NSW GOVERNMENT | Environment, Climate Change & Water

Department of Environment, Climate Change and Water submission to NSW Law Reform Commission inquiry into penalty notices

1. EXECUTIVE SUMMARY

The Department of Environment, Climate Change and Water (**DECCW**) has considered the issues discussed in the NSW Law Reform Commission's (**LRC**) publication '*Consultation Paper 10 Penalty Notices*' (**the Consultation Paper**).

In summary:

a) DECCW's view is that the existing penalty notice system, as far as DECCW is concerned, is operating well.

b) DECCW's view is that there is no need for a central body in NSW to oversee and monitor the penalty notice system. The penalty notice system is already subject to Parliamentary scrutiny under section 41 of the *Interpretation Act 1987*, which enables Parliament to pass resolutions disallowing statutory rules. DECCW's view is that there are no compelling reasons for additional scrutiny of the penalty notice system. Reporting to Parliament on penalty notices is often done in Annual Reports which are tabled in Parliament. This process should not be duplicated, creating unnecessary additional reporting.

c) DECCW's view is that each agency is best placed to determine which offences are appropriately enforced by penalty notice. DECCW is acutely aware of the need to have clear guidance to assist agencies and the community on how each agency will administer the penalty notice system. For example, DECCW has published two prosecution guidelines, namely the *EPA Prosecution Guidelines* and the *NPWS Prosecution Policy* (copies of which were forwarded to the LRC by letter dated 23 February 2009).

d) DECCW's view is that it is appropriate to establish principles and guidelines in relation to the penalty notice system, but that these should take the form of guidelines only (as opposed to standards or other more prescriptive means).

2. BACKGROUND

Across DECCW, penalty notices are issued by DECCW authorised officers for offences against legislation administered by different parts of the agency, namely, Environment Protection and Regulation Group ("EPRG"), Parks and Wildlife Group ("PWG"), and the Marine Parks Authority ("MPA").

In the 2009/2010 financial year, DECCW officers issued a total of 1574 penalty notices for offences under Acts and Regulations administered by EPRG, as reported in the DECCW Annual Report Appendix 8.

Of these, the most prevalent offence for which penalty notices were issued was 'Littering from Motor Vehicles' for which a total of 857 penalty notices were issued. This was followed by 'Smoky Vehicles' for which a total of 302 penalty notices were issued and 'Noisy Vehicles' for which a total of 188 penalty notices were issued. Penalty notices for these offences were all issued under the *Protection of the Environment Operations Act* 1997 (NSW) and Regulations under that Act.

Of the 6,098 penalty notices issued in the 2009/2010 financial year for offences under the *National Parks and Wildlife Regulations* 2009 (NSW) more than 78% were for 'Parking a vehicle in a park without displaying a valid entry pass.' A further 12% were for offences directly associated with vehicles in parks.

In the 2009/2010 financial year, 181 penalty notices were issued by DECCW officers under Marine Park legislation and 162 penalty notices were issued by DECCW officers under Fisheries Management legislation.

3. WHAT SHOULD BE THE CRITERIA FOR ASSESSING WHICH OFFENCES COULD BE ENFORCED BY PENALTY NOTICE?

3.1 Absolute, strict liability and mens rea offences

Whilst it is clear that some offences will be too serious for a penalty notice, the seriousness does solely not turn on the absence or presence of a mental element. Penalty notices should not be confined to absolute or strict liability offences, but instead be capable of being issued for offences which contain a mental element

where DECCW officers can readily form a view as to the presence of a mental element.

DECCW officers are presently able to issue penalty notices for a variety of offences containing a mental element, including the following offences:

a) Sections 89A (failure to notify known location of Aboriginal objects), and 118D(1) (damage habitat of known threatened species, endangered population or endangered ecological community) of the NPW Act;

b) Section 6(2) (consign dangerous goods for transport by road on a vehicle if the person knows that the vehicle is unlicensed) and 6(3) (drive a vehicle transporting dangerous goods by road or rail if the person knows that the vehicle is unlicensed) of the *Dangerous Goods (Road and Rail) Transport Act 2008* (NSW); and

c) Section 211(2) of the POEO Act (furnishing information knowing it to be materially false or misleading).

DECCW's view is that it is appropriate that DECCW officers are able to issue penalty notices for the above offences. Breaches of the above offences may not be so serious as to warrant prosecution in all circumstances. DECCW officers should be able to issue a penalty notice provided they can readily form a view as to the presence of a mental element for the above offences.

3.2 Where maximum penalty specifies term of imprisonment

The fact that the maximum penalty for an offence specifies a term of imprisonment should not be of itself a bar to that offence being designated a penalty notice offence.

DECCW officers are able to issue penalty notices for multiple offences under the NPW act that are punishable by imprisonment, including sections 45, 57(1), 57(2), 58Q(1), 58R, 86(4), 90J, 98, 101, 110, 112G, 117(1), 118, 118A, 118C and 118D of the NPW Act.

These offences can cover a multitude of sins, some of which warrant imprisonment and others for which a penalty notice is appropriate. For example, trading in

protected fauna is known to occur internationally by offenders using very sophisticated methods. On the other hand, a person may possess one animal without being aware that it was protected. In other words, the issue is the seriousness of the breach rather than whether imprisonment is a possible penalty for the most serious breaches of the offence provision.

3.3 Prevalence

Prevalence should not be a relevant criterion in determining which offences could be enforced by penalty notice. Deterrence is still required for certain offences that may have a significant impact, but are of low prevalence. The deterrent effect will still be valid for offences that are of low prevalence. Many of the penalty notice offences in the environmental protection legislation administered by DECCW are comparatively low volume offences. However their use is appropriate as a regulatory tool to deter offending without going to court.

For example, the *Protection of the Environment Operations Act* (NSW) creates offences for providing false or misleading information in relation to a licence (section 66(2)), the pollution of waters (section 120), the unlawful transporting of waste (section 143) and failure to comply with a notice issued under the Act (section 211). Penalty notices may be issued in respect of each of the above offences in the amount of between $500 and $5,000. The maximum fine that can be imposed by a court for the above offences is up to $1,000,000.

While the above offences are of relatively low prevalence, it is nevertheless appropriate in some cases for penalty notices to be issued in respect of the above offences as a regulatory tool to achieve deterrence for minor, one off breaches.

3.4 Community standards

A small number of offences under the legislation administered by DECCW refer to community standards relating to decency, offensiveness, etc. This is not however considered to be a major issue. For example, DECCW provides training to authorised officers in how to carry out law enforcement and compliance activities as part of their duties. DECCW officers also receive training from the State Debt Recovery Office on the issuing of penalty notices.

In practical terms, DECCW's experience is that the risk of excluding such offences from being dealt with by way of penalty notice at an operational level is that it would be necessary for our agency to commence more court proceedings for such offences. For example, clause 13 of the *National Parks and Wildlife Regulation* 2009 (NSW) deals with offensive conduct, such as behaving in a disorderly manner, using insulting or indecent language or committing an act of indecency in a park. Experience shows that infringement notices are commonly issued in circumstances where the behaviour of the recipient is seriously interfering with the enjoyment of the park by others.

In the 2009/2010 financial year, DECCW authorised officers issued 21 penalty notices under clause 13. Our agency commenced a total of 139 prosecutions that financial year, so our prosecution caseload would increase by almost 15% if that offence alone were not able to be dealt with by penalty notice. Rigid limitations on the use of penalty notices would place undue demands upon agency time and resources.

In our view, the risk of inconsistency is outweighed by the practical and operational desirability of allowing penalty notices to be issued for offences which relate to community standards.

3.5 Maximum fine for which penalty notices may be issued

Paragraphs 4.43-4.47 of the *Consultation Paper* address the question whether penalty notices should be capable of only being issued for offences where the maximum pecuniary penalty does not exceed a specified figure.

Rigid criteria relating to maximum fines are not, in our view an appropriate way to determine whether or not a penalty notice may be issued. This is because many of the offences arising under statutes administered by DECCW have very high maximum penalties to cover the full range of environmental damage and the culpability of behaviour which causes it. However, there will also be many environmental offences of lower seriousness for which a penalty notice is the appropriate response. For example, the *Protection of the Environment Operations Act* (NSW) creates an offence for the pollution of waters (section 120). Penalty notices may be issued in respect of the offence of pollution of waters in the amount of $750 (for an individual) and $1,500 (for a corporation). The maximum fine that can be imposed by a court for the offence is up to $250,000 (for an individual) and

$1,000,000 (for a corporation). Pollute waters offences can range from minor breaches (for example, inappropriate sediment controls at a residential building site) up to serious breaches (for example, involving discharges of millions of litres of toxic pollutants from major industrial undertakings). It is absolutely appropriate to allow DECCW officers to issue penalty notices for minor breaches of the pollute waters offence.

3.6 Maximum amount for penalty notices

Paragraphs 4.15-4.20 of the *Consultation Paper* address the question whether a maximum amount for penalty notices should be set and whether there should be principles which allow exemptions to the maximum. DECCW currently has several infringement notices with amounts above the range of $1,200 to $1,600 discussed in the *Consultation Paper*. In environmental offences, the financial benefit to be obtained by non-compliance would often easily outweigh the amount of the penalty notice if $1,600 were the proposed ceiling. The practical effect of limiting the issue of penalty notice to $1,600 would be to deprive DECCW of a legitimate and practical enforcement tool and, instead, force the agency to resort to prosecution more often.

4. WHAT SHOULD BE THE PRINCIPLES OR GUIDELINES FOR SETTING PENALTY NOTICE AMOUNTS?

DECCW supports the establishment of guidelines (as opposed to standards or other more prescriptive means) in relation to the setting of penalty notice amounts and their adjustment over time. This would improve consistency between penalties in different legislation and the transparency in setting and adjusting penalty notice amounts.

DECCW generally supports the principles proposed for NSW on page 56 of The Consultation Paper (maximum amount; deterrence and court diversion; proportionality; consistency; and corporations) for setting penalty notice amounts. However, DECCW's view is that each offence needs to be considered on a case-by-case basis. Accordingly, DECCW considers that any guidance should be in the form of guidelines rather than standards or other more prescriptive means which will not allow for the necessary flexibility.

4.1 Proportionality

Proportionality between the amount fixed for a penalty notice and the maximum pecuniary penalty should be a relevant principle in setting penalty notice amounts.

Penalty notices serve two objectives. The first is to deter certain conduct from occurring; the second is to provide for an efficient, quick and cheap resolution to a breach as an alternative to commencing prosecution.

If the fixed penalty notice amount is set too low in proportion to the maximum pecuniary penalty, then the penalty notice may not achieve the objective of deterrence.

If the fixed penalty notice amount is set too high in proportion to the maximum pecuniary penalty, then many more offenders would potentially choose to court elect, and the penalty notice would risk failing to achieve the objective of being an efficient, quick and cheap resolution to an offence. This would decrease the effectiveness of the penalty notice system and undermine its objectives.

4.2 Court ordered penalties

The discussion in the above section underscores that the typical range of pecuniary penalty imposed by a court for an individual offence is relevant to the setting of penalty notice amounts.

The reason is that if the penalty notice amount is set too high, then many more offenders would potentially choose to court elect, and the penalty notice would risk failing to achieve its objective of being an efficient, quick and cheap resolution to an offence. This would decrease the effectiveness of the penalty notice system and undermine its objectives.

5. IS THERE A NEED FOR A CENTRAL AGENCY TO OVERSEE AND MONITOR THE PENALTY NOTICE SYSTEM AS A WHOLE?

DECCW's view is that there is no need for a central body in NSW to oversee and monitor the penalty notice system.

DECCW notes that it carefully considers relevant principles when deciding on penalty notice offences and amounts. Such decisions are given effect to by Regulations, which of course, are subject to Parliamentary scrutiny under section 41 of the *Interpretation Act 1987*, which enables Parliament to pass resolutions disallowing statutory rules. DECCW's view is that there are no compelling reasons for additional scrutiny of the penalty notice system. Reporting to Parliament on penalty notices is often done in Annual Reports which are tabled in Parliament. This process should not be duplicated, creating unnecessary additional reporting.

DECCW's view is that each agency is best placed to determine which offences are appropriately enforced by penalty notice. DECCW is acutely aware of the need to have clear guidance to assist agencies and the community on how each agency will administer the penalty notice system. For example, DECCW has published two prosecution guidelines, namely the *EPA Prosecution Guidelines* and the *NPWS Prosecution Policy* (copies of which were forwarded to the LRC by letter dated 23 February 2009).

6. OTHER COMMENTS RELATING TO PENALTY NOTICES

Penalty notice history should continue to be provided to courts which are sentencing for later offences, essentially for the reasons set out in *Ex parte Newman; Re Fisher and McInerny [1969] 1 NSWLR 538*. It remains open to a defendant to explain to the court that the motive for paying a penalty notice was expedience. It would be completely artificial for the sentencing court to be denied knowledge of prior penalty notices and therefore treat the defendant as having a completely unblemished record.

Higher penalty notice amounts are appropriate for corporations than for individuals. Again, there should not be a rigid rule. However, it is clearly appropriate where Parliament has created higher maximum penalties for corporations than individuals. Corporations are also more likely to have committed the offence in the course of commercial operations, which makes the offence objectively more serious. Corporations are also likely to have greater capacity to pay than individuals.

Guidelines would be appropriate for issuing multiple penalty notices for continuing offences and time limits for serving penalty notices but they should not be mandatory.

DECCW supports the general principle that penalty notices should be issued for minor, one off breaches and within a short period after the offence is committed.

For motor vehicle offences, it should not matter if the owner or driver is under 18 years of age. For other offences the fact that the offender is under 18 should remain as one factor to consider in the discretion of whether to issue the penalty notice.

Consistency with penalty notices under other legislation is sound in principle but it should be the subject of guidelines, as opposed to mandatory rules. There may be particular need to deter certain types of offences in particular types of parks. For example, riding of motor bikes without number plates is particularly prevalent in National Parks and there is a justification for a higher penalty amount to deter that offence in parks more so than in other places.

Issues such as those described above are dealt with in the *EPA Prosecution Guidelines*, which contain guidance to DECCW officers in relation to the appropriateness of issuing penalty notices for continuing offences and the time frames for the serving of penalty notices (Section E). In DECCW's view, such guidelines are examples of good regulatory practice and for this reason DECCW supports the establishment of guidelines (as opposed to standards or other more prescriptive means) in relation to the setting of penalty notice amounts and their adjustment over time.

DECCW again thanks the LRC for the opportunity to make this submission in relation to the LRC's inquiry into penalty notices.

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