HOLDING REGULATORS TO ACCOUNT IN NEW SOUTH WALES POLLUTION LAW: PART 1 – THE LIMITS OF MERITS REVIEW

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Decisions made by pollution regulators may impact upon the natural environment, which in turn may have ramifications for many people. Their determinations affect the ecological systems that humans depend upon to survive and for their quality of life — the air we breathe, the water we use and the land that we live on. The consequences may extend beyond the present generation to future generations as well. Once environmental damage has occurred it can be a very lengthy, difficult and often costly process to undertake remediation, assuming it is feasible at all. Some decisions may result in harm so catastrophic that it cannot be reversed.[1]

The need for regulatory accountability

A fundamental premise underlying administrative law is that governments must be accountable for their actions. Accountability of pollution regulators is crucial given the wide-ranging and long-lasting impact their decisions can have on the environment and human health. While legislation should provide guidance for executive decision-making, it is imperative that accountability mechanisms such as merits and judicial review are available to ensure compliance with the law, particularly in relation to the exercise of discretionary powers.[2] As Bird recognised, there is a need for accountably given the 'fairly extraordinary powers' that regulators are responsible for exercising.[3]

This article is the first of two related articles which examine the extent to which administrative law mechanisms can be, and have been, utilised to ensure the accountability of regulators for decisions made under the core piece of New South Wales pollution legislation — the *Protection of the Environment Operations Act 1997* (NSW) (POEO Act). This article considers the ability of merits review to hold regulators to account. A forthcoming article examines the impact of judicial review and civil enforcement on government accountability in pollution law.

Accountability is being referred to in the sense of ensuring that, by scrutiny through the courts, regulators are acting in accordance with the law and also, given the purpose of merits review, to ensure that the 'correct or preferable' decision is being made.[4] But furthermore, as a regulatory system is only considered to be effective if it is achieving its objectives,[5] accountability encompasses whether regulatory powers are being exercised 'effectively' — that is, whether decisions are being made to further the objects of the POEO Act. The 'paramount' purpose of the legislation is environmental protection: the avoidance or reduction of pollution to protect the environment and human health from harm.[6] This also represents the mandate of the New South Wales Environment Protection Authority (EPA).[7]

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Given the importance of the legislative objectives, scrutiny by the courts is also essential to ensure better decision-making. Regulators, such as the EPA, make decisions about high-risk activities which must be properly controlled given their potential environmental and health impacts. It is noted that the aim of this article is not to argue that the EPA or other regulators are doing a 'bad job', although it must be accepted that regulators are not 'perfect … like most organisations, they could always do a better job'.[8] The purpose of the two articles is to explore the extent to which administrative law mechanisms have the potential to, and have been utilised to, test the job regulators are doing in order to hold them accountable.

As a result of (i) the broad social purpose of environmental protection reflected in the objects and provisions of the POEO Act, (ii) the wide reach of environmental decisions, and (iii) the lack of the environment's ability to represent itself, often it is environmental groups or community members (that is, 'third parties') who wish to hold the government to account. Public participation has been an important tenet underlying environmental law since the late 1970s and is reflected in the objects of the POEO Act.[9] Gunningham and Grabosky have recognised the valuable role that the community and public interest groups can perform as surrogate regulators.[10] Furthermore, they can undertake a 'watchdog role' regarding the implementation of legislation by agencies.[11] As Mossop stated:

> citizen suits create a form of accountability that has been lacking from the process of government administration. Why is this so? It is because citizen suits empower ordinary citizens to enforce the law, so that environmental decision-making is government by the rule of law and not the rule of bureaucrats and Ministers.
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> The reason why this is so significant is that environmental law is an area where there are clearly conflicting aims that either have not, or cannot, be reconciled. These are: the goals of environmental protection, and the goals of a western, capitalist, resource-intensive society … [R]egulatory agencies governing pollution and resource management must deal with [these 'opposing goals'] every day. It is here that tensions are strongest and it is here that the need for accountability is greatest if the public values expressed by parliament are to be vindicated.[12]

A further theme underlying these two articles is therefore the extent to which third parties seeking to protect the environment in the public interest are provided with rights to participate in and challenge decisions under the POEO Act and also the extent to which they have contested such decisions.

This article begins by introducing the decision-makers under the POEO Act and the main powers that they exercise — namely, licensing and issuing notices. The limited rights of third parties to participate before a decision is made are examined given that public participation at this stage can help to ensure accountability and that a better decision is made. Next, the potential for merits review to hold pollution regulators to account is considered. The impact of an absence of third-party appeal rights is examined. A quantitative and qualitative review of merit appeals under the POEO Act is then conducted using material contained in the EPA's POEO Act public register (the Public Register), litigation statistics and written judgments. Searches were conducted in June–July 2016. It is concluded that, while there is a body of case law to guide future decision-making in issuing notices, limited case law exists in relation to the exercise of licensing powers. Merits review is not available for third parties and there have been few challenges by licensees regarding licensing decisions, resulting in limited accountability of the EPA through this type of proceeding.

POEO Act decision-makers and their main powers

The main bodies with regulatory responsibilities under the POEO Act are the EPA and local councils. The POEO Act is based on a 'one site, one regulator' principle: one regulator, known as the 'appropriate regulatory authority' (ARA), is responsible for all the pollution

issues at a particular premises.[13] Accordingly, a number of powers can generally only be exercised by the ARA, such as issuing environment protection licences or clean-up or prevention notices.[14] The EPA is the ARA for activities requiring a licence which have a higher potential to pollute, as well as 'activities carried on by the State or a public authority'.[15] Activities requiring a licence are those listed in sch 1 of the POEO Act[16] and any other activity that pollutes waters.[17] Only the EPA can make licensing decisions and take regulatory action regarding licensed premises.[18] As I have noted:

> Licences are the primary tool used by the EPA for controlling pollution from licensed activities … Notices can also be used by the EPA to initiate pollution control in relation to licensed activities, eg clean-up notices. However, for systemic pollution issues, the EPA is more likely to impose or vary a licence condition.[19]

Local councils are generally responsible for all other activities in their local government area that do not require a licence[20] and they have a significant enforcement role under the POEO Act.[21] The main way that local councils can manage pollution is by issuing notices — namely, clean-up, prevention and noise control notices.[22] The powers exercised by regulators are discussed in more detail in the following section.

Decision-making under the POEO Act

Licensing decisions

Licensing is a discretionary process. When the EPA makes a licensing decision, there is a list of factors that must be taken into consideration if they are of relevance.[23] This list includes:

- the actual or likely pollution resulting from the activity and its environmental impact;[24]
- 'the practical measures that could be taken to prevent, control, abate or mitigate that pollution, and to protect the environment from harm as a result of that pollution';[25]
- any environmental impact statement (EIS) or species impact statement that has been prepared for the purposes of obtaining development approval under planning legislation;[26]
- in relation to an application for the issue, variation, transfer or surrender of a licence, any public submissions that have been received;[27] and
- the EPA's objectives, which, as discussed, focus on protection and enhancement of the environment and the reduction of risks to the environment and human health.[28]

The weight to be given to each relevant consideration is generally a matter for the EPA as the decision-maker.[29] Once a licence has been issued, it 'remains in force until it is suspended, revoked or surrendered'.[30] It may be varied at any time, either upon application by the licensee or on the EPA's initiative.[31] Licences are reviewed at least every five years.[32]

Public participation in licensing

This section considers public participation rights before a licensing decision is made. As licensing is a discretionary process, targeted public participation can help to ensure that the EPA is fully apprised of the relevant matters before making a determination.[33] This can lead to better decision-making, providing accountability. The inappropriate exercise of discretion can have negative environmental and human health consequences.[34] If better decisions are made to begin with, this negates the need to overturn a 'bad' decision through the courts.

One of the objects of the POEO Act objects is 'to provide increased opportunities for public involvement and participation in environment protection'.[35] Despite this, the public has

limited rights of participation in licensing decisions. There is no provision requiring the EPA to call for submissions regarding new licence applications. However, it cannot grant or vary a licence unless, where required, development consent or approval has been obtained under the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).[36] In making a licensing decision, the EPA must consider any public submissions it has received, including those made under the EP&A Act.[37]

It is necessary to explain the public submission provisions in the EP&A Act in order to understand when submissions may be received by the EPA. Developments requiring a licence under the POEO Act generally constitute either 'designated development', 'State significant development' (SSD) or 'State significant infrastructure' (SSI) under the EP&A Act. Designated development is essentially a list of developments that require submission of an EIS because of their potential to impact on the environment.[38] SSD and SSI are declared by the *State Environmental Planning Policy (State and Regional Development) 2011* (NSW) or by order of the Minister in the *New South Wales Government Gazette*.[39] They are major projects that are determined by the Minister or, by delegation, the Planning Assessment Commission (PAC) rather than a local council.[40] SSD and SSI also require an EIS.[41] Examples of SSD are mining, quarries and sewage treatment plants over specified thresholds.[42] Examples of SSI are certain ports and wharfs.[43]

Development applications for designated development or SSD and their accompanying documentation, including the EIS, must be publicly exhibited.[44] If a licence under the POEO Act is required, this must be specified in the development application.[45] Any member of the public can make submissions in relation to the development application.[46] The EIS for SSI must be publicly exhibited, and public submissions may be made 'concerning the matter'.[47]

Submissions made under the EP&A Act could object to the development based on pollution issues, such as dust, odour, noise or water pollution. Where designated development requires a POEO Act licence and is dealt with through the integrated development provisions of the EP&A Act (essentially a process for streamlining the assessment of projects that require development consent and specified approvals under other legislation), the consent authority is required to forward public submissions to the EPA.[48] Similarly, in relation to SSI, the Secretary of the Department of Planning and Environment (DPE) must forward any submissions received 'or a report of the issues raised in those submissions' to the EPA.[49] There is no equivalent statutory requirement in relation to SSD, but any public submissions, and the applicant's response, must be made publicly available on the DPE's website.[50]

Where submissions made under the EP&A Act have been received by the EPA, they must be taken into account by the authority in determining a licensing application.[51] A member of the public who has made submissions under the EP&A Act should be aware from the publicly exhibited development application or EIS that a POEO Act licence is required.[52] However, there is no targeted request for submissions regarding the conditions that should be imposed on a licence by the EPA or whether a licence should be granted at all. The call for submissions is made in the context of the development application or project approval required under the EP&A Act. For example, the public notice in relation to designated development and SSD is required to state that 'any person … may make written submissions to the consent authority [or Minister for SSD] *concerning the development application*'.[53] There is nothing to draw to a person's attention that they could also make submissions in relation to a POEO Act licence, because those submissions will, where required, be forwarded to the EPA. Submissions under the EP&A Act, even if they address pollution, are likely to concentrate on relevant considerations under planning law rather than being targeted to matters the EPA must consider in making a licensing decision.[54] As Millar noted, the starting point for making an effective submission is to identify the relevant considerations for the decision-maker under the legislation.[55] If community members are

unaware that they can make submissions in relation to licensing issues, they will not accurately target the relevant matters the EPA must consider. The adequacy of the public participation process regarding licensing is examined below after the provisions relating to licence variation and review are considered.

If it is proposed that a licence be varied, the EPA is only required to 'invite and consider public submissions' in the following limited circumstance:

> (a) the variation of a licence will authorise a significant increase in the environmental impact of the activity authorised or controlled by the licence; and
> (b) the proposed variation has not, for any reason, been the subject of environmental assessment and public consultation under the *Environmental Planning and Assessment Act 1979* …[56]

The EPA is required to review a licence every five years.[57] The review must be publicly notified,[58] but there is no requirement to call for public submissions.[59] The statutory requirement to consider public submissions only applies to a 'licence application',[60] meaning 'an application for the issue, transfer, variation or surrender of a licence'.[61] Lyster et al argue that any submissions made in relation to a licence review will nevertheless be a relevant consideration for the EPA.[62] Indeed, there would seem little point in publicly advertising a licence review if the submissions that were received were not considered.

It is clear that there are limited public participation rights in relation to licensing decisions under the POEO Act. The main opportunity to participate is provided under planning law rather than pollution law. In the green paper for the Protection of the Environment Operations Bill 1996 (NSW) (POEO Bill), the government, while recognising the importance of public participation in terms of better decision-making, stated that the rationale for limiting such rights (and third-party appeal rights, discussed below) under the POEO Act was as follows:

> The Government … believes it is important that these participatory processes do not unduly delay development consent and/or create bureaucratic bottlenecks. A development proposal should only have to go through the public consultation process once, rather than at both the land use planning and environment protection licensing stages …
>
> [The POEO Act] uses the planning legislation as the mechanism to provide for public participation and appeal on environment protection issues.
>
> The close correlation between the Schedule of EPA-licensed activities and the list of designated developments under Schedule 3 of the EP&A Act regulations will mean that licensed activities will generally require an EIS and therefore will be the subject of public participation. Coupled with provisions to ensure consideration of environment protection issues at the development consent stage, this system will ensure that pollution control issues are subject to meaningful public participation and third-party appeals.[63]

This statement, however, does not seek to grapple with other issues raised by the government in the same document. It stated:

> [There is a need for separate approvals for a project under both the EP&A Act and POEO Act] in order to ensure transparency and accountability. Although the two processes are related, both the purpose of the authorisations and the considerations involved in determining an application are sufficiently different under [the] different legislation …[64]

The Land and Environment Court of New South Wales (LEC) has also recognised that, while the planning regime under the EP&A Act and pollution control under the POEO Act are complementary, they are two separate schemes with different requirements.[65] The matters to be taken into consideration in determining a development application or application for SSI vary from those for licensing decisions.[66] Furthermore, the objectives of the legislation

are different. The EP&A Act is widely recognised as having objectives aimed at both the promotion of development and environmental protection, which are often conflicting and result in one (generally, development) being prioritised over the other.[67] The POEO Act's objects also recognise the necessity for development by reference to 'the need to maintain ecologically sustainable development'.[68] However, the LEC has stated that '[t]he objects reveal that the *central mischief* to which the [POEO Act] is directed is to avoid, or at the very least, reduce pollution in order to prevent harm to human safety and the natural environment'.[69] That is, environmental protection is the 'paramount' purpose of the POEO Act.[70]

A greater level of public participation under the POEO Act could be provided by requiring the public notification of a development application under the EP&A Act which also requires a licence (or licence variation) under the POEO Act to state that submissions may also be made in relation to the licence. This would ensure public participation is directed at the relevant considerations under both the licensing and planning processes without causing any further delay in assessment. Such participation would arguably lead to better decision-making under the POEO Act and greater levels of transparency and accountability of the EPA.

Furthermore, targeted participation is critical for SSD and SSI. This is because the consent or approval under the EP&A Act — which is granted by the planning Minister, not a specialised pollution regulator such as the EPA — can dictate the maximum parameters for pollution control that can be contained in a POEO Act licence. This arises because the EP&A Act provides that a licence under the POEO Act *must* be granted for SSD or SSI and that the licence must be 'substantially consistent' with the consent or approval granted under the EP&A Act until the first licence review.[71] It is therefore essential that any public submissions under the EP&A Act address the appropriate conditions that should be imposed through a POEO Act licence.

Notice powers

There are a number of different types of notices that ARAs can issue under the POEO Act. Clean-up notices can be issued where a pollution incident has occurred. They allow ARAs to direct owners, occupiers or polluters to take clean-up action.[72] A prevention notice can be issued if an ARA 'reasonably suspects that an activity has been or is being carried on in an environmentally unsatisfactory manner'.[73] It can require an occupier and/or the person carrying on the activity to take specified action 'to ensure that the activity is carried on in future in an environmentally satisfactory manner'.[74] 'Environmentally unsatisfactory manner' is defined to include where an activity is carried on in breach of the Act or is likely to cause a pollution incident.[75] A noise control notice can be issued by an ARA to limit the noise being emitted by an activity or article at a premises, either by controlling the times the noise can be emitted or the level of noise.[76] The Minister also has power to issue a prohibition notice, on the recommendation of the EPA, to shut down an activity in specified circumstances.[77] Various other powers, such as investigation powers, are provided to regulatory authorities.

Merit appeals, accountability and better decision-making

This section examines the extent to which merits review is able to hold POEO Act regulators to account for their decisions, including the potential for such proceedings to guide better decision-making. First, the nature of and procedure of appeals in pollution law are considered. Given there is no common law right to merits review,[78] the appeal rights that have been provided under the POEO Act are discussed. Importantly, the lack of third-party rights is critically examined. Secondly, this section undertakes quantitative and qualitative

analysis of merit appeals by licensees and notice recipients to determine the impact of such matters on accountability and future decision-making.

The nature of and right to take merit appeals

Nature of and procedure in merit appeals

Appeals under the POEO Act (and EP&A Act) can only be taken in the LEC.[79] The LEC is a superior court of record,[80] with equivalent status to the Supreme Court of New South Wales. It has exclusive jurisdiction in relation to planning and environment cases, making it a 'one-stop shop' for all such matters.[81] The LEC has jurisdiction in relation to merit appeals, as well as judicial review, civil enforcement and criminal prosecutions.[82] Its merits jurisdiction is akin to work that would usually be conducted by a tribunal.

Merits review proceedings in the LEC are presided over by a commissioner or a judge, two or more commissioners or a judge sitting with a commissioner. Commissioners hear the majority of appeals, with judges generally being involved in more complex or controversial matters.[83] Commissioners must have expertise in one of a number of specified areas, such as town planning or environmental science, or as a lawyer.[84]

A merit appeal to the LEC provides the applicant with an opportunity to have the decision considered afresh.[85] The Court has 'all the functions and discretions' of the original decision-maker.[86] Merits review proceedings are 'conducted with as little formality and technicality' as is appropriate and 'the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits'.[87] In POEO Act appeals, the LEC's decision is 'final and binding on the appellant and the person or body whose decision or notice is the subject of the appeal'.[88]

The LEC has various alternative dispute resolution (ADR) procedures available to encourage agreement before a matter is adjudicated. For example, this includes participating in a conciliation conference,[89] mediation[90] or neutral evaluation[91] or referral to a referee.[92] Parties must participate in these ADR mechanisms in good faith.[93]

The right to a merit appeal under the POEO Act

Merit appeals can be taken in the LEC by the licence-holder or licensing applicant in relation to EPA licensing decisions such as refusal of a licence, imposition of conditions on a new or varied licence, refusal of a licence transfer or the suspension or revocation of a licence.[94] In addition, appeal rights are provided to the recipient of a prevention notice,[95] a noise control notice,[96] and a notice issued by the EPA to a waste transporter requiring a GPS tracking device to be installed on a waste transportation vehicle.[97] All appeals must be lodged in the LEC within 21 days.[98] There is no right of appeal against a clean-up notice or prohibition notice, or in relation to the exercise of investigation powers, such as a notice to provide information or records.[99]

The lack of merit appeal rights for third parties

The POEO Act does not give third parties merit appeal rights. In this respect, as Handley AJA noted in *Macquarie Generation v Hodgson*,[100] '[t]he [POEO] Act does not provide for third parties to participate'.[101] This is in contrast to the determination of development applications under planning law, where an appeal right is provided to third parties in limited circumstances. Under the EP&A Act a person who made a written submission objecting to a designated development may appeal against a decision by a

consent authority to grant consent.[102] This appeal right extends to SSD that would otherwise have been designated development if it had not been so declared.[103] There is no third-party appeal right in relation to SSI. As originally drafted, the list of designated developments quite closely matched the activities that require a licence under the POEO Act.[104] As such, for those activities that require a licence under the POEO Act, there may be a right of third-party merit appeal for objectors regarding the development consent but not in relation to the licence.

Section 39A of the *Land and Environment Court Act 1979* (NSW) (LEC Act) also gives the LEC power to join a third person as a party to certain planning law merit appeals brought by either the developer or a third-party objector. A person may be joined as a party if they can raise issues that would not otherwise be 'likely to be sufficiently addressed' or it is in either the public interest or 'the interests of justice'.[105] There is no equivalent statutory right provided for pollution law. However, it is noted that, in an appeal against a POEO Act prevention notice, the LEC did join an owners corporation of a strata building as an intervener in circumstances where that party was directly impacted on by the decision.[106] The intervener was allowed to 'adduce evidence, cross-examine witnesses and make submissions in the proceedings'.[107] Such options for third parties to participate are only possible where a licensee actually lodges an appeal against a licensing decision. As discussed below, few appeals have been lodged.

What is apparent from the legislative provisions is that there are no statutory rights afforded to third parties regarding the bringing of, or participation in, merits review under the POEO Act. The only persons given rights to hold the government to account through merit appeals are polluters — either licensees or notice recipients. Such persons are extremely unlikely to challenge the licence or notice on the grounds that its requirements are not stringent enough in terms of environmental protection. On the contrary: they are likely to argue that the requirements are too onerous for economic or other reasons. Accordingly, POEO Act merits reviews are focused on providing individual justice to the licensee or notice recipient. The lack of third-party appeal rights means there is no recognition through the statutory scheme of merit appeals of the wider purpose of ensuring accountability in terms of environmental protection — the paramount purpose of the POEO Act.[108] As the Independent Commission Against Corruption noted in the context of planning law, 'limited availability of third party appeal rights … means that an important check on executive government is absent'.[109]

It is not suggested that third-party merits review should be available for all POEO Act decisions. It has been suggested as appropriate for the grant or variation of a licence.[110] As the Environmental Defender's Office (NSW)[111] (EDO NSW) has noted, '[t]he lack of formal [public] consultation procedures in relation to decisions on EPA licence applications is compounded by the lack of [third-party] appeal rights in relation to licensing decisions'.[112] As discussed below, it is difficult to determine the exact number of licence applications each year and, therefore, the potential number of decisions open to appeal. However, it appears that an average of at least 90 new licences have been granted per year in the 10-year period since 1 July 2006.[113] It is very unlikely that the 'floodgates would open' if third-party merits review rights were provided. This has not been the case under the EP&A Act, where third-party objector appeals have represented a very small proportion of development application appeals, with a low number of cases each year.[114] In relation to licence variations, there is an average of 263 applications each year.[115] A number of these are likely to be minor variations. If a third-party appeal right were provided in relation to licence variations, it may be appropriate to limit that right to those applications which have a higher potential for environmental impact. Encapsulating all variations, even if only of a minor or technical nature, would not be appropriate or necessary.

The rationale for limited public participation and third-party appeals for POEO Act licensing was discussed above in relation to participation rights before a licensing decision is made. The government's argument was that, as activities which require a POEO Act licence will generally undergo public participation in relation to development consent, 'environmental protection issues' raised by the community could be considered at that stage and appeal rights were only to be provided in relation to development consents.[116] This rationale was problematic to begin with given the different objects and relevant considerations under the two pieces of legislation, as discussed. It is now even more questionable given amendments to the EP&A Act which removed third-party merit appeals in circumstances where PAC holds a public hearing before a development application is determined.[117] The Minister for Planning or the Secretary of the DPE can request PAC to review any development and hold a public hearing.[118] PAC must provide a report to the Minister setting out its findings and recommendations as well as a 'summary of any submissions received'.[119] As EDO NSW noted, third-party 'merits review is extinguished by the holding of a public hearing that has no decision-making power over the determination outcome'.[120] PAC can only go on to determine a development application which has been subject to a public hearing if it is one of the SSD or SSI development matters for which the Minister for Planning has delegated decision-making power.[121]

Since PAC was established in 2008 it has undertaken 38 public hearings.[122] Twenty-nine of those (76 per cent) were in relation to resource projects, such as mines.[123] In fact, Smith stated that PAC public hearings are essentially 'routine' for mines.[124] Third-party merit appeal rights in planning law have therefore been lost in relation to a number of major projects that have the potential to impact negatively on the environment in terms of pollution. The lack of oversight by the LEC through third-party appeals in planning law means that government accountability for such decisions has been significantly reduced.[125]

Furthermore, as discussed, a licence under the POEO Act *must* be granted for SSD or SSI: the EPA has no discretion to refuse a licence.[126] That licence must be 'substantially consistent' with the EP&A Act development consent or approval until the first licence review.[127] The Minister for Planning or PAC where the decision-making power is delegated, rather than the EPA as the specialised pollution regulator, therefore gets the final say on whether a licence should actually be issued and the parameters for pollution control. As Bird noted:

> Governments create independent regulatory bodies primarily to ensure that decisions are made by those with expertise and independence. Governments have decided that it is in the public interest if certain decisions are made by those who possess specialist expertise.[128]

The government has seen fit to invest the EPA with the power to make licensing decisions which set appropriate levels of pollution to protect the environment and human health. Yet it has taken away control from the EPA in the very situation where the final decision on pollution control should be made by those with the greatest level of expertise — namely, projects with the highest potential for environmental impact. This is highly concerning given (i) the reduction in third-party merit appeals available in planning law where a public hearing has been undertaken by PAC, and (ii) the absence of third-party appeals in pollution licensing. As the Australian Panel of Experts on Environmental Law has noted:

> Decision-making about large, controversial and high impact proposals is precisely when good governance arguably requires greater scrutiny and public participation, not less, and access to justice including rights to seek the review of decisions ought not to be constrained or excluded.[129]

These issues are further compounded by the 'negotiated nature of licensing'.[130] That is, the terms of a licence are negotiated between the EPA and licensee. It has been acknowledged by the New South Wales Court of Appeal that licence conditions 'may reflect a compromise

between what is desirable and what is practicable'.[131] This is particularly the case given that economic considerations regarding the affordability of pollution control mechanisms must be balanced with the need to protect the environment.[132] Furthermore, the EPA 'is, in the exercise of its functions, subject to the control and direction of the Minister'[133] and the Minister may take over the EPA's licensing functions in a particular matter.[134] This makes licensing functions vulnerable to political concerns and may result in less environmentally sound decisions being made.[135] In the absence of third-party merit appeals and meaningful public participation in pollution law, there is a clear lack of accountability in terms of testing the adequacy of negotiated licensing provisions to protect the environment and human health. As Mossop stated:

> This is not to say that negotiation and bargaining should not be part of environmental regulation but simply that where this is a closed process, citizen suits are an important mechanism for keeping that process lawful and ensuring that the gap between public perception and the reality of government regulation is minimised.[136]

Furthermore, when regulatory powers which are discretionary in nature remain unchecked, there is greater potential for regulatory capture.[137] However, there is no suggestion that this has occurred.

Figg conducted a review of third-party merit appeal rights available in relation to planning law decisions throughout the different states and territories in Australia.[138] She concluded that third-party merit appeal rights can result in enhanced decision-making and environmental outcomes.[139] Figg stated:

> The main benefits [of third-party appeal rights] can be summarised as including: greater information becoming available to decision-makers [particularly through 'local knowledge']; increased public confidence in decision-making; and additional scrutiny being applied to decisions.[140]

Figg concluded such appeals can result in greater levels of transparency and accountability in decision-making and may result in stricter environmental conditions being imposed.[141] Similarly, the EDO NSW has stated:

> there are clear benefits to allowing third party merits review in relation to major projects in NSW. These benefits relate to improving the consistency, quality and accountability of decision-making in environmental matters. In particular, merits review has facilitated the development of an environmental jurisprudence, enabled better outcomes through conditions, provides scrutiny of decisions and fosters natural justice and fairness. Better environmental and social outcomes and decisions based on ecologically sustainable development is the result.[142]

Due to the current lack of independent scrutiny of licensing decisions under the POEO Act, including through licensee appeals (discussed below), third-party merit appeals would certainly provide a greater level of accountability.

Accountability through merit appeals by licensees and notice recipients

Given the absence of third-party appeal rights in pollution law, this section explores merit appeals brought by licensees or notice recipients. The purpose is to examine the extent of accountability, particularly regarding adequate environmental protection, through these types of proceedings.

Rate of licensing appeals

Merit appeals and other civil proceedings in Classes 1–3 of the LEC's jurisdiction represented approximately 82 per cent of the Court's case load in 2010–2014.[143] The most prevalent merit appeals in the LEC are in relation to development applications under

planning law.[144] Appeals in pollution law matters represent a very small percentage of merits cases. Between 2010 and 2014 an average of 611 'environmental planning and protection appeals' (Class 1 of the LEC's jurisdiction) were lodged annually in the LEC.[145] Since the POEO Act commenced operation on 1 July 1999, there has been a total of 61 POEO Act licensing appeals in the LEC. Twenty-eight of those were related appeals by Sydney Water Corporation, which holds multiple licences. Another two matters were linked.[146] Essentially, this leaves 32 separate appeals, or an average of 1.9 licensing related merit appeals per year. This represents 0.3 per cent of the LEC's annual merits case load for environmental planning and protection appeals (Class 1).

The number of licensing appeals will naturally be much lower than the number for development applications given the smaller number of licensing decisions being made each year. For example, in 2008–09 there was a total of 87 056 development applications under the EP&A Act.[147] It was difficult to determine the number of licensing applications made each year using the Public Register.[148] Of licences that are currently in force, an average of 90 have been issued per year over the 10-year period since 1 July 2006. During that period an average of approximately 435 other licensing applications have been made each year for a licence variation, transfer or surrender.[149] The majority of applications were for licence variations: 60.6 per cent overall, with an average of 263 per year.[150] The remainder of applications were for licence transfer (15.0 per cent) or licence surrender (24.4 per cent). Given that licence terms are negotiated, it is to be expected that there will be few appeals in relation to licensing decisions.[151]

Licensing appeal outcomes

Table 1 sets out the outcome of merit appeals against EPA licensing decisions in the LEC derived from data contained in the Public Register and written judgments published on NSW Caselaw. It was difficult to ascertain the exact outcome in a number of matters. First, the Public Register did not record sufficient information to determine what happened in the case. This is despite the fact that the results of EPA civil proceedings are supposed to be recorded in the Public Register.[152] For example, in a number of matters the Public Register simply listed the proceedings as 'completed', with no information as to the actual result, including whether the case was settled, dismissed or determined by the LEC. Secondly, there were generally no written judgments for the vast majority of matters: published decisions could only be located for five matters.[153] It was therefore difficult to obtain a complete picture of the outcome of proceedings.

Outcome	Number of matters	Percentage of matters	Number of matters with written judgment
Proceedings discontinued	39	63.9	0
Completed — application dismissed, outcome unclear	3	4.9	0
Completed — outcome unclear	5	8.2	0
Completed — application allowed in part – outcome unclear	6	9.8	0
Completed — consent orders made	7	11.5	4
Determined by court after hearing	1	1.6	1
Total	61	100	5

Table 1. Outcome of merit appeals in the LEC against EPA licensing decisions under the POEO Act[154]

A high percentage of proceedings (63.9 per cent, n=39) were discontinued. Twenty-eight of those were the related Sydney Water Corporation appeals, with 11 other discontinuances recorded. A number of discontinuances may be explained by the short (21-day) licensing appeal period.[155] That is, an appeal may be lodged simply to preserve the appeal right, with the party then either deciding not to press the matter or reaching an agreement with the EPA. The reasons for discontinuance are, however, unknown.

There was a record of consent orders being made in 11.5 per cent of proceedings (n=7) and orders being made after a formal hearing and adjudication in 1.6 per cent of matters (n=1). The outcome of the remaining 22.9 per cent (n=14) of cases that were not discontinued was unclear. It is possible that a number of the matters were settled by consent orders. Some further proceedings may have been determined after an adjudicated hearing with an *ex tempore* unpublished judgment being delivered. These possibilities could not be determined on the information available.

McGrath conducted a review of the number of reviews/appeals in planning decisions in the 2008–09 financial year. In New South Wales in that year there were 87 056 development applications (DAs), 1132 reviews/appeals to the LEC (1.3 per cent of DAs) and 397 contested planning decisions (0.5 per cent of DAs).[156] In comparison, based on the figures discussed above, in each financial year since 1 July 2006 there has been on average a total of 525 licences issued and applications for variation, transfer or surrender of a licence.[157] An average of 1.9 licensing merit appeals are lodged in the LEC each year. A negligible number of matters proceed to a contested hearing, with only one matter found to have done so in the 17 years since the POEO Act commenced.[158] Again, the low appeal rates and lack of adjudicated hearings for licensing can probably be explained by the negotiated nature of licensing.

Licensing appeals: analysis of results

The small number of licensing appeals and dearth of contested hearings, combined with a low number of written decisions, are of significant interest from an accountability perspective. Judgments made by commissioners in merit appeals have been published online since September 2003.[159] There were written decisions in relation to only five licensing appeals.[160] Few judgments would be expected if the matters have been discontinued or settled by the

parties. Indeed, there were only 15 matters where there was no reference to the matter being either discontinued or settled by consent orders. In all of those cases except one, the outcome was unclear. There is no criticism being made of the LEC or EPA regarding the low number of written judgments, particularly given that the government is expected to be a model litigant by 'endeavouring to avoid litigation, wherever possible' and to have regard to the need 'to facilitate the just, quick and cheap resolution of the real issues in civil proceedings' under the *Civil Procedure Act 2005* (NSW).[161] The issue being considered relates solely to the accountability of the EPA as a regulator regarding licensing decisions in a context where conditions are negotiated. While it is noted that when making consent orders the Court does not act as a 'rubber stamp',[162] there is obviously less examination of a government decision than where a matter is fully litigated and the evidence heard and assessed.

In the five matters where judgments were available, three decisions simply recorded the agreement reached between the EPA and licensee as a result of a conciliation conference.[163] One decision was interlocutory in nature, adjudicating upon an application to stay a licence suspension until final judgment was delivered.[164] Two judgments regarding the same matter involved determination of an appeal against the deemed refusal of a licence transfer.[165] These cases demonstrate the important role that merit appeals can play, not only in terms of providing individual justice to a (prospective) licensee but also, more importantly, regarding clarification of the matters the EPA can consider in exercising its licensing powers in order to ensure environmental protection. For example, in *Always Recycling Pty Ltd v Environment Protection Authority*[166] (*Always Recycling*), the appeal involved the deemed refusal of a licence transfer of a waste storage and processing facility. Commissioner Pearson discussed the scope of the power to impose conditions on a licence transfer.[167] This included reaching a conclusion that the past management of the premises by the current licensee, being a company which had the same director as the proposed licence transferee, was relevant to (i) determining whether the licence transfer should be approved, and (ii) setting the licence conditions that could be imposed on the transfer regarding future management of the site.[168]

Furthermore, the penalty notices and regulatory action taken by the EPA against the current licensee was relevant to the consideration of the past management of the premises.[169] Commissioner Pearson also highlighted the need for the licence to be consistent with the development approval under the EP&A Act. It was discovered as part of the proceedings that the licence authorised waste stockpiles at heights greater than that permitted by the development approval.[170] There were also differences in the stated types of waste that could be received at the premises under the development approval and licence.[171] The licence was to be amended accordingly.

As mentioned, *Always Recycling* was the only written judgment located on the final adjudication of a licensing merit appeal. As such, there is no established body of case law in licensing appeals. While it is recognised that a decision on the facts in one merit appeal does not bind a decision-maker in another matter,[172] determinations can provide a useful source of guidance in the exercise of legislative powers, including in relation to the interpretation of statutory provisions. This is demonstrated by *Always Recycling*. With thousands of decisions being made in planning merit appeals since the LEC's inception, much greater headway has been made in that area in guiding and improving the decision-making of consent authorities. As Bates noted:

> Environmental issues figure prominently in planning appeals, and in fact some of the most significant court cases have been merits based. The first time that any court has applied the precautionary principle to deny an application for development, for example, was in a merits appeal.[173]

Indeed, many important decisions on ecologically sustainable development have been merit appeals.[174] As EDO NSW notes, such cases 'have forged a body of law which is globally influential'.[175] Preston and Smith stated that:

> The benefits of merits review include:
>
> - enhancing the quality of the reasons for decisions;
> - providing a forum for full and open consideration of issues of major importance;
> - increasing the accountability of decision-makers;
> - clarifying the meaning of legislation;
> - ensuring adherence to legislative principles and objects by administrative decision-makers;
> - focusing attention on the accuracy and quality of policy documents, guidelines and planning instruments; and
> - highlighting problems that should be addressed by law reform.
>
> All the benefits of merits review identified above involve improving the consistency, quality and accountability of decision-making.[176]

Furthermore, as EDO NSW recognised, 'the court process itself — the playing out of an adversarial process where evidence is tested and scrutinised under oath — has facilitated better environmental outcomes through the imposition of conditions'.[177] Such cases have led to more stringent environmental requirements and provided guidance for the types of conditions that should be considered in similar matters.[178]

The lack of third-party appeal rights combined with a virtual absence of case law on merits review against EPA licensing decisions means that the broader accountability of the authority through merit appeals is low. The rationale behind an appeal by a third party would most likely be to argue either that a licence should be refused or that stricter conditions should be imposed.[179] While merit appeals may have provided a source of accountability for individual licensees, they have not provided for broader accountability of the EPA to the public for licensing decisions. In particular, they have provided neither a mechanism to determine if the conditions imposed by the EPA are stringent enough to protect human health and the environment nor a body of case law to guide the exercise of the authority's licensing powers. Therefore, while the LEC has been given a supervisory jurisdiction over the EPA's licensing decisions,[180] its role in practice has been very limited. The Court's oversight role is very important in a context where licensing conditions are negotiated.

Merit appeals by notice recipients

As discussed, the main way the EPA regulates licensed premises is through licence conditions,[181] so it would be expected that the number of notices issued by the authority may be low. Since the POEO Act commenced, the EPA has issued 192 prevention notices — an average of 11.3 per year.[182] No noise control notices have been issued by the EPA.[183] The EPA does not have to record notices requiring the installation of a GPS tracking device on a waste transportation vehicle on the Public Register, so no figures were obtained. The Public Register recorded three appeals against prevention notices issued by the EPA. Two matters were listed as discontinued and the other as 'completed', with no further explanatory information. There were no written judgments found for EPA-issued prevention notices.

As discussed, for local councils, notices are the main mechanism to regulate pollution under the POEO Act.[184] Local councils are likely to use prevention notices and noise control notices where the pollution issue has not been adequately controlled through a development consent, or there is no development consent in force because a landowner has existing use rights.[185] There is no central database recording POEO Act notices issued by local councils. As ARAs, local councils are required to maintain a POEO Act Public Register containing

details of each prevention, clean-up and noise control notice issued and the results of civil LEC proceedings in which the council is involved.[186] However, there is no requirement for ARAs to maintain their Public Registers in electronic form[187] and they are generally not available on council websites. Therefore, to determine the impact of merit appeals by notice recipients, written judgments of the LEC were searched. As shown in Table 2 below, a total of 13 written judgments were found — 10 in relation to prevention notices and four in relation to noise control notices (one judgment was in relation to both a prevention and a noise control notice).

Type of merit appeal	Number of notices with written judgment
Prevention notice	10
Noise control notice	4
	Total = 13*

Table 2. Number of written LEC judgments in merit appeals of POEO Act notices

* All judgments related to notices issued by local councils. One judgment was in relation to both a prevention notice and a noise control notice.[188]

Again, the body of case law regarding POEO Act notices is significantly smaller than for development application merit appeals under the EP&A Act. This would be expected as, despite the figures for council-issued POEO Act notices being unavailable, it can safely be assumed the number of development applications determined is much higher. It is noted that local councils also have notice powers available to them under the EP&A Act and the *Local Government Act 1993* (NSW) that are capable of addressing some pollution issues, such as illegal waste storage.[189] Councils may therefore opt to use these tools instead of POEO Act instruments.

The written judgments on POEO Act notices have largely been about issues relating to residential amenity rather than protection of the natural environment per se. The noise control notices and four of the prevention notices concerned the impact of noise from businesses, barking dogs and a school swimming pool on residential neighbours.[190] Two of the prevention notices related to odour impacts from businesses on residential neighbours.[191] Another two prevention notices related to sewage discharges from faulty residential sewerage systems.[192] One prevention notice related to the storage of waste.[193] There was only one matter where a prevention notice was issued because the council held 'significant concerns about likely environmental harm'.[194] This case involved the unauthorised filling of a residential property, with the council arguing that possible harm may arise 'from contaminated material, leaching of pollution into the natural watercourses and the destruction of mature trees due to placement of filling in close proximity to their trunks and root systems'.[195]

While the available judgments have largely related to amenity issues, a number of matters demonstrate the important contribution merit appeals can make to clarifying the scope of a decision-maker's powers and the legislative provisions, and ultimately holding regulators to account. This is particularly the case given that questions of law can be referred to a judge for determination before a merits hearing[196] and also that judges have determined multiple notice appeals. For example, in *Udy v Hornsby Shire Council*,[197] Jagot J resolved a number of legal points regarding the scope of prevention notices and confirmed the broad nature of such powers in a manner favourable to regulators. This included that a prevention notice is not limited to regulating economic or businesses activities but extends to private activities.[198] Such notices are not limited to ongoing activities; they may address a 'one-off' activity and may require activities to cease altogether.[199]

In *Cobreloa Sporting Club and Ethnical Club Ltd v Fairfield City Council*,[200] the applicant operated a club pursuant to existing use rights. The club was the subject of noise complaints by local residents and, in response, the council issued a prevention notice. Justice Talbot commented that:

> The original direction made by the council was dramatic. It might have been described as draconian in that it effectively precluded any activities within the premises and would have resulted in total curtailment of the club's activities at the site.[201]

His Honour sought to find a 'happy medium' between the feasible operation of the club and the amenity of its residential neighbours in order to impose 'reasonable conditions' on the prevention notice.[202]

The decisions regarding appeals against POEO Act notices demonstrate the important role that merit appeals can play in terms of government accountability. They have provided individual justice to notice recipients — for example, by balancing the business interests of the recipient against the impacts of that activity on the broader community. The cases have also fostered accountability by confirming the limits on government power when issuing such notices. The guidance provided in the judgments should lead to better decision-making in the future. Notably, while a number of cases relate to amenity impacts, they nevertheless have a much broader impact by their confirmation of the wide manner in which notice powers can be used to protect the environment, including the community. These matters also illustrate the critical role that merit appeals could play in licensing decisions, where there is an absence of case law to guide decision-making and ensure accountability.

Conclusion

The EPA and local councils have an important role as pollution regulators given the potential wide-ranging and long-lasting impact of their decisions on the environment and human health. It is essential that they can be held accountable — particularly the EPA, which regulates activities that have a higher potential for environmental harm. This article sought to examine the extent to which regulators can be, and have been, held accountable for POEO Act decisions through merits review.

The largest body of case law regarding POEO Act merits review has been in relation to notices. The decisions have allowed the notice recipients to hold the government to account. They have also contained useful principles to guide future decision-making and demonstrate the useful oversight role that the LEC can play. In contrast, there is a much lower level of accountability for licensing. While one of the POEO Act objectives is to 'provide increased opportunities for public involvement and participation in environment protection',[203] there was a conscious decision to limit public participation in licensing decisions when the Act was drafted. Given the lack of specific requirements to call for submissions in relation to licensing decisions and the absence of third-party merit appeals in pollution law, there is a low level of accountability to the public regarding the impact of licensing decisions on the environment and human health. With third-party appeal rights being whittled away under planning law, there is a general lack of accountability under planning and pollution law in relation to larger projects.

Only licensees have a statutory right to hold the EPA to account for licensing decisions through merits review. They are very unlikely to appeal a decision on the basis that more stringent environmental conditions should be imposed. Few licensing appeals have been taken by licensees under the POEO Act, with only one published judgment on the final adjudication of a matter found. This most likely arises due to the negotiated nature of licensing. However, the paucity of appeals and case law means there is little to guide the

EPA in decision-making and there is a lack of broader accountability to the public, as licensing decisions have not been rigorously tested through the mechanisms of a contested hearing. To increase accountability, further consideration needs to be given to providing for targeted participation in licensing decisions and allowing third-party merit appeal rights. As EDO NSW has argued, consideration also needs to be given to reinstating third-party merit appeal rights in planning law for major projects.[204]

Endnotes

1 Brian J Preston, 'Public Enforcement of Environmental Laws in Australia' (1991) 6 *Journal of Environmental Law and Litigation* 39, 75.
2 Brian J Preston, 'Enforcement of Environment and Planning Laws in New South Wales' (2011) 16 *Local Government Law Journal* 72, 72, citing Preston, above n 1, 42.
3 Joanna Bird, 'Regulating the Regulators: Accountability of Australian Regulators' (2011) 35 *Melbourne University Law Review* 739, 741–2.
4 See Brian J Preston, 'The Adequacy of the Law in Satisfying Society's Expectations for Major Projects' (2015) 32 *Environmental and Planning Law Journal* 182, 200.
5 See, for example, Christopher McGrath, *How to Evaluate the Effectiveness of an Environmental Legal System* (PhD Thesis, Queensland University of Technology, 2007) 16; Environment Agency (UK), *Effectiveness of Regulation: Literature Review and Analysis* (Environment Agency, 2011), 11, citing Environment Agency, *Tender Specification* (2010); Australian National Audit Office, *Program Evaluation in the Australian Public Service*, Audit Report No 3, 1997–98 (1997) 3; Australian Panel of Experts on Environmental Law, *A New Generation of Environmental Laws* (2015), The Next Generation of Australia's Environmental Laws, 13 <http://apeel.org.au/>.
6 *Environment Protection Authority v Du Pont (Australia) Ltd* [2013] NSWLEC 98, [105]; *EPA v Unomedical Pty Ltd (No 3)* (2010) 79 NSWLR 236, [188]; *Protection of the Environment Operations Act 1997* (NSW) (POEO Act) s 3(a), (d).
7 See *Protection of the Environment Administration Act 1991* (NSW) (POEA Act) s 6(1); Legislative Council General Purpose Standing Committee No 5, Parliament of New South Wales, *The Performance of the NSW Environment Protection Authority* (2015) 13. The main objects of the POEO Act contained in s 3(a) and (d) are very similar to the objectives of the EPA: see POEA Act s 6(1).
8 Bird, above n 3, 771.
9 See POEO Act s 3(b). Public participation has been reflected in the provisions of environmental legislation in New South Wales since the late 1970s, particularly since the introduction of planning reforms in that era through the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).
10 Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998) 15, 93.
11 Ibid 96.
12 David Mossop, 'Citizen Suits — Tools for Improving Compliance with Environmental Laws' in Neil Gunningham, Jennifer Norberry and Sandra McKillop (eds), *Environmental Crime: Proceedings of a Conference Held 1–3 September 1993, Hobart* (Australian Institute of Criminology, 1995) 1.
13 See POEO Act s 6; Sarah Wright, 'Pollution Control and Waste Disposal' in Peter Williams (ed), *The Environmental Law Handbook: Planning and Land Use in NSW* (Thomson Reuters, 6th ed, 2016) 380.
14 POEO Act ss 91(1), 96(2). It is noted that the EPA can issue a clean-up notice in an emergency situation in relation to any pollution incident, including circumstances where it is not the ARA: POEO Act s 91(2).
15 Ibid s 6; see Wright, above n 13, 379–81.
16 POEO Act ss 5, 47(1), 48(2), 49(2).
17 A licence is required for any activity that will pollute waters, even if it is not otherwise listed in sch 1: see POEO Act ss 43(d), 120, 122.
18 Ibid s 6.
19 Wright, above n 13, 380.
20 POEO Act s 6; Wright, above n 13, 379.
21 Tom Howard, 'Prosecution of Environmental and Planning Offences in NSW — How Local Councils and Other Prosecuting Authorities Can Meet the Enforcement Challenge' (2001) 6 *Local Government Law Journal* 136, 136.
22 Wright, above n 13, 380; POEO Act ss 91(1), 96(2), 264(2).
23 POEO Act s 45.
24 Ibid s 45(c).
25 Ibid s 45(d).
26 Ibid s 45(i), (j).
27 Ibid s 45(l), Dictionary.
28 Ibid s 45(b). The EPA's objectives are set out in s 6(1) of the POEA Act.
29 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41 (Mason J).

30 POEO Act s 77.
31 Ibid s 58(3), (4).
32 Ibid s 78(1).
33 See Madeleine Figg, 'Protecting Third Party Rights of Appeal, Protecting the Environment: A Tasmanian Case Study' (2014) 31 *Environmental and Planning Law Journal* 210, 212.
34 See Hannes Schoombee and Lee McIntosh, *Watching Over the Watch-Dogs: Regulatory Theory and Practice, with Particular Reference to Environmental Regulation* (Environmental Defender's Office Western Australia, October 2002) 1 <http://www.edowa.org.au/files/articles/8_Watchdogs.pdf>.
35 POEO Act s 3(b).
36 Ibid s 50(2). This includes both development consent required under pt 4 of the EP&A Act and an approval for State significant infrastructure under pt 5.1 of the EP&A Act: POEO Act s 50(4). The provision does not apply where the licence is varied at the EPA's initiative: POEO Act s 50(2).
37 POEO Act s 45(l).
38 Designated development is declared by the regulations or an environmental planning instrument: see EP&A Act ss 77A, 78A(8)(a); *Environmental Planning and Assessment Regulation 2000* (NSW) (EP&A Reg) cl 4(1), sch 3 pt 1; Peter Williams, 'Development' in Williams (ed), above n 13, 171.
39 See EP&A Act ss 89C(2), (3), 115U(2), (4); *State Environmental Planning Policy (State and Regional Development) 2011* (NSW) cls 8, 14–16, schs 1–5.
40 EP&A Act ss 89D(1), 115W. SSD requires development consent under pt 4 of the EP&A Act. SSI is determined under pt 5.1 of the EP&A Act. The Department of Planning and Environment website notes that:

> The Planning Assessment Commission has a delegation to make decisions on State significant development and modification applications and modifications submitted by a private proponent, where:
>
> - there have been 25 or more objections to the application
> - the local council has objected, or
> - there has been a reportable political donation in connection with the application, or to a previous related application.

NSW Department of Planning and Environment, 'Delegated Decisions' (9 March 2016) <http://www.planning.nsw.gov.au/en/Assess-and-Regulate/Development-Assessment/Systems/Delegated-Decisions>.
41 EP&A Act ss 78A(8A), 115Y(2).
42 *State Environmental Planning Policy (State and Regional Development) 2011* (NSW) cl 8(1), sch 1.
43 Ibid cl 14, sch 3.
44 EP&A Act ss 79(1)(a), 89F(1)(a).
45 EP&A Reg cl 50(1)(a), sch 1, cl 1(g).
46 EP&A Act ss 79(5), 89F(3).
47 Ibid s 115Z(3), (4).
48 EP&A Reg cl 69.
49 EP&A Act s 115Z(5)(b).
50 EP&A Reg cl 85B(c), (g).
51 POEO Act s 45(l).
52 See EP&A Reg sch 1, cl 1(1)(g); sch 2, cls 2, 7(1)(d)(v).
53 Ibid cls 78(1)(f)(i), 85(f)(i) (emphasis added).
54 Environmental Defender's Office (NSW), *Clearing the Air: Opportunities for Improved Regulation of Pollution in New South Wales* (Nature Conservation Council of NSW, 2012) 26 n 121.
55 Ilona Millar, *Objector Participation in Development Appeals*, EDO NSW, 5 <http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/670/attachments/original/1381972457/yl_cle_objector_participation.pdf?1381972457>.
56 POEO Act s 58(6).
57 Ibid s 78(1).
58 Ibid s 78(2).
59 Rosemary Lyster et al, *Environmental and Planning Law in New South Wales* (Federation Press, 4th ed, 2016) 581.
60 POEO Act s 45(l).
61 Ibid Dictionary.
62 Lyster et al, above n 59, 581.
63 NSW Government, 'Protection of the Environment Operations Bill 1996: Public Discussion Paper' (Green Paper, Environment Protection Authority, December 1996) (POEO Green Paper) 18–19.
64 Ibid 16.
65 *Blacktown City Council v Wilkie* (2001) 119 LGERA 255, 275 (Pearlman CJ).
66 See EP&A Act ss 79C, 89H, 115ZB(2); POEO Act s 45.
67 This was recognised in the second reading speech for the EP&A Act itself: see New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 November 1979, 3045–6 (Bill Haigh).
68 POEO Act s 3(a); see *Environment Protection Authority v Du Pont (Australia) Ltd* [2013] NSWLEC 98, [105].
69 *EPA v Unomedical Pty Ltd (No 3)* (2010) 79 NSWLR 236, [188] (emphasis added).
70 *Environment Protection Authority v Du Pont (Australia) Ltd* [2013] NSWLEC 98, [105].
71 EP&A Act ss 89K(1)(e), (2)(c), 115ZH(1)(e), (2)(c).

72 POEO Act s 91(1).
73 Ibid s 96(1).
74 Ibid s 96(2).
75 Ibid s 95.
76 Ibid s 264(2).
77 Ibid s 101.
78 Lyster et al, above n 59, 38.
79 See POEO Act ss 287–290.
80 *Land and Environment Court Act 1979* (NSW) (LEC Act) s 5(1).
81 Brian J Preston, 'Operating an Environment Court: The Experience of the Land and Environment Court of New South Wales' (2008) 25 *Environmental and Planning Law Journal* 385, 387.
82 See LEC Act pt 3 div 1.
83 Ibid s 34C.
84 Ibid s 12(2), (2AA). There is no requirement, however, for commissioners to have legal qualifications.
85 Ibid s 39(3).
86 Ibid s 39(2).
87 Ibid s 38.
88 POEO Act s 292(2). In *Thaina Town (On Goulburn) Pty Ltd v City of Sydney Council* (2007) 71 NSWLR 230 the New South Wales Court of Appeal noted that there is a 'tension between s 292(2) [of the POEO Act] and s 39(5)' of the LEC Act, as the latter provides that the LEC's decision on appeal is 'deemed, where appropriate, to be the final decision of the person or body whose decision is the subject of the appeal'. The former provides the decision is 'final and binding' on the original decision-maker. The Court stated that this differentiated merit appeals under the POEO Act from appeals regarding development applications under ss 97 and 98 of the EP&A Act — namely, the LEC cannot be said to 'stand in the shoes' of the decision-maker in relation to POEO Act merit appeals; the LEC is not 'equated with the original administrative decision-maker': [15]–[16], [75]–[79], [145]–[146], [149], [155] (Spigelman CJ, Mason P, Beazley, Giles and Ipp JJA agreeing).
89 LEC Act s 34.
90 *Civil Procedure Act 2005* (NSW) s 26; see Land and Environment Court of NSW, *Mediation* <http://www.lec.justice.nsw.gov.au/Pages/resolving_disputes/mediation.aspx>.
91 *Land and Environment Court Rules 2007* (NSW) r 6.2; see Land and Environment Court of NSW, *Neutral Evaluation* (4 May 2015) <http://www.lec.justice.nsw.gov.au/Pages/resolving_disputes/neutral_evaluation.aspx>.
92 *Uniform Civil Procedure Rules 2005* (NSW) r 20.14(1).
93 LEC Act s 34(1A); *Civil Procedure Act 2005* (NSW) s 27; *Land and Environment Court Rules 2007* (NSW) r 6.2(4); *Uniform Civil Procedure Rules 2005* (NSW) r 20.20(6).
94 POEO Act ss 287–288.
95 Ibid s 289(1).
96 Ibid s 290(1)(a).
97 The power requiring such a device to be installed is contained in s 144AC of the POEO Act. The appeal right is contained in s 289A.
98 Ibid ss 287–290.
99 See POEO Act ch 7 in relation to investigation powers.
100 (2011) 186 LGERA 311.
101 Ibid [53].
102 EP&A Act s 98(1).
103 Ibid s 98(4).
104 Wright, above n 13, 381.
105 LEC Act s 39A.
106 In *Thaina Town (On Goulburn) Pty Ltd v Council of the City of Sydney* [2006] NSWLEC 624 the lessee of a restaurant within a strata title building that had been served with a prevention notice under the POEO Act in relation to odours, cooking grease and oil being emitted from an exhaust system appealed against the notice. The LEC granted leave for the owners corporation of the building in which the restaurant was situated to intervene in the proceedings: [2]. While the reasons for allowing the owners corporation to intervene were not stated in the final judgment, the owners corporation was directly impacted on by the LEC's decision. First, Commissioner Brown held that the relevant equipment was owned and managed by the owners corporation rather than the restaurant, such that the restaurant was neither the 'occupier' for the purposes of issuing a prevention notice nor the person carrying on the activity: at [17], [23]–[28]. This meant the owners corporation would be a proper recipient of any prevention notice as such a notice can only be issued to the occupier or the person carrying on the activity. Secondly, occupants of the building were being affected by odours from the exhaust system: [5], [11].
107 *Thaina Town (On Goulburn) Pty Ltd v Council of the City of Sydney* [2006] NSWLEC 624, [2].
108 *Environment Protection Authority v Du Pont (Australia) Ltd* [2013] NSWLEC 98, [105].
109 Independent Commission Against Corruption (NSW), *Anti-Corruption Safeguards and the NSW Planning System*, ICAC Report (February 2012) 22.
110 Environmental Defender's Office (NSW), above n 54, 7, 26.

111 EDO NSW, formerly known as the Environmental Defender's Office, is a specialist environmental and planning law community legal centre: see <http://www.edonsw.org.au/>.
112 Environmental Defender's Office (NSW), above n 54, 26.
113 Figures are based on information contained in the Public Register, available at <http://www.epa.nsw.gov.au/publicregister/index.htm>.
114 In 1995 Stein stated that the number of third-party objector appeals under s 98 of the EP&A Act constituted one to two per cent of all applications made in Class 1 of the LEC's jurisdiction: Paul Stein, 'The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Environmental Law' (1996) 13 *Environmental and Planning Law Journal* 179, 184. While the current figures for s 98 appeals are unknown, based on information regarding the other types of proceedings lodged in Class 1 it would appear that the number of third-party merit appeals remains low. The LEC website notes that in 2014 the percentage of matters in Class 1 of the LEC's jurisdiction was as follows: EP&A Act s 97, appeals by developers — 62 per cent; s 96, applications for modification of a development consent — 18 per cent; appeal against council orders or deemed refusal of a building certificate — eight per cent; all other Class 1 matters — for example, costs, appeals against other notices — 12 per cent: Land and Environment Court of NSW, *Class 1: Environmental Planning and Protection Appeals* (14 January 2016) <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_1/class_1.aspx>. Third-party objector appeals under the EP&A Act would fall within this last category, so they are likely to represent only a small percentage of overall matters.
115 Data is derived from the Public Register.
116 NSW Government, above n 63, 18–19.
117 EP&A Act s 98(5).
118 Ibid s 23D(1)(b).
119 EP&A Reg cl 268V(1), (2).
120 Environmental Defender's Office (NSW), *Merits Review in Planning in NSW* (Report, July 2016) 6.
121 See n 40 above in relation to the matters for which PAC has been delegated power.
122 Environmental Defender's Office (NSW), above n 120, 6–7.
123 Ibid; Planning Assessment Commission, *Projects* <http://www.pac.nsw.gov.au/Projects>.
124 Jeff Smith, 'Community Legal Rights to Protect the Environment being Eroded' (2014) 58(3) *Nature New South Wales* 24, 24.
125 See Environmental Defender's Office (NSW), above n 120.
126 EP&A Act ss 89K(1)(e), 115ZH(1)(e); Environmental Defender's Office (NSW), above n 54, 16.
127 EP&A Act ss 89K(1)(e), (2)(c), 115ZH(1)(e), (2)(c).
128 Bird, above n 3, 743 (citations omitted).
129 Australian Panel of Experts on Environmental Law, above n 5, 25.
130 Wright, above n 13, 422.
131 *Macquarie Generation v Hodgson* (2011) 186 LGERA 311, [55] (Handley AJA, Whealy and Meagher JJA agreeing).
132 See POEO Act s 45. In *Brown v Environment Protection Authority [No 2]* (1992) 78 LGERA 119, 137, Pearlman CJ held that the EPA was entitled to consider the best available technology economically achievable (BATEA) in exercising its licensing powers under the predecessor licensing provisions to the POEO Act, the *Pollution Control Act 1970* (NSW) s 17D.
133 POEA Act s 13(1). Certain functions of the EPA are excluded from ministerial control: s 13(2). However, licensing is not listed as one of them.
134 Ibid s 13A(2).
135 See Figg, above n 33, 213, citing an environmental lawyer from Victoria who was interviewed as part of Figg's study.
136 Mossop, above n 12, 7.
137 See Malcolm K Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings Institution Press, 2000) 238.
138 Figg, above n 33.
139 Ibid 210.
140 Ibid 212.
141 Ibid 216, 221; see also Millar, above n 55, 9–10.
142 Environmental Defender's Office (NSW), above n 120, 3.
143 Derived from data for registrations in Classes 1–3 of the LEC's jurisdiction for the years 2010–2014 as contained in Land and Environment Court of NSW, *The Land and Environment Court of NSW Annual Review 2014* (2015) 29–30. Classes 1–3 of the LEC's jurisdiction incorporates the Court's merits review functions. There are also some other civil proceedings falling within those classes, such as disputes between neighbours regarding trees: LEC Act ss 17–19.
144 See Land and Environment Court of NSW, above n 143, 31; Land and Environment Court of NSW, above n 114.
145 Figure derived from data contained in Land and Environment Court of NSW, above n 143, 29.
146 Figures are derived from a search of civil proceedings contained on the Public Register and published judgments contained on NSW Caselaw <http://www.caselaw.nsw.gov.au>.
147 See Chris McGrath, 'Myth Drives Australian Government Attack on Standing and Environmental "Lawfare"' (2016) 33 *Environmental and Planning Law Journal* 3, 10.

148 When searching for new licence applications on the Public Register, only licence applications with a status of 'pending' appear rather than a list of all licence applications made. A total of 2596 environment protection licences were listed as being 'issued' under the POEO Act, which seems to mean 'in force'. When searching for licences the drop-down search box for 'licence status' gives options of searching for 'revoked', 'issued', 'suspended', 'no longer in force' and 'surrendered'. A cross-sample of licences listed as 'no longer in force' could not be found in the 'issued' licences, indicating that a licence listed as 'issued' only refers to those in force. Licences, once issued, remain in force unless suspended, revoked or surrendered: POEO Act s 77(1).
149 These figures are derived from a search of the Public Register.
150 It is noted these figures also do not include variations initiated by the EPA rather than the licensee.
151 Wright, above n 13, 422.
152 Section 308(2)(k) of the POEO Act requires the Public Register to record 'the results of civil proceedings' in the LEC involving the EPA. 'Result' is defined to mean 'that which results; the outcome, consequence, or effect': Susan Butler (ed), *Macquarie Concise Dictionary* (Macquarie Dictionary Publishers, 2009) 1074. Simply recording that a matter has been 'completed' does not actually record the 'result' of the proceedings.
153 *Centennial Newstan Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1463; *Renewed Metal Technologies Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1216; *Hi-Quality Waste Management Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1175; *Truegain Pty Ltd v NSW Environment Protection Authority* [2008] NSWLEC 278; *Always Recycling Pty Ltd v Environment Protection Authority* [2012] NSWLEC 1170; *Always Recycling Pty Ltd v Environment Protection Authority* [2012] NSWLEC 1220.
154 Data has been sourced from the public register. In order to determine the outcome of a matter the information regarding the results of civil proceedings in the Public Register was initially consulted. In order to obtain further information about the matter or to try to determine the outcome of a case where this was not clearly stated on the Public Register, other information on the Public Register was also searched. For example, where consent orders have been made by the LEC regarding the variation of licence conditions, the EPA has then issued a further notice varying the licence conditions. The background information in the notice may refer to the consent orders made by the Court which assisted to determine the outcome in proceedings where there is no written judgment available. It was necessary to search this additional information as for a number of matters the Public Register simply lists the matter as 'completed' or 'completed … application allowed in part' without giving any indication of the substantive outcome. Information regarding whether a written judgment has been published in a matter was sourced by searching the NSW Caselaw website: <http://www.caselaw.nsw.gov.au>. Three additional merits review matters were found on NSW Caselaw that were not recorded in the list of civil matters on the public register: *Centennial Newstan Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1463; *Renewed Metal Technologies Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1216; *Always Recycling Pty Ltd v Environment Protection Authority* [2012] NSWLEC 1170; *Always Recycling Pty Ltd v Environment Protection Authority (No 2)* [2012] NSWLEC 1220.
155 POEO Act s 287(1).
156 McGrath, above n 147, 10.
157 Figures are based on information contained in the Public Register.
158 Ibid.
159 John Roseth, 'Planning Principles and Consistency of Decisions' (Paper presented at NSW Law Society Local Government and Planning Law Seminar, 15 February 2005) 1 <http://www.lec.justice.nsw.gov.au/Documents/speech_15feb05_roseth.pdf>.
160 *Centennial Newstan Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1463; *Renewed Metal Technologies Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1216; *Hi-Quality Waste Management Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1175; *Truegain Pty Ltd v NSW Environment Protection Authority* [2008] NSWLEC 278; *Always Recycling Pty Ltd v Environment Protection Authority* [2012] NSWLEC 1170; *Always Recycling Pty Ltd v Environment Protection Authority (No 2)* [2012] NSWLEC 1220.
161 NSW Government, *Model Litigant Policy for Civil Litigation* (29 June 2016) [2.1], [3.2] <http://arp.nsw.gov.au/sites/default/files/Model%20Litigant%20Policy%20for%20Civil%20Litigation.pdf>; see also *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424, [213] (Basten JA, Macfarlan JA agreeing).
162 Stein, above n 114, 183.
163 *Centennial Newstan Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1463; *Renewed Metal Technologies Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1216; *Hi-Quality Waste Management Pty Ltd v Environment Protection Authority* [2015] NSWLEC 1175.
164 *Truegain Pty Ltd v NSW Environment Protection Authority* [2008] NSWLEC 278, [1]–[4].
165 *Always Recycling Pty Ltd v Environment Protection Authority* [2012] NSWLEC 1170; *Always Recycling Pty Ltd v Environment Protection Authority (No 2)* [2012] NSWLEC 1220.
166 [2012] NSWLEC 1170.
167 Ibid [25], [64]–[66].
168 Ibid [25], [66].
169 Ibid [67].
170 Ibid [69].

171 *Always Recycling Pty Ltd v Environment Protection Authority (No 2)* [2012] NSWLEC 1220, [21].
172 Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 9th ed, 2016) 947; Tim Moore, 'The Relevance of the Court's Planning Principles to the DA Process' (Paper presented at Dealing with DAs in 2009, Sydney, 21 May 2009) 1 <http://www.lec.justice.nsw.gov.au/Documents/neerg_21_may_2009_paper.pdf>.
173 Bates, above n 172, 404, citing *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270.
174 Peter Biscoe, 'Ecologically Sustainable Development in New South Wales' (Paper presented at 5th Worldwide Colloquium of the IUCN Academy of Environmental Law, Paraty, Brazil, 2 June 2007) 27–8; Environmental Defender's Office (NSW), above n 120, 10.
175 Environmental Defender's Office (NSW), above n 120, 10.
176 Brian Preston and Jeff Smith, 'Legislation Needed for an Effective Court' in Nature Conservation Council of NSW (ed), *Promises, Perception, Problems and Remedies, The Land and Environment Court and Environmental Law 1979–1999: Conference Proceedings* (Nature Conservation Council of NSW, 1999) 107.
177 Environmental Defender's Office (NSW), above n 120, 13.
178 Ibid 13–15.
179 Bates, above n 172, 947.
180 Wright, above n 13, 422.
181 Ibid 380.
182 Based on a search of the Public Register.
183 Ibid.
184 Wright, above n 13, 380.
185 See EP&A Act pt 4 div 10.
186 POEO Act s 308(2)(h), (k).
187 Ibid s 308(3).
188 Judgments were located via NSW Caselaw <http://www.caselaw.nsw.gov.au>.
189 See EP&A Act s 121B; *Local Government Act 1993* (NSW) s 124; *Gerondal v Eurobodalla Shire Council* [2010] NSWLEC 1217, [31]; see also *Udy v Hornsby Shire Council* [2007] NSWLEC 242, [17].
190 *Martin v Campbelltown City Council* [2000] NSWLEC 228 (noise control notice — noise regarding poultry collection at a business premises); *Sumar Produce Pty Ltd v Griffith City Council* [2000] NSWLEC 27; *Sumar Produce Pty Ltd v Griffith City Council* [2000] NSWLEC 72; *Sumar Produce Pty Ltd v Griffith City Council* [2000] NSWLEC 104 (noise control notice — noise from a frost control fan on an agricultural premises); *Trustees of the Christian Brothers (Waverly College) v Waverly Council* [2004] NSWLEC 210 (noise control notice — noise from a school swimming pool); *Shearers Road Freight Pty Ltd v Canterbury City Council* [2006] NSWLEC 290 (noise control notice and prevention notice — noise from a milk warehousing and distributing centre); *Webber v Parramatta City Council* [2014] NSWLEC 1065 (prevention notice — movement of horses from stables); *Cobreloa Sporting Club and Ethnical Club Ltd v Fairfield City Council* [2007] NSWLEC 54 (prevention notice — noise from a club); *Rogers v Clarence Valley Council* [2013] NSWLEC 194 (prevention notice — noise from barking dogs at an animal shelter).
191 *Thaina Town (On Goulburn) Pty Ltd v Council of the City of Sydney* [2006] NSWLEC 624; *Cantarella Bros Pty Ltd v City of Ryde Council* (2003) 131 LGERA 190.
192 *Owners Strata Plan 10897 v Woollahra Municipal Council* [2004] NSWLEC 5; *Hall v Marrickville Council* [2013] NSWLEC 1235.
193 *Gerondal v Eurobodalla Shire Council* [2010] NSWLEC 1217; *Gerondal v Eurobodalla Shire Council* [2011] NSWLEC 77.
194 *Udy v Hornsby Shire Council* [2007] NSWLEC 614, [2].
195 Ibid [2].
196 See *Uniform Civil Procedure Rules 2005* (NSW) r 28.2.
197 [2007] NSWLEC 242.
198 Ibid [9].
199 Ibid [11], [15]; POEO Act s 96(3)(d).
200 [2007] NSWLEC 54.
201 Ibid [5].
202 Ibid [19]–[21].
203 POEO Act s 3(b).
204 Environmental Defender's Office (NSW), above n 120.