



Department of
Primary Industries

DPI FORESTRY PLANTATIONS REGULATION

Prosecution guidelines

July 2019

Published by NSW Department Primary Industries

Plantations Regulation Prosecution Guidelines

First published – July 2019.

PUB19/386

More information

www.dpi.nsw.gov.au

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1. Introduction

1.1 Purpose

This guideline explains the approach that the Plantations Regulation Unit (PR Unit), , will take in response to breaches of the *Plantations and Reafforestation Act 1999* (the Act) and the *Plantations and Reafforestation (Code) Regulation 2001* (the Code) under the regulatory programs that it administers. The PRU is an assessment, audit and enforcement unit within the NSW Department of Primary Industries. The capacity to prosecute offenders is an important discretionary power and regulatory tool, and in appropriate circumstances, prosecution action will be taken.

The overall goal of any prosecution undertaken is to stop and deter illegal activities by making offenders accountable as a personal and general deterrent and, to assist in building and maintaining community confidence in the audits, investigations, extension activities and enforcement response undertaken by Plantations Officers.

Prosecuting an offender for a plantations or associated environmental or cultural heritage offence, is a serious decision, with potential operational, financial and reputational impacts for both the Department and the affected individual or business. A clear and consistent governance framework regarding the decision-making process for prosecutions is crucial to ensure that proportionate and appropriate compliance action is taken in response to plantations offences.

This Guideline has been published to help explain:

- The basis on which the DPI Forestry will make a decision to prosecute.
- The factors that will be taken into account in deciding who the appropriate defendant is.
- How the decision regarding the specific charges laid is made.

This Guideline is not legally binding on the DPI Forestry or on any other organisation. It is however intended to form part of the Department's policy on compliance and enforcement and to provide guidance on the decision making process used when considering appropriate compliance action. The Guideline is also a key tool in educating the community, plantation owners and managers and other stakeholders on the processes undertaken and factors considered by DPI Forestry when assessing whether to proceed with prosecution action.

1.2 Who is the regulator

The Department of Primary Industries (DPI) has responsibility for administering laws governing the establishment, management and harvesting of the plantation estate across NSW. Through the execution of its regulatory functions, the Department is also responsible for managing the sustainability of forests in NSW. The department's Fisheries Forestry and Game Licensing Division provide these services through the PR Unit, within DPI Forestry.

The PR Unit includes assessment and audit teams, a governance team and an investigations and enforcement team.

This policy provides the guiding principles necessary for a fair, safe, efficient and equitable application of plantations laws in the day-to-day dealings of plantations officers with plantations owners, managers, contractors, interested stakeholders and the general community.

The PR Unit exercises regulatory functions across a range of plantations, including:

- publicly owned timber plantations,
- privately owned timber plantations, and
- privately owned environmental plantations.

Memoranda of understanding exist to outline practical jurisdictional responsibilities between other government agencies in order to successfully establish working relationships and to enable a cooperative approach to forestry compliance and enforcement.

Where possible, enforcement issues affecting the plantations forests industry in NSW and the states of Queensland, South Australia and Victoria will be addressed through collaborative approaches between the states.

1.3 Role of the Senior Manager Plantations Regulation, Manager Governance and Systems and the prosecution review processes

Within the PR Unit, the Senior Manager Plantations Regulation (Senior Manager) has responsibility for providing strategic direction and oversight of all compliance and enforcement activities and for driving continuous improvement in the quality of the Unit's regulatory services.

All prosecutions initiated by the Investigations and Enforcement team, within the PR Unit, are approved and managed through an established prosecution process. The Manager Governance and Systems within the PR Unit will maintain oversight of prosecution procedure, ensuring it meets best practice, natural justice and procedural fairness guidelines, including the NSW Office of the Director of Public Prosecutions [Prosecution Guidelines](#).

Over time, the PR Unit will establish a process of independent prosecution review using subject matter experts, including representatives of the Legal Services Branch. Initially, all PR Unit prosecutions will have independent review achieved through a collaborative approach with the DPI Fisheries Compliance Prosecution Review Panel, led by the Program Leader Special Operations. The Prosecution Review Panel will act objectively and independent of the investigation in carrying out its functions, with all its decisions being recorded.

As appropriate, prosecutions are referred to the Legal Services Branch, NSW Department of Planning, Industry and Environment, for information and advice.

The Senior Manager reviews all offences that are recommended for prosecution and offences which are subject to a court election following the issuing of a penalty notice. The Senior Manager will then refer the matter to the PRP for independent review, prior to approving the prosecution.

2. Principles of prosecution

Prosecution is one tool within the PR Unit's overall regulatory strategy. There are a range of other tools that can be used depending on the nature and type of breach being dealt with. The Unit applies the following principles in relation to prosecutions:

- The key aim of the enforcement action chosen is to encourage voluntary compliance with plantations and environmental laws. Prosecution is a strategic response the Unit may choose based on the circumstances and supporting evidence. The Unit recognises that prosecution may not always be the most effective means of promoting voluntary compliance and considers all alternatives to achieving compliance such as the issuing of warning letters, statutory notices, remediation orders, penalty notices, and other regulatory tools.
- Effective enforcement actions, including prosecutions, must be targeted, proportionate, consistent, fair, and considered in a timely fashion.
- Enforcement actions will be applied consistently to individuals, companies (including managers and employees) and where relevant, third parties such as contractors.

- Releasing information about enforcement actions draws attention to the consequences of breaking the law. When the Unit releases information regarding prosecutions, this is done to help educate others and to personally, and generally, deter non-compliance.

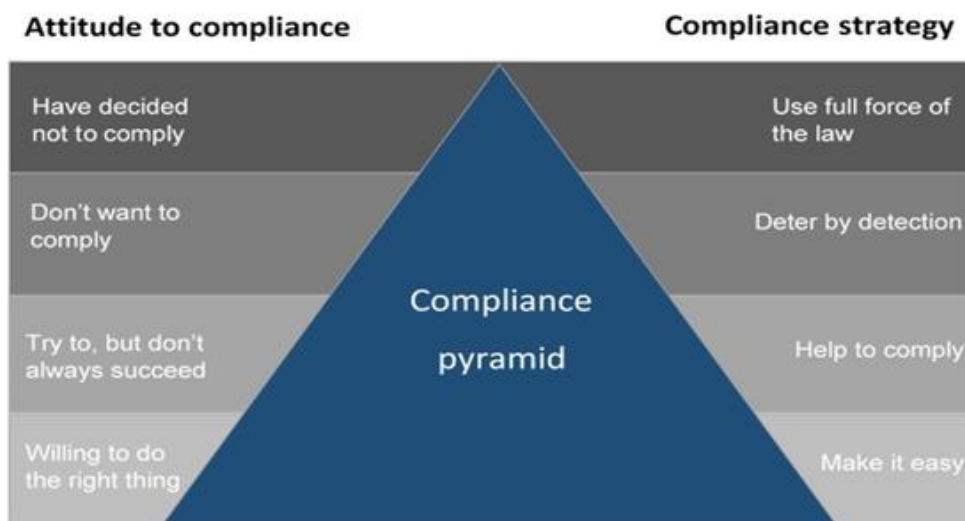


Figure 1 – Graduated compliance approach

3. Making a decision to prosecute

3.1 Who may prosecute?

The regulatory functions exercised by the PR Unit are made possible under the Act, and associated subordinate legislation, creating the authority to regulate.

Where prosecution action is available as a regulatory tool, the authority to pursue prosecution lies with the respective Minister, or their delegate, as established by sections 64 and 67 of the *NSW Plantations and Reafforestation Act 1999*.

In July 2019, the Minister delegated his authority to approve prosecutions to the Senior Manager Plantations Regulation within DPI Forestry.

3.2 When may prosecution occur?

The PR Unit treats prosecution as one of its strongest regulatory responses to a breach of the legislation. As with all enforcement actions, the primary aim of prosecution is to encourage voluntary compliance. In appropriate circumstances, prosecution sends a message to the community that a failure to comply with the law may be dealt with by the courts. That message is often referred to as creating “effective deterrence”.

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

4. Factors relevant to undertaking prosecutions

The NSW Director of Public Prosecutions (DPP) is the independent prosecutorial body for NSW and has developed Prosecution Guidelines for all NSW government bodies. Under these Guidelines, the public interest is the paramount consideration in determining whether the Department will prosecute

a matter or not. The Guidelines dictate that whether the public interest requires a matter be prosecuted is based on:

- Whether there is a prima facie case.
- Whether there are reasonable prospects of conviction, and
- Whether discretionary factors are such that the matter should not be prosecuted¹.

4.1 Establishing a prima facie case

Before any prosecution is considered, there must be sufficient admissible evidence available and capable of establishing each element of the offence (a prima facie case).

4.2 Reasonable prospect of conviction

Secondly, consideration must be given to the prospects of a conviction. This requires an exercise of judgment that will depend in part upon an evaluation of the weight of the available evidence and the persuasive strength of the prosecution case in light of the anticipated course of proceedings, including the circumstances in which they will take place. A relevant consideration in the evaluation of the strength of a prosecution case will be the existence or otherwise of evidence to support any defence that may be raised by the defendant.

4.3 Discretionary factors

Thirdly, consideration must be given to discretionary factors such as but not limited to:

- The seriousness or triviality of the offence and/or whether the breach is of a technical nature only.
- Any mitigating or aggravating circumstances.
- The length of time since the alleged offence.
- The degree of culpability of the alleged offender in relation to the offence.
- Whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute.
- The prevalence of the alleged offence and the need for both specific and general deterrence.
- Any prior breaches of, or convictions under the legislation.
- Whether the alleged offence is of considerable public concern.
- Any precedent which may be set by not instituting proceedings.
- The age, physical or mental health, or special infirmity of the alleged offender or witnesses.
- The length and expense of a court hearing.
- Whether proceedings are to be instituted against others arising out of the same incident.
- Community expectations that proceedings will be instituted.
- The availability and efficacy of any alternatives to prosecution.²
- Whether another Government agency has taken a prosecution with respect to the same facts and circumstances.

¹ See NSW Office of the Director of Public Prosecutions – Prosecution Guidelines 2007 <https://www.odpp.nsw.gov.au/publications-media/prosecution-guidelines>

² *ibid*

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

4.4 Irrelevant considerations

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

- Any elements of discrimination against the person, that is the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved.
- Personal empathy or antipathy towards the alleged offender.
- The political or other affiliations of those responsible for the prosecution decision.
- Possible political advantage or disadvantage to the government or any political party, group or individual.

5. Who may be prosecuted?

5.1 Selecting defendants

Liability under the relevant legislation is imposed on a plantation owner (including corporations) or a manager, who may have participated in or contributed to an offence. This can mean that multiple entities (either individuals or organisations) may have committed an offence arising out of a single incident. It is not always appropriate to prosecute every entity who may be liable for an offence.

The Department will, when selecting appropriate defendants, assess:

- Who is primarily responsible for the alleged offence, that is:
 - Who was primarily responsible for the acts or omissions giving rise to the alleged offence.
 - Who was primarily responsible for the material circumstances leading to the alleged offence.
 - Who formed any relevant intention.
- The potential effectiveness of any court orders that might be made against the proposed defendant.

5.2 Owners, managers and corporate liability

Owners, including corporations, and managers of plantations may attract liability for offences under the Act as a result of their actions or inactions.

The test, as set out in various legislative instruments, requires the relevant person to be an owner or manager of a plantation, the owner or a director of a corporation and in a position to influence the conduct of the corporation in relation to the commission of the offence.

5.3 Employee liability

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

6. Determining charges

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

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

6.1 Similar charges for the same offence

The PR Unit has a duty to refine its case to avoid laying duplicate or multiple charges for the same alleged offence. It is not uncommon for circumstances to disclose a number of contraventions against the Act. These occasions where an act or omission will be prohibited under two separate provisions of the Act may involve an offence under each. Laying duplicate or multiple charges will be avoided unless the evidence proves each element of the alleged offence reflects the serious conduct of the accused and is considered appropriate in the circumstances.

6.2 Continuing offences

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

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

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

6.3 Evaluation of prosecution proposals

The process of evaluating proposals relating to prosecutions and court-elect matters can be very complex. In light of this complexity, the Senior Manager Plantations Regulation will refer matters to a Prosecution Review Panel of senior officers, with appropriate skills and expertise to review the matter. The panel will review the matter consistent with the DPP Guidelines, assessing whether:

- There are applicable defences or exemptions.
- The defendant has been correctly identified, in particular where companies are identified as the defendant.
- The matters have elements of, or are, *mens rea* offences.
- The matters have elements of 'joint enterprise' or 'aid and abet' and if the offences are severe there must be sufficient evidence to prove the offences set for each alleged offender.
- Any defence of honest and reasonable mistake of fact applies for strict liability offences.
- Any of the evidence may be held inadmissible on the basis that it was unlawfully, improperly or unfairly obtained.

The above considerations are not exhaustive and the issues for consideration will depend on the circumstances of each matter. A recommendation is then provided to the Senior Manager about whether or not prosecution action should be pursued.

For prosecutions and other compliance actions associated with other relevant Acts, recommendations for prosecutions or other enforcement actions, such as seeking restoration orders,

will be considered in consultation with the relevant Government Authority controlling the statutes under which the offence was committed.

7. Commencing proceedings

Prior to commencing prosecution proceedings, the Unit engages appropriate legal advice through the DPIE Legal Services Branch, the NSW Crown Solicitors Office or approved external legal on the matter.

Normally summary proceedings will only be initiated by the Legal Services Branch or an approved external legal provider on behalf of the Department. An exception may arise if a person is apprehended by a police officer or is subject to action under the Act as well as other offences not within the scope of a plantations officer's normal duties.

The departmental person named as the informant in matters proceeding to prosecution is the Senior Manager Plantations Regulation, Department of Planning, Industry and Environment (DPIE).

Where possible and appropriate, the PR Unit will seek to recoup any legal costs with respect to any successful prosecution.

8. Selecting the appropriate court

Offences can be prosecuted summarily, either in the Local Court or the Land and Environment Court.

The Senior Manager Plantations Regulation will consider the following factors in choosing the venue for the summary hearing:

- The maximum penalty that can be imposed in a Local Court compared to the Land and Environment Court.
- Offences which are serious enough to attract possible penalties in excess of the jurisdictional limit for Local Courts will be commenced in the Land and Environment Court.
- Those matters which have or are expected to give rise to applications for orders under Part 7 of the Act will be commenced in the Land and Environment Court, and
- Unless there are good reasons to the contrary, all charges arising out of the same incident will be instituted in the same jurisdiction (and preferably at the same time) so the Court has the option to hear them together.

9. Appeals

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

- Whether there was a material error of fact or law in the initial proceedings.
- How likely the prosecution is to succeed, and
- Whether the sentence was manifestly inadequate.

10. Decisions to not prosecute

It is critical that there is integrity surrounding decisions to not prosecute. If the independent prosecution review process has recommended prosecution and legal advice indicates that there are reasonable prospects of success, any decision to not initiate prosecution must be supported by written reasons from the Senior Manager Plantations Regulation.

These reasons may be released to external parties, however, information will not be publically released for matters that attract legal professional privilege or where releasing the information would result in a breach of privacy or personal information rules.