



Natural Resources Access Regulator

# Prosecution guidelines

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# 1. Introduction

## 1.1 NRAR Objectives

The Natural Resources Access Regulator (NRAR) is an independent regulator established under the *Natural Resources Access Regulator Act 2017*. The NRAR has responsibility for ensuring that the regulated community achieves compliance with natural resources management legislation which currently includes the *Natural Resources Access Regulator Act 2017*, *Water Management Act 2000*, *Water Act 1912* and associated regulations.

The NRAR legislative objectives are to:

- ensure effective, efficient, transparent and accountable compliance and enforcement measures for the natural resources management legislation
- maintain public confidence in the enforcement of the natural resources management legislation.

To do this, the NRAR will:

- promote compliance with the objectives of the Water Act 1912 and the Water Management Act 2000
- achieve best practice management and regulation of surface water and groundwater
- take a risk-based and outcome-focused approach to regulation
- guide decision-making and action by officers, through the adoption of a graduated and proportionate response to legislative non-compliance
- ensure decisions on enforcement action are transparent to the community.

The NRAR seeks to build community confidence as a trusted, credible, effective, efficient and transparent regulator. Application of these guidelines seeks to ensure greater certainty and consistency for the regulated and wider community on how the NRAR will use its discretion in making proportionate enforcement decisions. The NRAR recognises that the majority of the regulated community voluntarily meet their obligations and want fair sharing of natural resources to achieve long term economic, environmental and social outcomes. The NRAR will encourage and assist high levels of voluntary compliance with appropriate education, guidance, advice and systems. However, when instances of non-compliance are detected, the NRAR will not hesitate to take enforcement action, including prosecution where appropriate.

## 1.2 The role of the NRAR Board

The NRAR Act creates a NRAR Board which is responsible for compliance and enforcement of the natural resources management legislation conferred on it. This includes ensuring that decisions relating to compliance and enforcement action are made independently in a fair and impartial manner, in accordance with best practice regulatory approaches.

The Board is comprised of 3 members who together have experience and expertise in law, natural resources management, compliance and regulation. The NRAR Board is responsible for all decisions relating to the functions of the NRAR. The NRAR or the NRAR Board is not subject to the control or direction of the Minister in relation to any specific matters being considered or determined by the NRAR.

## 1.3 Purpose of these guidelines

These guidelines explain and guide the approach that the NRAR will take in determining the appropriate response to non-compliance with the legislation it administers. The NRAR's power to prosecute the entities it regulates is an important discretionary power and regulatory tool and, in appropriate circumstances, prosecution action will be taken.

The overall goal of any prosecution undertaken by the NRAR is to achieve regulatory compliance and to seek to build and maintain community confidence in the regulatory oversight provided by the NRAR. This is explained in more detail in NRAR's Regulatory Policy.

A decision to begin proceedings for a breach of legislation is a serious decision, with potential operational, financial and reputational impacts for both the NRAR and the affected business/individual. A clear and consistent governance framework regarding the decision-making process for prosecutions is crucial to ensure that proportionate and appropriate compliance action is taken in response to non-compliance.

These guidelines have been published to help explain:

- the basis on which the NRAR will make a decision to prosecute
- the factors the NRAR will take into account in deciding which person is the appropriate defendant
- how the NRAR will make a decision regarding the specific charges it lays.

These guidelines are not legally binding on the NRAR or on any other organisation. They are however intended to form part of the NRAR's policy on compliance and enforcement and provide guidance on the decision making process the NRAR utilises when considering appropriate compliance action. These guidelines are also a key tool in educating the community and regulated entities on the processes undertaken, and factors considered by the NRAR when assessing whether to proceed with prosecution action.

These guidelines will be reviewed annually or in response to any significant contextual change to ensure they meet NRAR requirements.

## 2. Principles of prosecution

Prosecution is one tool within the NRAR's overall enforcement strategy. There are a range of other enforcement tools that can be used depending on the nature and type of non-compliance being dealt with. The NRAR applies the following principles when making determinations about enforcement action:

- Prosecution is a strategic response which the NRAR may choose based on the circumstances and supporting evidence. The NRAR considers the appropriateness of all possible responses to non-compliance, for example the issuing of written warnings, statutory notices, civil penalties, enforceable undertakings, penalty notices, as well as prosecution action. This recognizes that prosecution may

not always be the most effective or appropriate means of promoting compliance and may not be proportionate to the non-compliance in all circumstances.

- The key aims of the enforcement action taken by NRAR are to:
  - achieve compliance with legislative obligations,
  - ensure specific and general deterrence
  - take action which is in the public interest
- Effective enforcement actions, including prosecutions, must be targeted, proportionate, consistent, fair, and considered in a timely fashion.
- Releasing information about enforcement supports transparency and draws attention to the consequences of breaking the law. When the NRAR releases information regarding prosecutions, this is done to help educate others and achieve compliance.

NRAR's Regulatory Policy requires that a graduated and proportionate response to non-compliance be employed. It requires that the NRAR respond to non-compliance according to the severity of the non-compliance and the regulated entity's culpability and approach to non-compliance.

## 3. Making a decision to prosecute

### 3.1 Who may prosecute?

The NRAR exercises regulatory functions conferred on it under legislation that it administers.

Where prosecution action is available as an enforcement tool under the legislation, authority to pursue prosecution is established by virtue of section 14 of the *NSW Criminal Procedure Act 1986*.

The NRAR Board determines whether to commence proceedings by the Crown for offences under the natural resources management legislation. Before making a decision about whether to commence proceedings, legal advice will be obtained in relation to an alleged offence. The Board can only decide to commence proceedings under the natural resources management legislation on behalf of the Crown when that decision is supported by legal advice.

### 3.2 When may prosecution occur?

The NRAR treats prosecution as one of its strongest regulatory responses to a breach of the legislation, along with other serious compliance actions such as licence or authorisation suspension/cancellation. As with all enforcement actions, the primary aims of prosecution are to achieve compliance, ensure specific and general deterrence, and take action in the public interest. In appropriate circumstances, prosecution sends a message to industry and the community that a failure to comply with the law may be dealt with by the courts.

However, there are finite resources available to pursue enforcement actions like prosecutions, so informed decisions must be made when this is the most effective response. This decision is discretionary and made on a case-by-case basis with regard to the circumstances of the matter being dealt with. Generally, the NRAR will consider taking prosecution action for serious breaches of the legislation, or in situations where other enforcement actions have proven ineffective or the regulated entity has demonstrated a clear intention not to comply.

## 4. Factors relevant to undertaking prosecutions

The decision to prosecute an offence is discretionary and requires consideration as to whether prosecution is in the public interest. In determining this issue the NRAR will consider whether:

- there are reasonable prospects of conviction; and
- discretionary factors are such that the matter should be prosecuted<sup>1</sup>.

### 4.1 Reasonable prospect of conviction

A prosecution may only be commenced if legal advice indicates there are reasonable prospects of a conviction. This requires an exercise of judgment that will depend in part upon an evaluation of the weight of the available evidence and the persuasive strength of the prosecution case in light of the anticipated course of proceedings, including the circumstances in which they will take place. A relevant consideration in the evaluation of the strength of a prosecution case will be the existence or otherwise of evidence to support any defence that may be raised by the defendant.<sup>2</sup>

### 4.2 Discretionary factors

Consideration must be given to discretionary factors such as but not limited to:

- the seriousness or triviality of the offence and/or whether the breach is of a technical nature only
- the severity of the environmental harm or community impact (real or potential)
- any mitigating or aggravating circumstances
- the length of time since the alleged offence
- the degree of culpability of the alleged offender in relation to the offence
- whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute
- the prevalence of the alleged offence and the need for both specific and general deterrence
- any prior breaches of, or convictions under the legislation
- whether the alleged offence is of considerable public concern
- any precedent which may be set by not instituting proceedings
- the age, physical or mental health, or special infirmity of the alleged offender or witnesses
- the length and expense of a court hearing
- whether proceedings are to be instituted against others arising out of the same incident
- community expectations that proceedings will be instituted
- the availability and efficacy of any alternatives to prosecution
- whether another Government agency has taken a prosecution or other enforcement action in respect to the same facts and circumstances.

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<sup>1</sup> NSW Office of the Director of Public Prosecutions – Prosecution Guidelines 2007, <http://www.odpp.nsw.gov.au/prosecution-guideline>

<sup>2</sup> *ibid*

The applicability of and weight to be given to these and other factors will vary, depending on the particular circumstances of each case.<sup>3</sup>

### 4.3 Inappropriate considerations

The NRAR has established policies and governance frameworks to ensure that its exercise of prosecutorial discretion is not influenced by any inappropriate considerations, such as:

- any elements of discrimination against the person, that is the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved
- personal empathy or antipathy towards the alleged offender or victim
- the political or other affiliations of those responsible for the prosecution decision
- possible political advantage or disadvantage to the government or any political party, group or individual.<sup>4</sup>

### 4.4 Evaluation of prosecution proposals

The process of evaluating proposals relating to prosecutions and requests to have penalty notices decided in court can be very complex. In light of this complexity, the NRAR documents and implements a process for reviewing prosecution proposals and requests to have penalty notices decided in court with advice from persons with appropriate skills and expertise in relation to the matter. The process includes reviewing each matter against the NRAR's Prosecution Guidelines, assessing whether:

- there are reasonable prospects of conviction and
- there are any discretionary factors relating to the matter that would suggest the matter should proceed.

A recommendation is then provided to the NRAR Board by the Chief Regulatory Officer about whether or not prosecution action should be pursued.

## 5. Who may be prosecuted?

### 5.1 Selecting defendants

Liability under the relevant legislation is imposed on a wide range of entities who may have participated in or contributed to an offence. This can mean that multiple regulated entities may have committed an offence arising out of a single incident. It is not always appropriate to prosecute every entity who may be liable for an offence.

The NRAR will, when selecting appropriate defendants, assess:

- who is primarily responsible for the alleged offence, that is:
  - who was primarily responsible for the acts or omissions giving rise to the alleged offence
  - who was primarily responsible for the material circumstances leading to the alleged offence

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<sup>3</sup> ibid

<sup>4</sup> ibid

- who formed any relevant intention
- the potential effectiveness of any court orders that might be made against the proposed defendant.

## 5.2 Corporate and director/manager liability

Where an offence is committed by employees, agents or officers of a corporation in the course of their employment, proceedings will usually be commenced against the corporation. Where, however, the offence has occurred because the employee, agent or officer has embarked on a venture of their own making and volition, outside the scope of their employment, proceedings may be instituted against the employee, agent or officer and not against the corporation.<sup>5</sup>

In addition managers and directors / officers may attract personal liability for offences under the legislation as a result of their actions or inactions. The relevant legislation will generally specify the offences for which director/managerial liability can arise and the circumstances in which this may occur. Generally this will require the relevant person to be a director of the corporation, or an individual involved in the management of the corporation and in a position to influence the conduct of the corporation in relation to the commission of the offence.

## 5.3 Employee / worker liability

Proceedings may be brought by the NRAR against an employee, agent or worker where an offence has occurred, regardless of whether that person has embarked on a venture of their own making and volition, or one that is outside the scope of their employment / engagement and without the explicit approval of their employer.

The guiding principle in deciding whether to charge an employee is the degree of culpability involved. Factors relevant to assessing the degree of culpability include:

- (a) whether the employee knew or should have known that the activity in question was illegal
- (b) the seniority of the employee and the scope of the employee's employment duties, and
- (c) whether, having regard to the employee's seniority and employment duties, the employee had taken reasonable steps to draw to the attention of the employer or any other relevant person the impropriety of the practice.<sup>6</sup>

# 6. Determining charges

Once a decision is made to deal with an alleged contravention of the legislation by way of prosecution, it is in the public interest for that prosecution to succeed. The NRAR is responsible for selecting charges that are consistent with the seriousness of the offence and that it can prosecute successfully.

Any charges laid must reflect the nature and extent of the conduct disclosed by the evidence, with the aim of providing a basis for the court to impose an appropriate penalty.

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<sup>5</sup> NSW Environmental Protection Authority - Prosecution Guidelines March 2013, page 7  
<http://www.epa.nsw.gov.au/legislation/20130141EPAProsGuide.htm>

<sup>6</sup> Ibid., 7-8.



## 6.1 Similar charges for the same offence

The NRAR has a duty to refine its case to avoid laying duplicate or multiple charges for the same alleged offence. There will be occasions where an act or omission will be prohibited under two separate statutes and involve an offence under each. Laying duplicate or multiple charges will be avoided unless considered appropriate in the circumstances.

## 6.2 Continuing offences

The NRAR will assess whether to lay a charge for a continuing offence or separate charges depending on the act or omission. The main consideration when making this determination is:

- whether there was a single act or omission which gave rise to the offence; and
- whether the consequences of the act or omission continued over a period of time.

The NRAR will usually lay a charge for a continuing offence if a single act or omission has continuing consequences. Similarly, where there has been continuing or multiple acts or omissions, it would be appropriate to lay a charge for a continuing offence.

## 6.3 Tiered offence structure

The natural resources management legislation creates a tiered structure for offences with the most serious offences being tier 1 offences. Offences which are categorised as tier 1 come with substantial penalties and require evidence of intentional, negligent or reckless conduct. Tier 2 and 3 offences, which do not require evidence of intent, negligence or recklessness, have lower penalties and do not impose any possible term of imprisonment.

Corporations are subject to maximum financial penalties which are about four times the maximum financial penalty that may be imposed on individuals. In addition to financial penalties, individuals are subject to possible imprisonment if found guilty of a tier 1 offence.

When deciding whether to lay charges in relation to tier 1 or 2 offences, the NRAR will use its discretion, having regard to the factors set out above in section 4. In making this determination factors that are of particular significance to this decision will be the evidence in relation to the degree of culpability and the severity of the harm caused by the accused corporation or individual.

## 6.4 Penalty notices

The natural resources management legislation creates a schedule of offences for which penalty notices may be issued. Penalty notices require the evidence obtained, in relation to the offence, to meet the standard of a prosecution for the offence. A decision may be taken by the NRAR to issue a penalty notice if it is considered the most effective and efficient means of achieving the key aims of taking enforcement action and the NRAR's principle objectives. The decision to issue a penalty notice for an offence or, in the alternative, initiate a prosecution, is discretionary and will also be guided by the factors set out above under section 4. Further, a decision on whether to issue a penalty notice or, in the alternative, issue a caution, the NRAR will have regard to the matters set out in the NSW Attorney General's 'Guidelines under the *Fines Act 1996*'. In general, penalty notices may be appropriate where the offence is not sufficiently serious to warrant prosecution and the breach is not trivial or a minor technical breach and the evidence indicates a lack of culpability on the part of the offender. Usually, it will be considered inappropriate to issue successive penalty notices to an offender for multiple similar breaches as this is not consistent with the overall enforcement strategy.

Penalty notices do not result in criminal convictions but create a civil debt which may be paid or challenged by the offender by electing for the matter to be heard in court. In accordance with the NSW Attorney General's 'Internal Review Guidelines under the *Fines Act 1996*', NRAR provides an internal review option for those that have been issued with a penalty notice by the NRAR.

Penalty notices may be issued by authorised NRAR officers in relation to designated offences under the natural resources management legislation. They may be issued as the sole response to an offence or in addition to other responses to the non-compliance such as statutory directions. Where penalty notices are issued it will be done by an authorised NRAR officer in a timely manner to ensure fairness to the offender and meet the key aims of taking enforcement action and the NRAR's principle objectives.

A penalty notice may be withdrawn within 28 days of the date on which it was issued by the NRAR and any payment made under the penalty notice can be returned. Proceedings for the same offence may then be initiated by the NRAR. A decision to withdraw a penalty notice and institute proceedings will only be done in rare circumstances where, based on an assessment of the offence against the factors above in section 4, a significant error of judgement is deemed to have been made.

## 7. Selecting the appropriate court

Offences under the natural resources management legislation are disposed of summarily either in the Land and Environment Court or the Local Court. Where the NRAR has carriage of the matter, it will consider the following factors in choosing the venue for the summary hearing:

- (a) the maximum penalty that can be imposed in a Local Court compared to the Land and Environment Court
- (b) all offences which are serious enough to attract possible penalties in excess of the jurisdictional limit for Local Courts will be commenced in the Land and Environment Court
- (c) those matters which have or are expected to give rise to applications for orders under Division 6 of Part 1 in Chapter 7 of the WM Act or similar provisions in other parts of the natural resources management legislation, will be commenced in the Land and Environment Court, and
- (d) unless there are good reasons to the contrary, all charges arising out of the same incident will be instituted in the same jurisdiction (and preferably at the same time) so the Court has the option to hear them together.<sup>7</sup>

## 8. Commencing proceedings

Prior to commencing prosecution proceedings, the NRAR engages appropriate legal advice as to whether there are reasonable prospects of conviction for the alleged offence.

Where possible and appropriate the NRAR will seek to recoup both its investigation and legal costs in respect to a successful prosecution.

## 9. Appeals against sentences

Decisions to appeal a sentence following a prosecution judgement in a Local Court are treated in a similar way to the initial decision to prosecute. These decisions are made on a case-by-case basis with regard to all of the circumstances of the matter. In particular, the NRAR considers:

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<sup>7</sup> Ibid, 16

- whether there was a material error of law in the initial proceedings;
- how likely the appeal is to succeed; and
- whether the sentence was manifestly inadequate.

Where a sentence is imposed by the Local Court, with respect to an environmental offence, an appeal as to sentence will also require leave to be granted by the Court.

The NRAR does not commence appeals to sentences in jurisdictions other than the Local Court. Appeals to sentences in all these jurisdictions must be commenced by the Attorney-General or Director of Public Prosecutions.

## 10. Releasing information about prosecutions

The need for deterrence is a significant consideration in the decision to prosecute. This will only be successful if the regulated community is informed of the potential implications of breaching the law. The NRAR will issue a media release and publish the details of successful prosecutions on the NRAR website. The NRAR may also include information about enforcement actions taken by NRAR in a public register. In doing so care must be taken to ensure that the offence and resulting penalty is accurately described.

## 11. Decisions to not prosecute

It is critical that there is integrity surrounding decisions to not prosecute. If the investigating officer or the Chief Regulatory Officer has recommended prosecution and legal advice indicates that there are reasonable prospects of a conviction any decision to not prosecute must be supported by written reasons by the NRAR Board. The decision maker will also advise the Secretary of his or her decision, and the reasons for it, in writing within 5 days.

# Document Control

## Version control and change history

Version	Approved date	Approved by	Notes
1	February 2018	Interim Chief Regulatory Officer	N/A
2	July 2018	Chief Regulatory Officer	Additional information about tiered offences.  Updates inline with the Water Management Amendment Act 2018