo to new horizon".[373] Nonetheless it was noted by Bartel that the fine in *Taylor* remained substantially lower than fines for clearing native vegetation under both the *National Parks and Wildlife Act* and the *EP&A Act*, in accord with the finding of this Chapter.

[369] *Department of Land and Water Conservation v Stanley Arthur Jones* [1998] NSWLEC 51; *Department of Land and Water Conservation v Duncan Maxwell Cameron* [1998] NSWLEC 236; *Director-General Land & Water Conservation v Tony Rial* [1998] NSWLEC 72; *Director-General of the Department of Land & Water Conservation v Nunkeri Pastoral Pty Limited* [1998] NSWLEC 6; *Department of Land & Water Conservation v Orlando Farms Pty Limited* (1998) 99 LGERA 101; *Department of Land and Water Conservation v Warroo (Lands) Pty Ltd* [2002] NSWLEC 10; *Director-General Department of Land & Water Conservation v Bungle Gully Pty Limited* [1997] NSWLEC 112; *Director-General Department of Land and Water Conservation v Ronald Lewis Greentree* [1998] NSWLEC 30.
[370] *Department of Land and Water Conservation v Warroo (Lands) Pty Ltd* [2002] NSWLEC 10.
[371] Bartel, above n 2, 4
[372] Ibid.
[373] Ibid 8.

Section 5 Conclusion

Detailed consideration of the sentences imposed during the research period under both the *Native Vegetation Act* and the *Native Vegetation Conservation Act* reveals disproportionality in a number of cases. The majority of sentences appear to be reasonably proportionate.

The chief cause of disproportionality in the minority of cases which exhibit it is excessive weight being given to mitigating factors, or the absence of such factors. When undue weight is given to these factors then the disparity between penalty and environmental harm becomes greater than can be justified, with the consequence that at times offences with high levels of harm attract lesser penalties than offences with much lower levels of harm.

Comparison of land clearing offences under the *Native Vegetation Act* and the *Native Vegetation Conservation Act* with land clearing offences under both the *EP&A Act* and the *National Parks and Wildlife Act* also reveals significant disproportionality. When penalties are considered on a dollar per square metre basis, an imperfect but nonetheless useful method of comparison, very significant disparities are revealed. Offences under the *Native Vegetation Act* and the *Native Vegetation Conservation Act* appear to be regarded as less serious than land clearing offences under the other Acts. Whilst penalties under the *Native Vegetation Act* and the *Native Vegetation Conservation Act* are high in absolute terms compared to penalties imposed under the other Acts considered by this thesis, they are low relative to the degree of environmental harm.

Chapter 7: Sentences for offences under section 120 of the *Protection of the Environment Operations Act 1997* (NSW)

Chapter abstract

When judges of the LEC sentence criminal offenders the law requires them to impose penalties which conform with the law of proportionality in criminal sentencing. This Chapter seeks to determine whether sentences imposed by the LEC for water pollution offences under the *POEO Act* during the research period so conform. It does so using the test for proportionality developed in Chapter 3. It finds that whilst most sentences appear to have a reasonably proportionate relationship between penalty and environmental crime, nine sentences that fall into the High Penalty range do not. Eight of these sentences fit a similar pattern of low or no actual environmental harm, and cannot be reconciled with other sentences with significant actual harm and lower or comparable penalties. In the ninth sentence, the high penalty and low environmental harm is explained by a high order for legal costs, the proceedings having been unusually lengthy and complex. These findings contribute to addressing the second research question.

Contents

Section 1 Introduction

1.1 Introduction

In Chapter 3 this thesis examined the law on proportionality in the context of criminal sentencing in the LEC, with the intention of determining what "proportionality" means. It concluded by formulating a three-step test for proportionality in sentencing. This Chapter is the last of four chapters which seek to apply that test to a specific offence type. This Chapter attempts to use that test to determine whether or not the sentences imposed for offences under section 120 of the *POEO Act* in the LEC during the research period conform with the law on proportionality in sentencing. In doing so it seeks to address the second research question, namely whether criminal sentences imposed by the LEC are proportionate in practice.

The test for proportionality is a three-step test. The first step asks whether the penalty is reasonably proportionate to the environmental harm caused by the offence, measured by comparison to other sentences for like or very similar offence types. In order to implement this first step, the method adopted by this thesis has been to rank by penalty severity and then categorise by environmental harm. This first step identifies a number of sentences as having a disproportionate relationship between penalty and environmental harm.

For these sentences, the second step is to ask whether the disproportionality between penalty and environmental harm is justified by sentencing considerations other than environmental harm. If the answer is no, then the sentence is disproportionate. This requires consideration of the detail of the sentences.

If the answer to the second step is yes, then the third step is to ask whether the penalty is nonetheless more severe or more lenient than the objective gravity of the offence demands. If the answer is yes then the sentence is disproportionate, if the answer is no then the sentence is proportionate.

This Chapter proceeds in four sections. Section 1 provides this introduction as well as an introduction to the *POEO Act*. Section 2 applies step one of the proportionality test to the sentences under consideration, and considers criteria to assess environmental harm which are appropriate to water pollution offences. Section 3 applies the second and third steps of the proportionality test, and contains this Chapter's findings. Section 4 concludes the Chapter.

1.2 The POEO Act

The *POEO Act* is the statutory instrument which regulates pollution in NSW. Its provisions cover water and air pollution as well as waste disposal. More sentences were imposed under the *POEO Act* during the research period than any other Act.

For the reasons discussed in Chapter 2, this Chapter considers only those sentences imposed during the research period for an offence against section 120 of the Act. More sentences were imposed for breaches of section 120 during the research period than any other *POEO Act* offence, and this Chapter considers fifty-eight sentences.[374] This is a significantly greater number of sentences than considered by other chapters of this thesis.

Section 120 of the *POEO Act* is concerned with water pollution. The section states:

> "**120 Prohibition on pollution of waters**
>
> (1) A person who pollutes waters is guilty of an offence.
>
> (2) In this section:
>
> ***pollute*** waters includes cause or permit any waters to be polluted."

[374] Tables 1 and 2 list 58 sentences. *Environment Protection Authority v Wattke* and *Environment Protection Authority v Geerdink* have been separated into two sentences. These two men were co-offenders to the same offence but have different subjective characteristics.

The Dictionary to the *POEO Act* defines the relevant terms both broadly and extensively. Pollution of waters under the Act includes certain actions that only risk polluting water. The threshold for pollution is very low, and "waters" is defined so broadly that it includes any water stored in artificial works, which including tanks, pipes and even swimming pools:

> "***water pollution*** or ***pollution of waters*** means:
>
> (a) placing in or on, or otherwise introducing into or onto, waters (whether through an act or omission) any matter, whether solid, liquid or gaseous, so that the physical, chemical or biological condition of the waters is changed, or
> (b) placing in or on, or otherwise introducing into or onto, the waters (whether through an act or omission) any refuse, litter, debris or other matter, whether solid or liquid or gaseous, so that the change in the condition of the waters or the refuse, litter, debris or other matter, either alone or together with any other refuse, litter, debris or matter present in the waters makes, or is likely to make, the waters unclean, noxious, poisonous or impure, detrimental to the health, safety, welfare or property of persons, undrinkable for farm animals, poisonous or harmful to aquatic life, animals, birds or fish in or around the waters or unsuitable for use in irrigation, or obstructs or interferes with, or is likely to obstruct or interfere with persons in the exercise or enjoyment of any right in relation to the waters, or
> (c) placing in or on, or otherwise introducing into or onto, the waters (whether through an act or omission) any matter, whether solid, liquid or gaseous, that is of a prescribed nature, description or class or that does not comply with any standard prescribed in respect of that matter,
> and, without affecting the generality of the foregoing, includes:
> (d) placing any matter (whether solid, liquid or gaseous) in a position where:
> (i) it falls, descends, is washed, is blown or percolates, or
> (ii) it is likely to fall, descend, be washed, be blown or percolate,
> into any waters, onto the dry bed of any waters, or into any drain, channel or gutter used or designed to receive or pass rainwater, floodwater or any water that is not polluted, or

(e) placing any such matter on the dry bed of any waters, or in any drain, channel or gutter used or designed to receive or pass rainwater, floodwater or any water that is not polluted,
if the matter would, had it been placed in any waters, have polluted or have been likely to pollute those waters.

waters means the whole or any part of:

(a) any river, stream, lake, lagoon, swamp, wetlands, unconfined surface water, natural or artificial watercourse, dam or tidal waters (including the sea), or
(b) any water stored in artificial works, any water in water mains, water pipes or water channels, or any underground or artesian water."

The consequence of these very broad definitions of the key terms is that the offences which are prosecuted under section 120 can vary enormously in seriousness. This Chapter includes offences in which, for example, pollution only reached as far as a dry creek bed and never came into contact with actual water, in addition to relatively serious offences where a pollutant entered a waterway and caused extensive death of aquatic life.[375]

The maximum penalties for offences against section 120 are set out in section 123. Differently to the other offences considered by this thesis, the maximum penalty is different depending on whether the offender is a corporation or an individual person. For a corporation the maximum penalty is $1,000,000, plus an additional $120,000 per day for continuing offences. For an individual the maximum is $250,000, plus an additional $60,000 per day for continuing offences. The research did not identify any instances of daily penalties being applied for an offence against section 120.

It is important to note that the maximum penalties for this offence changed during the research period. The *Protection of the Environment Operations Amendment Act 2005* (NSW), which commenced on 1st May 2006, increased the maximum penalties

[375] For example, *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419; *Environment Protection Authority v Straits (Hillgrove) Gold Pty Ltd* [2010] NSWLEC 114.

sharply. Prior to 1st May 2006, the maximum penalty for a corporation was $250,000, plus a maximum of $120,000 per day for a continuing offence, and the maximum penalty for an individual person was $120,000, plus a maximum daily penalty of $60,000 for a continuing offence. The lower maxima were thus in place for almost two and a half years, or twenty-five per cent, of the ten-year research period.

The *POEO Act* contains a wide range of additional orders than can be imposed on sentence, which are discussed further below. In addition the Act gives the Environment Protection Authority (EPA) wide powers to issue clean-up notices that compel an owner or occupier of premises to clean up a pollution incident that is occurring or has occurred.[376] The significance of these powers will be discussed below in Section 4.

[376] *Protection of the Environment Operations Act 1997* (NSW), Part 4.2.

Section 2 Step one: Is the penalty reasonably proportionate to the environmental harm caused by the offence?

This Section applies the first step of the proportionality test – the assessment of whether or not penalty is disproportionate to environmental harm – to the sentences considered by this Chapter. In order to compare penalty to environmental harm it is first necessary to evaluate both.

2.1 Evaluating penalty

In order to compare penalty to environmental harm it is necessary to understand the quantum of the penalty in each sentence. In the sentences considered by this Chapter the sentencing judge has imposed a fine expressed in dollar terms, which is straightforward to understand. As was the case for the previous three chapters however, the total penalty however is broader in scope than the fine alone. Understanding the quantum of the total penalty is complicated by orders for the offender to pay the legal costs of the prosecutor ("costs orders") and also by additional orders of various types.

2.1.1 Costs orders

Costs orders formed a part of the penalty in all fifty-eight sentences considered by this Chapter. The complexity which this introduces for proportionality, as discussed in Chapter 4 in the context of the *EP&A Act*, applies equally to sentences under the *POEO Act*. It need not be repeated here.

2.1.2 Additional orders

Part 8.3 of the *POEO Act* sets out the court orders than can be imposed in connection with an offence. The types of order are numerous, and in the interest of brevity only those orders which were imposed in sentences considered by this Chapter will be described, with the exception of section 245 orders. Section 245 orders allow the LEC to compel an offender to "prevent, control, abate or mitigate" the environmental harm

caused by an offence, or to make good any resulting environmental damage or to prevent continuance or recurrence of the offence. These orders are intended to reduce the specific environmental harm caused by the offence, and as such are most analogous to remediation orders under section 126 of the *EP&A Act* and section 200 of the *National Parks and Wildlife Act*. The most interesting aspect of section 245 orders, from the perspective of this thesis, is that none were imposed in the sentences this Chapter considers. This is in contrast to Chapter 4, which saw remediation orders imposed in twelve out of thirty-eight sentences under the *EP&A Act*, and to Chapter 5, which saw section 200 orders imposed in two out of twenty sentences under the *National Parks and Wildlife Act*. Possible explanations for this difference will be explored in Section 4 below.

Other types of order were found in the sentences considered by this Chapter. Section 246 provides for orders that the offender pay a regulatory authority's costs of cleaning up a pollution incident. Section 248 provides for orders for an offender to pay to a regulatory authority the costs and expenses incurred during the investigation of an offence. Such orders are described as "investigation costs orders" in this Chapter. Section 250 contains a range of orders that are similar to those in section 205 of the *National Parks and Wildlife Act*. Sub-section 250(1)(a) makes provision for publication orders. Sub-section 250(1)(b) provides for notification orders, under which the offender is compelled to notify a specified person or classes of persons of the offence and its consequences. Sub-section 250(1)(c) provides for an order to compel an offender to carry out a specified environmental restoration or enhancement project in a public place or for the public benefit. Finally, sub-section 250(1)(e) allows the LEC to compel an offender to pay a specified amount to a specified organisation for the purposes of a specified project for the restoration or enhancement of the environment. This final type of order is used relatively frequently in the sentences considered by this Chapter.

These additional orders are capable of creating the same difficulties for evaluating penalty as do remediation orders under the *EP&A Act* and additional orders under the *National Parks and Wildlife Act*. They can render sentences difficult or impossible to compare, particularly when they are not quantified in monetary terms. Publication

orders were imposed in twenty-four of the fifty-eight sentences considered by this Chapter, without the cost to the offender being quantified once. Given the high frequency with which publication orders were imposed in the sentences considered by this Chapter, and the fact that such orders are never quantified in monetary terms, this consideration is particularly relevant to this Chapter. In *Environment Protection Authority v Cargill Australia Limited*, with respect to publication orders under the *POEO Act*, Pain J stated:

> "The Prosecutor's policy relating to the circumstances in which it seeks publication orders for environmental offences is, based on the cases before me, frankly not entirely clear to the Court."[377]

Pain J's statement is important because it highlights the role played by prosecutorial policy. If the prosecutor does not seek a publication order then it will not be imposed by the Court.

Other order types were quantified in monetary terms. Orders for investigation costs were imposed in thirty-two of fifty-eight sentences, and only once was the quantum of investigation costs not specified.[378] Two orders were imposed under sub-section 250(1)(c) and both provided a specific dollar amount or limit. Fifteen orders were imposed under sub-section 250(1)(e) and all fifteen specified the financial cost to the offender. Notification orders under sub-section 250(1)(b) carry zero, or only nominal, financial cost to an offender and so are not relevant in this context.

Consequently, additional orders pose less of an overall challenge to the evaluation of penalty size than for those sentences which were considered under the *EP&A Act* and the *National Parks and Wildlife Act*.

[377] *Environment Protection Authority v Cargill Australia Limited* [2007] NSWLEC 337 [42].
[378] 1) In *Environment Protection Authority v Wattke* and *Environment Protection Authority v Geerdink* the quantum of investigation costs was specified but was a total amount for the section 120 offences and the more serious section 115(1) offences. It is not possible to allocate those costs between the different offences.
2) In *Environment Protection Authority v CSR Building Products Limited* the offender was ordered to pay a sum of $83,400 as "246/248" costs, that is a combination of clean up and investigation costs.

As previously discussed in the context of the *EP&A Act* and the *National Parks and Wildlife Act*, additional orders can lead to penalties being reduced in a way that is not transparent or predictable. Section 244(2) of the *POEO Act* states that "orders may be made … in addition to any penalty that may be imposed or any other action that may be taken in relation to the offence", which suggests that they are additional to penalty. This is the same language used by section 199(2) of the *National Parks and Wildlife Act*, and is in contrast to section 126 of the *EP&A Act* which allows them to be either additional or in substitution for a pecuniary penalty. However in in the 2007 case *Environment Protection Authority v Hardt* Preston CJ stated at [65]:

> "… I am of the opinion that an appropriate fine for this offence is $12,000. In fixing this amount I have also taken into account the financial costs that would be incurred in carrying out the orders for restoration of the environment under s 245 of the *Protection of the Environment Operations Act*. Mr Lane estimated those costs to be in the order of $55,000. The defendant estimated that it may cost around $30,000 if he can use his own and his friends' labour and minimise the amount of imported fill. Accordingly, the financial costs of carrying out these orders should be taken into account in fixing the amount of the fine."[379]

Thus in *Hardt* Preston CJ reduced the fine that he ultimately imposed because of the section 245 order, even though the cost of that order to the offender was uncertain. Whilst *Hardt* was not a water pollution case, it was a sentence for a *POEO Act* offence and the same provisions apply.

2.1.3 Ranking by penalty

In order to facilitate comparison between penalty size and environmental harm it is desirable to rank the penalties by size. This will make the comparison with environmental harm more straightforward.

[379] *Environment Protection Authority v Hardt* [2007] NSWLEC 284.

Table 7.1 below ranks the fifty-eight sentences by penalty. In doing so the financial burden to the offender of costs orders and unquantified additional orders has been included as far as it is possible to do so.

For the same reason as in the previous three chapters - the ranking process is imperfect because the information upon which it is based is incomplete - the cases are instead sorted into three categories: high, moderate and low penalty. There is no fourth category of no conviction is recorded under section 10 of the *Crimes (Sentencing Procedure) Act*, because there are no sentences falling into that category. The high penalty category is defined as a penalty that totals, or is very likely to total, more than $100,000. The moderate penalty category is a penalty that totals, or is very likely to total, between $50,000 and $100,000. The low penalty category is a penalty that totals, or is very likely to total, below $50,000.

These categories of penalty are the same as those applied to the *EP&A Act*, the *National Parks and Wildlife Act* and the *Native Vegetation Conservation Act / Native Vegetation Act*, thereby allowing comparison of penalty size between Acts.

In Table 7.1 the maximum penalty which applied to the sentence is listed. Not only did the maxima increase from 1 May 2006, there were different maxima for corporations and individual persons throughout the research period. Given the yardstick role played by maximum penalties, it is important to bear the maximum penalty in mind when seeking to compare two or more penalties.[380] Where an offender was sentenced for more than one offence against section 120 that is indicated in the same column (for example, $250,000 x 2 indicates two offences each with a maximum penalty of $250,000).

Each additional order for which no cost was stipulated or estimated in the written judgment has each been footnoted, and a brief summary of the order provided in the footnote, in order to allow the reader to assess the likely financial cost to the offender.

[380] The term "yardstick" comes from the High Court authority of *Markarian v The Queen* [2005] HCA 25 at [31].

Table 7.1 – Sentences imposed for offences against section 120 of the *POEO Act* in the research period ranked by penalty size in total dollar terms into three categories: high penalty, moderate penalty and low penalty. Estimations of costs orders and additional orders are as indicated in the text of the sentence judgment. Assumptions as to costs orders are based on comparisons undertaken by the author.

No	Case	Citation	Max	Penalty
HIGH PENALTY				
1	Environment Protection Authority v Queanbeyan City Council (No 3)	[2012] NSWLEC 220	$1m	250(1)(e) order $80,000 plus investigation costs $1,189 plus 250(1)(a)[381] order plus costs $343,000
2	Environment Protection Authority v CSR Building Products Limited	[2008] NSWLEC 224	$1m	$280,000 plus 246/248 costs $83,400 plus costs $75,000
3	Environment Protection Authority v Ramsey Food Processing Pty Ltd	[2010] NSWLEC 23	$1m x2	$50,000 plus investigation costs $13,000 plus 250(1)(a)[382] order plus costs estimated >$200,000
4	Environment Protection Authority v Tea Garden Farms Pty Ltd	[2012] NSWLEC 89	$1m	250(1)(e) order $77,000 plus investigation costs $1,500 plus 250(1)(a)[383] order plus costs $120,000
5	Environment Protection Authority v Moolarben Coal Operations Pty Ltd (No 2)	[2012] NSWLEC 80	$1m	$112,500 plus 250(1)(a)[384] order plus costs $63,000
6	Environment Protection Authority v Fulton Hogan Pty Ltd	[2008] NSWLEC 268	$1m	$100,000 plus investigation costs $2,000 plus costs $84,000
7	Environment Protection Authority v Snowy Hydro Ltd	[2008] NSWLEC 264	$1m	$100,000 plus investigation costs $2,000 plus costs $84,000
8	Environment Protection Authority v Moolarben Coal Operations Pty Ltd	[2012] NSWLEC 65	$1m	$105,000 plus investigation costs $9,000 plus 250(1)(a)[385] order plus costs $53,000
9	Environment Protection	[2008] NSWLEC	$1m	250(1)(e) order $120,000

[381] To place a specified notice in the first twelve pages of the early general news section of The Sydney Morning Herald, The Canberra Times and The Queanbeyan Age at a minimum size of 10cm by 20cm.
[382] To place a specified notice in the first twelve pages of the early general news section of The Sydney Morning Herald at a minimum size of 10cm by 20cm and in the first five pages of The Daily Examiner (Grafton) at a minimum size of one-quarter of a page.
[383] To place a specified notice within the first twelve pages of The Sydney Morning Herald at a minimum size of 10cm by 20cm and the Newcastle Herald at a minimum size of a quarter page.
[384] To place a specified notice within the first twelve pages of The Sydney Morning Herald and the Mudgee Guardian at a minimum size of 10cm by 20cm.
[385] To place a specified notice within the first twelve pages of The Sydney Morning Herald and the Mudgee Guardian at a minimum size of 10cm by 20cm.

No	Case	Citation	Max	Penalty
	Authority v Baiada Poultry Pty Limited	280		plus investigation costs $5,000 plus 250(1)(a)[386] order plus costs $30,000
10	Environment Protection Authority v Goulburn Wool Scour Pty Limited	[2005] NSWLEC 206	$250K	250(1)(c) order capped at $20,000 plus costs $125,000
11	Environment Protection Authority v Centennial Newstan Pty Ltd	[2010] NSWLEC 211	$1m	250(1)(e) order $105,000 plus investigation costs $10,000 plus 250(1)(a)[387] order plus costs $28,500
12	Environment Protection Authority v Nowra Chemical Manufacturers Pty Ltd	[2008] NSWLEC 187	$1m	250(1)(e) order $100,000 plus 250(1)(a)[388] order plus costs $28,000
13	Environment Protection Authority v Sibelco Australia Limited	[2011] NSWLEC 160	$1m	250(1)(e) order $78,000 plus investigation costs $10,000 plus 250(1)(a)[389] order plus costs $25,000
14	Environment Protection Authority v Waste Recycling and Processing Corporation	[2006] NSWLEC 419	$250K	$75,000 plus investigation costs $7,240 plus 250(1)(a)[390] order plus costs $39,500
15	Environment Protection Authority v Cleary Bros (Bombo) Pty Limited	[2007] NSWLEC 466	$250K	$16,000 plus investigation costs $7,000 plus costs $104,000
16	Fairfield City Council v TT Rubbish Removal Pty Limited; Fairfield City Council v Kim Thu Nguyen	[2008] NSWLEC 201	$1m x6 $250K x 6	$45,000 plus costs $69,000
17	Environment Protection Authority v George Weston Foods Ltd	[2010] NSWLEC 120	$1m	250(1)(e) order $67,000 plus investigation costs $12,000 plus 250(1)(a)[391] order plus costs $18,000
18	Environment Protection Authority v Chillana Pty Ltd	[2010] NSWLEC 255	$1m	250(1)(c) order $60,000 plus investigation costs $16,000 plus 250(1)(a)[392] order plus unstated costs which are assumed to total more than $24,000 based upon comparable cases

[386] To place a specified notice in the first twelve pages of the early general news section of The Sydney Morning Herald, the Northern Daily Leader and the Financial Review at a minimum size of 8cm by 12cm.
[387] To place a specified notice in the first twelve pages of the early general news sections of The Sydney Morning Herald and the Newcastle Herald at a minimum size of 10cm by 20cm.
[388] To place a specified notice within the first twelve pages of the South Coast Register and The Sydney Morning Herald in the early general news section at a minimum size of 10cm by 20cm.
[389] To place a specified notice in the first five pages of the Singleton Argus, the Scone Advocate and Australian Mining monthly magazine at a quarter of a page in size.
[390] To place a specified notice in the early general news section of the The Sydney Morning Herald of at least 16cm high by three columns wide. To publish a specified notice in the offender's 2005-2006 Annual Report, at least half a page in size.
[391] To place a specified notice in the first twelve pages of the early general news section of The Sydney Morning Herald, the Northern Daily Leader and the Financial Review at a minimum size of 8cm by 12cm.
[392] To place a specified notice in the first twelve pages of the Daily Liberal at a minimum size of 10cm by 20cm and the Coonabarabran Times at a minimum size of one-quarter of a page.

No	Case	Citation	Max	Penalty
				and the details of the order
19	Environment Protection Authority v Austar Coal Mine Pty Ltd	[2011] NSWLEC 252	$1m	250(1)(e) order $75,000 plus investigation costs $17,000 plus costs $25,000
20	Environment Protection Authority v Big River Group Pty Ltd	[2011] NSWLEC 80	$1m	$67,000 plus investigation costs $25,000 plus costs $35,000
21	Environment Protection Authority v Peak Gold Mines Pty Limited	[2013] NSWLEC 158	$1m	250(1)(e) order $50,000 plus investigation costs $4,500 plus 250(1)(a)[393] order plus costs $52,000
22	Environment Protection Authority v Coal and Allied Operations Pty Ltd	[2013] NSWLEC 134	$1m	$45,000 plus 250(1)(a)[394] order plus costs $51,000. Order assumed to have total cost greater than $4,000.
MODERATE PENALTY				
23	Environment Protection Authority v Integral Energy Australia Pty Ltd	[2006] NSWLEC 141	$250K	$26,250 plus investigation costs $2,471 plus 250(1)(a)[395] order plus costs $50,000. Order has no cost to offender.
24	Environment Protection Authority v Ravensworth Operations Pty Limited	[2012] NSWLEC 222	$1m	$50,000 plus investigation costs $2,000 plus 250(1)(a)[396] order plus costs $26,500. Order assumed to total less than $21,800.
25	Environment Protection Authority v Centennial Newstan Pty Ltd	[2006] NSWLEC 732	$250K	250(1)(e) order $50,000 plus 250(1)(a)[397] order plus costs $28,000. Order assumed to total less than $22,000.
26	Environment Protection Authority v Boral Australian Gypsum Limited	[2009] NSWLEC 26	$1m	$58,500 plus investigation costs $3,000 plus costs $20,000
27	Environment Protection Authority v BHP Steel (AIS) Pty Limited	[2004] NSWLEC 37	$250K	$60,000 plus unstated costs which are assumed to be less than $40,000 based upon comparable cases
28	Environment Protection	[2012] NSWLEC	$1m	$30,000 plus investigation

[393] To place a specified notice in The Sydney Morning Herald, the Dubbo Daily Liberal and the Cobar Weekly at a minimum size of 8cm by 12cm.
[394] To place a specified notice in the Singleton Argus, the Newcastle Herald and Australian Mining magazine at a quarter of a page size.
[395] To publish a specified notice in the Environmental Performance section of the offender's 2005-2006 annual report.
[396] The written judgment states that the parties have agreed the terms of a publication order and it states "I will make such an order when the final orders are made". As such the details are not provided.
[397] To place a specified notice in the first twelve pages of the early general news section of The Sydney Morning Herald at a minimum width of 137mm and in the first five pages of the Newcastle Herald at a minimum size of one-quarter of a page.

No	Case	Citation	Max	Penalty
	Authority v Pipeline Drillers Group Pty Ltd	18	x2	costs $15,000 plus 250(1)(a)[398] order plus costs $29,000. Order assumed to total less than $26,000.
29	Environment Protection Authority v Hochtief AG and Thiess Pty Limited	[2007] NSWLEC 177	$250K	$45,000 plus 250(1)(a)[399] order plus costs $24,000. Order assumed to cost less than $31,000.
30	Environment Protection Authority v Straits (Hillgrove) Gold Pty Ltd	[2010] NSWLEC 114	$1m	$50,000 plus investigation costs $13,000 plus costs $11,000
31	Shoalhaven City Council v DP Druce P/L	[2005] NSWLEC 123	$250K	$30,000 plus costs $40,000
32	Environment Protection Authority v Tyco Water Pty Ltd	[2005] NSWLEC 453	$250K	$50,000 plus unstated costs which are assumed to be less than $50,000 based upon comparable cases.
33	Environment Protection Authority v Hanson Precast Pty Limited	[2008] NSWLEC 285	$1m	$50,000 plus investigation costs $4,000 plus costs $18,000
34	Environment Protection Authority v Cargill Australia Limited	[2007] NSWLEC 337	$250K	$37,500 plus investigation costs $7,550 plus costs $22,450
35	Environment Protection Authority v Allied Industrial Services Pty Ltd	[2005] NSWLEC 501	$250K	$25,000 plus costs $19,000 plus investigation expenses $12,000
36	Environment Protection Authority v Albury City Council	[2009] NSWLEC 169	$1m	$45,500 plus costs $18,000
37	Environment Protection Authority v M A Roche Group Pty Ltd; Environment Protection Authority v Roche	[2013] NSWLEC 191	$1m x2	$22,000 plus investigation costs $15,000 plus 250(1)(a)[400] order plus costs $24,500. Order assumed to total less than $38,500.
38	Environment Protection Authority v Nalco Australia Pty Ltd	[2007] NSWLEC 831	$1m	250(1)(e) order $50,000 plus 250(1)(a)[401] order plus costs $10,000. Order assumed to total less than $40,000.
39	Environment Protection Authority v Illawarra Coke Company Pty Limited	[2005] NSWLEC 296	$250K	$40,000 plus costs $20,000
40	Wollongong City Council v Belmorgan Property Development Pty Limited	[2008] NSWLEC 291	$1m	$40,000 plus unstated costs which are assumed to exceed $10,000 based

[398] To place a specified notice in the first six pages of the Port Macquarie News at quarter page size and in the Australian Pipeliner at one-third page size.
[399] To place a specified notice in the first twelve pages of the early general news section of The Sydney Morning Herald at a minimum size of 10cm by 20cm.
[400] To place a specified notice in the first five pages of the Port Macquarie Independent, the Port Macquarie News, the Port Macquarie Express, the Newcastle Herald, The Land, the Manning River Times and the Manning Great Lakes Extra at a minimum size of 10cm by 20cm.
[401] To place a specified notice in the early general news section of The Southern Courier and The Sydney Morning Herald.

No	Case	Citation	Max	Penalty
				upon comparable cases
41	Environment Protection Authority v Arenco Pty Limited	[2006] NSWLEC 244	$250K x 2	250(1)(e) order $26,000 plus 250(1)(a)[402] order plus costs $25,000. Order assumed to total less than $49,000.
42	Environment Protection Authority v Abigroup Contractors Pty Limited	[2007] NSWLEC 712	$250K	250(1)(e) order $20,000 plus 250(1)(a)[403] order plus costs $30,000. Order assumed to total less than $50,000.
43	Environment Protection Authority v Ross	[2009] NSWLEC 36	$250K	$18,000 plus investigation costs $12,000 plus 250(1)(b)[404] order plus costs $23,000. Order brings no cost to offender.
44	Gosford City Council v Australian Panel Products Pty Ltd	[2009] NSWLEC 77	$1m	$25,000 plus investigation costs $6,000 plus unstated costs which are assumed to exceed $19,000 based upon comparable cases
45	Environment Protection Authority v Forestry Commission of New South Wales	[2004] NSWLEC 751	$250K	$30,000 plus unstated costs which are assumed to exceed $20,000 based upon comparable cases
LOW PENALTY				
46	Greater Taree City Council v Haritomeni Nominees Pty Limited	[2004] NSWLEC 775	$250K	$18,000 plus costs $30,000
47	Environment Protection Authority v Hochtief; Thiess Pty Ltd	[2005] NSWLEC 506	$250K	$24,000 plus costs $21,000
48	Environment Protection Authority v Colenden Pty Ltd	[2007] NSWLEC 289	$250K	$25,500 plus costs $18,000
49	Environment Protection Authority v Coe Drilling Australia Pty Limited	[2005] NSWLEC 179	$250K	$18,000 plus costs $20,000
50	Environment Protection Authority v Forestry Commission of New South Wales	[2013] NSWLEC 101	$1m	250(1)(e) order $23,333 plus unstated investigation costs plus unstated costs[405] which

[402] To place a specified notice in the early general news sections of both The Sydney Morning Herald and The Western Advocate.

[403] To place a specified notice in the first twelve pages of the early general news section of The Sydney Morning Herald at a minimum width of 137mm, in the first five pages of the Echo Newspaper (Byron Bay) at a minimum size of one-quarter of a page and in the first five pages of the Northern Star (Lismore) at a minimum size of one-quarter of a page.

[404] The offender must lodge an *Adverse Experience Reporting Form* with the *Australian Pesticides and Veterinary Medicines Authority*.

[405] Forestry Commission was also sentenced for a breach of section 133(4) of the *National Parks and Wildlife Act*. The fine for the *POEO Act* offence was originally $28,000 and the fine for the *National Parks and Wildlife Act* offence $14,000, a total of $42,000. Totality reduced the total to $35,000 and Pepper J did not divide this final sum between the two offences. As the fine for the *POEO Act* offence was two-thirds of the original $42,000, it has been assumed to be two-thirds of the final fine of $35,000, which is $23,333.

No	Case	Citation	Max	Penalty
				are assumed to total less than $26,667 based upon comparable cases
51	Environment Protection Authority v Olex Australia Pty Ltd	[2005] NSWLEC 475	$250K	$15,000 plus costs $13,000
52	Fairfield City Council v Hong Son Ngo	[2008] NSWLEC 200	$250K x 6	$22,250 plus costs $4,110
53	Fairfield City Council v Florence Flowers Pty Limited	[2006] NSWLEC 707	$250K	$13,000 plus investigation costs $3,465 plus unstated costs which are assumed to be less than $33,535 based upon comparable cases
54	Environment Protection Authority v Caltex Australia Petroleum Pty Limited	[2007] NSWLEC 647	$250K	250(1)(e) order $12,000 plus 250(1)(a)[406] order plus unstated costs which are assumed to total less than $38,000 based upon comparable cases
55	Newcastle City Council v Pace Farm Eggs Products Pty Limited (No 3)	[2005] NSWLEC 423	$250K	$12,000 plus 30% of unstated costs which are assumed to be less than $38,000 based upon comparable cases
56	Environment Protection Authority v Wattke	[2010] NSWLEC 24	$250K	$10,000 plus investigation costs and unstated costs[407] which are assumed to total less than $40,000 based upon comparable cases
57	Environment Protection Authority v Geerdink	[2010] NSWLEC 24	$250K	$10,000 plus investigation costs and unstated costs[408] which are assumed to total less than $40,000 based upon comparable cases
58	Environment Protection Authority v Cut and Fill Pty Limited	[2005] NSWLEC 401	$250K	$7,800 plus unstated costs which are assumed to be less than $42,200 based upon comparable cases

[406] To place a specified notice in the first four pages of the Moree Champion and Border News at a minimum quarter page size.
[407] Wattke was also sentenced for a more serious offence under section 115(1) of the *POEO Act*. Investigation costs were awarded in the sum of $15,000 for both offences. Legal costs for both offences were estimated at $125,000 in total for both Wattke and his co-offender Geerdink.
[408] Geerdink was also sentenced for a more serious offence under section 115(1) of the *POEO Act*. Investigation costs were awarded in the sum of $15,000 for both offences. Legal costs for both offences were estimated at $125,000 in total for both Geerdink and his co-offender Wattke.

As demonstrated by Table 7.1, twenty-two cases fall into the high penalty category, twenty-three cases into the moderate penalty category and thirteen into the low penalty category. The penalties for this offence are relatively higher than those under the *EP&A Act* (where more than half were in either the low or no conviction recorded category), and broadly comparable to those under sections 118A and 118D of the *National Parks and Wildlife Act* and under the *Native Vegetation Conservation Act / Native Vegetation Act*.

The total penalties having been determined, as accurately as possible, the next step in completing the task of comparing penalty to environmental harm is to evaluate the harm in each case.

2.2 Evaluating environmental harm

As discussed in depth in Chapter 4, it is not always straightforward to quantify environmental harm and often not possible to quantify it precisely. There is inevitably a degree of subjectivity and also the practical difficulty that written sentence judgments do not always express the harm caused by the offence with sufficient precision.

For these reasons, the sentences are divided into four categories of environmental harm: serious, moderate, low and negligible. Table 7.2 below builds upon Table 7.1 by introducing a brief description of the environmental harm that accompanied each case, and then highlighting each category of harm in a different shade of grey. The serious harm category is the darkest shade and the negligible harm category is not shaded. This allows harm to be compared against the penalty categories of high, moderate and low.

To assess the degree of environmental harm in each case, criteria must be developed which are appropriate to the context of water pollution. The offences considered by this thesis under the *EP&A Act*, the *Native Parks and Wildlife Act* and the *Native Vegetation Conservation Act / Native Vegetation Act* all involved harm to native vegetation. Such harm is relatively long-lasting. If mature trees are removed, for

example, it will take some decades for those trees to be replaced even under ideal conditions. The relevant authorities can be notified weeks or even months after the offence occurred and still be able to readily observe and document the harm, and that observation and documentation can then provide the evidentiary basis for the evaluation of harm in a sentencing hearing.

The pollution of a waterway is by comparison relatively transient, other than in extreme instances. Either the flow of the waterway disperses the pollutant, or if a large body of water such as a lake is polluted then the pollutant is rapidly diluted. If the harm is not observed in the first hours or days after the offence occurred then it may not be possible for authorities to observe and document the harm at all. As a consequence there will not be a sound evidentiary basis upon which to evaluate harm in a sentencing hearing.

Further, harm that occurs to a waterway is less easily observed than harm to native vegetation. On some occasions water will be discoloured or dead fish will float on the surface, and such harm can be readily described or recorded. On other occasions the harm to aquatic life will occur under the surface of the water where it cannot be easily seen. Such harm is difficult to record and in such cases the expert evidence upon sentence is often reduced to describing the harm that would be expected to occur in a hypothetical case as a result of a pollution incident such as the one the subject of sentence. At other times expert evidence is able to rely upon scientific techniques such as the laboratory testing of water samples.

These characteristics of the harm caused by water pollution offences – transitory and often difficult to observe – are heightened when the pollution incident is swiftly cleaned up. Water pollution offences are more immediately reversible than damage to native vegetation. Whilst native vegetation may regenerate over many years, the impact of a water pollution incident can be greatly ameliorated in the hours and days after it occurs if a clean up is enacted promptly. A prompt and effective clean up can greatly reduce the harm caused by an offence, often reducing the harm to a mere potential or likelihood of harm. Consequently the harm becomes even more transitory and theoretical than otherwise would be the case.

The likelihood of pollution being cleaned up promptly is greatly increased by certain provisions of the *POEO Act*. Section 148 stipulates that a person carrying on an activity which causes a pollution incident causing or threatening to cause material harm to the environment must notify the appropriate regulatory authority as soon as practicable. A failure to do so is a criminal offence, and a person must notify of a pollution incident even if doing so might incriminate that person in a criminal offence.[409]

Once notified, the EPA has wide powers under Chapter 4 of the Act to serve environment protection notices. The EPA can issue a clean-up notice to direct a person to take such clean-up action as the EPA considers necessary, within a time period specified by the EPA.[410] Failure to comply with a clean-up notice, without a reasonable excuse, is a criminal offence.[411] In an urgent situation a clean-up notice can be given orally, provided that a written version is supplied within seventy-two hours.[412]

At sub-section 2.1 above it was observed that no orders under section 245 were imposed in the sentences considered by this Chapter. Such orders are for the remediation of the environmental harm caused by the offence. The absence of such orders is striking, given that similar orders were imposed under both the *EP&A Act* and the *National Parks and Wildlife Act*. The reason for their absence is most likely that the ability of the EPA to issue clean-up notices effectively makes them redundant. There is no utility in a court ordering an offender to repair the environmental harm caused by an offence if that harm has already been cleaned up pursuant to a clean-up notice issued by the EPA.

These considerations shape the criteria used to categorise harm in Table 7.2. Actual harm is considered more serious than the potential for harm. If the harm was actual harm, then consideration is given to the extent and duration of the known or likely

[409] *Protection of the Environment Operations Act 1997* (NSW), ss152-153.
[410] Ibid ss91-94.
[411] Ibid s91.
[412] Ibid s93.

impacts upon aquatic life. If the harm was merely potential harm, then consideration is given to the degree of risk involved (how close did the potential harm come to being actual harm) and the likely severity of the actual harm had it eventuated.

Table 7.2 – Sentences imposed for offences against section 120 of the *POEO Act* during the research period ranked by penalty size and categorised for environmental harm into serious (dark grey), moderate (grey), low (light grey) and negligible (no shading)

No	Case	Citation	Max	Penalty	Environmental Harm
HIGH PENALTY					
1	Environment Protection Authority v Queanbeyan City Council (No 3)	[2012] NSWLEC 220	$1m	250(1)(e) order $80,000 plus investigation costs $1,189 plus 250(1)(a) order plus costs $343,000	Pump failure at sewage station. Approx 1,000,000 litres discharged into Queanbeyan River, then Molonglo River then Lake Burley Griffin. Joint expert report concluded environmental impact insignificant, no measurable public health risk.
2	Environment Protection Authority v CSR Building Products Limited	[2008] NSWLEC 224	$1m	$280,000 plus clean up costs $83,000 plus costs $75,000	Spill to Parramatta River of chemical used to seal concrete roof tiles. Moderately toxic substance. 2.5km of river affected. Strong odour. No signs of dead mangroves or biota. Potential adverse affects to sediment-dwelling organisms. Cleaned up.
3	Environment Protection Authority v Ramsey Food Processing Pty Ltd	[2010] NSWLEC 23	$1m x2	$50,000 plus investigation costs $13,000 plus 250(1)(a) order plus costs estimated >$200,000	Untreated abattoir effluent escaped via broken pipe, spread over approx. 300m^2 area, flowed to creek. 1km of creek & 300m of tributary visibly polluted, water black and anoxic, death of aquatic species.
4	Environment Protection Authority v Tea Garden Farms Pty Ltd	[2012] NSWLEC 89	$1m	250(1)(e) order $77,000 plus investigation costs $1,500 plus 250(1)(a) order plus costs $120,000	Dam wall collapsed releasing sediment-laden water to Marine Park. Flowed for approx. 5 hours, plume extended 100m. Impacts short-term and negligible.
5	Environment Protection Authority v Moolarben Coal Operations Pty Ltd (No 2)	[2012] NSWLEC 80	$1m	$112,500 plus 250(1)(a) order plus costs $63,000	Approx. 18.7 ML sediment-laden water discharged to creek. Water discoloured for 76km. Potential for significant harm to aquatic organisms, no evidence of actual harm.

No	Case	Citation	Max	Penalty	Environmental Harm
6	Environment Protection Authority v Fulton Hogan Pty Ltd	[2008] NSWLEC 268	$1m	$100,000 plus investigation costs $2,000 plus costs $84,000	Accident during upgrade of Jindabyne Dam released sediment-laden water to Snowy River. Pollution extended approx. 15km. Impact on aquatic organisms at most minor and short-term.
7	Environment Protection Authority v Snowy Hydro Ltd	[2008] NSWLEC 264	$1m	$100,000 plus investigation costs $2,000 plus costs $84,000	Accident during upgrade of Jindabyne Dam released sediment-laden water to Snowy River. Pollution extended approx. 15km. Impact on aquatic organisms at most minor and short-term.
8	Environment Protection Authority v Moolarben Coal Operations Pty Ltd	[2012] NSWLEC 65	$1m	$105,000 plus investigation costs $9,000 plus 250(1)(a) order plus costs $53,000	Most sediment & erosion control measures not in place during initial phase of mine construction. Sediment-laden water washed into creek. Long-term monitoring station 6km downstream showed no discernible change. Potential serious impact on aquatic biota, no evidence of actual harm.
9	Environment Protection Authority v Baiada Poultry Pty Limited	[2008] NSWLEC 280	$1m	250(1)(e) order $120,000 plus investigation costs $5,000 plus 250(1)(a) order plus costs $30,000	Approx. 1m litres effluent escaped from underground pipe, flowed along dry watercourse through a paddock for approx. 1.1km. Cleaned up. Harm slight, environment affected not sensitive, no aquatic life.
10	Environment Protection Authority v Goulburn Wool Scour Pty Limited	[2005] NSWLEC 206	$250K	250(1)(c) order capped at $20,000 plus costs $125,000	Rainfall washed chemicals into creek due to first flush system bypassing containment pond. Harm minor and transitory.
11	Environment Protection Authority v Centennial Newstan Pty Ltd	[2010] NSWLEC 211	$1m	250(1)(e) order $105,000 plus investigation costs $10,000 plus 250(1)(a) order plus costs $28,500	1.4-1.8 ML of sediment-laden water discharged from old colliery via pipe. 2ha wetland containing EEC located 20m downstream of pipe outlet. Sediment settled in wetland, up to 40cm depth. Clean up & rehabilitation works successfully undertaken over many months. Harm low in long-term.
12	Environment Protection Authority v Nowra Chemical Manufacturers Pty Ltd	[2008] NSWLEC 187	$1m	250(1)(e) order $100,000 plus 250(1)(a) order plus costs $28,000	1,700 litres of diluted sulphuric acid leaked from improper storage tank. Flowed along dry stormwater channel. Actual harm to vegetation. Potential for serious harm averted by dry conditions and clean up.

No	Case	Citation	Max	Penalty	Environmental Harm
13	Environment Protection Authority v Sibelco Australia Limited	[2011] NSWLEC 160	$1m	250(1)(e) order $78,000 plus investigation costs $10,000 plus 250(1)(a) order plus costs $25,000	Dam wall failed at small bentonite mine. 2.8-5.0 ML of sediment-laden water flowed into waterway. Moderate actual harm caused but short-term, clean up effective. Temporary reduction in macroinvertebrates.
14	Environment Protection Authority v Waste Recycling and Processing Corporation	[2006] NSWLEC 419	$250K	$75,000 plus investigation costs $7,240 plus 250(1)(a) order plus costs $39,500	Toxic leachate from Lucas Heights landfill overflowed. Creek polluted for 800m, most aquatic life killed. Remained toxic for 5 weeks until clean up completed. Harm substantial.
15	Environment Protection Authority v Cleary Bros (Bombo) Pty Limited	[2007] NSWLEC 466	$250K	$16,000 plus investigation costs $7,000 plus costs $104,000	Toxic leachate from Lucas Heights landfill overflowed. Creek polluted for 800m, most aquatic life killed. Remained toxic for 5 weeks until clean up completed. Harm substantial.
16	Fairfield City Council v TT Rubbish Removal Pty Limited; Fairfield City Council v Kim Thu Nguyen	[2008] NSWLEC 201	$1m x6 $250K x 6	$45,000 plus costs $69,000	Directed employee to wash garbage trucks using a fire hose in Fairfield CBD then tip wastewater into stormwater drain. No actual harm to creek.
17	Environment Protection Authority v George Weston Foods Ltd	[2010] NSWLEC 120	$1m	250(1)(e) order $67,000 plus investigation costs $12,000 plus 250(1)(a) order plus costs $18,000	Pipe failure led to discharge of animal tallow and vegetable oil blend to Peel River. Polluted 2.25km of river over 9 days. Clean up effected. No evidence of actual harm beyond dead grass. Potential for harm as toxic to aquatic animal life.
18	Environment Protection Authority v Chillana Pty Ltd	[2010] NSWLEC 255	$1m	250(1)(c) order $60,000 plus investigation costs $16,000 plus 250(1)(a) order plus unstated costs	Underground pipe cracked and abattoir effluent leaked at pressure, undetected for 6 days. Soaked soil & flowed into creek. Extensively contaminated creek over 250m. Significant actual harm. Creek pumped out, large volume of fat & soil removed.

No	Case	Citation	Max	Penalty	Environmental Harm
19	Environment Protection Authority v Austar Coal Mine Pty Ltd	[2011] NSWLEC 252	$1m	250(1)(e) order $75,000 plus investigation costs $17,000 plus costs $25,000	Unknown volume of water containing detergent & effluent leaked from septic system into creek. Caused white foam in creek for approx. 2km. Localised odour. Actual harm, water samples showed toxic to aquatic biota. No evidence of dead biota. Clean up mitigated harm.
20	Environment Protection Authority v Big River Group Pty Ltd	[2011] NSWLEC 80	$1m	$67,000 plus investigation costs $25,000 plus costs $35,000	Chemical leaked from plywood factory into stormwater then wetland. Affected approx. 17,000m^2 of wetland. Water samples showed pollution sufficient to cause lethal toxicity to tadpoles, fish and aquatic macroinvertebrates. Would recover over time.
21	Environment Protection Authority v Peak Gold Mines Pty Limited	[2013] NSWLEC 158	$1m	250(1)(e) order $50,000 plus investigation costs $4,500 plus 250(1)(a) order plus costs $52,000	In heavy rain tailings leaked from tailings dam at gold and copper mine. Washed through pipe into drain for 1km then dispersed into bushland. No evidence of actual harm to flora or fauna. Likelihood of harm, albeit low.
22	Environment Protection Authority v Coal and Allied Operations Pty Ltd	[2013] NSWLEC 134	$1m	$45,000 plus 250(1)(a) order plus costs $51,000	Failure to have adequate sediment/erosion control. Sediment-laden water flowed into creek then lagoon in heavy rain over 5 days. No actual or potential harm other than short-term potential harm for 2-3 weeks.
MODERATE PENALTY					
23	Environment Protection Authority v Integral Energy Australia Pty Ltd	[2006] NSWLEC 141	$250K	$26,250 plus investigation costs $2,471 plus 250(1)(a) order plus costs $50,000	Transformer oil leaked from sub-station into stormwater then creek. 9,000 litres. Oil trapped in creek using floating bunds and cleaned up. Creek a concrete canal in heavy industrial area, low environmental value.
24	Environment Protection Authority v Ravensworth Operations Pty Limited	[2012] NSWLEC 222	$1m	$50,000 plus investigation costs $2,000 plus 250(1)(a) order plus costs $26,500	Pipe installed in error through sediment control structure. Sediment-laden water flowed into creek, approx. 1,640,000 litres. No evidence of actual harm, likely harm low.

No	Case	Citation	Max	Penalty	Environmental Harm
25	Environment Protection Authority v Centennial Newstan Pty Ltd	[2006] NSWLEC 732	$250K	250(1)(e) order $50,000 plus 250(1)(a) order plus costs $28,000	Required soil & water management measures not implemented. Dam overflowed during rain, discharging sediment-laden water into creek then Lake Macquarie. Likely harm low.
26	Environment Protection Authority v Boral Australian Gypsum Limited	[2009] NSWLEC 26	$1m	$58,500 plus investigation costs $3,000 plus costs $20,000	Chemical spill to Parramatta River, approx. 6,400 litres. Low to moderate toxicity to aquatic organisms. Unlikely to have had significant adverse effect on aquatic fauna beyond vicinity of discharge point. No evidence of actual harm, unlikely to be significant long term impact.
27	Environment Protection Authority v BHP Steel (AIS) Pty Limited	[2004] NSWLEC 37	$250K	$60,000 plus unstated costs	Industrial accident led to contaminated water flowing into a creek. Approx. 1.4km of creek affected, hundreds of fish killed. Creek in heavy industrial area, not pristine. Long term harm lower but extent unclear.
28	Environment Protection Authority v Pipeline Drillers Group Pty Ltd	[2012] NSWLEC 18	$1m x2	$30,000 plus investigation costs $15,000 plus 250(1)(a) order plus costs $29,000	Accidental discharge of bentonite slurry (drilling mud) whilst undertaking horizontal drilling under wetland. Wetland habitat for vulnerable froglet, contains EECs. Approx. 1,600m2 polluted with sediment up to 850mm deep. Cleaned up over 2-3 weeks, 99% removed. Slurry non-toxic but smothered plants, removed food sources for fauna. Actual harm but short-term.
29	Environment Protection Authority v Hochtief AG and Thiess Pty Limited	[2007] NSWLEC 177	$250K	$45,000 plus 250(1)(a) order plus costs $24,000	Wastewater treatment plant malfunctioned, discharging 36,750 litres of turbid wastewater into creek. Swift remedial action, 90% removed in first 24 hours. Actual harm unclear but largely short-term. High potential for harm without the rapid remediation.

No	Case	Citation	Max	Penalty	Environmental Harm
30	Environment Protection Authority v Straits (Hillgrove) Gold Pty Ltd	[2010] NSWLEC 114	$1m	$50,000 plus investigation costs $13,000 plus costs $11,000	1,000-3,000 tonnes toxic slimes escaped from gold and antimony mine and travelled more than 300m long a road, across a grassed area and along a dry creek bed. No evidence of harm to fauna or flora. Potential harm if rain had washed slimes into flowing creek. Cleaned up.
31	Shoalhaven City Council v DP Druce P/L	[2005] NSWLEC 123	$250K	$30,000 plus costs $40,000	Sediment pond failed, causing sediment-laden water to enter wetland. Cleaned up. No evidence of permanent damage.
32	Environment Protection Authority v Tyco Water Pty Ltd	[2005] NSWLEC 453	$250K	$50,000 plus unstated costs	Contractor renewing sewer pipe. Flow diversion works failed, sewerage flowed into creek. Caused severe stress to creek for several days. Creek ecosystem already degraded.
33	Environment Protection Authority v Hanson Precast Pty Limited	[2008] NSWLEC 285	$1m	$50,000 plus investigation costs $4,000 plus costs $18,000	Oil leaked via stormwater to creek. 200-300 litres. Affected approx. 200m of creek. Killed small number of fish, damaged reeds. Odour. Cleaned up. Long-term harm low to zero.
34	Environment Protection Authority v Cargill Australia Limited	[2007] NSWLEC 337	$250K	$37,500 plus investigation costs $7,550 plus costs $22,450	Pipe cracked at abattoir, causing approx. 20,000 litres effluent to flow through stormwater to artificial wetland created to treat stormwater run-off from industrial area. Actual harm but minor. Cleaned up.
35	Environment Protection Authority v Allied Industrial Services Pty Ltd	[2005] NSWLEC 501	$250K	$25,000 plus costs $19,000 plus investigation expenses $12,000	Offender in business of chemical cleaning of industrial machinery parts. Chemical leaked via stormwater to creek. 300-400 litres. Samples tested showed high toxicity. Clear risk of harm. No evidence of actual harm.
36	Environment Protection Authority v Albury City Council	[2009] NSWLEC 169	$1m	$45,500 plus costs $18,000	Pump failure caused sewage overflow via stormwater to Murray River for 20 minutes duration. Potential harm, no evidence of actual harm.

No	Case	Citation	Max	Penalty	Environmental Harm
37	Environment Protection Authority v M A Roche Group Pty Ltd; Environment Protection Authority v Roche	[2013] NSWLEC 191	$1m x2	$22,000 plus investigation costs $15,000 plus 250(1)(a) order plus costs $24,500	Sediment-laden waters escaped through poorly built dam wall at a quarry. Caused creek to be brown and murky for approx. 500m. Harm likely to aquatic organisms, but for limited time.
38	Environment Protection Authority v Nalco Australia Pty Ltd	[2007] NSWLEC 831	$1m	250(1)(e) order $50,000 plus 250(1)(a) order plus costs $10,000	Chemical leak to Botany Bay. No evidence of actual harm, chemical of low toxicity, readily biodegradable. Potential harm minor and transient.
39	Environment Protection Authority v Illawarra Coke Company Pty Limited	[2005] NSWLEC 296	$250K	$40,000 plus costs $20,000	Sump oil leaked to creek then to estuarine lagoon. Likely caused death of large portion of aquatic life in creek. No long term chemical persistence. Cleaned up.
40	Wollongong City Council v Belmorgan Property Development Pty Limited	[2008] NSWLEC 291	$1m	$40,000 plus unstated costs	Oil from underground tank overflowed in rain through stormwater to wetlands. Cleaned up over a week using substantial resources. 9 dead ducks found, other birds oil covered. Possible harm to turtles. Harm to vegetation. Harm short-term.
41	Environment Protection Authority v Arenco Pty Limited	[2006] NSWLEC 244	$250K x 2	250(1)(e) order $26,000 plus 250(1)(a) order plus costs $25,000	Sediment-laden water flowed into creek after rain. 18,600 litres approx. No evidence of actual harm. Potential for harm.
42	Environment Protection Authority v Abigroup Contractors Pty Limited	[2007] NSWLEC 712	$250K	250(1)(e) order $20,000 plus 250(1)(a) order plus costs $30,000	Sediment-laden water flowed into wetland during high rainfall event. Pacific Hwy construction. Thick sediment fan extended over 20m. Some harm due to sediment, potential for ongoing harm low.
43	Environment Protection Authority v Ross	[2009] NSWLEC 36	$250K	$18,000 plus investigation costs $12,000 plus 250(1)(b) order plus costs $23,000	Sprayed creek banks and adjacent areas with insecticide dangerous to fish and aquatic organisms. More than 200 dead crayfish observed, plus dead insects. Several breeding seasons required for crayfish population to recover.
44	Gosford City Council v Australian Panel Products Pty Ltd	[2009] NSWLEC 77	$1m	$25,000 plus investigation costs $6,000 plus unstated costs	Resin overflowed tank, flowed through stormwater to creek then into National Park. 20-50 litres. Short-term impacts, creek recovered.

No	Case	Citation	Max	Penalty	Environmental Harm
45	Environment Protection Authority v Forestry Commission of New South Wales	[2004] NSWLEC 751	$250K	$30,000 plus unstated costs	Dirt road collapsed and washed into stream. Actual harm. Evidence unclear regarding impacts on aquatic life.
LOW PENALTY					
46	Greater Taree City Council v Haritomeni Nominees Pty Limited	[2004] NSWLEC 775	$250K	$18,000 plus costs $30,000	Caravan park septic system piped to creek. No evidence of downstream impacts. Harm caused but unable to be quantified.
47	Environment Protection Authority v Hochtief; Thiess Pty Ltd	[2005] NSWLEC 506	$250K	$24,000 plus costs $21,000	Water treatment plant failed. Sediment-laden water discharged to creek. No evidence of actual harm. Creek moderately degraded prior.
48	Environment Protection Authority v Colenden Pty Ltd	[2007] NSWLEC 289	$250K	$25,500 plus costs $18,000	Tank ruptured at timber treatment plant, causing at least 1,000 litres of copper chrome arsenate to flow into creek. Water samples showed sufficient to cause acute toxicity to aquatic life for 5 weeks. High risk of potential harm, no evidence of actual harm.
49	Environment Protection Authority v Coe Drilling Australia Pty Limited	[2005] NSWLEC 179	$250K	$18,000 plus costs $20,000	Bentonite slurry (drilling mud) escaped from underground drilling into wetland above. Area affected approx. 30,000m^2, mud 100-300mm deep. Short-term impacts on plants and macroinvertebrates. No significant long-term impacts.
50	Environment Protection Authority v Forestry Commission of New South Wales	[2013] NSWLEC 101	$1m	250(1)(e) order $23,333 plus unstated investigation costs plus unstated cost	During bushfire hazard reduction burn ash, charcoal and sediment entered waters within Marine Park. Temporary increases in turbidity, localised smothering, increased nutrient loads.
51	Environment Protection Authority v Olex Australia Pty Ltd	[2005] NSWLEC 475	$250K	$15,000 plus costs $13,000	Equipment malfunction caused chemical leak via stormwater to creek. 50-100 litres discharged to creek. Pollutant toxic, acute and chronic. No evidence of actual harm. Potential harm.

No	Case	Citation	Max	Penalty	Environmental Harm
52	Fairfield City Council v Hong Son Ngo	[2008] NSWLEC 200	$250K x 6	$22,250 plus costs $4,110	Employee who was directed to wash garbage trucks using a fire hose in Fairfield CBD then tip wastewater into stormwater drain. No actual harm to creek.
53	Fairfield City Council v Florence Flowers Pty Limited	[2006] NSWLEC 707	$250K	$13,000 plus investigation costs $3,465 plus unstated costs	Oil used to heat greenhouse leaked via creek to dam. Approx. 300 litres. Likelihood of harm to aquatic life, but short-term and minimal.
54	Environment Protection Authority v Caltex Australia Petroleum Pty Limited	[2007] NSWLEC 647	$250K	250(1)(e) order $12,000 plus 250(1)(a) order plus unstated costs	Leak from underground fuel pipe. Potentially polluted groundwater. No evidence polluted waterway.
55	Newcastle City Council v Pace Farm Eggs Products Pty Limited (No 3)	[2005] NSWLEC 423	$250K	$12,000 plus 30% of unstated costs	Egg waste placed in position were likely to fall or descend into lagoon. Leaked into stormwater but not proven that reached lagoon. Only small amount leaked, potential for harm low if reached lagoon.
56	Environment Protection Authority v Wattke	[2010] NSWLEC 24	$250K	$10,000 plus investigation costs and unstated costs	Illegal dumping of waste to rural property including creeks and dam. Water samples showed arsenic, sulphur, calcium, copper, strontium, tin, zinc, DEET and animal fat. Very low levels of aquatic macroinvertebrates found.
57	Environment Protection Authority v Geerdink	[2010] NSWLEC 24	$250K	$10,000 plus investigation costs and unstated costs	Illegal dumping of waste to rural property including creeks and dam. Water samples showed arsenic, sulphur, calcium, copper, strontium, tin, zinc, DEET and animal fat. Very low levels of aquatic macroinvertebrates found.
58	Environment Protection Authority v Cut and Fill Pty Limited	[2005] NSWLEC 401	$250K	$7,800 plus unstated costs	Road contractor, no sediment controls. Approx. 226,000 litres sediment-laden water flowed into creek. Creek not pristine or particularly sensitive. No evidence of actual harm. Creek recovered quickly.

2.3 Identification of cases with prima facie disproportionality

It is apparent from Table 7.2 that the sentences that fall into the Moderate Penalty and Low Penalty ranges are reasonably proportionate to environmental harm. With limited exceptions, those in the Moderate Penalty range have moderate or low environmental harm, and those in the Low Penalty range have low or negligible environmental harm. All of the five exceptions can be explained by the fact that the lower maximum penalty of $250,000 was in place, and the penalty was therefore lower than it would have been under a maximum penalty of $1,000,000.

In the High Penalty range however there are sentences which display prima facie disproportionality. Of the twenty-two sentences in the High Penalty range, one has been categorised as causing negligible environmental harm, and a further eight have been categorised as causing low environmental harm. These nine sentences will continue to Section 3 where the second and third steps of the proportionality test will be applied.

Section 3 Steps two and three: can the disparity between penalty and harm be justified, and if so does it exceed the range established by the objective seriousness?

3.1 Legal costs orders distort proportionality

The 2005 case of *Environment Protection Authority v Goulburn Wool Scour Pty Limited* provides further evidence that large orders for legal costs can distort a proportionate relationship between penalty and environmental harm, because costs are proportionate not to harm but to the amount of legal work that has been done in order to prosecute the offender.[413] This contention has already been made in Chapter 5.

In this case the penalty of $20,000, imposed as a section 250(1)(c) order to carry out a specified environmental project, was dwarfed by the legal costs of $125,000. This sentence fell into the High Penalty range only because of the magnitude of the legal costs. The environmental harm was relatively minor, Talbot J stating at [10]:

> "… I agree with the description adopted by Mr Howard that, although not insignificant, the harm was of a relatively minor and transitory nature."

Talbot J found "no serious aggravating factors that need to be taken into account".[414]

The reason why the legal costs were so high was because the legal proceedings were lengthy and complicated. Talbot J at [16]:

> "The defendant has agreed to pay the prosecutor's costs in relation to not only the hearings in this Court but insofar as they relate to the proceedings in the Court of Appeal, the Court of Criminal Appeal, and the preparations involved in the application for special leave to appeal to the High Court. Those costs have been agreed in the sum of $125,000. In the context of a maximum fine of

[413] *Environment Protection Authority v Goulburn Wool Scour Pty Limited* [2005] NSWLEC 206.
[414] Ibid [20].

> $250,000 and the relative seriousness of the offence, which I assess as being at the lower end of the scale, $125,000 is a significant amount."

3.2 Pattern of low environmental harm and few aggravating considerations, yet high penalty

Eight of the nine sentences considered by this Section fit into a pattern. They are all characterised by low environmental harm and there are few, or no, sentencing considerations that would justify a penalty higher than is proportionate to environmental harm. These sentences all involve either no or very low actual harm, and a low potential for harm.

In *Environment Protection Authority v Queanbeyan City Council (No 3)*, Pepper J found at [166]-[167]:

> "In having regard to the expert evidence before the Court, I find that any actual harm caused by the offence was, as the unchallenged expert evidence plainly demonstrated, "insignificant" in terms of its impact on the receiving waters.
>
> "Having said this, I nevertheless find beyond reasonable doubt that there was potential, albeit low, for harm to public health and the environment given the large amount of sewage discharged into the rivers and given that people use the rivers for fishing and recreational purposes."

Pepper J found that the harm was foreseeable, and that the Council had control over the causes of harm and practical measures available to avoid it.[415] In addition, she found that deterrence and denunciation were important considerations.[416] In the Council's favour were a plea of guilty, albeit a relatively late one, contrition, good character, assistance with the authorities and a high legal costs order.[417] The penalty imposed was a section 250(1)(e) order for $80,000, an investigation costs order for

[415] *Environment Protection Authority v Queanbeyan City Council (No 3)* [2012] NSWLEC 220 at [196]-[209].
[416] Ibid [252]-[257].
[417] Ibid [219]-[249].

$1,189, a section 250(1)(a) publication order and a legal costs order of $343,000. The penalty was reduced in mitigation of the legal costs order.

In *Environment Protection Authority v Tea Garden Farms Pty Ltd*, Craig J stated at [80] and [85]:

> "It is apparent from the joint report that, given the seagrass distribution in the North Arm Cove estuary, there was no indication of measurable change on seagrass plants or on seagrass biota. The scientists concluded that "on the basis of probability there was likely no significant impact on the medium term basis." Once again, these expressions of opinion, which I accept, indicate that while some harm may have been occasioned to the marine ecology, it was both minor and of short-term duration."
>
> "Considering all elements of "harm", within the meaning of s 241(1)(a) of the POEO Act, I conclude that, overall, the environmental harm was in the relatively low range."

Craig J found "no aggravating factors … that are applicable to the circumstances in which the present offence was committed", and six mitigating factors in favour of the offender.[418] The penalty imposed was a section 250(1)(e) order for $77,000, plus an investigation costs order of $1,500 plus a section 250(1)(a) publication order and legal costs of $120,000.

In *Environment Protection Authority v Fulton Hogan Pty Ltd*, Biscoe J stated at [153]-[154]:

> "… the environmental harm was minor, short term and over a relatively short distance on an already degraded section of the Snowy River. …

[418] *Environment Protection Authority v Tea Garden Farms Pty Ltd* [2012] NSWLEC 89 [120].

> "Although there was potential for greater environmental harm and notwithstanding that the pollution continued over some days, overall I consider that the pollution was in the relatively low range."

In terms of other sentencing considerations, Biscoe J found that the harm was foreseeable, that Fulton Hogan had control over the cause of the harm and practical measures could have been put in place to avoid it, and that there was a need for general deterrence.[419] In the offender's favour, he found prior good character, an early plea of guilty, remorse and a high degree of cooperation with authorities.[420] The penalty imposed was a fine of $100,000 plus investigation costs of $2,000 and legal costs of $84,000.

In *Environment Protection Authority v Snowy Hydro Ltd*, the offender was a co-offender of Fulton Hogan Pty Ltd, and the facts as to environmental harm were the same.[421] Biscoe J also found the other sentencing considerations to be essentially identical for Snowy Hydro as they had been for Fulton Hogan, and the penalty imposed was identical.

In *Environment Protection Authority v Baiada Poultry Pty Limited*, Preston CJ stated at [12]:

> "The actual environmental harm caused by the effluent was confined to the unnamed [dry] watercourse. The effluent did not reach Bolton's Creek or the Peel River. The extent of actual environmental harm was very small but not absent. The environment that was exposed to the release of the effluent … was not sensitive and contained no permanent aquatic life, because there is usually no water in the watercourse. This was aided by the removal of much of the effluent on 27 April 2007 and on the following days."

[419] *Environment Protection Authority v Fulton Hogan Pty Ltd* [2008] NSWLEC 268 [155]-[166], [189]-[192].
[420] Ibid [184]-[188].
[421] *Environment Protection Authority v Snowy Hydro Ltd* [2008] NSWLEC 264.

Preston CJ found that the harm was foreseeable, that Baiada had control over the cause of the harm and practical measures could have been put in place to prevent it.[422] In Baiada's favour was an early plea of guilty, contrition and assistance to authorities.[423] The penalty imposed was a section 250(1)(e) order for $120,000, an investigation costs order of $5,000, a section 250(1)(a) publication order and legal costs of $30,000.

In *Environment Protection Authority v Peak Gold Mines Pty Limited*, Preston CJ stated at [11]:

> "There was no evidence of actual harm to fauna or flora during this period. There was, however, a likelihood of harm being caused to the environment by reason of the water pollution in the clean water drain, although it was low."

Preston CJ found that the risk of harm was foreseeable, and that Peak Gold Mines had both control over the cause of harm and practical measures that it could have put in place to prevent it.[424] General deterrence and denunciation were also identified as relevant considerations.[425] In Peak Gold Mines' favour, Preston CJ found as mitigating factors: prior good character, unlikely to re-offend, remorse, an early guilty plea and assistance to the authorities.[426] The penalty imposed was a section 250(1)(e) order for $50,000, an investigation costs order of $4,500, a section 250(1)(a) publication order and legal costs of $52,000.

In *Fairfield City Council v TT Rubbish Removal Pty Limited; Fairfield City Council v Kim Thu Nguyen*, whilst there is actual harm, that harm is very low. Jagot J stated at [31]:

> "… the offences caused actual harm to the stormwater drainage system by introducing wastewater and some solids. The Council does not allege any harm to the creek but, in terms of likelihood, the system drains to the creek."

[422] *Environment Protection Authority v Baiada Poultry Pty Limited* [2008] NSWLEC 280 [27]-[40].
[423] Ibid [51]-[54].
[424] *Environment Protection Authority v Peak Gold Mines Pty Limited* [2013] NSWLEC 158 at [15]-[18].
[425] Ibid [25]-[26].
[426] Ibid [19]-[24].

In this case, the offending company and the owner of the company were prosecuted together for the actions of an employee. The employee had washed an empty garbage truck out into a stormwater drain on a number of occasions, and the remnant garbage from the truck was washed into the stormwater system and then, presumably, to a creek. Although Jagot J did not find that the employee had been directed to undertake the offending action, it was found that the company was incompetently managed and had no systems in place to ensure environmental compliance.[427] Further, the risk of harm was foreseeable, and the company had control over the cause of harm, and practical measures available to it to prevent the harm.[428] In the offenders' favour was limited means, no prior convictions, an early guilty plea and a substantial order for legal costs.[429] A further complexity in this case is that the number of charges (six, one for each time the truck was illegally washed out) increased the penalty by, in effect, $7,500.[430] The penalty ultimately imposed was a fine of $45,000 plus legal costs of $69,000.

In *Environment Protection Authority v Coal and Allied Operations Pty Ltd*, Biscoe J stated at [103]:

> "I conclude that no actual or potential environmental harm was caused by the offence other than short-term potential harm for two or three weeks following the incident. … Overall, the environmental harm should be assessed as low."

Biscoe J found that the risk of harm was foreseeable, that Coal and Allied had control over the cause of harm and that practical measures could have been put in place to avoid it.[431] He found that there was a need for general deterrence.[432] In the offender's favour, Biscoe J found that Coal and Allied had no prior convictions, had entered an early guilty plea, was of good character, was remorseful and had cooperated with the

[427] *Fairfield City Council v TT Rubbish Removal Pty Limited; Fairfield City Council v Kim Thu Nguyen* [2008] NSWLEC 201 [36].
[428] Ibid [31].
[429] Ibid [38].
[430] Ibid [39]. Jagot J imposed a fine of $50,000 for the first offence, and then five subsequent fines of $2,000 each. The subsequent fines were reduced due to the principle of totality. The total of $60,000 was then reduced by 25% due to the early plea of guilty.
[431] *Environment Protection Authority v Coal and Allied Operations Pty Ltd* [2013] NSWLEC 134 [104]-[106].
[432] Ibid [115].

prosecutor.[433] The penalty imposed was a fine of $45,000, a section 250(1)(a) publication order and legal costs of $51,000.

These eight sentences all fit a similar pattern, and none of them possess sentencing considerations other than environmental harm which would justify a significant departure from a proportionate relationship between environmental harm and penalty. They are difficult to reconcile with other sentences from Table 7.2 which involve significant actual environmental harm and a lower or comparable penalty.

In *Environment Protection Authority v Ramsey Food Processing Pty Ltd*, for example, a fine of $50,000 was imposed, along with investigation costs of $13,000 and a publication order.[434] The legal costs were estimated by the prosecutor to be very high, more than $200,000, yet Biscoe J declined to take the high costs into account when determining the fine in this case. It cannot be said therefore that the high costs explain, at least in part, the relatively low fine. The environmental harm in this case was categorised in Table 7.2 as serious. Biscoe J at [161]-[162]:

> "The offences seriously harmed the environment in the short term … Other than the death of aquatic life in the days following the pollution incident, there was no long term environmental harm. …
>
> "The results of water sampling by EPA officers in October 2007, combined with the evidence of the prosecutor's scientific experts indicate the nature of the harm caused and likely to be caused. The results indicate that aquatic material present in the discharge caused depletion of dissolved oxygen, which led to the asphyxiation of fish, eels and minnows and the death of macrophytes (plants living in the water). The water became largely anaerobic with no capacity to support aquatic organisms for about a kilometre."

A consideration in the offender's favour was that an unauthorised and unknown person had opened a valve, causing the pollution incident, although the offender had

[433] Ibid [109]-[114].
[434] *Environment Protection Authority v Ramsey Food Processing Pty Ltd* [2010] NSWLEC 23.

left the valve unlocked and unguarded.[435] There were no other substantial mitigating factors.

A second sentence which is difficult to reconcile with the pattern of seven sentences above is *Environment Protection Authority v Chillana Pty Ltd*.[436] This offence caused significant actual harm over a period of weeks. Sheahan J at [58]-[59]:

> "It is admitted by the defendant, as charged, that a very substantial amount of untreated abattoir effluent entered the degraded Salty Creek and extensively contaminated it over a distance of 250m to the Castlereagh River, where it was diluted and dissipated. It is further accepted that at least the ammonia generated in the creek, if not other pollution caused by the spill, would have killed some if not all aquatic life present at the time, but there is no evidence of pre-spill populations, nor of mortality or distress post-spill. The creek was then further harmed by pump-out and clean-up activities …"

Sheahan J found a range of mitigating factors: prior good character, unlikely to re-offend, remorse, plea of guilty and cooperation with the authorities, before imposing a penalty of section 250(1)(c) order of $60,000, investigation costs of $16,000, a section 250(1)(a) publication order and unstated legal costs.[437]

A third sentence which involves significant actual environmental harm, and is difficult to reconcile with the pattern above, is *Environment Protection Authority v Big River Group Pty Ltd*.[438] In this case approximately 6,000 litres of resin spilled from industrial premises, through stormwater drains to a wetland. Pepper J described the environmental harm at [71]-[72]:

> "Overall, approximately 1.7 ha of the wetland was affected by the pollution incident. These effects included the fact that:

[435] Ibid [172].
[436] *Environment Protection Authority v Chillana Pty Ltd* [2010] NSWLEC 255.
[437] Ibid [172].
[438] *Environment Protection Authority v Big River Group Pty Ltd* [2011] NSWLEC 80.

(a) actual harm was caused by reducing the water quality in the wetland below the accepted limited for phenol and pH levels;
(b) the concentrations for formaldehyde in samples taken in the wetland were approximately 100 to 200 times the concentrations necessary to cause acute toxicity to the flora likely to be present in the wetland;
(c) the concentration composition for the pollutant in the wetland was sufficient to have rapidly killed any frogs, tadpoles, fish or aquatic macroinvertebrates that may have been present from 30 November to 2 December 2009…"

"It follows from the evidence that there can be no doubt that actual harm was caused by the resin spillage to the environment."

Pepper J found that some mitigating considerations were present, including an early plea of guilty, remorse, cooperation with the authorities and prior good character (despite two previous convictions for environmental offences.)[439] The penalty imposed was a fine of $67,000, investigation costs of $25,000 and legal costs of $35,000.

These three sentences, all involving significant actual environmental harm, cannot be reconciled with the pattern of eight sentences identified above, all involving low or no actual harm and low or no potential for harm. The other sentencing considerations present are reasonably similar across all ten sentences and cannot explain the variation. Either the eight sentences in the pattern display disproportionality, in that the penalties exceed the range established by the objective circumstances of the offences, or the three sentences with significant actual harm are disproportionate, in that the penalties lower than the range established by the objective circumstances of the offences.

Section 4 Conclusion

[439] Ibid [96]-[107].

This Chapter has applied the proportionality test to the particular and relatively complex offence type of water pollution offences under the *POEO Act*. This offence type is associated with relatively numerous and varied additional orders. The issue of legal costs orders, common across offence types, is present as well. In addition, water pollution offences have quite different characteristics to the other offence types considered in depth by this thesis, and which involve harm to native vegetation. This required the development of specific criteria to assess environmental harm.

The application of the proportionality test has shown that most sentences for this offence type during the research period had a reasonably proportionate relationship between penalty and environmental harm. A number of sentences did not, and there is evidence of disproportionality particularly amongst sentences falling into the High Penalty range.

This Chapter concludes the empirical research component of this thesis. The following Chapter shifts to a law reform focus, seeking to address the third research question.

Chapter 8: Addressing the causes of disproportionality

Chapter abstract

When judges of the LEC sentence criminal offenders the law requires them to impose penalties which conform with the law of proportionality in sentencing. This thesis, in Chapters 3 through 7, has identified a diverse range of potential or actual causes of disproportionality in the Court's sentencing of criminal offenders. This Chapter considers those causes of disproportionality and proposes a range of law reform measures to address them. It finds that whilst solutions can be proposed to most causes of disproportionality, the potential disproportionality caused by inconsistency in how individual judges evaluate environmental harm is a complex area requiring significant further research.

Contents

Section 1 Introduction

Chapters 4 to 7 of this thesis considered the proportionality of sentencing in practice in the LEC, examining the sentencing of four common offence types, each occurring under a different piece of New South Wales environmental legislation. These chapters built upon Chapter 3, which considered the complexity of both the common law and statutory provisions relevant to proportionality and ultimately developed a test for proportionality in the LEC.

This lengthy process – from the identification of the law relevant to proportionality, to the formulation of a proportionality test, to the application of that test to the sentences of varied common offence types – has revealed a number of potential or actual causes of disproportionality. These causes of disproportionality are diverse, ranging from the complex and unresolved law relevant to proportionality to particular statutory provisions such as additional per plant or animal harmed penalties.

The purpose of this Chapter is to consider potential solutions to these causes of disproportionality. As the causes are diverse, no single solution can address them all. A range of solutions is required to address diverse causes of disproportionality. Some of the suggested reforms are straightforward, involving relatively minor statutory amendments. Other potential solutions touch upon deeper philosophical issues and involve far-reaching and sophisticated reforms to sentencing practice. Reforms to how environmental harm is assessed, in particular, could be the subject of another thesis.

This Chapter proceeds in five sections, the first of which is this Introduction. The remaining sections mirror the structure of the thesis as a whole. Section 2 considers the issues raised by Chapter 3 and proposes a modest reform to simplify and strengthen the role of proportionality in the sentencing of environmental crimes in NSW. Sections 3 and 4 reflect the structure of Chapters 4 to 7, which first considered issues relevant to the evaluation of penalty and then issues relevant to the evaluation of harm, in order to allow a comparison between the two. Section 3 examines causes

of disproportionality which arise in the evaluation of penalty, and Section 4 examines causes of disproportionality which arise in the evaluation of harm. Section 5 then concludes this Chapter.

Section 2 Simplifying and strengthening proportionality

This Section considers the issues raised in Chapter 3 which examined the complex and unresolved law relevant to proportionality in criminal sentencing in the LEC. It argues that the complexity and uncertainty inherent to the status quo is itself a potential cause of disproportionality in sentencing, and proposes a modest reform to simplify and strengthen the role of proportionality in sentencing.

As demonstrated in Chapter 3, when sentencing criminal offenders the judges of the LEC face a significant challenge in applying the law of proportionality. They must consider the binding authorities from both the High Court of Australia and the Supreme Court of NSW on the proportionality principle, which are somewhat different from each other, and also the rule deriving from *Camilleri's Stockfeeds Pty Ltd v Environment Protection Authority* that penalty should ordinarily be proportionate to environmental harm.[440] *Camilleri's* rule has its origins in the statutory direction to consider the extent of harm to the environment which first appeared in the *Environmental Offences and Penalties Act* and today lives on in the *POEO Act* and the *National Parks and Wildlife Act*, amongst others. In addition the *Crimes (Sentencing Procedure) Act* stipulates a range of purposes of sentencing and provides lists of aggravating and mitigating factors to be considered (which include the whether the harm caused by the offence was substantial).[441] Thus LEC judges must synthesise a range of authorities on proportionality from different jurisdictions, some of which are at least mildly contradictory, in addition to statutory directions to consider harm, into a single judicial decision-making process.

This complexity in the task of determining proportionate sentences for environmental crimes is undesirable. As described in Chapter 3, in the LEC judges understand the proportionality principle to mean that the objective seriousness of an offence fixes the upper and lower limits of proportionate punishment, and *Camilleri's* rule states that "the more serious the lasting environmental harm the more serious the offence and, ordinarily, the higher the penalty". In the written sentence judgments

[440] *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) NSWLR 683.
[441] *Crimes (Sentencing Procedure) Act 1999* (NSW), ss3, 21A.

considered by this thesis, the proportionality principle and *Camilleri's* rule co-exist without acknowledgment. The fact that there are two strands of common law each attempting to play the same role is never acknowledged in the judgments, and there has been no judicial attempt made to reconcile them. One judge may rely upon the proportionality principle to determine a proportionate sentence and another, in an otherwise similar case, may rely upon *Camilleri's* rule instead.

This unresolved complexity increases the risk that the law of proportionality will be understood differently by different judges and thereby applied inconsistently. If judges use different methods to determine what is a proportionate sentence then there is a risk that they will arrive at different sentence outcomes. As discussed in Chapter 3, the differences in practice between the proportionality principle and *Camilleri's* rule are minor and as such any differences between sentence outcomes may be relatively small. Nonetheless, the risk of different outcomes could be reduced if the law of proportionality was simplified.

A simpler definition of proportionality in the sentencing of environmental crimes could build upon the statutory provisions contained in the *POEO Act* and the *National Parks and Wildlife Act*. Section 241 of the *POEO Act* states:

> "241 Matters to be considered in imposing penalty
>
> (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."

Section 194 of the *National Parks and Wildlife Act* is similar:

"194 Sentencing – matters to be considered in imposing penalty

(1) In imposing a penalty for an offence under 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 by the commission of the offence,

(b) the significance of the reserved land, Aboriginal object or place, threatened species or endangered species, population or ecological community (if any) that was harmed, or likely to be harmed, by the commission of the offence,

(c) the practical measures that may be taken to prevent, control, abate or mitigate that harm,

(d) the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused by the commission of the offence,

(e) the extent to which the person who committed the offence had control over the causes that gave rise to the offence,

(f) in relation to an offence concerning an Aboriginal object or place or an Aboriginal area – the views of Aboriginal persons who have an association with the object, place or area concerned,

(g) whether, in committing the offence, the person was complying with an order or direction from an employer or supervising employee,

(h) whether the offence was committed for commercial gain.

(2) The court may take into consideration other matters that it considers relevant."

It is only sub-section (a) in each which is relevant to proportionality, the other considerations having more to do with the culpability of the offender.

The most straightforward reform to simplify proportionality would be to amend sections 241 of the *POEO Act* and 194 of the *National Parks and Wildlife Act* to exclude the common law of proportionality and insert a version of *Camilleri's* rule as a mandatory sentencing consideration in the LEC jurisdiction. This would simplify and clarify the law of proportionality that LEC judges are required to apply. The inclusion of the word "ordinarily" from *Camilleri's* rule would leave judges with a discretion to depart from a proportionate relationship between penalty and environmental harm if the circumstances require it. The use of the term "proportionate" is intended to place beyond doubt that it is a proportionality provision and thereby exclude the common law.

The amended sections could read as follows:

"Sentencing considerations

(1) In imposing a penalty for an offence under this Act or the regulations, there should ordinarily be a proportionate relationship between penalty and the lasting harm caused by the offence, or between penalty

and the risk of lasting harm caused by the offence irrespective of whether or not any actual harm occurred.

(2) In addition the court is to take into consideration the following (so far as they are relevant):

(a) the practical measures that may be taken to prevent, control, abate or mitigate that harm

….

(2) The court may also take into consideration other matters that it considers relevant."

This modest reform is a straightforward way to simplify the law of proportionality in the LEC, avoiding the complexity involved in substantial re-writes of the relevant legislation.

In order for this reform to be effective across the range of environmental statutes, a section equivalent to sections 241 of the *POEO Act* and 194 of the *National Parks and Wildlife Act* would need to be inserted into the legislation which does not already include such a section, such as the *Native Vegetation Act* and the *EP&A Act*.

As discussed above in Chapter 2, whilst all offences under the *EP&A Act* involve harm to the integrity of the planning system, not all offences under that Act involve harm to the environment. For example, alterations to the internal layout of a dwelling without development consent may constitute an offence under that Act although no issue of environmental harm will arise. The proposed reform suggested above is nonetheless applicable to the *EP&A Act* because it stipulates "harm" rather than "environmental harm" as the primary sentencing consideration. A sentencing judge could thus apply the section equally to offences involving only harm to the planning system and offences that also involve harm to the environment or to human health.

The proposed reform is much less ambitious than the wholesale reforms of sentencing law proposed by Bagaric, amongst others.[442] Whilst it clarifies that proportionality should be measured with respect to harm, it leaves untouched the extensive array of other sentencing considerations, both statutory and common law, that Bagaric and Edney assert have rendered the proportionality principle "so nebulous that it would be misleading to assert that it provides a meaningful guide to sentencers".[443] Whilst wholesale reform of sentencing law could render the law simpler and more coherent, to remove judicial discretion to vary a penalty based upon considerations other than proportionality to harm would likely result in injustice in individual cases. The reform proposed here is measured and relatively achievable.

This reform does not provide a method to measure harm, an issue that will be discussed further in Section 4 below.

[442] Bagaric and Edney, above n 4.
[443] Ibid 38.

Section 3 Problems with the evaluation or distortion of penalty

This Section considers potential solutions to the causes of disproportionality which were identified in the evaluation of penalty in Chapters 4 to 7.

Proportionality requires a comparison of penalty with the harm caused by the offence. As identified in Chapters 4 to 7, certain factors can distort penalty size so that it is no longer proportionate to harm. Those factors are therefore causes of disproportionality. This Section discusses those factors and suggests how they might be overcome.

3.1 Orders for legal costs

Orders for legal costs, or costs orders, can distort penalty size so that it is no longer proportionate to harm in two distinct ways. This arises from the fact that costs are proportionate to the amount of legal work that the prosecutor has had to do to prosecute the case, and not proportionate to the harm caused by an offence.

Costs orders can distort penalty size when the quantum of the order is not known at the time of sentencing. Costs form "part of the penalty", according to the rule in *Environment Protection Authority v Barnes*, and the penalty otherwise imposed can therefore be reduced in recognition of a costs order.[444] When the quantum of costs is not known then the sentencing judge is in the invidious position of reducing a penalty, usually a fine, without knowing with any precision how much it should be reduced by. The inevitable result is a degree of educated guess-work. Should the sentencing judge reduce a penalty by either too much or too little then the penalty may no longer be proportionate to the harm caused by the offence.

Costs orders can also distort penalty size when the quantum is known and it is so large that no amount of reduction in penalty size can sufficiently compensate. This was demonstrated in Chapter 7 by the cases of *Environment Protection Authority v Queanbeyan City Council (No 3)*, in which an order to the value of $80,000 was

[444] *Environment Protection Authority v Barnes* [2006] NSWCCA 246.

accompanied by a costs order of $343,000, and *Environment Protection Authority v Goulburn Wool Scour Pty Limited* in which an order capped at $20,000 was accompanied by a costs order of $125,000.[445] Numerous other examples exist in other chapters. In such cases even if the fine had been reduced to zero, the total penalty would still have been disproportionately high due to the impact of the costs order.

Costs orders can also adversely affect proportionate sentencing when there is variation between judges as to whether or not, or by how much, to reduce a penalty in recognition of a costs order.

Other criminal jurisdictions in NSW, including the Local Court, District Court and Supreme Court, suffer this problem to a far lesser degree. Costs orders are seldom made in those jurisdictions for the simple reason that the prosecuting agencies active there – the police, the NSW Director of Public Prosecutions and the Commonwealth Director of Public Prosecutions – seek them rarely or not at all.[446] Those agencies have adopted policies which recognise the undesirability of costs orders in criminal cases.

It would assist the cause of proportionate sentencing if the prosecutors active in the LEC – the Environment Protection Authority, the Office of Environment and Heritage and local Councils – were to adopt a similar policy. They may be reluctant to do so however if they have come to depend upon costs orders as a form of supplemental income.

It should be noted that the judges of the LEC impose costs orders in compliance with the law as it currently stands. Section 257B of the *Criminal Procedure Act 1986* (NSW) states:

> "A court may, in and by a conviction or order, order an accused person to pay to the registrar of the court, for payment to the prosecutor, such costs as the

[445] *Environment Protection Authority v Queanbeyan City Council (No 3)* [2012] NSWLEC 220; *Environment Protection Authority v Goulburn Wool Scour Pty Limited* [2005] NSWLEC 206.
[446] Judcom, above n 201.

court specifies or, if the conviction or order directs, as may be determined under section 257G, if:

a) the court convicts the person of an offence, or

b) the court makes an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* in respect of an offence."

The use of the term "may" in section 257B indicates that judges have a discretion as to whether or not to award costs.[447] It would therefore be possible for judges to decline to award costs, or decline to award the full amount of costs, on the grounds that a costs order would create a disproportionate relationship between penalty and harm. The current practice of the Court is so well established however that such a change in judicial behaviour is unlikely to occur of its own accord.

Statutory reform may therefore be required to abolish costs orders. Such reform is desirable to improve the proportionality of criminal sentencing in the LEC. Reform of section 257B above would potentially affect not only the LEC, as the section applies to the summary jurisdiction of the Supreme Court and other higher courts as well. The implications for those other jurisdictions would need to be considered prior to the reform taking place. If, as seems likely, costs orders create the same problems for proportionality in those other jurisdictions as they do for the LEC then there may be a strong argument to adopt the reform for all criminal jurisdictions.

3.2 Additional orders

Three of the four Acts for which an offence type was considered in depth by this thesis – the *EP&A Act*, the *National Parks and Wildlife Act* and the *POEO Act* – contain provisions for specific orders to be made in addition to, or in substitution for, the penalty that is imposed for an offence.

Additional orders under the *EP&A Act* are the simplest, with remediation orders under sub-section 126(3) being the only type of order available to judges under that

[447] *Interpretation Act 1987* (NSW) section 9(1): In any Act or instrument, the word "may", if used to confer a power, indicates that the power may be exercised or not, at discretion.

Act. Remediation orders were imposed in twelve of the thirty-eight sentences considered by Chapter 4, and in only two of those was an estimate of the financial cost to the offender of complying with the order included in the judgment.

The *National Parks and Wildlife Act* and the *POEO Act* contain a similar range of additional orders. Some types of order were never imposed in the sentences constituting the research. Other types of order were imposed quite frequently. For the *National Parks and Wildlife Act*, section 200 orders for restoration and prevention are the most similar to remediation orders under the *EP&A Act*. In addition the research found that additional orders were imposed under section 205, sub-sections (1)(a), (1)(c) and (1)(d), being respectively publication orders, orders to restore or enhance the environment in a public place or for the public benefit, and orders to pay a specified amount to a third party to restore or enhance the environment or for general environmental purposes. At least one additional order was included in every sentence considered by Chapter 5 in the period since additional orders were added to the *National Parks and Wildlife Act* in 2010.

For the *POEO Act*, orders were imposed under section 246 (orders to compel an offender to pay a regulatory authority's costs of cleaning up a pollution incident), section 248 (orders to pay a regulatory authority's investigative costs and expenses), sub-section 250(1)(a) (publication orders), sub-section 250(1)(b) (notification orders), sub-section 250(1)(c) (orders to restore or enhance the environment in a public place or for the public benefit) and sub-section 250(1)(e) (orders to pay a specified amount to a third party to restore or enhance the environment or for general environmental purposes). At least one additional order was included in forty-three of the fifty-eight sentences for an offence against section 120 of the *POEO Act* considered by Chapter 8.

The problem that these additional orders can pose for proportionality is similar to the problem posed by legal costs orders: they can distort penalty size if the financial cost to the offender of complying with the order is not known at the time of sentence. The logic of *Environment Protection Authority v Barnes* applies equally well to additional orders as it does to legal costs orders: they form "part of the penalty" and

as such the penalty otherwise imposed can be reduced to compensate.[448] If the cost of complying with the order is unknown then the inevitable result is a degree of judicial guess-work to determine by how much a penalty should be reduced. Should the sentencing judge reduce a penalty by either too much or too little then the penalty may no longer be proportionate to the harm caused by the offence.

In contrast to legal costs orders however, it is not proposed that additional orders should be abolished. Whilst the effectiveness of additional orders is little studied, it seems likely that they improve the effectiveness of environmental criminal law at achieving its core goal of protecting the environment. Additional orders insert a restorative justice paradigm into the sentencing of environmental crimes, thereby placing a focus upon not only punishing the offender but also upon restoring the environment.[449] Although the variety of types of additional orders makes it difficult to generalise, it appears self-evident that orders to repair the harm caused by an offence, such as remediation orders under the *EP&A Act* and section 200 orders under the *National Parks and Wildlife Act*, will be more effective at protecting the environment than merely a fine which leaves the harm untouched (assuming that the order is complied with). Publication orders, a contrasting type of additional order, seem likely to enhance the general and specific deterrence of a criminal penalty by embarrassing an offender with a form of public shaming. Whether or not additional orders are effective in achieving their goal, and how well they are complied with, remains a research gap, and the evidence does not yet exist to support a definitive finding that additional orders render environmental criminal sentencing more effective. Nonetheless the likelihood, or even the mere possibility, that they do make sentencing more effective militates against their abolition.

Instead of abolishing additional orders, it would be preferable to implement reforms which would allow for the total penalty to be quantified in dollar terms at the time of sentence. This would require additional orders to be quantified in specific dollar amounts, or be capped at a maximum amount, or for sentences to be expressed more flexibly. Regardless of the method, the consequence would be that the sentencing

[448] *Environment Protection Authority v Barnes* [2006] NSWCCA 246.
[449] Preston, above n 21.

judge would have the information required to adjust the penalty imposed in a way that maintains a proportionate relationship between penalty and harm. Judges would no longer be required to operate in the dark, using educated guess-work when adjusting penalties to compensate for the cost to an offender of complying with an additional order.

This reform would be more straightforward to implement for some types of additional order than for others. Those orders which are directed towards addressing the specific harm caused by an offence – remediation orders under the *EP&A Act* and section 200 orders under the *National Parks and Wildlife Act* – pose a particular challenge because their intention is to repair the harm caused by the offence, not to punish the offender a particular amount. The cost to the offender in both time and money is left open-ended; it is to be sufficient to get the job done. Quantifying such orders in dollar terms at the time of sentence risks ordering an offender to spend either too little or too much.

This difficulty could be resolved in part by a more flexible sentencing approach which first establishes a proportionate total penalty and then subsequently allocates that penalty amount between an order and a fine as appropriate. This would require offenders to return to court once their obligations under the order are fulfilled. For example, a judge might determine that a proportionate penalty for a particular offence is $100,000. If an *EP&A Act* remediation order or a section 200 *National Parks and Wildlife Act* order, or an equivalent order under another Act, was appropriate then the offender would fulfil the order over the timeframe stipulated, usually a number of years. At that time the offender would present to the Court evidence that the order had been fulfilled, along with documentation to establish the total cost to the offender of doing so. The prosecutor would of course have the opportunity to consider the documents and to object to them if disputed. Once the evidence was settled, the Court would then finalise the sentence by fining the offender the balance remaining from the original $100,000 sum.

As a safeguard, if the prosecutor was concerned at the time of initial sentencing that a corporate offender might be wound up, or an individual offender become bankrupt,

as a means to avoid paying the balance of the fine some years later, then the statute could allow an application to be made for a percentage of the total fine to be paid to the Court as a bond. This would ensure that the funds were available to pay the balance of the fine in due course.

Such a reform would make it more likely that the combination of a fine and an additional order of this type would form a total penalty that is proportionate to the harm caused by the offence. It would avoid the current situation whereby judges are required to determine a total fine amount before knowing the cost to the offender of complying with the order.

This model is limited however in that it would be possible for the cost to the offender of complying with the order to exceed the original sentence amount. An offender initially sentenced to a $100,000 total penalty might find that the cost to comply with the order exceeds that figure, and even though the fine eventually imposed would be zero the total penalty would nevertheless be disproportionately high compared to the harm caused by the offence. Whilst this would be unfortunate, it is preferable to the alternative of capping the total penalty at $100,000 and thereby not fully repairing the harm caused by the offence. The disproportionality in such instances would be limited, and the instances relatively rare, whilst failing to fully repair the harm caused by the offence would undermine the restorative justice intent of the order. In this case disproportionality would be the lesser of two evils.

Achieving the objective of having the total penalty quantified in dollar terms at the time of sentence is more straightforward for other types of additional order. The cost to an offender of a publication order was never specified in the sentences considered by the research, yet would be relatively simple to achieve because the publication requirements are always detailed in the orders. The publication into which the notice must be placed, the page or range of pages on which it must be placed and the size of the notice are stated in the order. The prosecutor – who seeks the order – could readily obtain quotes from the relevant publications ahead of the sentencing hearing, and the order could then specify a capped cost to the offender of compliance. Similarly, orders under sub-section 205(1)(c) of the *National Parks and Wildlife Act*

and sub-section 250(1)(c) of the *POEO Act* - orders to restore or enhance the environment in a public place or for the public benefit – could be capped at a specific dollar amount based upon quotes to undertake the specified project.

The remainder of the additional order types found in the research are already specified in dollar terms, apart from notification orders (*POEO Act*, sub-section 250(1)(b)) which carry zero or nominal financial cost to the offender.

3.3 Additional penalties per individual plant or animal harmed

As discussed in depth in Chapter 5, the unique characteristics of section 118A of the *National Parks and Wildlife Act* are prone to distorting penalty size so that it is no longer proportionate to environmental harm.

Offences under section 118A carry additional penalties for each individual plant or animal harmed. There is an additional maximum penalty of $11,000 per endangered plant or animal, and an additional maximum penalty of $5,500 per vulnerable plant or animal. This method of structuring the maximum penalty is unusual and not found in the other Acts considered by this thesis. It creates complexity in terms of assessing proportionality because the maximum penalty is a fundamental consideration for a sentencing judge in determining the quantum of a sentence.

Whilst adjustable maximum penalties are in theory quite sensible from a proportionality perspective – a theory endorsed by Chief Justice Preston in *Plath v Rawson* – Chapter 5 found that in practice they not only do not assist proportionality, but in fact are detrimental to it.[450] Practical difficulties with knowing how many individual plants or animals were harmed in some cases can lead to offences with similar environmental harm having markedly different maximum penalties, or a less harmful offence in fact having a higher maximum penalty than a more harmful offence. Because maximum penalties are a 'yardstick', higher maximum penalties

[450] *Plath v Rawson* [2009] NSWLEC 178.

should lead to higher actual penalties.[451] Penalty size can thus become detached from environmental harm in section 118A sentences.

In practice additional per plant or animal harmed penalties can produce nonsensical sentencing scenarios. In *Gordon Plath of the Department of Environment, Climate Change and Water v Lithgow City Council* there was a maximum penalty for an offence of harming a single individual endangered plant of $231,000, which was higher than the maximum penalty of $220,000 in *Garrett v Williams* where the offender cleared 29,000m^2 of endangered ecological community.[452] This degree of disproportionality between maximum penalty and environmental harm risks bringing environmental criminal law into disrepute.

Chapter 5 found that penalties for section 118A offences are generally proportionate. The most likely explanation is that judges are in practice disregarding, or at least minimising, additional maximum penalties so as to ensure a reasonable degree of consistency with other comparable sentences. This finding further highlights the failure of additional per plant or animal harmed penalties to assist proportionality.

The solution to this problem is relatively straightforward. Additional penalties per individual plant or animal harmed should be removed from the *National Parks and Wildlife Act*. These additional penalties, which were intended to assist proportionality, have failed to do so and serve no useful purpose.

Preston CJ asserted in *Plath v Rawson* that "the prescription by Parliament of an additional penalty is intended to enable the total penalty to be proportionate to the extent of harm caused by the actions constituting the offence".[453] Assuming this to be correct, then Parliament intended that serious breaches of section 118A, those involving harm to numerous individual plants or animals, would have significantly higher maximum penalties than the stipulated $220,000 for species that are presumed extinct, critically endangered or endangered, or part of an endangered

[451] *Markarian v The Queen* [2005] HCA 25.
[452] *Gordon Plath of the Department of Environment, Climate Change and Water v Lithgow City Council* [2011] NSWLEC 8; *Garrett v Williams* [2007] NSWLEC 56.
[453] *Plath v Rawson* [2009] NSWLEC 178 at [62].

population or ecological community, and $55,000 for species that are listed as vulnerable. Removing additional penalties from section 118A would mean that all breaches, whether serious or minor, would have the same maximum penalty of $220,000 or $55,000.

The simplest way to preserve the intention of Parliament in respect of section 118A would be to raise the maximum penalties significantly. If the maximum penalty was, for example, raised to $1,100,000 for species that are presumed extinct, critically endangered or endangered, or part of an endangered population or ecological community, to bring it into line with the maximum penalty in the *EP&A Act* and the *Native Vegetation Act*, then there would be ample scope for serious breaches to be penalised heavily. The maximum penalty for species listed as vulnerable could be increased to $275,000 to maintain the current 4:1 ratio ($220,000 being four times $55,000). The prosecution would be spared the at times impossible task of proving beyond reasonable doubt precisely how many individual protected plants or animals were harmed by an offence. The sentencing judge would be able to impose a penalty proportionate to environmental harm in every case.

Section 4 Evaluation of harm

Proportionality requires a comparison of penalty with the harm caused by the offence. As identified in Chapters 4 to 7, the evaluation of harm in environmental crime is often difficult. This difficulty can be divided into two distinct parts: difficulties that arise when other sentencing considerations overwhelm harm, and difficulties associated with measuring harm itself. This Section discusses those difficulties and suggests how they might be overcome.

4.1 Other factors overwhelm harm

4.1.1 Views

In Chapter 4 this thesis identified and analysed a sub-category of *EP&A Act* cases: those where a tree or trees have been removed, or merely pruned, in order to enhance a view from a residence. In views cases, environmental harm is at risk of being overwhelmed by general deterrence as a sentencing consideration.
These cases are characterised by relatively low environmental harm and relatively severe penalties. The relatively severe penalties are driven by the need for strong general deterrence given the powerful financial incentive to commit the offence. Such cases pose a challenge for proportionality because the low level of environmental harm points towards a low penalty, yet a low penalty might prove ineffective at protecting the environment if it is dwarfed by the financial gain to the offender from committing the offence.

Chapter 4 considered two views cases in detail – *Hunters Hill Council v Gary Johnston* and *The Council of the City of Gosford v Tauszik* – and applied the proportionality test developed in Chapter 3: a proportionate penalty is one where any discrepancy between penalty and environmental harm is justified by other sentencing considerations, provided that the discrepancy does not exceed the range established by the objective circumstances of the offence.[454] The application of this test found a

[454] *Hunters Hill Council v Gary Johnston* [2013] NSWLEC 89; *The Council of the City of Gosford v Tauszik* [2005] NSWLEC 266.

potential for general deterrence to drive penalties so high that they exceed the range established by the objective circumstances of the offence, although it was not possible to conclude conclusively that they had done so in those cases.

The most obvious solution to the disproportionality caused by views cases would be to impose penalties proportionate to environmental harm regardless of the need for strong general deterrence. This solution would create its own difficulties however, as relegating the role of general deterrence would likely lead to penalties too low to discourage the commission of the offence. The additional financial value added to a residence by a desirable view is a powerful incentive to commit this type of offence, and penalties proportionate to the (often low) level of environmental harm in views cases may effectively allow offenders to financially profit from their offence.

A more sophisticated solution to such a scenario already exists in New South Wales environmental legislation, although it does not currently apply to views cases. Section 249 of the *POEO Act* stipulates:

> "249 Orders regarding monetary benefits
>
> (1) The court may order the offender to pay, as part of the penalty for committing the offence, an additional penalty of an amount the court is satisfied, on the balance of probabilities, represents the amount of any monetary benefits acquired by the offender, or accrued or accruing to the offender, as a result of the commission of the offence.
> (2) The amount of the additional penalty for an offence is not subject to any maximum amount of penalty provided elsewhere by or under this Act.
> (3) The regulations may prescribe a protocol to be used in determining the amount that represents the monetary benefit acquired by the offender or accrued or accruing to the offender."

In all of the sentences considered by the research that were imposed under the *POEO Act*, not a single instance of a section 249 order was found. It is not possible, without

further research, to identify why this potentially powerful provision was not utilised by prosecutors or judges during the research period.

The insertion into the *EP&A Act* of a provision equivalent to section 249 of the *POEO Act* would provide a mechanism to ensure that offenders do not profit from their crimes in views cases. A penalty proportionate to the extent of environmental harm would be determined initially, and then an additional penalty added should the evidence justify it. It would be relatively straightforward for prosecutors to adduce evidence as to the monetary benefit acquired by an offender through the commission of a views offence as the valuation of residential property is a commonly undertaken business activity, and the LEC already has some familiarity with and expertise in valuations cases as it functions as an appeals court for appeals against determinations made by valuers-general under the *Valuation of Land Act 1916* (NSW).[455]

This approach would be preferable to the status quo not only because it would resolve the potential for views cases to lead to penalties disproportionate to harm, but also because it would reduce the likelihood of offenders profiting from their crimes. At present, whilst sentencing judges may increase a penalty significantly due to general deterrence, they do so without having any information before them as to the financial benefit accrued by the offender as a result of the offence. Whilst the penalties in *Gary Johnston* and *Tauszik* appear severe, it is possible that the financial benefit to Johnston and Tauszik was even greater that the penalties imposed upon them.

The importance of offenders not profiting from their crimes was emphasised by Chief Justice Preston in *Environment Protection Authority v Waste Recycling and Processing Corporation* at [229], where the Chief Justice provided a number of authorities for his argument:

> "Courts have repeatedly stated that when sentencing for environmental crime that the sentence of the court needs to be of such magnitude as to change the

[455] Land and Environment Court, *Class 3: valuation, compensation and Aboriginal land claim cases* <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_3/class_3.aspx>.

> economic calculus: *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at 369-370; *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34 (6 February 2006) at [150]-[157]. It should not be cheaper to offend than to prevent the commission of the offence: Sentencing Advisory Panel (UK), "Environmental Offences: The Panel's Advice to the Court of Appeal", 1 March 2000, para 16. Environmental crime will remain profitable until the financial cost to offenders outweighs the likely gains: M Watson, "Environmental Offences: the Reality of Environmental Crime" (2005) 7(3) *Environmental Law Review* 190 at 199-200. The amount of the fine needs to be such as will make it worthwhile that the cost of precautions be undertaken: *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at 359. The amount of the fine must be substantial enough so as not to appear as a mere licence fee for illegal activity."[456]

It is self-evident that sentencing judges will be better placed to ensure that offenders do not profit from their crimes if they have before them evidence as to the extent of profit acquired by the commission of the offence. The insertion into the *EP&A Act* of a provision equivalent to section 249 of the *POEO Act* would facilitate this outcome in views cases.

4.1.2 Land clearing cases

Chapter 6 identified a number of sentences for land clearing offences under the *Native Vegetation Conservation Act* and the *Native Vegetation Act* in which other sentencing considerations appear to have overwhelmed environmental harm. Interestingly, these cases did not disclose a pattern of either typically lenient penalties (undue weight being given to mitigating considerations) or typically severe penalties (undue weight being given to aggravating considerations), but rather instances of both.

[456] *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419.

In *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 4)* the penalty of $200,000 plus unstated costs was disproportionately severe, being the equal second highest fine across the sentences considered by Chapter 6 despite the environmental harm being categorised as low.[457] Indeed Pepper J found that the area cleared was analogous to a sentence which included a $5,000 fine, *Director General, Department of the Environment Climate Change and Water v Ian Colley Earthmoving*.[458] That sentence was itself found to be disproportionately lenient, with strong mitigating factors overwhelming the significant environmental harm occasioned by the offence.

In other such cases from Chapter 6 it was unclear if the sentence was disproportionately severe or lenient, although it was clear that it could not be reconciled with another comparable sentence. In *Director General, Department of the Environment and Climate Change v Olmwood (No 2)* the offender was fined $100,000 plus unstated costs for clearing less than 100,000m^2 of native vegetation of "no particular conservation significance".[459] In *Director General, Department of Environment, Climate Change and Water v Linklater* the offender was fined less - $82,500 – for clearing 1,660,000m^2 of native vegetation of high ecological value and known habitat for threatened species.[460]

The findings of this thesis differ from the findings of Bartel's earlier study, in which she found a pattern of mitigating factors overwhelming environmental harm.[461] Bartel found that the prior good character of offenders in land clearing cases, who generally had no criminal past and were established community members, was contributing to excessively lenient penalties. Whilst that may be the case for some of the sentences considered by Chapter 6, other sentences appear disproportionately

[457] *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 4)* [2011] NSWLEC 119.
[458] *Director General, Department of the Environment Climate Change and Water v Ian Colley Earthmoving* [2010] NSWLEC 102.
[459] *Director General, Department of the Environment and Climate Change v Olmwood (No 2)* [2010] NSWLEC 100.
[460] *Director General, Department of Environment, Climate Change and Water v Linklater* [2011] NSWLEC 30.
[461] Bartel, above n 2; Bartel, above, n 2.

severe. There does not appear to be a prevailing pattern, other than environmental harm being subsumed by other considerations.

It is these sentences – those where other sentencing considerations appear to have overwhelmed environmental harm – where the law reform proposed in Section 2 may be most beneficial. Clarifying the law of proportionality to stipulate that ordinarily there should be a proportionate relationship between penalty and lasting harm should reduce the likelihood of strong aggravating or mitigating factors overwhelming environmental harm in particular cases.

4.2 Difficulties associated with evaluating harm

4.2.1 Inconsistent evaluation of harm a potential cause of disproportionality

It is relatively straightforward to stipulate, as proposed in Section 2 of this Chapter, that penalties should ordinarily have a proportionate relationship between penalty and harm. Such a reform would not however ensure that all judges evaluated, or measured, environmental harm in the same way. It is far more difficult to propose reforms that would assist sentencing judges to evaluate harm in a consistent manner.

This thesis has made no findings as to how the judges of the LEC evaluate harm, for the simple reason that such information cannot be reliably obtained from written sentence judgments. It is possible to describe the mechanics of how the judges receive information describing harm: from expert scientific evidence, statements of agreed facts, witness testimony and, at times, from the evidence of the offenders themselves. This does not reveal however how each judge assesses that information to then form an opinion as to the extent of environmental harm in each case.

Given that proportionality entails a proportionate relationship between penalty and environmental harm, it is self-evident that a potential cause of disproportionality is judges evaluating harm in different ways or to different standards. Given that there is little common law or statutory direction as to how harm should be measured, there is

undoubtedly a risk that the individual instincts of judges will take them in different directions.

Certainly the statutory definitions of harm offer little assistance; the *POEO Act*, for example, defines harm so broadly that it provides no basis to distinguish between types or degrees of harm:

> "***harm*** to the environment includes any direct or indirect alteration of the environment that has the effect of degrading the environment and, without limiting the generality of the above, includes any act or omission that results in pollution."

This thesis has found instances of inexplicable disproportionality, where the disparity between penalty and environmental harm could not be justified by other sentencing considerations and no apparent explanation could be found. Within the range of possible explanations for such sentences is that a judge in a particular case has evaluated environmental harm in a manner inconsistent with another judge in a comparable sentence. *Eurobodalla Shire Council v Christenssen*, *Department of Environment & Climate Change v Ianna, Department of Environment & Climate Change v Sommerville* and *Director-General of the Department of Environment and Climate Change v Taylor* are all examples of such cases.[462]

The peculiar characteristics of environmental crime pose challenges for the evaluation of harm. All environmental offences possess certain characteristics that differentiate them from most other forms of crime, the most important of which in this context is that the victim is usually not a human being.[463] This has practical consequences for harm evaluation: the victim is unable to give evidence as to the harm suffered by it, and in addition human judges may find it harder to relate to or understand the harm suffered by the environment compared to the harm suffered by a fellow human being. With certain offence types these practical difficulties are

[462] *Eurobodalla Shire Council v Christenssen* [2008] NSWLEC 134; *Department of Environment & Climate Change v Sommerville; Department of Environment & Climate Change v Ianna* [2009] NSWLEC 194; *Director-General of the Department of Environment and Climate Change v Taylor* [2007] NSWLEC 530.
[463] See Preston, above n 21, 140 for a thorough identification of the types of victims of environmental crime.

magnified by the characteristics of the offence. Chapter 7 considered water pollution offences discussed the particular characteristics of that offence type, in the context of developing criteria by which to categorise harm. The fact that the harm in water pollution cases is often transitory, difficult to observe and swiftly cleaned up make that harm more difficult to assess.

Methods to evaluate harm in environmental crime is an area which has not received a great deal of attention from legal theorists. Various models have been proposed to measure harm in criminal sentencing generally, none of which are applicable to environmental crime. These models nonetheless provide conceptual frameworks upon which models relevant to environmental crime could be built.

Bagaric and Amarasekara have argued for a utilitarian theory of punishment, under which the utility that should be maximised is human happiness or pleasure.[464] Bagaric and McConvill have progressed this one step further by suggesting that the appropriate criterion for matching offence seriousness to sentence severity should be the level of unhappiness or pain caused.[465] For example, the level of pain meted out to a rape offender should equal the level of pain caused to the rape victim. They rely upon empirical research to argue that humans are fundamentally similar in terms of the things that are conducive to happiness, and it is therefore possible to design penalties which match unhappiness of the victim with unhappiness to the offender. This proposal, whilst radical, offers an objective means to measure the gravity of an offence in place of judicial discretion.

The weakness of Bagaric and McConvill's model is that it assumes a human victim. Pollution of a waterway or unlawful land clearing will cause harm to the environment without necessarily harming a human being. Their model does not allow environmental harm to be measured or converted to an equivalent amount of human harm. Basing a penalty system upon human happiness is hopelessly anthropocentric in the context of environmental crime.

[464] Mirko Bagaric and Kumar Amarasekara, 'Critique and Comment: The Errors of Retributivism' (2000) 24 *Melbourne University Law Review* 124.
[465] Bagaric and McConvill, above n 50.

Von Hirsch and Jareborg have also developed a model to measure harm – defined as the injury done or risked by the criminal act – known as the living standards model.[466] This model is concerned with the quality of a person's life; the most serious harms are those which most diminish a person's well-being.[467] As individual sense of well-being is varied and subjective, the model focuses upon standardised means or capabilities for achieving a certain quality of life.[468]

Von Hirsch and Jareborg concede that their model is inapplicable to offences with non-human victims, such as environmental or animal welfare offences.[469] Like Bagaric and McConvill's model above, living standards is anthropocentric and cannot be used to measure harm inflicted upon the environment or animals.

Halsey and White have considered how environmental harm is understood, and discerned three philosophies which each conceive of the relationship between human beings and the environment in a different way: anthropocentric, biocentric and ecocentric.[470] They consider environmental harm beyond the narrow confines of legally defined harm, arguing that as most harm to the environment is lawful it is a mistake to accept without question the state's determinations as to which harm constitutes a crime and which does not. Whilst this thesis is confined to a study of court practice, and these broader issues do not arise, Halsey and White illustrate the practical consequences of different understandings of harm in a way that is relevant to this thesis. Adopting the clearing of old-growth forest as a case study, they examine how each of the philosophies would evaluate the harm caused by the clearing and thereby demonstrate how different philosophical approaches can produce different assessments of environmental harm.

It is not possible, without further research, to know how the judges of the LEC perceive the relationship between human beings and the environment. Halsey and White's paper illustrates the potential range of perspectives. Whether the judges of the LEC fit into one of their three categories, or into another category or categories

[466] Hirsch and Jareborg, above n 127.
[467] Ibid 7.
[468] Ibid 10.
[469] Ibid 34.
[470] Halsey and White, above n 109.

altogether, the individual perspective of each judge is likely to strongly influence how he or she evaluates environmental harm in any particular case.

The evaluation of environmental harm by individual judges is a potential cause of disproportionality. There is a need for further research, to better understand the judicial approach to harm, to develop models or methods to measure environmental harm and to consider mechanisms, whether statutory or perhaps involving judicial training, to ensure that judges are evaluating harm consistently with each other. One possible solution is considered at 4.2.2 below. It is beyond the scope of this thesis to comprehensively address this substantial research gap, and conclusions cannot be sensibly arrived at without first obtaining a deeper understanding of the issue.

4.2.2 Sentencing guideline for environmental offences in England and Wales: a possible solution?

New South Wales, and indeed Australia, is not alone in encountering challenges as the relatively new field of environmental crime assumes greater importance. The experience of England and Wales in introducing a sentencing guideline for environmental offences deserves consideration, particularly given the existence and operation of guideline judgments for non-environmental offences in New South Wales.[471]

The Sentencing Council for England and Wales ("Sentencing Council") was established in 2010 as an independent body to promote greater consistency and transparency in sentencing.[472] Its primary role is to issue guidelines on sentencing which courts must follow unless it is in the interests of justice not to do so.[473]

One key difference between the two jurisdictions is that England and Wales does not have a specialist environmental court such as the LEC, and all environmental offences

[471] *Sentencing guidelines* Judicial Commission of New South Wales <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/sentencing_guidelines.html/?searchterm=guideline%20judgments>.
[472] The Sentencing Council for England and Wales, *About us* <https://www.sentencingcouncil.org.uk/about-us/>.
[473] Ibid.

are sentenced in generalist criminal courts. Dissatisfaction with the sentencing of environmental offences in magistrates' courts in England and Wales has been evident in the academic literature for some years. Adshead and Andrew in 2009 reviewed the previous studies and concluded that lack of experience, guidance and training together with the complex nature of many environmental law cases meant that magistrates were not always in a position to reach sound decisions on guilt and sentence.[474] Adshead in 2013 foreshadowed and welcomed the introduction of a guideline for environmental offences.[475]

The Sentencing Council issued a Definitive Guideline for Environmental Offences ("Guideline") in February 2014, effective from 1 July of that year. The Guideline, a document of twenty-six pages, sets out a systematic process for the sentencing of particular offences. Much of it is inapplicable to the New South Wales context; the numerical ranges of penalty in particular would surely fall foul of the High Court's dislike of numerical sentencing guidelines as articulated in *Wong v R*, and as discussed in Chapter 3.[476]

From the perspective of this thesis, the most relevant and interesting aspect of the Guideline is the manner in which it structures the evaluation of environmental harm. For offences involving "unauthorised or harmful deposit, treatment or disposal etc of waste" or "illegal discharges to air, land and water", a sentencing magistrate or judge must determine which of four categories of harm the offence falls into. Each category is defined in the Guideline by a number of criteria:

> "Category 1
>
> - Polluting material of a dangerous nature, for example, hazardous chemicals or sharp objects
> - Major adverse effect or damage to air or water quality, amenity value, or property

[474] Adshead and Andrew, above n 15, 1159.
[475] Adshead, above n 19, 224.
[476] *Wong v R* [2001] HCA 64.

- Polluting material was noxious, widespread or pervasive with long-lasting effects on human health or quality of life, animal health or flora
- Major costs incurred through clean-up, site restoration or animal rehabilitation
- Major interference with, prevention or undermining of other lawful activities or regulatory regime due to offence

Category 2

- Significant adverse effect or damage to air or water quality, amenity value, or property
- Significant adverse effect on human health or quality of life, animal health or flora
- Significant costs incurred through clean-up, site restoration or animal rehabilitation
- Significant interference with or undermining of other lawful activities or regulatory regime due to offence
- Risk of Category 1 harm

Category 3

- Minor, localised adverse effect or damage to air or water quality, amenity value, or property
- Minor adverse effect on human health or quality of life, animal health or flora
- Low costs incurred through clean-up, site restoration or animal rehabilitation
- Limited interference with or undermining of other lawful activities or regulatory regime due to offence
- Risk of Category 2 harm

Category 4

- Risk of Category 3 harm"

The Guideline then leads the sentencing magistrate or judge through a number of other steps to determine the ultimate penalty. Culpability, similarly to harm, is divided into four categories. A numerical table then uses a combination of the harm and culpability ratings to provide a starting point and range for penalty. A non-exhaustive list of aggravating and mitigating factors allows adjustment from the identified range, as do further considerations including removing any economic benefit from offending, ensuring any fine is in keeping with the means of the offender, assistance to the prosecution, a guilty plea and totality.

The criteria for evaluating environmental harm provide a mechanism for standardising the evaluation of harm that does not exist in the New South Wales context. Given that the evaluation of harm by judges of the LEC is a potential cause of disproportionality, any mechanism that provides assistance to judges is likely to reduce the risk of harm being assessed inconsistently.

Yet the categories and definitions of harm in the Guideline also demonstrate the limitations of this approach. There remains considerable scope for the individual perspective of each magistrate and judge as to the relationship between human beings and the environment to influence his or her assessment of which category the harm falls into. Terms such as "significant", "major", "minor" and "pervasive" leave ample scope for subjective interpretation. The Guideline applies to water pollution offences, but if the harm is difficult to observe and transitory then the criteria may not assist a sentencing magistrate or judge to know if it is "major", "significant" or "minor".

Perhaps most importantly, the harm criteria in the Guideline are designed to work in combination with the numerical table of penalty starting points and ranges. As identified above, in the Australian context such numerical tables are likely to fall foul of the High Court. Without the numerical table, there would be no assistance as to the relationship between penalty size and the category of harm, other than previous, comparable cases.

The Guideline is intended to provide assistance to magistrates and judges working in generalist criminal courts. The judges of the LEC work in a specialised field and are perhaps less likely to need assistance in recognising and categorising the harm caused by an environmental offence.

Research could not locate any studies conducted to determine the impact of the Guideline upon sentencing practice. This is unsurprising given that it has been in place for a short period of time. Whether or not the Guideline is improving the evaluation of harm in practice in England and Wales would be an important consideration before importing such an approach to New South Wales.

Criteria against which environmental harm can be assessed could be introduced in New South Wales by means of a guideline judgment. The *Crimes (Sentencing Procedure) Act* 1999 (NSW) allows the Supreme Court to deliver guideline judgments, upon the application of the Attorney-General or upon the Court's own initiative.[477] There is no particular form that guideline judgments must take; they come in a variety of forms from statements of general principle to more specific indications of particular factors to be taken into account or given particular weight, and sometimes to indications of the kind of outcome that might be expected in certain kinds of case.[478] There are currently six guideline judgments in force in NSW covering diverse but commonly encountered areas of criminal law: high range drink driving; break, enter and steal; armed robbery; dangerous driving; the impact of a guilty plea; and the operation of Form 1 procedures (whereby subsidiary or previously undisclosed charges are taken into account on sentence).[479] Whenever a court in NSW imposes a sentence, any relevant guideline judgment must be considered.

[477] *Crimes (Sentencing Procedure) Act 1999* (NSW), Part 3, Division 4.
[478] *Wong v R* (2001) 207 CLR 584 [5].
[479] Judicial Commission of New South Wales, *Sentencing Bench Book* Judicial Commission of New South Wales <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing>40.

Section 5 Conclusion

This Chapter has considered the diverse causes of disproportionality identified by Chapters 3 to 7, and proposed solutions where possible. Some solutions, such as the abolition of additional per plant and per animal penalties from the *National Parks and Wildlife Act*, are straightforward. Others, such as improving additional orders by ensuring that they are always quantifiable in dollar terms at the time of sentencing, are more complex. By far the most complex cause of disproportionality is inconsistency in how individual judges evaluate environmental harm, and here considerable research is required before solutions can be confidently endorsed. The Environmental Offences Guideline recently introduced in England and Wales may offer a way forward in this regard if it can be demonstrated to have improved how magistrates and judges evaluate harm in practice in that jurisdiction.

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