HOW TO LEAD A SUCCESSFUL LIFE OF CRIME IN THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES: AN (UPDATED) GUIDE TO CRIMINAL PROSECUTIONS IN THE COURT[1]

The Preparation of Criminal Hearings in the LEC

1. Criminal prosecutions in the Land and Environment Court of New South Wales ("the LEC") are summary criminal prosecutions in Class 5 of the Court's jurisdiction (as defined in s 21 of the *Land and Environment Court Act 1979*, "the LEC Act").

2. Part 5 of Ch 4 of the *Criminal Procedure Act 1986* ("the CPA") applies to proceedings in Class 5 of the Court's jurisdiction (see s 41 of the LEC Act).

3. Not so new case management procedures were introduced in Part 5 Div 2A of the CPA in 2012. As was stated by Biscoe J in *Sutherland Shire Council v Benedict Industries Pty Ltd* [2013] NSWLEC 121 (at [3]):

> Case management of criminal matters in class 5 of the Court's jurisdiction is governed by Division 2A (ss 247A-247Y) Part 5 Chapter 4 of the *Criminal Procedure Act*. Division 2A is entitled: "Case management provisions and other provisions to reduce delays in proceedings". Division 2A applies to the Supreme Court, and the Land and Environment Court, in its summary jurisdiction: s 247A. The Land and Environment Court is a court of summary jurisdiction only. Division 2A came into force in 2012 and is modelled on the older case management provisions applicable to indictable offences in Division 3 (ss 134-149F) Part 3 Chapter 3. These provisions abrogate the defendant's right to silence to a substantial degree. Further substantial abrogation of the right to silence in the case of indictable offences only will occur upon the coming into effect (expected to be on 1 September 2013) of the *Criminal Procedure Amendment (Mandatory Pre-trial Defence Dialogue) Act* 2013 and the *Evidence Amendment (Evidence of Silence) Act* 1989. For example, the accused will be required to disclose the nature of his defence including particular defences to be relied on: s 143(1)(b) of the first mentioned amending 2013 Act. It may be a legislative oversight that that none of the 2013 amendments apply to summary offences.

4. The purpose of Div 2A of the CPA is stated in s 247B as:

   (1) The purpose of this Division is to reduce delays in proceedings before the court in its summary jurisdiction by:

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(a) requiring certain preliminary disclosures to be made by the prosecution and the defence before the proceedings are heard, and
(b) enabling the court to undertake case management where suitable in those proceedings, whether on its own motion or on application by a party to the proceedings.

(2) Case management measures that are available to the court under this Division include the ordering of preliminary hearings, preliminary conferences and further preliminary disclosure. The court has a discretion in determining which (if any) of those measures are suitable in the proceedings concerned.

5. Plainly the objective of Div 2A is to narrow the issues to those genuinely in dispute in order to reduce the time spent in Court, thereby reducing costs. It seeks to ensure a process wherein there is an ordered approach to the narrowing of issues, both legal and factual, leading up to trial (*Environment Protection Authority v Bulga Coal Management Pty Limited* [2013] NSWLEC 29 at [9]). This is particularly important in Class 5 matters where an accused that is convicted invariably pays the prosecutor's costs.

6. To this extent the aim of Div 2A is not dissimilar to s 56 of the *Civil Procedure Act 2005*, namely, to facilitate the just, quick and cheap resolution of the real issues in the proceedings (see *Director of Public Prosecutions (NSW) v Wililo* [2012] NSWSC 713; (2012) 222 A Crim R 106 at [49]).

Can the Prosecution Be Brought At All?

7. Whether a stay (temporary or permanent) of the proceedings can be sought is a matter that defendants should consider in light of the following quartet of High Court decisions: *X7 v Australian Crime Commission* [2013] HCA 29; (2013) 248 CLR 92; *Lee v New South Wales Crime Commission* [2013] HCA 39; (2013) 251 CLR 196 ("the first *Lee* decision"); *Lee v The Queen* [2014] HCA 20; (2014) 308 ALR 252 ("the second *Lee* decision"); and *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5.

8. The first three cases concerned the compulsory examination processes by the Australian Crime Commission and the New South Wales Crime Commission. The examinations had been conducted pursuant to certain statutory powers vested in those authorities under the relevant legislation. The matters in

contention related to the extent to which an accused's right to silence, or privilege against self-incrimination, could be lawfully abrogated by these processes under the relevant legislation (see the second *Lee* decision at [29], [56] and [191–193]).

9. The principle of legality states, in one of its many manifestations, that such fundamental rights cannot be abrogated or impinged without clear and express statutory language or necessary intendment to do so. The question in each case, therefore, was one of statutory construction.

10. In *X7* a majority of the High Court held that the powers of compulsory examination given to the Australian Crime Commission were not to be construed as applying to persons already charged with offences the subject of the examination (Hayne and Bell JJ at [142] Kiefel J at [157]–[162], French CJ and Crennan J at [53]–[61] in dissent) . This is because to do so would be to depart from the accusatorial nature of the criminal justice system in a fundamental respect. Clear words or necessary intendment were therefore necessary, and neither was as a matter of statutory construction, present in the legislation in question.

11. The Court emphasised that the privilege against self-incrimination and its companion, the right to silence (and, after *Kirk*, and as a matter of logic, the principle that an accused person is not competent to give evidence as a witness for the prosecution) were fundamental to our system of criminal justice (Hayne and Bell JJ at [124], Kiefel J at [160]).

12. The first *Lee* decision related to an order issued pursuant to s 31D of the *Criminal Assets Recovery Act 1990* requiring that the appellants be compulsorily examined in relation to civil confiscation proceedings. Prior to the compulsory examinations, the appellants had been charged with criminal offences overlapping in subject matter with the examinations. The matter, heard on appeal from the New South Wales Court of Appeal, turned on whether the results of that compulsory examination might unfairly prejudice the applicants in the context of the criminal charges pending against them. The

High Court narrowly (French CJ, Crennan, Gageler and Keane JJ, Hayne, Kiefel and Bell JJ dissenting) distinguished *X7* and held that the Act, as a matter of interpretation, clearly abrogated the privilege against self-incrimination. Further, while the compulsory examination had the potential to prejudicially interfere with the course of the criminal trial, that prejudice was mitigated by the Court's inherent power to supervise and control its own processes to ensure that they were not abused and, to take appropriate action to prevent injustice and ensure a fair trial (per French CJ at [41], Gageler and Keane JJ at [340]).

13. By contrast, in the second *Lee* decision the High Court held that a fair trial had not been held . A publication of the appellants' evidence had been given to the Police and to the DPP so that the DPP could ascertain any defences the appellants might raise. Documents that had been produced by the father to the Commission were also made available to potential witnesses, the Police, and the DPP. A provision of the *NSW Crimes Commission Act 1985* (s 13(9)) required the Commission to make a direction prohibiting the publication of evidence given before it, where publication might prejudice the fair trial of a person who may be charged with an offence.

14. The Crown conceded that the provision of the transcripts was contrary to s 13(9) of the *NSW Crime Commission Act* (at [17]). The Court held that the decision to provide the transcripts to the Police and the DPP was unlawful insofar as it was for a patently improper purpose, namely, the ascertainment of the appellants' defence. Rejecting the argument that there has been no miscarriage of justice because there had been no practical injustice insofar as the transcripts had not proved to be material at the trial, the Court held that the appellants' trial was altered in a fundamental way by the prosecution having the transcripts in its possession (at [39] and [51]). In short, "it is a breach of the principle of the common law, and a departure in a fundamental respect from a criminal trial which the system of criminal justice requires an accused person to have, for the prosecution to be armed with evidence of an accused person obtained under compulsion concerning matters the subject of charges" (at [46] and see also at [47] and [48]). Because what occurred in that case altered the

criminal trial in a fundamental respect and there was no legislative authority for the alteration, the appeals were allowed and the convictions quashed with a new trial ordered.

15. In *Zhao*, proceedings were brought by the Commissioner of the Australian Federal Police for the forfeiture of property (civil proceedings) of the respondents as proceeds of crime when criminal charges were pending. In both the civil and the criminal case, the relevant offence at the heart of each proceeding was the same. One of the accused argued that his defence of his criminal proceedings may be affected if he was obliged to defend the forfeiture proceedings before his criminal trial was held, and thus a stay of the forfeiture proceedings should be granted pending the finalisation of the criminal proceedings. The High Court agreed. It held that it was not necessary for the accused in question to do any more than to identify the risk, given that the offences and the circumstances relevant to both proceedings were almost identical. In other words, he did not have to state the specific matters of prejudice. Indeed to do so would force him to reveal matters about his defence, the very situation which an order for a stay sought to avoid. At [47] the Court stated (footnotes omitted):

> The prospect that civil proceedings may prejudice a criminal trial and that such prejudice may require a stay of the civil proceedings is hardly novel. In some jurisdictions, procedures are provided for making an application for a stay in such circumstances. The risk of prejudice in a case such as this is real. The second respondent can point to a risk of prejudice; the Commissioner cannot.

16. Given that the AFP would not suffer any relevant prejudice from a delay in the forfeiture proceedings, it was held that a stay of those proceedings should be granted.

17. But more recently, the New South Wales Court of Criminal Appeal in *Regina v OC* [2015] NSWCCA 212 overturned the decision of a trial judge who granted a temporary stay of a criminal trial in respect of a respondent charged with conspiracy to commit insider trading. Prior to being charged, the respondent had been compulsorily examined under the *Australian Securities and Investment Commission Act 2001* (Cth) in connection with an investigation

being carried out by ASIC. The examination was found to have gone to matters relevant to the subject of the charge, including matters of proof and material relevant to the defence. The respondent's answers were given under a claim of privilege against self-incrimination. A report of the examination was generated. ASIC was empowered under the Act to give a copy of the report and the transcript of the examination to the DPP (Cth), which it did. Further, the Act provided that a statement made during an examination was admissible evidence against a person in a proceedings unless, relevantly, a claim for privilege was made before making the statement and additionally that the statement might in fact incriminate the examinee. A temporary stay was granted pending the removal of any person from the prosecution team who had direct or derivative access to the transcript of the examination.

18. The Court of Criminal Appeal held that the provision of the transcript to the prosecutor fundamentally altered the accusatorial judicial process and, applying the principle of legality, that such an alteration could only be made by clear words or necessary intendment (at [98]-[102]). Because the Act rendered admissible in criminal proceedings statements made during an examination subject to certain preconditions being met, and moreover, stipulated that the time for determining whether or not those preconditions were met was when the examination statements were sought to be tendered in evidence, the proper construction of the legislation disclosed, albeit by implication, that the prosecutor could be given a copy of the transcript of examination not only to formulate the charges, but also to prosecute them (at [111]-[120]).

19. And in Land and Environment Court, regard should be had to the decision in *Zhang v Woodgate and Land Cove Council* [2015] NSWLEC 10. In that case an officer of the council commenced proceedings against Mr Zhang in respect of an excavation of his land without proper development consent. After commencing proceedings, the council issued a written notice under s 118BA of the EPAA to a director of a company that had prepared two environmental reports relating to Mr Zhang's land requiring the director to answer questions about Mr Zhang in relation to the over excavation. Mr Zhang sought to have the notice set aside on various grounds, one of which was that s 118BA did not

empower the council to compel the director, or any other person, to answer questions in relation to the subject matter of the current criminal proceedings against him.

20. Section 118BA of the EPAA relevantly provided that (emphasis added):

> **118BA Power of authorised persons to require answers and record evidence**
>
> (1) A person authorised to enter premises under this Division (**"an authorised person"**) may require an accredited certifier, a person carrying out building work or subdivision work or any other person whom the authorised person suspects on reasonable grounds to have knowledge of matters in respect of which information is reasonably required to enable the council concerned to exercise its functions under this Act to answer questions in relation to those matters.
>
> (2) An authorised person may require a corporation to nominate a director or officer of the corporation who is authorised to represent the corporation for the purposes of answering questions under this section.
>
> *(3) An authorised person may, by notice in writing, require a person referred to in subsection (1) to attend at a specified place and time to answer questions under this section if attendance at that place is reasonably required in order that the questions can be properly put and answered.*
>
> (4) The place and time at which a person may be required to attend under subsection (3) is to be:
>
> (a) a place and time nominated by the person, or
> (b) if the place and time nominated is not reasonable in the circumstances or a place and time is not nominated by the person, a place and time nominated by the authorised person that is reasonable in the circumstances.
>
> (5) An authorised person may cause any questions and answers to questions given under this section to be recorded if the authorised person has informed the person who is to be questioned that the record is to be made.

21. The Court held that, on its proper construction, the power under s 118BA of the EPAA could not be used to issue a notice to obtain information to enable a council to exercise its function to prosecute an offence against the EPAA because that function was not a function under the EPAA, but was a function under the *Local Government Act*. However, the Court noted that statutory

powers such as s 118BA should not be read down to prevent notices being issued to persons other than defendants in pending criminal proceedings merely because criminal proceedings have commenced, as such notices cannot interfere with the rights of the addressee of the notice.

22. But what about notices issued to an accused to either, by compulsion, attend records of interview or to produce documents? These notices are not uncommon in environmental prosecutions. There may be an argument that they are either amenable to be set aside or that any evidence obtained under such compulsory processes cannot be used against the accused, and that if they are, that any subsequent charges based on such material should be stayed.

23. Furthermore, can an accused be subject to civil enforcement proceedings in Class 4 of the Court's jurisdiction and subsequent criminal proceedings in Class 5? Perhaps not.

24. While the answer to these questions will ultimately be governed by the proper construction of the statute under scrutiny, opportunities await the courageous and creative legal representative.

What Must be Disclosed Pursuant to Div 2A

25. Subject to the Courts' discretion in s 247P of the CPA to waive any statutory requirement, there are two significant 'compulsory' processes contained in Div 2A that must be observed for all Class 5 matters (all other procedures are at the discretion of the Court).

26. The first involves the notice of prosecution case under s 247E. This includes:

> (1) The prosecutor is to give to the defendant notice of the prosecution case that includes the following:
>
> (a) a copy of the application for any appearance order relating to the defendant,
> (b) a statement of facts,
> (c) a copy of the affidavit or statement (whichever is applicable) of each witness whose evidence the prosecutor proposes to adduce at the hearing of the proceedings,

(c1) in accordance with Division 3 of Part 4B of Chapter 6, a copy of any recorded statement of a witness that the prosecutor proposes to adduce at the hearing of the proceedings,
(d) a copy of each document, evidence of the contents of which the prosecutor proposes to adduce at the hearing of the proceedings,
(e) if the prosecutor proposes to adduce evidence at the hearing of the proceedings in the form of a summary, a copy of the summary or, where the summary has not yet been prepared, an outline of the summary,
(f) a copy of any exhibit that the prosecutor proposes to adduce at the hearing of the proceedings,
(g) a copy of any chart or explanatory material that the prosecutor proposes to adduce at the hearing of the proceedings,
(h) if any expert witness is proposed to be called at the hearing by the prosecutor, a copy of each report by the witness that is relevant to the case,
(i) a copy of any information, document or other thing provided by authorised officers to the prosecutor, or otherwise in the possession of the prosecutor, that may reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the defendant,
(j) a list identifying:
    (i) any information, document or other thing of which the prosecutor is aware and that would reasonably be regarded as relevant to the case but that is not in the prosecutor's possession and is not in the defendant's possession, and
    (ii) the place at which the prosecutor believes the information, document or other thing is situated,
(k) a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness.

27. This disclosure cannot be limited by the prosecutor reserving its position in respect of a right to adduce further evidence. The rationale is that the disclosure must be complete to permit the accused to enter a plea upon the disclosure being provided.

28. In my view, this compulsory disclosure does not materially alter the common law duty of disclosure imposed on a prosecutor in any event.

29. The defendant is then required to provide a preliminary response pursuant to s 247F which must include:

> The defendant is to give the prosecutor notice of the defence response that includes the following:
>
> (a) the name of any Australian legal practitioner proposed to appear on behalf of the defendant at the hearing of the proceedings,
> (b) notice of any consent that the defendant proposes to give at the hearing of the proceedings under section 190 of the *Evidence Act 1995* in relation to each of the following:

(i) a statement of a witness that the prosecutor proposes to adduce at the hearing of the proceedings,
(ii) a summary of evidence that the prosecutor proposes to adduce at the hearing of the proceedings.

30. The Court can direct a preliminary hearing at any time, under s 247G. The hearing may be used for case management or may be used to decide whether or not there needs to be:

(a) a preliminary conference under s 247H, for example, to determine whether the defendant and the prosecutor are able to reach agreement regarding evidence to be admitted at a hearing on liability or a sentencing hearing (s 247H(4));

(b) further preliminary disclosure by the prosecutor or defendant under s 247I (of matters adverse to the credit of the defendant: s 247J); or

(c) further disclosure by the defendant of matters in s 247K.

31. Importantly, the Court can, assuming the Court is aware of it, also order a preliminary hearing be held to give a ruling on a question of law that might arise at the hearing (s 247G(3)(g)).

32. This procedure should be used more than it currently is by the parties. While a defendant retains a right to silence, this should not be equated with a right to do nothing in the preparation of his or her defence until such time as the entirety of the prosecution's evidence has been filed, or the first day of the hearing (see ss 134, 149E and s 247B of Div 2A of the *Criminal Procedure Act*).

33. All too often, valuable time set aside for a final hearing is consumed by having to decide preliminary but nevertheless threshold points of law (typically, whether or not the summons is duplicitous or whether or not an expert's report is admissible). The invariable result is the adjournment of the hearing part-heard. It is important that the parties conduct criminal proceedings in a manner

that facilitates the proper and efficient minimisation of court resources and costs to the parties. This is particularly significant in a jurisdiction where, if the defendant is convicted, the defendant is routinely ordered to pay the prosecutor's costs.

34. The second material compulsory disclosure is proscribed by s 247K. Section 247K states what the notice of the defence response is to contain. It is extensive (emphasis added):

> For the purposes of section 247I (1) (b), the notice of the defence response is to contain the following:
>
> (a) the matters required to be included in a notice under section 247F,
> (b) a statement, in relation to each fact set out in the statement of facts provided by the prosecutor, as to whether the defendant considers the fact is an agreed fact (within the meaning of section 191 of the *Evidence Act 1995*) or the defendant disputes the fact,
> (c) a statement, in relation to each matter and circumstance set out in the statement of facts provided by the prosecutor, as to whether the defendant takes issue with the matter or circumstance as set out,
> (d) notice as to whether the defendant proposes to dispute the admissibility of any proposed evidence disclosed by the prosecutor and the basis for the objection,
> (e) if the prosecutor disclosed an intention to adduce expert evidence at the hearing of the proceedings, notice as to whether the defendant disputes any of the expert evidence and which evidence is disputed,
> *(f) a copy of any report, relevant to the proceedings, that has been prepared by a person whom the defendant intends to call as an expert witness at the hearing of the proceedings,*
> (g) if the prosecutor disclosed an intention to adduce evidence at the hearing of the proceedings that has been obtained by means of surveillance, notice as to whether the defendant proposes to require the prosecutor to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,
> (h) notice as to whether the defendant proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor,
> (i) if the prosecutor disclosed an intention to tender at the hearing of the proceedings any transcript, notice as to whether the defendant accepts the transcript as accurate and, if not, in what respect the transcript is disputed,
> (j) notice as to whether the defendant proposes to dispute the authenticity or accuracy of any proposed documentary evidence or other exhibit disclosed by the prosecutor,
> (k) notice of any significant issue the defendant proposes to raise regarding an application for an appearance order, severability of the charges or separate trials or sentencing proceedings for the charges,
> (l) notice of any consent the defendant proposes to give under section 184 of the *Evidence Act 1995* .

35. Whether, and the extent to which, a defendant will be required to provide more content in the response is to be determined on a case by case basis.

36. There can be no doubt that s 247K impinges upon a defendant's right to silence to a "substantial" degree. Previously, for example, defendants were not compelled to disclose their expert evidence in advance.

37. And any further disclosure under s 247K should not be perceived as affording a prosecutor the opportunity to remedy deficiencies in their evidence. Where the prosecutor has been tardy, or grossly deficient in the preparation of their evidence, or has acted in bad faith, this may be a basis for refusing a prosecutor to adduce further evidence.

38. Further, if a defendant can demonstrate potential irremediable unfairness consequent upon the granting of leave to a prosecutor to adduce further evidence this will be a strong reason to refuse the application (*Wingecarribee Shire Council v O'Shanassy* [2013] NSWLEC 201; (2012) 200 LGERA 140 at [30] –[33]). Relevant considerations will include whether the hearing date has been fixed , whether there is any real prejudice other than costs and how relevant and probative the evidence is (*O'Shanassy* at [33] –[35]). And, of course, the reason or reason for not having adduced the evidence earlier.

39. But as Biscoe J opined in *Benedict* (at [31]):

> I do not think that a defendant can generally complain of unfairness or prejudice if a prosecutor, who has acted in good faith, seeks to file supplementary evidence at a relatively early stage of the proceedings to meet the defendant's objections to the admissibility of parts of the prosecutor's evidence. In such a case, the defendant has received fair notice. This statutory scheme also operates to the benefit of a defendant. For example, if a prosecutor were to make timely objection to the admissibility of parts of a defendant's expert reports, which a defendant is obliged to serve under s 247K(f), the defendant would have the same opportunity to patch up that evidence by supplementary evidence.

40. Thus in *Sutherland Shire Council v Benedict Industries Pty Ltd (No 2)* [2015] NSWLEC 39, the Court permitted the prosecutor to file and serve supplementary expert evidence in response to expert evidence filed by the accused that challenged the analysis of fact and the process of reasoning by the prosecutor's expert. These were matters that were expected to be put to the prosecutor's expert in any event by the defendant, and moreover, the early provision to the defendant of the affidavit provided the defendant with an

advantage. The evidence was supplementary and not 'reply' evidence and its provision could not properly be characterised as the prosecution splitting its case, neither of which are generally allowed by a prosecutor in criminal proceedings (at [71]-[82]).

41. Any application by the prosecutor to reply on supplementary evidence should be made in the normal way, that is to say, preferably by notice of motion, and supported by affidavit evidence, not evidence from the bar table (*O'Shanassy* at [27] –[29]).

42. *O'Shanassy* concerned an application by the prosecuting council to supplement its notice of prosecution case pursuant to s 247E by adding to the list of affidavits it wanted to rely upon. One was from a lay witness, a neighbour, and one was from a contractor who had allegedly assisted (at the defendant's direction) in carrying out the unlawful works and one was from a council officer. The application was opposed by the defendant primarily on the basis of: first, cost; second, an absence of any evidence by the prosecutor as to why the evidence had not been served earlier; and third, prejudice insofar as the defendant would not have made several concession in his s 247K notice had the material been served earlier. No trial date had been set for the hearing of the, then, contested liability hearing.

43. The Court allowed the prosecutor leave to rely on the additional affidavits because, first, in relation to costs, this could be accommodated at the conclusion of the trial; second, although the Court agreed with Mr O'Shanassy that the explanation provided by the council for the failure to serve the material earlier was inadequate, this was not determinative; third, the contention about the concessions was made from the bar table and could not be tested by the council; fourth, the proposed evidence was relevant and probative; and fifth and finally, no irremediable prejudice could be said to flow to the defendant by permitting the evidence.

44. In *Sutherland Shire Council v Benedict Industries Pty Ltd (No 3)* [2015] NSWLEC 97 the Court (very) reluctantly allowed the prosecutor leave to

amend its ss 247E and 247J notices in order to file 10 additional affidavits, the need for which had arisen because a witness who was deposing to the absence of any development consent was determined to be unreliable by the prosecutor. The defendant had been charged with five offences contrary to s 125 of the *Environmental Planning and Assessment Act 1979*. A central element of all five charges was the absence of any development consent to undertake the impugned activities. The evidence was therefore crucial.

45. Notwithstanding that the granting of leave caused the six week hearing date to be vacated, permission was granted to the prosecutor to rely on the affidavits because, having regard to the "touchstone for the exercise of the Court's discretion" of "fairness or justice between the parties" (at 68]), to refuse leave would cause the proceedings to be dismissed in circumstances where the prejudice suffered by the defendant was not severe or irremediable that it could not be remedied by a suitable order for costs (at [82]-[83]).

46. Nevertheless, and to reiterate, it may be that the initial round of disclosure required by s 247E is the only opportunity that the prosecutor is afforded to deliver its evidence in full. It should not rely on the Court permitting any further evidence to be filed. Thus prosecutors should anticipate from the outset the potential evidential matters a defendant may raise, including objections to evidence.

47. Finally, and again at the risk of repetition, the defendant's s 247K response may raise matters that potentially defeat the charge. It is appropriate that these issues are ventilated early (and not at the commencement of the hearing) under the preliminary hearing process pursuant to s 247G. All too frequently valuable hearing time is lost, causing proceedings to be adjourned part-heard, by parties agitating at the commencement of a trial matters that ought to have been raised earlier under the mechanism provided for in s 247G.

What a Defendant Does Not Have to Disclose

48. Under Div 2A of the CPA a defendant is not required to disclose the nature and extent of any lay evidence or what the defendant's defence is – either legal or factual.

49. Regrettably, contrary to Biscoe J's prediction in *Benedict*, the *Criminal Procedure Amendment (Mandatory Pre-trial Defence Dialogue) Act 2013,* amending the *Criminal Procedure Act 1986* to require a defendant to disclose the nature and particulars of their defence and the points of law the accused person intends to raise, only applies to indictable offence and not summary offences. It is not clear why. In my view, that Act should apply to both, particularly given the length and complexity of criminal prosecutions in the LEC. It is curious that an accused in a murder trial in the Supreme Court has a greater burden of disclosure than that imposed for a breach of development consent in the LEC.

50. Finally, Div 2A makes no provision for compulsory joint expert conferencing (ie concurrent evidence and its associated processes), whether in respect of a contested hearing on liability or a sentencing hearing (*cf* the position in all civil trials in the LEC). Absent consent of the parties, it cannot be ordered. To do so would be to breach a defendant's right to silence (*Director General, Department of Environment and Climate Change v Walker Corporation Pty Ltd (No 3)* [2010] NSWLEC 135; (2010) 78 NSWLR 294).

51. Having said this, however, it should be noted that given that costs are almost invariably awarded to the prosecutor's following upon conviction, it is in the defendant's interest to consent to concurrent expert evidence thereby reducing hearing time.

Non-Compliance with Div 2A

52. Section 247N provides the Court with discretionary sanctions to refuse the admission of evidence and the power to grant adjournments where there has been non-compliance with Div 2A processes.

Discretion to Waive Requirements

53. Section 247P provides that the Court may waive the requirements of Div 2A. This permits the Court to tailor the directions made by the Court to the nature of the case before it. Even the compulsory disclosure requirements referred to above can be modified by the Court.

Costs

54. Many of the criminal enactments over which the Court has jurisdiction enable the Court to award costs (including investigation costs) in the prosecutor's or defendant's favour (see, for example, s 248 of the *Protection of the Environment Operations Act 1997*). The timing of when such an order may be made is, however, governed by the CPA.

55. Costs under the CPA are governed by Ch 4 Div 4, in ss 257A-G.

56. Sections 257B concerns the award of costs to the prosecutor and provides that:

> **257B When costs may be awarded to prosecutor**
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> 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 court specifies or, if the conviction or order directs, as may be determined under section 257G, if:
>
> (a) the court convicts the accused 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.

57. Essentially, in order for the prosecutor to be awarded its costs there must exist a conviction or an order under s 10 of the *Crimes (Sentencing Procedure Act) 1999*. Hence the Court has held that a prosecutor is not entitled to its reasonable costs and expenses in complying with a subpoena in criminal

proceedings because neither condition has yet to be fulfilled (*Sutherland Shire Council v Benedict Industries Pty Ltd (No 5)* [2015] NSWLEC 103).

58. Where an accused is successful in defending a Class 5 prosecution in there are limited circumstances in which the accused may recover costs. The two statutory regimes which govern this process are contained in the CPA and the *Costs in Criminal Cases Act 1967* ("the CCCA").

59. Section 257C of the CPA governs the award of "professional costs" as defined (not the broader category of "costs", which would include investigation costs: *cf* s 257B) to an accused. It states that:

> **257C When professional costs may be awarded to accused person**
>
> (1) A court may at the end of proceedings under this Part order that the prosecutor pay professional costs to the registrar of the court, for payment to the accused person, if the matter is dismissed or withdrawn.
>
> (2) The amount of professional costs is to be such professional costs as the court specifies or, if the order directs, as may be determined under section 257G.
>
> (3) Without limiting the operation of subsection (1), a court may order that the prosecutor in proceedings under this Part pay professional costs if:
>
> (a) the accused person is discharged as to the offence the subject of the proceedings, or
> (b) the matter is dismissed because the prosecutor fails to appear, or
> (c) the matter is withdrawn or the proceedings are for any reason invalid.

60. Again, such an order will only be made at the end of the proceedings when the accused has been discharged, the charges dismissed, or the charges have been withdrawn. In other words, an order cannot be made in favour of an accused who has enjoyed success at an interlocutory stage (*Environment Protection Authority v Truegain Pty Ltd* [2013] NSWCCA 204; (2013) NSWLR 125 at [97]-[99] and *Benedict (No 2)* at [96]).

61. In *Truegain*, the Court of Criminal Appeal held that s 68 of the *Land and Environment Court Act 1979* is not a separate head of power to order costs,

and that, instead, such a power derives from Div 4 of Ch 4 of the CPA. The Court opined that (at [97]-[98]):

> 97. Where a prosecutor invokes the judicial power of the State in order to punish a wrongdoer, it has long been the case that costs are addressed separately. "Different considerations arise in criminal proceedings which are brought, not for private ends, but for public purposes": *Latoudis* at 557 (Dawson J). Although one must be cautious of arguments based upon a classification of proceedings as either "civil" or "criminal" (cf *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* [2003] HCA 49; (2003) 216 CLR 161 at [114]), it is plain that for many years, in relation to the question of costs, the Legislature has enacted different regimes turning upon that classification.
>
> 98. For those reasons, in my respectful opinion, the primary judge was wrong to conclude that s 68(1) was a separate head of power to order costs (at [18]), and wrong to say that it was not inconsistent with s 257C (at [22]). When the question is one of inconsistency of powers in separate statutes, the first question is one of construction, and not lightly will an earlier, generally worded power be held to cut across a specific, qualified and later power. In my opinion, such statutory power as the Land and Environment Court has to order costs in respect of proceedings in Class 5 of its jurisdiction is regulated by the *Criminal Procedure Act*. The costs order made in *Wakool Shire Council v Garrision Cattle Feeders Pty Ltd* is to be regarded as being made per incuriam, as was that made *Sutherland Shire Council v Benedict Industries Pty Ltd* [2013] NSWLEC 121 at [35] in reliance on the decision the subject of this appeal: [2012] NSWLEC 78.

62. There is a limit on the professional costs that will be awarded against a prosecutor acting in a public capacity (s 257D). Practically, this means therefore that in order for an accused to be awarded costs, one of the criteria in s 257D(1) must be established:

> **257D Limit on award of professional costs against a prosecutor acting in a public capacity**
>
> (1) Professional costs are not to be awarded in favour of an accused person in proceedings under this Part unless the court is satisfied as to one or more of the following:
>
> (a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner,
> (b) that the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner,
> (c) that the prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought,

(d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award professional costs.

63. In *Pittwater Council v A1 Professional Tree Recycling Pty Ltd (No 3)* [2009] NSWLEC 21, Biscoe J noted that "such provisions negative the majority view in *Latoudis v Casey* (1990) 170 CLR 534 that generally when a prosecution fails an order should be made that the prosecutor pay the defendant's costs."

64. In *A1* Biscoe J provided a useful summary of the applicable principles in awarding costs under ss 257C and D of the CPA (at [15]):

(a) the onus is upon the defendant to bring the case within one of the exceptions to the general rule laid down by s 257D(1) that professional costs are not to be awarded in favour of an accused person;
(b) the finding of a prima facie case may not negate the application of s 257D in the circumstances of the case;
(c) the exceptions in s 257D(1)(a) and (c) are concerned with investigations, whereas the exception in (b) is concerned with the proceedings. A prosecutor's failure to interview an eye witness when it was not known what the witness' evidence might be, could satisfy the test in (a) but not the test in (c) because of the additional requirement;
(d) as to the exception in s 257(1)(a) (that the investigation was conducted in an unreasonable or improper manner)
    (i) the test is purely objective. The test is not whether the investigation fell "grossly below optimum standards". The question whether proceedings have been initiated without reasonable cause is to be answered by reference to the quality of the evidence gathered "with an eye not only to the enquiries which had been made but also to those which should have been made";
    (ii) it is unnecessary in every case for the defendant to show that an investigation conducted in a reasonable manner would have suggested that the defendant might not be guilty or that the proceedings ought not to be brought;
    (iii) a conclusion that the investigation was conducted in an unreasonable manner does not impugn the general competence, far less the integrity, of those responsible for the investigation;
(e) as to the exception in s 257D(1)(b) (that the proceedings were initiated without reasonable cause):
    (i) the failure of proceedings does not, of itself, mean that the proceedings were initiated without reasonable cause;
    (ii) proceedings will be instituted without reasonable cause if, objectively assessed on the facts or the facts apparent at the

> time of initiating the proceedings, they had no real prospects of success or were doomed to failure.

65. Accordingly, in *Kogarah City Council v El Khouri* [2014] NSWLEC 196 the Court dismissed an appeal from a Magistrate in the Local Court who had dismissed six offences under the *Environmental Planning and Assessment Act 1979* of causing six trees to be cut down and removed without the necessary approvals. The council had failed to prove an element of the offence, namely, that there was no development consent or permit authorising the cutting down of the trees.

66. The Magistrate had also awarded the accused his costs, having been satisfied that in running its case absent this critical evidence, the prosecutor's conduct amounted to exceptional circumstances under the relevant legislative equivalent of s 257D(1)(d), namely, s 214(1)(d) of the CPA. The Magistrate explained that it was a serious responsibility for a local council to prosecute serious environmental offences which carry significant penalties and by reason of this responsibility, the prosecutor had a duty to prepare and review the evidence on all of the elements of the offence not only prior to the commencement of proceedings, but also during the course of the prosecution. To fail to discharge this prosecutorial duty to adduce evidence proving each of the elements of the offence was an exceptional circumstance warranting an order for costs against the council. The Magistrate's reasoning was not disturbed on appeal (at [40]-[42]).

67. *Wehbe v Kogarah City Council* [2015] NSWLEC 170 concerned an application by the defendant for the prosecutor to pay his costs after the prosecutor conceded on appeal that the court attendance notices by which proceedings were commenced were defective. The notices had charged Mr Wehbe with having committed incorrect offences. Accordingly, his appeal against his convictions and sentences had to be upheld. The council accepted that it was time barred from amending the charges.

68. Section 49(4) of the *Crimes (Appeal and Review) Act 2001* empowers the LEC to make such orders as to costs as the Court thinks fit. Again, there are limits

on the Court's power to order costs against a public prosecutor. Thus s 70 of the Act provides that costs cannot be awarded unless the appeal court is satisfied of one of the matters in s 70(1)(a) – (d), including that the proceedings in the Local Court were initiated without reasonable cause (s 70(1)(d)).

69. Mr Wehbe argued that the offences with which he had been charged in the court attendance notices were incapable of being proven at the time the notices were initiated, and therefore, the proceedings had been initiated without reasonable cause. The Chief Judge, Preston J, agreed, irrespective of the evidence available at the time of initiation of the proceedings. Because the proceedings charging an offence were "doomed to failure" from the outset (at [16]), they had been initiated without reasonable cause. There was no other discretionary reason for the Court not to order costs. His Honour noted that costs were awarded in Mr Wehbe's favour not to punish the council but to compensate Mr Wehbe for the expense to which he had been put in defending charges for offences that ought not to have been laid against him (at [17]).

70. In *Manly Council v Leech (No 2)* [2015] NSWLEC 204 a defendant was acquitted of an unlawful development charge. He sought an order that the prosecutor, a council, pay his costs of the proceedings pursuant to s 257D(1) of the CPA. The first issue was whether the proceedings had been instituted without reasonable cause or had been conducted in an improper manner. The case concerned the construction of an external stairway. Mr Leech was the architect. The builder had pleaded guilty. Mr Leech was acquitted, the trial judge determining that Mr Leech neither gave a direction to the builder to construct the stairs nor was he vicariously liable for the builder's conduct, the latter finding turning upon the construction of the relevant building contract.

71. In examining when it was unreasonable for a prosecution to have instituted proceedings, Biscoe J quoted (at [6]), with apparent approval, the following passage from *Beatson v R* [2015] NSWCCA 17 per Hoeben CJ at CL:

> The case law on applications under the CCC Act does not provide a single bright line test as to when it would be unreasonable for a prosecution to have been instituted. Rather, the cases indicate that where the issue is word against word which involves an assessment of credibility, then generally it would be less likely that the requisite affirmative opinion would be formed that it was unreasonable for the prosecution to be instituted. By contrast, if there were expert or highly technical evidence from which it was apparent that the Crown case was incapable of making out the elements of the offence then it might be more likely that the requisite affirmative opinion would be formed that it was unreasonable for the prosecution to be instituted.

72. Justice Biscoe held that given the robustness of the evidence against Mr Leech and given that the prosecutor's construction of the contract was at least arguable (although not ultimately accepted), it could not be said that the proceedings had been unreasonably commenced or improperly conducted by it.

73. The second issue was whether the investigation into the alleged offence was conducted in an unreasonable or improper manner because the prosecutor had failed to interview a material witness until quite late, and once interviewed, the prosecutor had failed to investigate matters that had they been examined would have suggested that Mr Leech was not guilty. After exploring the circumstances in which a prosecutor is justified in not calling a material witness (quoting extensively from *R v Kneebone* [1999] NSWCCA 279; (1999) 47 NSWLR 450, at [41] of Biscoe J's reasons), his Honour rejected Mr Leech's submission and with it his application for costs.

74. A separate regime for costs is provided for under the CCCA. Section 4 of the CCCA allows for an application to be made to the Director-General to make a payment from the Consolidated Fund, where a Court has issued a certificate under s 2 of the CCCA, and the Director-General considers making such a payment is justified. The role of the Court is therefore limited to determining whether it ought to exercise its discretion and grant a certificate. Relevantly, s 2 of the CCCA provides that:

> (1) The Court or Judge or Magistrate in any proceedings relating to any offence, whether punishable summarily or upon indictment, may:

(a) where, after the commencement of a trial in the proceedings, a defendant is acquitted or discharged in relation to the offence concerned, or a direction is given by the Director of Public Prosecutions that no further proceedings be taken, …

grant to that defendant a certificate under this Act, specifying the matters referred to in section 3 and relating to those proceedings.

75. The factors of which the Court must be satisfied are set out in s 3 of the CCCA, which provides:

(1) A certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Magistrate granting the certificate:

(a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings, and
(b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.

76. *Port Macquarie-Hastings Council v Lawlor Services Pty Limited; Port Macquarie-Hastings Council v Petro (No 7)* [2008] NSWLEC 75 is illustrative of a successful costs application under both s 257C of the CPA and s 2 of the CCCA. The costs application followed the dismissal of proceedings brought by the prosecutor, Port Macquarie-Hastings Council, against Lawlor Services Pty Limited ("Lawlor Services") and Mr Petro, who were alleged to have destroyed trees contrary to an existing tree preservation order contrary to s 125 of the *Environmental Planning and Assessment Act 1979*.

77. After holding that Port Macquarie-Hastings Council, as a council, was acting in a public capacity and thereby enlivening s 257D of the CPA (at [17]-[28]), Pain J considered whether any of the criteria in s 257D were satisfied. In relation to s 257D, Pain J noted that "the issues are assessed on the basis of what actually occurred, not with the benefit of hindsight" (at [57]). In relation to Lawlor Services, because the proceedings against it depended upon the finding of guilt of Mr Petro, and because Mr Petro had not been interviewed at the time Lawlor Services were charged, Pain J found that the proceedings had

been initiated against Lawlor Services without reasonable cause. This satisfied s 257D(b) and permitted costs to be awarded under 257C in favour of Lawlor Services. However, no such factors arose in relation to Mr Petro.

78. Rather, Pain J found that Mr Petro was entitled to a certificate under s 3 of the CCCA. Unlike s 257D, s 3 is permissive of the benefits of hindsight. Her Honour held that had Port Macquarie-Hastings Council had all the relevant facts immediately before the proceedings were instituted it would not have instituted them otherwise to do so would have been unreasonable.

79. An exception to the general statutory rule that neither party may seek an order for costs until the proceedings have been determined is where the matter has been adjourned (s 257F). In these circumstances the Court may order that one party pay costs if the matter is adjourned:

> **257F Costs on adjournment**
>
> (1) A court may in any proceedings under this Part, at its discretion or on the application of a party, order that one party pay costs if the matter is adjourned.
>
> (2) An order may be made only if the court is satisfied that the other party has incurred additional costs because of the unreasonable conduct or delays of the party against whom the order is made.
>
> (3) The order must specify the amount of costs payable or may provide for the determination of the amount at the end of the proceedings.
>
> (4) An order may be made whatever the result of the proceedings.

80. The legal principles applicable to the resolution of when costs may be ordered under this provision in the case of an adjournment were elucidated by the Court in *Council of the City of Sydney v Trico Constructions Pty Ltd* [2015] NSWLEC 56 (at [105]-[142]). They warrant careful examination. They were recently discussed in *Sutherland Shire Council v Benedict Industries Pty Ltd (No 6)* [2015] NSWLEC 106.

81. In summary, first, additional costs must have been, or are about to be, as a matter of certainty, incurred (*Benedict (No 6)* at [20]). Second, the costs must

be “additional” in the sense that if there had been no adjournment the costs would not have been, or about to be, incurred. Third, there must be unreasonable conduct or delay by the party against whom the costs are sought, and not just delay or conduct that is short of unreasonable. And fourth, there must be a causal nexus between the additional costs and the unreasonable conduct or delay.

82. Finally, any costs payable may be as agreed or as assessed (s 257G).

Class 5 Practice Note

83. There is one. It was published on 12 November 2012. Please read it.

84. The Practice Note requires the parties to consider appropriate directions in light of Div 2A, including, where appropriate, application to be relieved from strict compliance with the Note. There is helpful guidance in relation to the commencement of Class 5 proceedings and the preparation of proceedings up to the commencement of the trial.

Sentencing

85. The majority of Class 5 cases in the Court are sentencing matters. This is because so many environmental offences are, for obvious policy reasons, offences of strict liability. While these hearings and the principles that inform them are not qualitatively different to any other court, there are nonetheless some peculiarities to be aware of and some distinctive jurisprudence.

86. The *Crimes (Sentencing Procedure) Act 1999*, and established common law rules, apply to sentencing for environmental offences. In addition, the statute creating the offence with which the defendant has been convicted will often have sentencing considerations that must be taken into account by the Court in imposing an appropriate sentence, and which will need to be addressed by the parties (for example, s 241 of the *Protection of the Environment Operations Act 1997*).

87. It is beyond the scope of this session to address all of the sentencing factors the Court has regard to in determining an appropriate sentence to impose on an offender. I want to focus on those that occupy the majority of the Court's time, and invariably the defendant's money.

88. From the outset, however, it should be noted that most sentencing hearing in the Court, consequent upon a plea of guilty, proceed by way of a statement of agreed facts. Plainly, the more comprehensive the statement, the quicker the hearing and the less cost are incurred. Affidavits, and other documentary material, that are not objected to and are not the subject of cross-examination, should be reduced to, or included in, a statement of agreed facts. There is no need to burden the Court with material that is not contentious.

89. The factors that the Court considers in determining the imposition of an appropriate penalty are both objective and subjective: the objective seriousness of the commission of the offence and the subjective circumstances of the offender (*Veen v The Queen* [1979] HCA 7; (1979) 143 CLR 458 at 490*; Veen v The Queen (No 2)* [1988] HCA 14; (1988) 164 CLR 465). It is the instinctive synthesis of these factors that enables the Court to decide the penalty.

90. Factors adverse to the defendant must be proved beyond reasonable doubt by a prosecutor, whereas factors in mitigation need only be proved on the balance of probabilities by a defendant (*R v Olbrich* [1999] HCA 54; (1999) 199 CLR 270 at [27] citing *R v Storey* [1998] 1 VR 359 at [369]).

Objective Factors

91. Turning first to the objective factors. The most important considerations in a sentence hearing are:

(a) the nature of the offence – having regard to the statutory objects of the legislation creating the offence, what is the nature of the offence (*Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 234 at [168]-[172]). It is necessary to consider the extent to which the conduct has offended against the overall objects of the Act and the objects of the particular provision breached (*Director-General of the Department of Environment and Climate Change v Rae* [2009] NSWLEC 137; (2009) 168 LGERA 121 at [15]). Thus, for example, an offence of development without consent against s 76A of the EPAA tends to undermine the planning regime of the State established by the Act by avoiding environmental assessment;

(b) the maximum penalty - the maximum penalty is used as a public expression of the seriousness or gravity with which Parliament views the commission of the offence (*Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 698). Careful attention to maximum penalties will almost always be required as they invite the comparison between the worst possible case and the case before the Court (*Markarian v The Queen*[2005] HCA 25 (2005) 228 CLR 357 at [31])

One matter to keep in mind is the jurisdictional limit of the Local Court. There has been a five-fold increase in the monetary penalty the Local Court can impose for an offence under the POEOA from $22,000 to $110,000 (*Protection of the Environment Legislation Amendment Act* amending s 215(2)). While the offence is still measured against the maximum penalty under the Act for the purpose of determining the objective seriousness of the offence in question, the sentence imposed cannot be any greater than the jurisdictional limit of the court in which the proceedings are brought (*R v Doan* (2000) 40 NSWLR 115 at [35]). Why is this relevant to prosecutions in the LEC? The answer to this question is the NSWCCA decision in *Harris v Harrison* [2014] NSWCCA 84;(2014) 201 LGERA 277.

The offence in *Harris* concerned the tampering of a water meter (s 91K of the POEOA) by the insertion of a metal rod to stop the meter from recording water usage. Under the POEOA, the maximum penalty was $1.1million dollars. The matter was prosecuted in the LEC. Had the offence been prosecuted in the Local Court, the maximum penalty that could have been imposed at that time was $22,000. The trial judge imposed a fine of $28,000 and was held to be in error for (amongst other things) not taking into account the fact that the matter could have been prosecuted in the Lower Court with a lower jurisdictional limit (*Harris* at [97]–[98]).

The decision in *Harris* is, with the greatest of respect, anomalous in the result. First, it may mean that where a prosecutor has a choice of forum and elects to prosecute in a superior court, this may effectively stifle the monetary penalty that a superior court imposes notwithstanding that it must have regard to the maximum penalty under the legislation in assessing the objective seriousness of the commission of the offence. Second, given the increase in the jurisdictional limit of the Local Court, arguably more environmental offences will be prosecuted in the Local Court, which lacks the specialised expertise of the LEC and lacks the resources to deal with complex expert evidence and lengthy sentence proceedings. Third, it also has the potential to lead, in my view, to inconsistent decision-making as between the jurisdictions. Having said this, perhaps a continuing incentive to prosecute in the LEC is the range of orders the LEC can impose (such as restoration orders) that the Local Court cannot;

(c) environmental harm – what environmental harm has been caused or, was potentially caused (*Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at [366]; and *Environment Protection Authority v Waste Recycling and Processing Corp* [2006] NSWLEC 419; (2006) 148 LGERA 299 at [145]) by the commission

of the offence. It is this factor that overwhelmingly is responsible for the majority of the time and expense of conducting sentence hearings before the Court. This is because the determination of what environmental harm has been caused by the commission of the offence often requires expert evidence (ecologists, engineers and so on). Harm can be actual physical harm or it can be potential harm (*Waste Recycling and Processing Corp* at [147]). It can include intangible forms of harm such as harm to the amenity of a neighbour, or the effect on the planning system. Almost always, the greater the environmental harm caused by the commission of the offence, the greater the objective seriousness of the crime and the greater the penalty (*Waste Recycling and Processing Corp* at [145]–[147] and *Environment Protection Authority v Orica Australia Pty Ltd (the Nitric Acid Air Lift Incident)* [2014] NSWLEC 103 at [116];

(d) offender's state of mind – although most of the offences are offences of strict liability, an offence that is committed intentionally, recklessly or negligently will increase the objective seriousness of the offence to an offence that was committed unintentionally (*EPA v Orica (the Nitric Acid Air Lift Incident)* at [127], *Gittany* at [123] *Plath v Rawson* [2009] NSWLEC 178; [2006] NSWLEC 419 at [98]). Thus time is often spent during a sentence hearing debating the offender's state of mind during the commission of the offence.

In this context, it is important to have regard to the *De Simoni* principle (for an explanation of which, see the *EPA v Orica (the Nitric Acid Air Lift Incident)* [2014] NSWLEC 103 decision handed down by the Court last year at [131]-[145])

Where the offender is a corporate entity, the relevant state of mind will be that of the directors, that is to say, the 'directing mind and will' of the company (set out in *Director-General, Department of*

Environment and Climate Change v Jack & Bill Issa Pty Ltd (No 5) [2009] NSWLEC 232; (2009) 172 LGERA 225 at [79], [82]–[83]);

(e) reasons for committing the offence – these are relevant to penalty (*Axer Pty Limited v Environment Protection Authority* (1993) 113 LGERA 357 at [366]. In particular, if the offence was commercially motivated (to avoid the cost of obtaining a licence or consent), that is to say, committed for financial gain, this will be an aggravating factor that increases the objective seriousness of the offence. It will be an aggravating factor under s 21A(2) of the CSPA (see *Gittany* at [141], *Bentley* at [246]–[247]);

(f) finally, check that no other aggravating factors under s 21A(2) of the CSPA are present.

Subjective Factors

92. Turning to the subjective and mitigating factors (see, in this regard, ss 21A(3) and 22 of the CSPA) of the defendant, this will include:

(a) the offender's prior record (see *R v Veen [No 2]* [1988] HCA 14; (1988) 164 CLR 165 at [47];

(b) the offender's good character (if you acting for a defendant, obtain references) (s 21A(3)(f) of the CSPA);

(c) the likelihood of reoffending (s 21A(3)(g) of the CSPA);

(d) any plea of guilty and if so, its utilitarian value having regard to when it was entered (at the first available opportunity: to obtain the full 25% discount: *R v Thomson; R v Houlton* NSWCCA 309; (2000) 49 NSWLR 383 at [152]–[155]) and the manner in which the

defendant has conducted the sentencing hearing (see ss 21A(3)(k) and 22 of the CSPA);

(e) the assistance provided to authorities in the prosecution of the offence as evidenced by voluntarily participating in records of interview or the provision of documents(ss 21A(3)(m) and 23 of the CSPA). A greater discount will be given if that assistance assists in the prosecution of a third party (s 23(2) (i) of the CSPA);

(f) the remorse and contrition demonstrated by the defendant. Not merely by proffering an apology, but by the defendant's actions (voluntarily engaging in remediation, assisting the prosecuting authorities, agreeing facts, etc) per s 21A(3)(i) of the CSPA (see *Waste Recycling and Processing Corp* at [203]-[214]). Pleading guilty is not a demonstration of contrition. Defendants plead guilty for many reasons;

(g) agreeing to pay the prosecutor's costs (although given that these costs are almost always awarded, how much weight should be accorded to this factor remains somewhat vexing (but see *Environment Protection Authority v Barnes* [2006] NSWCCA 246 at [88]). The Court does not, of course, deduct the quantum of the costs from the quantum of any monetary penalty imposed. Rather, the payment of the prosecutor's costs is taken into account (usually the costs are substantial, especially where there has been expert evidence adduced) in determining an appropriate penalty (see *EPA v Orica (the Nitric Acid Air Lift Incident)* at [209]); and

(h) the offender's ability to pay – if the offender is impecunious and has a limited capacity to pay, the Court must take this into account in determining penalty under s 6 *Fines Act* (see *Ngo v Fairfield City Council* (2009) 169 LGERA 56; [2009] NSWCCA 241 at [28]). However, a statement from the bar table to this effect is insufficient.

It must be demonstrated by appropriate evidence, usually in the form of an affidavit.

Consistency

93. The Court will apply the principle of even-handedness, *viz*, that like cases are to be treated alike, and different cases are to be treated differently, as reflected in the sentence imposed (*Gittany Constructions Pty Limited v Sutherland Shire Council* [2006] NSWLEC 242; (2006) 145 LGERA 189 at [179]–[182]; *Hili v The Queen* [2010] HCA 45; (2010) 242 CLR 520 at [18] and [46]–[48] and *The Queen v Pham* [2015] HCA 39 at [28]). What is sought is consistency in the application of relevant legal principles (*Pham* at [28], [42] and [46]).

94. It is therefore incumbent upon the parties to furnish the Court with similar decisions – where the facts are analogous – to assist the Court in identifying the range of available penalties. This is not contrary to the High Court decision in *Pasquale Barbaro v The Queen* ([2014] HCA 2 at [6]–[7] and [35]–[36]) (see *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 at [75]-[77] per Gageler J).

95. However, each case will turn on its own facts and there are usually distinguishing features the authorities handed up by the parties to the Court. In other words, the comparable cases will serve as a yardstick to illustrate, but not define, the possible range of an available sentence (*Pham* at [29]).

96. If statistics are to be used, considerable care must be taken with the use of the numerical information embedded within them. The consistency referred to above is not synonymous with numerical equivalence and is not capable of reduction to mere mathematical expression or expression in tabular form. For this reason, presentation of comparable cases in numerical tables, bar charts and graphs should be avoided, or at the very least, treated with considerable caution (*Pham* at [28], [45] and [47]).

97. In *Pham* the High Court unanimously upheld a ground of appeal that the Victorian Court of Appeal had erred in law by adopting an impermissible statistical analysis of comparable cases to determine the objective seriousness of the subjective offence (importation of drugs). The court below had relied on a table of cases presented in statistical form and a graph plotting the head sentence of each case. The numerical information was used to hold that the sentence imposed by the trial judge was outside the range indicated by other jurisdictions. The High Court held that the Court of Appeal had erred by wrongly treating the pattern of past sentences presented in this form as defining the proper boundaries of the sentencing judge's discretion, which it did not.

98. If sentencing statistics are used, there must be an adequate sample. This is not the case with respect to environmental sentencing decisions entered on the JIRS system.

Deterrence

99. Deterrence can be general (directed to the broader community), specific (directed towards the individual defendant), or both.

100. General deterrence will be an element in the imposition of most sentences. As the Court observed in *Bankstown City Council v Hanna* (a serial unlawful dumper) [2014] NSWLEC 152 (at [152]):

> …The sentence of the court needs to operate as a powerful factor in preventing the commission of similar offences by other persons who might be tempted to do so by the prospect that, if they are caught, only light punishment will be imposed: *R v Rushby* [1977] 1 NSWLR 594 at 597-598. Courts have repeatedly stated, when sentencing for environmental offences, that the sentence of the court needs to be of such magnitude as to change the economic calculus of persons in determining whether to comply with or contravene environmental laws. It should not be cheaper to offend than to prevent the commission of the offence. Environmental crime will remain profitable until the financial cost to offenders outweighs the likely gains by offending. The amount of any fine needs to be such as will make it worthwhile to incur the costs of complying with the law and undertaking the necessary precautions. The amount of the fine must be substantial enough so as not to

> appear as a mere licence fee for illegal activity: *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at 359-360; *Environment Protection Authority v Waste Recycling and Processing Corp* at [229]. In this way, the sentence of the court changes the economic calculus of persons who might be tempted not to comply with environmental laws or not to undertake the necessary precautions. Compliance with the law becomes cheaper than offending. Environmental crimes become economically irrational.

101. In other words, the penalty imposed must not become part of the cost of doing business.

102. The sentence imposed may also have regard to the need for specific deterrence, depending on the subjective circumstances of the defendant.

Totality Principle

103. Finally, remember that the totality principle may apply where the offender has committed more than one offence (again for a recent explanation of this principle and its application, see the *Orica (Nitric Air Lift)* decision at [224] to [249]). But in reducing the overall penalty to reflect the total criminality of the defendant, the sentence for each offence must not be reduced to such an extent that the penalty for each offence is disproportionate to the objective seriousness of each offence (*Plath v Rawson* at [222]).

Sentences Are Increasing[2]

104. Lastly, it is fair to say that sentences are, in line with community expectations (however so measured), increasing for environmental offences. This has been reflected in legislative changes and in the general pattern of sentences imposed by the Court.

[2] See Kennett SC, G and McWilliam, V, "Legislative Update and Recent Cases in Planning and Environment Law", paper presented at *UNSW CLE – Recent Developments in Planning and Environmental Law*, 19 February 2015.

105. As of 29 July 2015, the maximum penalties imposed under ss 125A – 125C of the *Environmental Planning and Assessment Act 1979* have increased significantly, with:

(a) Tier 1 offences (wilful or negligent conduct) now carrying a maximum penalty for corporations of $5 million dollars and $1 million for individuals; and

(b) Tier 2 offences now carrying a maximum penalty for corporations of $2 million dollars and $500,000 for individuals; and

(c) Tier 3 offences now carrying a maximum penalty for corporations of $1 million dollars and $250,000 for an individual.

106. Likewise, the *Contaminated Land Management Act 1997* and the POEOA have both, since 1 January 2015, been amended to increase the penalties for environmental offences and make changes to the enforcement provisions of those Acts.

107. One recent judicial illustration of the upward trend in sentencing is *Cowra Shire Council v Fuller* [2015] NSWLEC 13. Those proceeding involved a landowner of Shiel Homestead, which was constructed in approximately 1900. The defendant, Mr Fuller, was charged with carrying out development without consent under the EPAA. Basically the Homestead was demolished. He pleaded guilty.

108. At the time of the demolition, Mr Fuller was aware that he required consent from the council and that he did not possess it. He was also aware that, although not heritage listed, the council was investigating the heritage significance of the building.

109. Mr Fuller did not demolish the building himself and he claimed to have no knowledge of it (the offence was one of strict liability), but there was evidence before the Court that he had told the caretaker that an excavator

would be arriving in the week that the Homestead was demolished and the hot water service and electric stove had been removed prior to demolition at the direction of Mr Fuller.

110. Having regard to the objective seriousness of the offence, the lack of any prior convictions, the lack of any expressed or demonstrated remorse, the diminished utilitarian value of the guilty plea given the lack of cooperation with the prosecutor, general and specific deterrence and comparable cases, the Court fined Mr Fuller $175,000 and ordered him to pay the prosecutor's costs. This is one of the largest fines imposed for an offence of this nature.

Conclusion

111. The principles in respect of criminal prosecutions are the same when conducting criminal proceedings in the LEC as they are in any other Court, subject to the particular provisions of the Acts over which it has jurisdiction, as discussed above.

5 March 2016

Justice Rachel Pepper
Land and Environment Court of New South Wales