HOLDING REGULATORS TO ACCOUNT IN NEW SOUTH WALES POLLUTION LAW: PART 2 — THE LIMITS OF JUDICIAL REVIEW AND CIVIL ENFORCEMENT

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Merits review, judicial review and civil enforcement proceedings offer a means to hold regulators to account for the decisions they have made. Judgments in these matters can also provide guidance in order to foster better decision-making in the future. Merits review can test the quality of a regulator's decision.[1] It aims to ensure that a decision is the 'correct or preferable' one.[2] Both judicial review and civil enforcement proceedings taken against regulators seek to ensure accountability. Their very purpose is to challenge whether a decision-maker has acted in accordance with the law. In the previous edition of this journal, part 1 of this series of two articles examined the ability of merits review to hold regulators to account for decisions made under the main piece of New South Wales (NSW) pollution legislation — the *Protection of the Environment Operations Act 1997* (NSW) (POEO Act).[3] This part of the article examines the role that judicial review and civil enforcement have played in the accountability of NSW pollution regulators.

Part 1 of these articles contains detailed background to the decision-makers under the POEO Act and their powers. To recap briefly: the NSW Environment Protection Authority (EPA) regulates activities with the highest potential environmental impacts in terms of pollution as well as activities of the state and public authorities.[4] It does so mainly through licensing, but, in addition, it may use notice powers such as clean-up notices and prevention notices.[5] Local councils are the other main regulators and can manage pollution using POEO Act notice powers.[6]

Part 1 concluded that there has been little accountability of the EPA for POEO Act licensing decisions through merits review. There are no third-party appeal rights, and judgments could only be found in relation to one licensee merit appeal matter that actually proceeded to a final hearing. This also meant there was scarce material in previous merits review cases to guide the exercise of the EPA's licensing powers and promote better decision-making. In contrast, the judgments in 13 merit appeals against notices issued by local councils demonstrated the important role this type of proceeding can play. These decisions contained a number of principles which clarified the scope and limits of the notice powers, providing accountability and a body of jurisprudence that can guide future decisions.

This article begins by explaining the judicial review and civil enforcement jurisdiction of the Land and Environment Court of New South Wales (the LEC), which provides a 'one-stop shop' for all environmental and planning matters in the state.[7] It then considers the limitations of these types of proceedings before examining the extent to which judicial review

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and civil enforcement have been able to hold regulators to account in NSW pollution law. As there is a lack of decisions in this area, particular emphasis is placed on undertaking a qualitative review of the substance of the judgments.

The judicial review and civil enforcement jurisdiction of the LEC

The LEC has exclusive jurisdiction in relation to judicial review of POEO Act decisions, such as licensing decisions made by the EPA or the issue of a clean-up notice by the authority or a local council.[8] A collateral challenge on judicial review grounds may also be mounted as part of other proceedings. For example, in a prosecution for failure to comply with a clean-up notice, a challenge may be raised regarding failure to afford procedural fairness in issuing the notice.[9] As there is no right to a merit appeal in respect of a clean-up notice, judicial review provides a mechanism to contest such a notice.

The POEO Act, like many NSW environmental laws, provides open standing for civil enforcement of the legislation. Section 252(1) provides that '[a]ny person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act or the regulations'. It is not necessary to establish that the person's rights have been infringed.[10] The LEC has wide powers to make 'such orders as it thinks fit'.[11] Section 252 of the POEO Act 'embodies … the important public interest of upholding environmental legislation'.[12] This open standing provision allows environmental groups and members of the public to ensure that the law is followed by decision-makers and other persons that have obligations under the Act. When making orders for relief in public interest matters, the Court's role extends beyond providing remedies between the parties to considering the broader interests of the community in light of the legislative regime.[13]

In broad terms civil enforcement proceedings may be used where either a 'polluter' or decision-maker is in breach of the POEO Act. Such proceedings may be of the following 'types':

Actions against citizens:

- A regulator, such as the EPA or local council, may seek to enforce the legislation where a person fails to comply. For example, a person might illegally dump waste or fail to comply with their licence conditions.
- Any person, such as a concerned member of the public, may seek to enforce a breach of the legislation committed by another citizen — for example, if a company fails to obtain a licence or breaches their licence conditions. In some circumstances the 'citizen' against whom proceedings are taken may be a government body, such as a council that holds a licence in relation to a sewage treatment plant (STP) that it operates.

Actions against regulators:

- A person against whom a decision is made may lodge a case arguing that the regulator breached the legislation when making a decision.
- Any person, such as a concerned citizen, may bring proceedings in relation to a regulator's decision arguing a breach of the POEO Act.

In the latter two circumstances, the grounds in civil enforcement proceedings may resemble traditional judicial review proceedings.[14] For example, a person against whom a decision is made may argue that the government breached the legislation by failing to provide an opportunity to make submissions before making a decision.[15] This may constitute a failure to

afford procedural fairness. A concerned citizen may argue that the EPA breached the legislation by failing to take into account a relevant consideration when granting a licence.[16] Additionally, civil enforcement by one citizen against another has the potential to raise deficiencies in the way that a regulator has exercised their power, such as the conditions imposed (or not imposed) on a licence[17] or the failure to take regulatory action where it may be required. Such proceedings can also provide confirmation that a regulator was justified in exercising their powers in a particular way or not exercising their powers at all.[18] Relevant cases from the last three categories identified above are considered below.

Judicial review and civil enforcement proceedings in the LEC are determined by a judge. The judge may be assisted by a commissioner, but it is only the judge who may adjudicate on the matter.[19] The commissioner only provides assistance and advice to the court.[20]

Limitations of judicial review and civil enforcement proceedings

Before considering the extent to which judicial review and civil enforcement proceedings have contributed to regulatory accountability, it is useful first to consider some of their limitations. Often it is ordinary citizens and environmental groups who seek to take such actions and there are many barriers that these types of litigants may face, even in relation to civil enforcement where open standing has been granted. Most obviously, this includes the expense involved in litigation, in terms of both an applicant's legal costs and any prospective costs order should the proceedings be unsuccessful.[21] The general rule in these types of proceedings is that costs follow the event.[22] Furthermore, there is the possibility that a security for costs order may be made. Where a citizen wishes to enforce the public interest rather than the protection of their own interests — such as amenity or business interests — they may be less willing to risk the potential costs involved.[23] Such costs 'can be exorbitant' and have a 'deadening effect' on prospective litigation.[24] As Preston J noted, 'the public lacks the financial resources to plead effectively on the environment's behalf'.[25] Similarly, Pain J stated that:

> Typically in public interest environmental litigation, disparity in the parties' financial resources results as non-profit organisations or highly motivated individuals of limited means pursue cases in which complex legal issues arise, with the possibility of expensive expert evidence. Respondents are generally comparatively well-resourced government ministers or departments and companies undertaking development. While an applicant's lawyers and expert witnesses in civil enforcement or judicial review proceedings may act for a reduced fee, or on condition that cost recovery occurs only if proceedings are successful, the applicant may have difficulties raising funds to pay a costs order against him or her, particularly where there are two respondents.[26]

Costs can therefore act as a disincentive to bringing proceedings, particularly those that seek to uphold the public interest. As Toohey and D'Arcy recognised in what is now an oft-quoted statement, '[t]here is little point in opening the doors to the courts if litigants cannot afford to come in'.[27]

There are cost provisions which can help to facilitate public interest litigation. This includes the power to make a protective cost order which sets the maximum amount of costs recoverable.[28] This order can be sought early in proceedings,[29] allowing a party to better ascertain the costs involved and determine whether to proceed with the litigation. The LEC can also decline to award costs against an unsuccessful applicant in public interest proceedings or refuse to make a security for costs order.[30] These powers are, however, discretionary. They will not automatically be exercised in favour of an applicant simply because the proceedings are found to have been taken in the public interest.[31] Additionally, while an applicant can seek to reduce their own costs through self-representation, there are obvious disadvantages to this approach. Successfully arguing a judicial review or civil enforcement proceeding may require an understanding of complex legal principles. It may be

difficult for a layperson to make meaningful submissions, even if they have extensive experience in arguing such disputes.[32]

An obvious limitation of judicial review is its sheer nature in comparison with merits review. Judicial review precludes a reconsideration of a development or project on its merits. The courts are at pains to emphasise that is an area into which a judge in judicial review will not tread. The court is confined to determining whether the decision-maker acted within the limits of the law, rather than re-exercising the discretion of the decision-maker and substituting a new decision.[33] Accordingly, in order to challenge a decision on judicial review grounds, some legal error must be shown, such as a failure to consider a relevant consideration or failure to afford procedural fairness. McGrath describes judicial review proceedings vividly as 'like trying to fight the development in a straight-jacket'.[34] He stated:

> Judicial review is seldom a cause of action that addresses the main complaint made against approval of a poor development. Most public interest litigants concerned about approval of a development wish to challenge the merits of the decision — that a decision was wrong and the proposed development should have been refused because of its environmental impacts. Judicial review may, however, be the only avenue to challenge the decision. For such cases judicial review is like trying to fight the development in a straight-jacket — the public interest litigant wants to say, 'the development is a bad idea and shouldn't be allowed', but the judicial review process prevents this issue being raised. Instead, litigants are forced to try to find some procedural error in the decision-making process to challenge or simply concede that they cannot challenge the decision at all.[35]

Similar constraints apply in civil enforcement proceedings, with a litigant being required to demonstrate that there has been a statutory breach.

Even if a judicial review or civil enforcement action can be successfully made out, relief is not automatic but, rather, discretionary. Furthermore, if the relief granted has the effect of overturning a decision, the regulator may then remake the decision in a legal manner. This may nevertheless result in the same substantive outcome as the original decision.[36] The victory for the applicant may therefore be short-lived. As Millar noted in the context of planning law, these 'proceedings often do no more than delay the inevitable approval of a development'.[37]

A further complication arises in relation to licensing decisions regarding state significant development and state significant infrastructure[38] given that the EPA is required to grant a licence which must be substantially consistent with the development consent until the first licence review.[39] Arguably, this makes it harder to challenge a licensing decision to begin with, but even if a licence is invalidated the EPA would have no choice but to grant a further licence.

Accountability through judicial review and civil enforcement proceedings

This section analyses POEO Act judicial review and civil enforcement proceedings to determine the impact of these matters on regulatory accountability and better decision-making. Given the lack of cases, particular emphasis is placed on a qualitative analysis of the substance of the judgments.

The EPA and local councils are required to keep a POEO Act public register and record in it the LEC civil cases they have been involved in.[40] While the EPA's POEO Act public register (the Public Register) is available electronically on its website,[41] there is no central electronic register for local councils and their public registers are generally not available on their websites. Accordingly, figures on the total number of civil enforcement and judicial review proceedings *commenced* under the POEO Act were not obtained. General statistics across all environment and planning matters on civil enforcement and judicial review, which

together comprise Class 4 of the LEC's jurisdiction, show that in 2014 a total of 135 matters were finalised.[42] Further statistics in relation to those matters are as follows:

> In 2014, Class 4 matters were **11%** of the Court's finalised caseload.
>
> Of the Class 4 matters finalised in 2014:
>
> **58%** were civil enforcement proceedings initiated by local councils.
> **30%** involved judicial review proceedings.
> **12%** were other matters.
>
> In 2014, **67%** of Class 4 matters were finalised by alternative dispute resolution processes and negotiated settlement, without the need for a court hearing.[43]

The vast majority of Class 4 matters are therefore civil enforcement proceedings by the government. This has been the consistent trend since the LEC's inception, although the proportion of non-government actions has increased.[44] The amount of challenges to decisions made under the POEO Act which proceed to a finalised hearing is likely to be relatively low each year given the high settlement rate.

A search was conducted for written judgments relating to POEO Act civil enforcement and judicial review matters in the LEC and New South Wales Court of Appeal (NSWCA) using the NSW Caselaw website.[45] The Public Register was also examined to identify civil proceedings involving the EPA, although all of these matters were also referred to in a judgment of some form. Table 1 below sets out the matters for which a written judgment could be located in relation to some aspect of the case, even though the matter may not have proceeded to a final hearing. A total of 28 matters were located, with some having multiple judgments.

Type of legal proceedings	No. of matters
Civil enforcement by regulators (EPA or local council) of a citizen's legal obligations	12 (Local councils = 7; EPA = 5)
Civil enforcement by a citizen, enforcing another citizen's legal obligations	7
Challenge to government decision by person against whom a decision was made — civil enforcement or judicial review	7 (Local councils = 4; EPA = 3)
Challenge to government decision by a third party — civil enforcement or judicial review	2 (Local councils = 0; EPA = 2)
	Total = 28

Table 1. Number of cases for civil enforcement and judicial review matters under the POEO Act where a written judgment was published.[46]

The majority of the matters were in relation to civil enforcement of a citizen's legal obligations by either a regulator (n=12) or another citizen (n=7). The remaining nine matters involved a civil enforcement or judicial review challenge to a government decision. Seven of these were by a person against whom a power was exercised, namely a notice recipient, and two were by a third party. Further analysis of the last three categories identified in Table 1 follows.

Challenges by a person against whom the decision was made

The seven challenges to government decisions by a person against whom a decision was made included five challenges to clean-up notices. Four of these were collateral challenges to the validity of a clean-up notice in a prosecution for failure to comply with the notice.[47] The other two matters were judicial review challenges to notices issued in the exercise of POEO Act investigation powers in relation to offences under other legislation.[48]

Combined with the merit appeal judgments on prevention notices and noise control notices (discussed in Part 1 of this article), proceedings challenging clean-up notices make up the most significant, or at least largest, body of case law on POEO Act decision-making powers. These matters have held regulators to account for their decisions, at least in the sense of providing individual justice to the notice recipient. For example, in *Liverpool City Council v Cauchi*[49] (*Cauchi*) the defendants in a prosecution for failure to comply with a clean-up notice successfully mounted a collateral challenge to the validity of the notice. The prosecution was dismissed. The LEC held that the Council was required to afford the defendants procedural fairness before issuing the notice but had failed to do so.[50] *Cauchi*

and later decisions of the LEC have provided regulators with guidance in determining the content of the duty to afford procedural fairness in a particular case.[51]

Challenges to government decisions by a third party

The two challenges to government decisions by third parties related to the exercise of the EPA's licensing variation power. In *Weston Aluminium Pty Ltd v Environment Protection Authority (No 2)*[52] (*Weston*) and, on appeal to the NSWCA*, Alcoa Australia Rolled Products Pty Ltd v Weston Aluminium Pty Ltd*,[53] Weston Aluminium Pty Ltd (Weston) challenged the validity of a licence variation granted by the EPA to Alcoa Australia Rolled Products Pty Ltd (Alcoa). The proceedings were not brought for environmental protection reasons but, rather, it appears, to protect a business interest. Weston processed aluminium dross, a by-product of aluminium, at a facility located in Cessnock, NSW. It had previously received aluminium dross from Alcoa's aluminium smelter in Victoria. Alcoa sought and obtained a licence variation to allow it to process the Victorian dross at its own aluminium processing plant in Yennora, NSW.[54]

Weston argued the licence variation had been issued in breach of the POEO Act. The case involved the interpretation of Alcoa's licence and the scope of the licence variation powers in the POEO Act. The EPA filed a submitting appearance[55] and, therefore, did not take part in the proceedings. By the time the proceedings reached the NSWCA, the legislation had been amended to clarify the scope of the variation power in order to address the legal issue identified by the LEC.[56] While the NSWCA reframed the legal question that should have been posed,[57] the Court's decision nevertheless derived a simple proposition: 'the addition of a new scheduled activity to an existing licence cannot be done by way of variation if the effect is to permit the licensing of the activity absent the grant of a necessary development consent'.[58] There is little else that can be taken from the judgment in terms of guiding the exercise of the EPA's licensing powers, except perhaps that some of Alcoa's licence conditions could have been better drafted.[59]

A comment made by Pain J in the LEC in *Weston* is, however, of interest as it highlights the complete lack of decisions regarding the interpretation of licensing powers and licence conditions under the POEO Act. Her Honour stated:

> The Court has not been provided with any cases which have considered the appropriate interpretation of environment protection licences issued under the POEO Act and is unaware of any. This case therefore raises the fundamental issue of what is the appropriate approach to take to such statutory instruments. Is the case law applicable to development consents … also applicable to the construction of licences under the POEO Act?[60]

It is noted that the question raised by her Honour above did not need to be dealt with on appeal given the way the matter progressed. The point is that, as Pain J recognised, there is little guidance in the case law regarding licensing matters. As the first of these two articles discussed, only one licensing merit appeal has proceeded to a contested hearing in the 17 years since the POEO Act commenced. There is little civil case law on the exercise of licensing powers generally, as these two articles demonstrate.

The second third-party challenge to a government POEO Act decision was *Donnelly v Delta Gold Pty Ltd*[61] (*Donnelly*). The applicant contested a licence variation granted by the EPA to the fourth respondent, Timbarra Gold Mines Pty Ltd, regarding a goldmine. The variation allowed treated mining waste water to be spray irrigated over a total area of 18 hectares.[62] The applicant was described as 'an authorised representative of the Wahlabul/Malerah Bandjalung Aboriginal Communities and has claimed, pursuant to the *Native Title Act 1993* to be a traditional custodian of the land and waters' where the goldmine was located.[63] The proceedings were brought to protect Indigenous cultural heritage and the environment and

were later found to have been taken in the public interest.[64] The applicant challenged the licence variation on two main grounds. First, it was alleged that the EPA had breached s 58(6) of the POEO Act. That section requires the authority to call for and consider public submissions in circumstances where a licence variation:

(a) 'will authorise a significant increase in the environmental impact' of the licensed activity; and
(b) there has been no public consultation under the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act) regarding the variation.

There had been no public consultation under either the EP&A Act or POEO Act. The issue was whether the licence variation authorised a significant increase in environmental impact and, therefore, whether the EPA was required to invite and consider public submissions.[65] Justice Bignold held that the question posed by s 58(6)(a) regarding whether the licence authorised a significant increase in environmental impact was a jurisdictional fact which the LEC was required to determine for itself.[66] After considering all the evidence, his Honour held that the environmental impact authorised by the licence variation was insignificant.[67]

The second major argument was that the EPA had 'failed to consider the impact of the Variation upon "aboriginal relics" within the meaning of the [*National Parks and Wildlife Act 1974* (NSW)]'.[68] This argument was rejected on the evidence.

Despite the applicant in *Donnelly* being unsuccessful, Bignold J commented on the important nature of the case in a later judgment on costs.[69] His Honour stated that '[c]ertainly a number of important provisions of [the POEO Act] were judicially considered for the first time'.[70] This included the s 58 licence variation power and the civil enforcement provision in s 252 of the POEO Act.[71] The case had also highlighted 'serious omissions and deficiencies in the expert material that had been submitted to, and acted upon by, the [EPA] in granting the Licence Variation'.[72] In this respect, Bignold J noted that 'the Respondents, to a fairly significant degree can be said to have brought the proceedings upon themselves'.[73] The matter was important in terms of accountability. While the applicant may have lost, the fact that the decision regarding 'significant increase in environmental impact' was held to be a jurisdictional fact means that the EPA is likely to be more careful in making this determination because the LEC can reconsider the issue. Additionally, the case highlighted the importance of making decisions based on adequate expert evidence — hopefully leading to greater scrutiny of an applicant's documents by the authority in the future. Nevertheless, the impact of the decision was limited given its narrow focus on the licensing variation provision as its main concern. Indeed, as the only challenges to government decisions by third parties have related to licence variations, the scope of judicial consideration of the exercise of the EPA's powers in these matters has been extremely narrow.

Civil enforcement: citizen v citizen

Seven of the cases located were civil enforcement matters brought by a citizen against another citizen to enforce that person's obligations under the POEO Act. Four of those cases were brought by a neighbour of the party alleged to be in breach of the legislation. The purpose behind bringing those proceedings was largely to protect the amenity or property interests of the neighbour rather than a general concern to protect the environment in the public interest.[74] One further matter was brought for the purpose of protecting Indigenous cultural heritage.[75] There was little within these judgments in terms of principles that could be used to guide the future exercise of regulatory powers under the POEO Act. For example, in *McCallum v Sandercock (No 2)*,[76] Pepper J stated, in the context of discussing whether the proceedings were brought in the public interest for the purposes of costs, that '[o]n a fair reading of the [principal judgment in the proceedings] it does not, in my view, contribute in

any material way to the proper understanding, development or administration of the law with respect to the Act'.[77]

However, in one matter it was acknowledged that the EPA was justified in refraining from exercising its enforcement powers where a breach had occurred. In accountability terms, this essentially confirmed that the authority had used its powers in a proper manner. In *Moore v Cowra Shire Council*[78] the LEC found that a Council-operated STP had breached s 120 of the POEO Act (pollution of waters).[79] However, in the exercise of its discretion the Court decided not to grant relief.[80] The EPA was aware of problems with the STP and numerous licence breaches yet did not take any enforcement action.[81] Justice Sheahan accepted that the Council and the EPA were doing their best to manage pollution from a 'severely overloaded' STP while waiting for a new plant to be built.[82]

Two of the civil enforcement matters brought by one citizen against another are of particular interest in terms of environmental protection. One especially illustrates the important role that such proceedings can play in improving regulatory decision-making and ensuring government accountability. In *Blue Mountains Conservation Society Inc v Delta Electricity*,[83] the plaintiff environmental group brought civil enforcement proceedings alleging that the defendant had breached s 120 of the POEO Act by causing water pollution.[84] A defence is provided to persons who pollute waters in circumstances where the pollution was permitted by a POEO Act licence.[85] Delta Electricity, a state government corporation, operated Wallerawang Power Station in the Blue Mountains. It was alleged that, over a period of two years, a number of specified pollutants were discharged into Coxs River (as part of wastewater discharged from the power station) that were not permitted under the defendant's licence. They included 'salt, copper, zinc, aluminium, boron, fluoride and arsenic'.[86] Delta Electricity denied that it was emitting pollutants in breach of s 120.[87] The issue in terms of whether the licence authorised such discharges was that it required the monitoring of certain substances but did not set a maximum discharge limit. As Johnson noted, 'the litigation was a test case. In particular, the case raised questions about the construction of environment protection licences, and whether conditions requiring the monitoring of pollutants constituted an implied authority to pollute'.[88]

The Blue Mountains Conservation Society Inc (BMCS) was of the view 'that the ongoing degradation of water quality in the Coxs River was an important environmental issue that needed to be addressed'.[89] BCMS had written to the Department of Environment and Conservation (DECC), which then incorporated the EPA, before commencing proceedings and asked the department to take enforcement action regarding water pollution. DECC indicated it would not prosecute.[90] BMCS therefore took proceedings against Delta Electricity.[91] The proceedings were brought in the public interest[92] and, as Beazley JA noted in the NSWCA, in doing so BMCS was 'seeking to support the rule of law'.[93] The case was significant because:

> [It] was the first case under the [POEO] Act using the open standing provisions of s 252 of that Act seeking, in civil proceedings, a declaration and orders requiring a holder of an environment protection licence to cease polluting waters in contravention of the [POEO] Act.[94]

The matter was the subject of a number of preliminary decisions regarding a protective costs order,[95] security for costs[96] and a motion to strike out the proceedings.[97] While BCMS's case survived these preliminary judgments, the matter settled without a final hearing.[98] The parties agreed that the proceedings would be discontinued on the basis of certain conditions. This included that Delta Electricity admitted to polluting waters in breach of the POEO Act, except regarding salt; furthermore, that it would apply to the EPA 'to vary its licence to specify maximum concentration levels for copper, zinc, aluminium, boron, fluoride, arsenic, salt and nickel'.[99]

Johnson was critical of the fact that the EPA had not taken enforcement action given its responsibilities as a regulator under the POEO Act.[100] She stated that '[t]he case highlights significant gaps and deficiencies in the administration of pollution laws in NSW, raising serious questions about the role of the government in the enforcement of its own pollution laws'.[101] The case is therefore notable, as it allowed an environmental group acting in the public interest to enforce the law when the regulator had not done so. In the circumstances it played a role in government accountability rather than just the accountability of the licensee.

The other civil enforcement case brought against a licensee by a citizen was not successful. In *Macquarie Generation v Hodgson*,[102] the NSWCA summarily dismissed proceedings alleging that Macquarie Generation, which operated Bayswater Power Station located at Muswellbrook in NSW, had breached s 115(1) of the POEO Act. That section makes it an offence to 'wilfully or negligently [dispose] of waste in a manner that harms or is likely to harm the environment'. The alleged waste was CO_2. It is a defence to the s 115(1) offence if a person has lawful authority to dispose of the waste, such as by way of a licence.[103] Section 64(1) makes it an offence to breach a condition of a licence. Macquarie Generation held a POEO Act licence to operate the power station. There were no provisions in the licence which expressly limited the amount of CO_2 that could be emitted or the amount of electricity that could be generated or coal burnt.[104] Hodgson argued that:

> [T]he authority conferred by the licence was subject to an 'implied' or 'common law' limitation or condition preventing Macquarie emitting CO_2 in excess of the level it could achieve by exercising 'reasonable regard and care for the interests of other persons and/or the environment'. It was alleged that this level had been exceeded giving rise to offences under s 64(1).[105]

If such an implied term was upheld and the level deemed permissible under that term was exceeded, the defence of lawful authority to a s 115(1) breach would not be available. It would, however, need to be established, among other things, that CO_2 constituted 'waste' in order to make out a breach of s 115(1).

Applying contract law principles to the statutory licence, the NSWCA rejected that a term limiting the amount of CO_2 emitted should be implied:

> It is not necessary to imply any condition to make it effective, and the condition relied on would contradict the licence.
>
> On the other hand it was necessary to imply a term permitting Macquarie to emit CO_2 because a licence to burn coal would otherwise be ineffective.[106]

An argument that a condition should be implied in the licence that limits the amount of coal consumed per year was also rejected.[107] Accordingly, the alleged breaches of ss 64(1) and 115(1) could not be made out.

While the case was clearly brought for environmental protection reasons — aiming to limit the amount of CO_2 that Macquarie Generation could emit — the decision of the NSWCA had the opposite effect. The judgment implied a term allowing an unlimited amount of CO_2 to be released. In the course of the NSWCA's decision, CO_2 was described as 'colourless, odourless and inert'.[108] As Gardner and Lee note, 'there was no trial of the evidence about whether the CO_2 emissions were harmful to the environment and whether [Macquarie Generation] could reasonably have reduced those emissions'.[109] It would have been interesting to see whether the NSWCA would have reached the same conclusion if a more blatantly 'harmful' substance, such as arsenic or heavy metals, was the pollutant in question.

Final synopsis of accountability through judicial review and civil enforcement

The seven matters that have been brought by a person against whom a decision was made all related to a clean-up or investigation notice issued to that person. Together with the merit appeal decisions on prevention and noise control notices, these matters form the largest body of case law regarding challenges to the exercise of a regulator's powers under the POEO Act. They have been effective in providing guidance for future decision-making. The two challenges to government decisions by third parties were both about licence variations. One was initiated solely to protect business interests. The cases were extremely limited in terms of offering assistance in decision-making.

In proceedings where citizens sought to enforce another citizen's legal obligations, seven of the nine matters were concerned with protecting amenity and property interests rather than being brought in the public interest to protect the environment. This general pattern of fewer cases being brought to protect the public interest is consistent with the nature of cases taken under the EP&A Act by citizens.[110] Nevertheless, a substantial number of public interest matters have been brought in planning law for environmental protection purposes. In *Blue Mountains Conservation Society Inc v Delta Electricity*,[111] Pain J stated:

> The history of public interest litigation in this Court through the utilisation of third party standing provisions in virtually all the major environmental and planning legislation in NSW is reasonably extensive and commenced early in the life of the Court. Broad standing provisions enable the legislation to be tested and enforced through proceedings in the Court.[112]

However, while this may be the case for the EP&A Act and other environmental legislation, it certainly does not appear to be the case for the POEO Act. While there have been few civil cases taken under the POEO Act, the vast majority of proceedings that have been instituted were not taken in the public interest. Exceptionally few cases could be characterised in this way. This is of significant interest because these are precisely the cases which may have the biggest impact on the way in which decision-makers exercise their powers. The former Chief Judge of the LEC, Peter McClellan, noted the importance of such proceedings 'is both because of the issues raised and the impact of the decisions on the proper administration of environmental law'.[113] In the context of the EP&A Act, McClellan stated:

> The decisions have proved of fundamental importance in construing the legislation and defining the obligations of both the public and private sector under it. Without these proceedings it is almost certain that the quality of environmental assessment of major development projects, particularly those undertaken by government, would not have met the expectations of the legislature when the Act was passed.[114]

The low number of such proceedings under the POEO Act means that the legislation and decision-making under it have not received the same level of scrutiny by the LEC. In particular, there has been insufficient testing of licensing decisions through judicial review and civil enforcement. It is not being suggested that the EPA is making 'bad' decisions and that a flurry of legislation should ensue. The lack of cases does, however, mean that decision-making has not been tested and, consequently, the level of accountability is low. One possible explanation for the small number of cases in pollution law is that a potential litigant may have a number of decisions that they could contest in relation to a project. For example, a litigant may decide to challenge the development consent or approval, rather than the licence, whereby the whole project may collapse. Another possible reason for the lack of litigation is that the EPA may respond appropriately to community concern, such as by amending a licence or taking enforcement action when a citizen complains about pollution. This would negate the need for third-party litigation altogether. These issues were not, however, examined as part of this article, as they are difficult to assess on the available information.

Overall, however, it is clear that there has been scarce testing of the way in which the EPA has exercised its licensing powers. A greater level of scrutiny of licensing decision-making would clearly enhance accountability in this important area concerned with environmental protection and the reduction of risks to human health.

Endnotes

1 Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 9th ed, 2016) 946.
2 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.
3 See Sarah Wright, 'Holding Regulators to Account in New South Wales Pollution Law: Part 1 — The Limits of Merits Review' (2016) 86 *AIAL Forum* 78.
4 *Protection of the Environment Operations Act 1997* (NSW) (POEO Act) s 6; see 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) 379–81.
5 Wright, above n 4, 380.
6 POEO Act s 6; Wright, above n 4, 380.
7 Brian J Preston, 'Judicial Specialisation Through Environment Courts: A Case Study of the Land and Environment Court of New South Wales' (2012) 29 *Pace Environmental Law Review* 602, 604.
8 *Land and Environment Court Act 1979* (NSW) (LEC Act) s 20(2), (3).
9 See, for example, *Liverpool City Council v Cauchi* (2005) 145 LGERA 1.
10 POEO Act s 252(3).
11 Ibid s 252(6).
12 *Blue Mountains Conservation Society Inc v Delta Electricity (No 3)* (2011) 81 NSWLR 407, [41] (Pepper J) citing *Meriton Apartments Pty Ltd v Sydney Water Corporation* (2004) 138 LGERA 383, [15].
13 Peter McClellan, 'Access to Justice in Environmental Law an Australian Perspective' (Paper presented at Commonwealth Law Conference 2005, London, 11–15 September 2005) 22 citing *F Hannan Pty Ltd v Electricity Commission of New South Wales* (1985) 66 LGRA 306, 313.
14 See Rosemary Lyster et al, *Environmental and Planning Law in New South Wales* (Federation Press, 4th ed, 2016) 41.
15 For example, s 55 of the POEO Act provides that the EPA must not refuse to issue or transfer a licence unless it has notified the applicant, given reasons for its proposed decision, provided 'a reasonable opportunity to make submissions' and considered any submissions. It is recognised that such a challenge would be unlikely in relation to decisions for which a merit appeal is available.
16 For example, s 45 of the POEO Act, which contains a list of factors the EPA must take into account, so far as they are relevant, in making a licensing decision.
17 See Elaine Johnson, '*Blue Mountains Conservation Society v Delta Electricity*' [2011] (3) *National Environmental Law Review* 35.
18 See, for example, *Moore v Cowra Shire Council* [2009] NSWLEC 59.
19 LEC Act s 37(1), (3).
20 Ibid s 37(3).
21 Nicola Pain, 'Protective Costs Orders in Australia: Increasing Access to Courts by Capping Costs' (2014) 31 *Environmental and Planning Law Journal* 450, 450; see also McClellan, above n 13, 42.
22 *Uniform Civil Procedure Rules 2005* (NSW) r 42.1.
23 Brian Preston, 'Public Enforcement of Environmental Laws in Australia' (1991) 6 *Journal of Environmental Law and Litigation* 39, 61.
24 Pain, above n 21, 450.
25 Preston, above n 23, 74.
26 Pain, above n 21, 451–2 (citations omitted).
27 John Toohey and Anthony D'Arcy, 'Environmental Law — Its Place in the System' in Robert John Fowler (ed), *Proceedings of the International Conference on Environmental Law. 14–18 June 1989, Sydney, Australia*, National Environmental Law Association of Australia and Law Association for the Asia and the Pacific, 1989, quoted in *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424, [195] (Basten JA, Macfarlan JA agreeing).
28 *Uniform Civil Procedure Rules 2005* (NSW) r 42.4(1).
29 Pain, above n 21, 451 n 7.
30 *Land and Environment Court Rules 2007* (NSW) r 4.2.
31 See Bates, above n 1*,* 931ff.
32 See the discussion of Bignold J in *Donnelly v Delta Gold Pty Ltd* (2001) 113 LGERA 34, [14]–[16]; *Donnelly v Delta Gold Pty Ltd* [2002] NSWLEC 44, [28]–[30].
33 See, for example, *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 189 (Kitto J); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40–1 (Mason J); *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042, [4].
34 Chris McGrath, 'Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324, 330.

35 Ibid; see also Chris McGrath, 'Myth Drives Australian Government Attack on Standing and Environmental "Lawfare"' (2016) 33 *Environmental and Planning Law Journal* 3, 6.
36 See, for example, *Friends of Tumblebee Incorporated v ATB Morton Pty Limited (No 2)* (2016) 215 LGERA 157, [237].
37 Ilona Millar, *Objector Participation in Development Appeals*, Environmental Defender's Office NSW <http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/670/attachments/original/1381972457/yl_cle_objector_participation.pdf?1381972457> 17.
38 The concepts of state significant development and state significant infrastructure were explained in the first of these two articles: see Wright, above n 3, 81.
39 *Environmental Planning and Assessment Act 1979* (NSW) s 89K(1)(e), (2)(c), 115ZH(1)(e), (2)(c).
40 POEO Act s 308(2)(k).
41 The Public Register is available at <http://www.epa.nsw.gov.au/prpoeo/index.htm>.
42 Land and Environment Court of NSW, *The Land and Environment Court of NSW Annual Review 2014* (2015) 29.
43 Land and Environment Court of NSW, *Class 4: Judicial Review and Civil Enforcement* <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_4/class_4.aspx>.
44 See McClellan, above n 13, 24, 26.
45 The NSW Caselaw website can be accessed at <http://www.caselaw.nsw.gov.au>.
46 These cases were located by searching the written judgments available on NSW Caselaw <http://www.caselaw.nsw.gov.au>.
47 *Liverpool City Council v Cauchi* (2005) 145 LGERA 1; *Ryding v Kempsey Shire Council* [2008] NSWLEC 306; *Lismore City Council v Ihalainen* (2013) 198 LGERA 47; *Environment Protection Authority v Sydney Drum Machinery Pty Ltd (No 4)* [2016] NSWLEC 59; *Nati v Baulkham Hills Shire Council* (2002) 120 LGERA 301 (*Nati*). *Nati* was the only written judgment involving a challenge to a clean-up notice in civil proceedings.
48 *D'Anastasi v Environment Protection Authority* (2010) 181 LGERA 412, overturned on appeal: *D'Anastasi v Department of Environment, Climate Change and Water NSW* (2011) 81 NSWLR 82 (the EPA was previously part of the Department of Environment, Climate Change and Water). This matter involved a challenge to a notice to provide information and records issued under s 193 of the POEO Act. The matter related to an investigation regarding potential offences under pesticides legislation, to which the POEO Act investigation powers also apply: see POEO Act s 186(b1). *Southon v Beaumont* (2008) 69 NSWLR 716 involved a challenge to a notice issued under s 203 of the POEO Act requiring 'the applicant to attend at a specified time and place to answer questions': [1]. However, the investigation related to potential breaches of the *National Parks and Wildlife Act 1974* (NSW) (NP&W Act), in relation to which the POEO Act investigation powers can be used: NP&W Act s 156B.
49 *Liverpool City Council v Cauchi* (2005) 145 LGERA 1.
50 Ibid [35]–[37], [49]–[53].
51 See *Ryding v Kempsey Shire Council* [2008] NSWLEC 306; *Lismore City Council v Ihalainen* (2013) 198 LGERA 47; see also Alison Packham, 'Cleaning Up Pollution Fair and Square: The Duty to Afford Procedural Fairness in the Issue of Clean-up Notices in NSW' (2014) 19 *Local Government Law Journal* 87.
52 *Weston Aluminium Pty Ltd v Environment Protection Authority (No 2)* (2005) 144 LGERA 7.
53 *Alcoa Australia Rolled Products Pty Ltd v Weston Aluminium Pty Ltd* (2006) 148 LGERA 439.
54 Ibid [6]–[9].
55 A submitting appearance means that a respondent does not intend actively to take part in the proceedings and agrees to any orders made by the Court — usually except as to costs orders: see *Uniform Civil Procedure Rules 2005* (NSW) r 6.11. A government department may decide to file a submitting appearance in circumstances where another respondent is actively arguing the matter and the government sees no reason to take part in the proceedings.
56 *Alcoa Australia Rolled Products Pty Ltd v Weston Aluminium Pty Ltd* (2006) 148 LGERA 439, [71].
57 Ibid [79].
58 Ibid [82].
59 See, for example, *Alcoa Australia Rolled Products Pty Ltd v Weston Aluminium Pty Ltd* (2006) 148 LGERA 439, [67].
60 *Weston Aluminium Pty Ltd v Environment Protection Authority (No 2)* (2005) 144 LGERA 7, [29].
61 *Donnelly v Delta Gold Pty Ltd* (2001) 113 LGERA 34.
62 Ibid [2]–[3].
63 Ibid [1].
64 See *Donnelly v Delta Gold Pty Ltd* [2002] NSWLEC 44, [23], [25]–[27], [53].
65 *Donnelly v Delta Gold Pty Ltd* (2001) 113 LGERA 34, [24]–[25].
66 Ibid [70].
67 Ibid [252], [254].
68 Ibid [11].
69 *Donnelly v Delta Gold Pty Ltd* [2002] NSWLEC 44.
70 Ibid [28].
71 Ibid.
72 Ibid [33].

73 Ibid [50].
74 See *McCallum v Sandercock* (2011) 183 LGERA 399; *McCallum v Sandercock (No 2)* [2011] NSWLEC 203, [31]–[32]; *Meriton Apartments Pty Ltd v Sydney Water Corporation* (2004) 138 LGERA 383; *Sydney Water Corporation v Jeffman Pty Ltd* [2010] NSWLEC 132; *Moore v Cowra Shire Council* [2009] NSWLEC 59.
75 *Kennedy v Stockland Developments Pty Ltd (No 4)* [2012] NSWLEC 3.
76 *McCallum v Sandercock (No 2)* [2011] NSWLEC 203.
77 Ibid [38].
78 *Moore v Cowra Shire Council* [2009] NSWLEC 59.
79 Ibid [81].
80 Ibid [81]–[87].
81 Ibid [51]–[52], [63].
82 Ibid [71]–[75], [82].
83 *Blue Mountains Conservation Society Inc v Delta Electricity* (2009) 170 LGERA 1.
84 Ibid [1]. See also the following related decisions: *Blue Mountains Conservation Society Inc v Delta Electricity (No 2)* [2009] NSWLEC 193; *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424; *Delta Electricity v Blue Mountains Conservation Society Inc (security for costs)* [2010] NSWCA 264; *Blue Mountains Conservation Society Inc v Delta Electricity (No 3)* (2011) 81 NSWLR 407.
85 POEO Act s 122.
86 *Blue Mountains Conservation Society Inc v Delta Electricity* (2009) 170 LGERA 1 [1]–[2].
87 *Blue Mountains Conservation Society Inc v Delta Electricity (No 3)* (2011) 81 NSWLR 407, [16].
88 Johnson, above n 17, 36.
89 *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424, [20].
90 *Blue Mountains Conservation Society Inc v Delta Electricity* (2009) 170 LGERA 1, [12].
91 *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424, [20].
92 Ibid [209] (Basten JA, Macfarlan JA agreeing), [120]–[121] (Beazley JA).
93 Ibid [121] (Beazley JA).
94 Ibid [38] (Beazley JA).
95 *Blue Mountains Conservation Society Inc v Delta Electricity* (2009) 170 LGERA 1; appealed *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424.
96 *Blue Mountains Conservation Society Inc v Delta Electricity (No 2)* [2009] NSWLEC 193; appealed *Delta Electricity v Blue Mountains Conservation Society Inc (security for costs)* [2010] NSWCA 264.
97 *Blue Mountains Conservation Society Inc v Delta Electricity (No 3)* (2011) 81 NSWLR 407.
98 Johnson, above n 17, 36.
99 Ibid.
100 Ibid 35–7.
101 Ibid 35.
102 *Macquarie Generation v Hodgson* (2011) 186 LGERA 311.
103 POEO Act s 115(2).
104 *Macquarie Generation v Hodgson* (2011) 186 LGERA 311, [7]–[8].
105 Ibid [16]; see also *Gray v Macquarie Generation* [2010] NSWLEC 34, [8]. The proceedings in the LEC had been taken by Peter Gray and Naomi Hodgson. Mr Gray died before judgment was delivered in the NSWCA and the proceedings were continued in Ms Hodgson's name: *Macquarie Generation v Hodgson* (2011) 186 LGERA 311, [3], [19].
106 *Macquarie Generation v Hodgson* (2011) 186 LGERA 311, [65]–[66] (Handley AJA, Whealy and Meagher JJA agreeing).
107 Ibid [76]–[79].
108 Ibid [45].
109 Alex Gardner and Jessica Lee, 'Case Note: Macquarie Generation v Hodgson [2011] NSWCA 424' (2012) 27 *Australian Environment Review* 321, 321.
110 See McClellan, above n 13, 33.
111 *Blue Mountains Conservation Society Inc v Delta Electricity* (2009) 170 LGERA 1.
112 Ibid [44].
113 McClellan, above n 13, 33.
114 Ibid 33–4.