

Prosecution Guidelines

January 2026

Acknowledgement of Country

We acknowledge the Traditional Custodians of the lands and waters across New South Wales and pay our respects to Elders past and present. We recognise the ongoing connection Aboriginal peoples have to Country, and we honour their deep spiritual, cultural, and custodial relationships that continue to this day.

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Introduction

NRAR objectives

The Natural Resources Access Regulator (NRAR) is an independent regulator established under the *Natural Resources Access Regulator Act 2017* (NRAR Act). NRAR is responsible for ensuring that the regulated community achieves compliance with natural resources management legislation. This currently includes the NRAR Act, *Water Management Act 2000* (WM Act), *Water Act 1912* and associated regulations.

NRAR's legislative objectives are to:

- ensure effective, efficient, transparent and accountable compliance and enforcement measures for the natural resources management legislation
- maintain public confidence in the enforcement of the natural resources management legislation.

To do this, NRAR will:

- promote compliance with the objectives of the Water Act 1912 and the WM Act
- achieve best practice management and regulation of surface water and groundwater
- take a risk-based and outcome-focused approach to regulation
- guide decision-making and action by officers, through the adoption of a graduated and proportionate response to legislative non-compliance
- ensure decisions on enforcement action are transparent to the community.

NRAR seeks to build community confidence as a trusted, credible, effective, efficient and transparent regulator. Application of these guidelines, together with the Regulatory Policy and the Enforceable Undertaking Guidelines, seeks to ensure greater certainty and consistency for the regulated and wider community on how NRAR will use its discretion in making proportionate enforcement decisions. NRAR recognises that the majority of the regulated community voluntarily meet their obligations and want fair sharing of natural resources to achieve long term economic, environmental and social outcomes. NRAR will encourage and assist high levels of voluntary compliance with appropriate education, guidance, advice and systems. However, when instances of non-compliance are detected, NRAR will not hesitate to take enforcement action, including prosecution where appropriate.

The role of the NRAR Board

The NRAR Board, created by the NRAR Act, is responsible for compliance and enforcement of the natural resources management legislation conferred on it. This includes ensuring that decisions relating to compliance and enforcement action are made independently in a fair and impartial manner, in accordance with best practice regulatory approaches.

The board is comprised of 4 members who together have experience and expertise in law, natural resources management, compliance and regulation. The NRAR Board is responsible for all decisions relating to the functions of NRAR, including determining whether proceedings for

offences under the natural resources management legislation should be instituted. NRAR or the NRAR Board is not subject to the control or direction of the Minister in relation to any specific matters being considered or determined by NRAR.

Purpose of these guidelines

These guidelines explain and guide the approach that NRAR will take in determining when and how to prosecute for non-compliance with the legislation it administers.

NRAR's power to prosecute the entities it regulates is an important discretionary power and regulatory tool. In appropriate circumstances, prosecution action will be taken.

The overall goal of any enforcement action undertaken by NRAR is to achieve regulatory compliance and to seek to build and maintain community confidence in the regulatory oversight provided by NRAR. This is explained in more detail in NRAR's Regulatory Policy.

A decision to begin proceedings for a breach of legislation is a serious decision, with potential operational, financial and reputational impacts for both NRAR and the affected business/individual. 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 non-compliance.

These guidelines have been published to help explain:

- the basis on which NRAR will make a decision to prosecute
- the factors NRAR will take into account in deciding which person is the appropriate defendant
- the factors NRAR will take into account when deciding the appropriate jurisdiction to bring proceedings
- how NRAR will make a decision regarding the specific charges it lays.

These guidelines are not legally binding on NRAR or on any other organisation. They are however intended to form part of NRAR's policy on compliance and enforcement and provide guidance on the decision-making process NRAR utilises when considering appropriate compliance action.

These guidelines are also a key tool in educating the community and regulated entities on the processes undertaken, and factors considered by NRAR when assessing whether to proceed with prosecution action.

These guidelines will be reviewed annually or in response to any significant contextual change to ensure they meet NRAR requirements.

Principles of prosecution

Prosecution is one tool within NRAR's overall enforcement strategy. There are a range of other enforcement tools that can be used depending on the nature and type of non-compliance being dealt with. NRAR applies the following principles when making determinations about enforcement action:

- Prosecution is a strategic response which NRAR may choose based on the circumstances and supporting evidence. NRAR considers the appropriateness of all possible responses to non-compliance, for example the issuing of written warnings, statutory notices, civil penalties, enforceable undertakings, penalty notices, as well as prosecution action. This recognises that prosecution may not always be the most effective or appropriate means of promoting compliance and may not be proportionate to the non-compliance in all circumstances.
- The key aims of the enforcement action taken by NRAR include:
 - achieving compliance with legislative obligations,
 - ensuring specific and general deterrence
 - taking action which is in the public interest.
- Effective enforcement actions, including prosecutions, must be targeted, proportionate, consistent, fair, and considered in a timely fashion.
- Releasing information about enforcement supports transparency and draws attention to the consequences of breaking the law. When NRAR releases information regarding prosecutions and civil enforcement, this is done to help educate others and achieve compliance.

NRAR's Regulatory Policy requires that a proportionate response to non-compliance be employed. It requires that NRAR respond to non-compliance according to the severity of the non-compliance and the regulated entity's culpability and approach to non-compliance.

Making a decision to prosecute

Who may prosecute?

One of NRAR's functions is to commence and conduct proceedings for offences under, and contraventions of, the natural resources management legislation.

The NRAR Board determines whether to commence proceedings for offences under the natural resources management legislation. Before making a decision about whether to commence proceedings, legal advice will be obtained in relation to an alleged offence. The board can only decide to commence proceedings under the natural resources management legislation when that decision is supported by legal advice.

When may prosecution occur?

NRAR treats prosecution as one of its strongest regulatory responses to a breach of the legislation, along with other serious compliance actions such as civil penalty proceedings, and licence or approval suspension/cancellation. As with all enforcement actions, the primary aims of prosecution are to achieve compliance, ensure specific and general deterrence, and take action in the public interest.

In appropriate circumstances, prosecution sends a message to industry and the community that a failure to comply with the law may be dealt with by the courts.

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

Factors relevant to undertaking prosecutions

The decision to prosecute an offence is discretionary and requires consideration as to whether prosecution is in the public interest. In determining this issue NRAR will consider whether:

- there are reasonable prospects of conviction; and
- discretionary factors are such that the matter should be prosecuted.¹

Reasonable prospects of conviction

A prosecution may only be commenced if legal advice indicates there are reasonable 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.²

Discretionary factors

When deciding whether to prosecute consideration must be given to discretionary factors such as but not limited to:

- the seriousness or triviality of the breach and/or whether the breach is of a technical nature only
- the severity of the environmental harm (real or potential)
- impact on other water users or community impact including on the spiritual, social, customary or economic use or value of land and water by or for Aboriginal people
- any mitigating or aggravating circumstances
- whether the breach was deliberate, reckless, or careless
- the length of time since the alleged breach

¹ NSW Office of the Director of Public Prosecutions – Prosecution Guidelines 2021 <https://www.odpp.nsw.gov.au/prosecution-guidance/prosecution-guidelines>

² Ibid.

- the degree of culpability of the alleged offender in relation to the breach
- any motivation for the breach, for example if financial benefit was obtained as a result of the breach
- whether a prosecution or civil penalty proceedings will have significant deterrent effect due to criminal sanctions or maximum penalty
- whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute
- the prevalence of the alleged breach and the need for both specific and general deterrence
- any prior breaches of, or convictions under the legislation
- whether the alleged breach 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 or civil penalty proceedings
- whether NRAR has taken any other enforcement action in respect to the same facts and circumstances
- whether another Government agency has taken a prosecution or other enforcement action in respect to the same facts and circumstances.

The applicability of and weight to be given to these and other factors will vary, depending on the particular circumstances of each case.³

These discretionary factors also apply to a decision to initiate civil penalty proceedings. The NRAR Regulatory Policy contains information about when NRAR may choose to initiate civil penalty proceedings for contraventions of civil penalty provisions.

Inappropriate considerations

A decision whether or not to take enforcement action will not be 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 or victim
- 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.⁴

³ Ibid.

⁴ Ibid.

Evaluation of prosecution proposals

The process of evaluating proposals relating to prosecutions and requests to have penalty notices decided in court can be very complex. In light of this complexity, NRAR documents and implements a process for reviewing prosecution proposals and requests to have penalty notices decided in court with advice from persons with appropriate skills and expertise in relation to the matter. The process includes reviewing each matter against NRAR's Prosecution Guidelines, assessing whether:

- there are reasonable prospects of conviction
- there are any discretionary factors relating to the matter that would suggest the matter should proceed.

A recommendation is then provided to the NRAR Board by the Chief Regulatory Officer about whether or not prosecution action should be pursued.

Who may be prosecuted?

Selecting defendants

Liability under the relevant legislation is imposed on a wide range of entities who may have participated in or contributed to an offence. This can mean that multiple regulated entities 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.

NRAR 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
- who obtained a financial benefit from the alleged offence
- the potential effectiveness of any court orders that might be made against the proposed defendant.

Corporate and director/manager liability

Where an offence is committed by employees, agents or officers of a corporation in the course of their employment, proceedings will usually be commenced against the corporation. Where, however, the offence has occurred because the employee, agent or officer has embarked on a venture of their own making and volition, outside the scope of their employment, proceedings may be instituted against the employee, agent or officer and not against the corporation.⁵

⁵ NSW Environment Protection Authority Prosecution Guidelines March 2025, page 13
https://www.epa.nsw.gov.au/sites/default/files/2025-03/25p4580-prosecution-guidelines_0.pdf

In addition, managers and directors/officers may attract personal liability for offences under the legislation as a result of their actions or inaction. The relevant legislation will generally specify the offences for which director/managerial liability can arise and the circumstances in which this may occur. Generally, this will require the relevant person to be a director of the corporation, or an individual involved in the management of the corporation and in a position to influence the conduct of the corporation in relation to the commission of the offence.

Employee/worker liability

Proceedings may be brought by NRAR 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.

The guiding principle in deciding whether to charge an employee is the degree of culpability involved. Factors relevant to assessing the degree of culpability include:

- a. whether the employee knew or should have known that the activity in question was illegal
- b. the seniority of the employee and the scope of the employee's employment duties, and
- c. whether, having regard to the employee's seniority and employment duties, the employee had taken reasonable steps to draw to the attention of the employer or any other relevant person the impropriety of the practice.⁶

Determining charges

Once a decision is made to deal with an alleged breach of the legislation by way of prosecution, it is in the public interest for that prosecution to succeed. NRAR 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.

Similar charges for the same offence

NRAR has a duty to refine its case to avoid laying duplicate or multiple charges for the same alleged offence. There will be occasions where an act or omission will be prohibited under two separate statutes and involve an offence under each. Laying duplicate or multiple charges will be avoided unless considered appropriate in the circumstances.

NRAR will only commence a prosecution after civil penalty proceedings in the unusual circumstances where it is in the public interest to do so.

⁶ Ibid.

Continuing offences

NRAR 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.

NRAR 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.

Tiered offence structure

The natural resources management legislation creates a tiered structure for offences with the most serious offences being tier 1 offences. Offences which are categorised as tier 1 come with substantial penalties and require evidence of intentional, negligent or reckless conduct. Tier 2 and 3 offences, which do not require evidence of intent, negligence or recklessness, have lower penalties and do not impose any possible term of imprisonment.

Corporations are subject to maximum financial penalties which are about four times the maximum financial penalty that may be imposed on individuals. In addition to financial penalties, individuals are subject to possible imprisonment if found guilty of a tier 1 offence.

When deciding whether to lay charges in relation to tier 1 or 2 offences, NRAR will use its discretion, having regard to the factors set out above in section 4. In making this determination factors that are of particular significance to this decision will be the evidence in relation to the degree of culpability and the severity of the harm caused by the accused corporation or individual.

Penalty notices

The natural resources management legislation creates a schedule of offences for which penalty notices may be issued.

Penalty notices do not result in criminal convictions but create a civil debt which may be paid or challenged by the offender by electing for the matter to be heard in court. In accordance with the NSW Attorney General's 'Internal Review Guidelines under the Fines Act 1996', NRAR provides an internal review option for those that have been issued with a penalty notice by NRAR.

If the recipient of a penalty notice elects to have the matter decided by a court, NRAR will decide if it is appropriate to proceed to prosecute the matter. It is important to the penalty notice regime that NRAR may proceed with prosecution and does not withdraw penalty notices only because they have been court-elected.

Selecting the appropriate court

Offences under the natural resources management legislation are disposed of summarily either in the Land and Environment Court or the Local Court. Where NRAR has carriage of the matter, it will consider the following factors in choosing the venue for the summary hearing:

- a. the maximum penalty that can be imposed in a Local Court compared to the Land and Environment Court
- b. all 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
- c. those matters which have or are expected to give rise to applications for orders under Division 6 of Part 1 in Chapter 7 of the WM Act or similar provisions in other parts of the natural resources management legislation, will be commenced in the Land and Environment Court, and
- d. 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.⁷

Commencing proceedings

Prior to commencing prosecution proceedings, NRAR engages legal advice as to whether there are reasonable prospects of conviction for the alleged offence.

Where possible and appropriate NRAR will seek to recoup both its investigation and legal costs in respect to a successful prosecution.

Appeals against sentence

Decisions to appeal a sentence following a prosecution judgment 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, NRAR considers:

- whether there was a material error of law in the initial proceedings;
- how likely the appeal is to succeed; and
- whether the sentence was manifestly inadequate.

⁷ Ibid, 21.

Releasing information about prosecutions

The need for deterrence is a significant consideration in the decision to prosecute. This will only be successful if the regulated community is informed of the potential implications of breaching the law.

NRAR will issue a media release and publish the details of convictions on the NRAR website. NRAR may also include information about enforcement actions taken by NRAR in a public register, including identifying individuals.

Decisions to not prosecute

It is critical that there is integrity surrounding decisions to not prosecute. If the investigating officer or the Chief Regulatory Officer has recommended prosecution and legal advice indicates that there are reasonable prospects of a conviction any decision to not prosecute must be supported by written reasons by the NRAR Board. The decision maker will also advise the Secretary of the decision, and the reasons for it, in writing within 5 days.