

# EFFACE Notes: Tailored Sanctions in Australia

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# Non-Specialist Courts

- Environmental crime is not a “real” crime
- Devolving of environmental crimes to lower courts
- Poor judicial knowledge about environmental crimes
- Few case precedents due to low prosecution rates
- Placing a low ‘value’ on environmental crimes and harms
- Few well trained people on the ground

# Environment Specialist Courts

## **Definitions**

- contradictory principles, illegal acts that are normally condoned, potential harms and risk

## **Expertise**

- technical, traditional knowledge, ecological, environmental jurisprudence

## **Complexity**

- issues, trends, internationalisation

## **Dealing with multiple parties**

- multiple agencies, victims, communities

## **Specificity**

- tailored solutions to the problem, to the offender

# Land and Environment Court of New South Wales

The origins and functioning of the NSW LEC is based upon the idea that this court, from inception, has been conceptualised and constituted as a *problem-solving court*, with specific requirements to take heed of human interests, as well as those of natural objects and animals and plants.

An emergent interest is to *repair environmental harm* where possible and feasible.

# Orders aimed at restoration/preventing a recurrence of the offence

- Clean up orders
- Compensation orders
- Investigation costs orders (order the offender to pay costs and expenses incurred during the investigation of an offence)
- Monetary benefits penalty orders (order the offender to pay a sum up to the amount of the monetary benefit derived from the offence)
- Environmental audit orders (order the offender to carry out a specified environmental audit of activities carried on by the offender)

# Orders aimed at punishing or deterring offenders

- Fines/custodial sentence
- Environmental service orders (order the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit)
- Publication orders (order the offender to publish details of the offence and the orders made by the court in, for example, a newspaper and/or in a company's Annual Report)

## *Williams [2007] NSWLEC 56*

- The defendant was convicted of offences in violation of the *National Parks and Wildlife Act 1974 (NSW)*. This pertained to picking plants that were part of an Endangered Ecological Community [EEC], through the act of mass clearing and mulching 2.9 hectares. The clearing of the land related to preparing the way for subdivision consent by undermining the status of the area as worthy of conservation.
- The aggregate fine imposed by the court was **\$330,000**, plus prosecutors costs of **\$85,000**. The defendant was also ordered to undertake **400 hours of community service**. There are clear concerns here to express general and specific deterrence, and if 'time is money' the scale of the penalty is considerable.
- The reparative element lies in the fact that the penalty fine was to be paid into the National Parks and Wildlife Fund. It also is relevant that, rather than imprisonment, the court determined that the defendant was a suitable person for community service work (although, in this instance, the content of this was

# *Fish and Orogen Pty Ltd [2010]*

## *NSWLEC 144*

- The defendant was convicted of offences in violation of the *National Parks and Wildlife Act 1974 (NSW)*. This pertained to by act or omission causing damage to the habitat, not being critical habitat, of a threatened species knowing the land concerned was habitat of that kind, through the act of felling vegetation and habitat of the koala.
- The company Orogen was **fined \$10,000** and Fish the sum of **\$5,000**, plus **prosecutors costs** and both were subjected to an **Environmental Service Order**, and a **Publication Order**. In this instance, the defendants submitted that there was adverse impact on professional reputation and their professional embarrassment resulting from the offence, and this constituted *extra-curial punishment*.
- The reparative element lies in orders to conduct substantial parts of a *Koala habitat mapping project* (as spelled out in a submitted exhibit put forward by the defendants). The Targetted Koala Habitat Utilisation Assessment Project cost \$17,400 to prepare, and was accepted by the court as the



# Reprobation – Publication order

- *Environmental consultant convicted of causing damage to koala habitat at Taylors Beach, Port Stephens*
- *Orogen Pty Ltd and its director Anthony Fish have been convicted in the Land and Environment Court of causing damage to habitat of threatened species, namely the Koala, knowing that the land concerned was habitat of that kind. Orogen and Mr Fish provided a developer with advice on what vegetation could be lawfully cleared on a property but failed to advise that damaging the habitat of the Koala was unlawful under the National Parks and Wildlife Act. Both Orogen and Mr Fish were aware that the property contained habitat of the Koala and Koala movement corridors. Vegetation containing Koala habitat was subsequently cleared. The offences occurred at a proposed development site at 60 Port Stephens Drive, Taylors Beach, at the intersection of Sky Close.*
- *Orogen and Mr Fish both pleaded guilty. Orogen and Mr Fish were fined a total of \$15,000. The company was also ordered to pay the prosecutor's costs and investigation expenses*

# *Harbour Hardwoods Sales Pty Ltd*

## *[2012] NSWLEC 52*

- The defendant was convicted of offences in violation of the *National Parks and Wildlife Act 1974 (NSW)*. This pertained to picked plants of an endangered species and damage vegetation on in in land reserved under the Act, and involved logging operations for a log haulage route in which 13 Newry Golden Wattle were killed and 8 damaged.
- The defendant was fined **\$45,000** on one offence and **\$40,000** on another, and ordered to pay **prosecutor's costs of \$26,000**. A **publication order** was issued for the Coffs Harbour Advocate and the Bellinger Courier Sun. There was also imposition of **environmental service orders** to the effect that the defendant was ordered to design and erect strainer posts and a gate in a specific location with the sign saying 'Trail closed for Rehabilitation'. The defendant was also ordered to plan and carry out works for the mitigation and/or prevention of soil erosion in Jaaningga Nature Reserve

# *Rinaldo (Nino) Lani [2012] NSWLEC*

## *115*

- The defendant was convicted of offences in violation of the *National Parks and Wildlife Act 1974 (NSW)*. This pertained to by act or omission causing damage to the habitat, not being critical habitat, of a threatened species knowing the land concerned was habitat of that kind, through the act of clearing habitat of the squirrel glider.
- The defendant was **fined \$20,000**, ordered to pay **75% of prosecutor's costs**, and subject to a **publication order**. The need for specific deterrence was generated by the defendant's conduct that indicated an attitude of disregard towards the system of environment protection legislation and planning control. In the words of the court [56], 'they need to be taught a lesson which will, hopefully, discourage them from like conduct in the future'.
- There were two reparative elements in this case. First, the penalty fine was to be paid into the National Parks and Wildlife Fund for the *specific purpose* of mapping and study of the squirrel glider populations in Booti Booti National Park and any Crown land or council controlled land in the Foster area along with the study of

# Repair Your Harm

- *(5) Within three weeks of the date of these orders, the defendant, pursuant to section 200(1)(d) of the National Parks and Wildlife Act, shall retain consultants with the following expertise, being consultants acceptable to the prosecutor:
  - (a) a bush regenerator;
  - (b) an ecologist; and
  - (c) an expert with special knowledge of the threatened species squirrel glider (*Petaurus norfolcensis*).*
- *(6) Within 11 weeks of the date of these orders, the defendant shall prepare a remediation plan for Area B in the map annexed to these orders relating to the land at lot 22, deposited plan 843479 located near Southern Parkway, Foster, to include the following:
  - (a) regeneration of cleared vegetation;
  - (b) a timeframe for all actions proposed as part of the remediation plan implementation; and
  - (c) any other actions the consultants deem to be required to remediate the site.*
- *(7) Within 12 weeks of the date of these orders the defendant shall provide the remediation plan as produced in accordance with Order (6) above to the prosecutor.*
- *(8) No later than 20 weeks after the date of these orders the defendant shall cause the consultants to carry out all works required by the remediation plan and in accordance with the time frame under the remediation plan.*
- *(9) The defendant shall provide copies to the prosecutor of all retainers and instructions given to the consultants at the same time as they are given to the consultants.*
- *(10) In the event that any or all of the consultants are unable to continue to act pursuant to these orders, they may be replaced by the defendant engaging a replacement consultant acceptable to the prosecutor.*
- *(11) Schedule 7 to the Uniform Civil Procedure Rules 2005 is directed to apply to the*

# *Vaccount Pty Ltd t/as Tableland Timbers [2011] NSWLEC 202*

- The defendant was convicted of offences in violation of the *National Parks and Wildlife Act 1974 (NSW)*. This pertained to the unlawful harvest of trees in a national park, and involved the felling of 503 trees.
- The defendant was **fined \$73,000**, and ordered to pay prosecutor's costs and disbursements of **\$47,100** and prosecutor's investigation costs to the amount of **\$2,900**. The defendant was ordered to pay a *specific recipient*, the Northern Rivers Catchment Management Authority, the fine amount to be used for general environmental purposes. Notably, all future public references by Vaccount Pty Ltd t/as Timberlands Timbers to the payment above shall be accompanied by the following passage:
- **“The contribution by Vaccount Pty Ltd, trading as Timberland Timbers, to the Northern Rivers Catchment Management Authority is part of a penalty imposed on it by the Land and Environment Court of NSW after it was convicted of damaging reserve land being an offence**

# Summary

- **Scale** of fine in particular instances
- To what **purpose** the fine is put:
  - General environmental fund
  - Specific environmental projects
- **Publication** orders and reprobation
- **Community service** oriented at offender punishment
- **Environmental service orders** oriented toward
  - Specific environmental projects reparation
  - Specific types of environmental remediation

# Conclusion

**Reparative justice**, with an emphasis on repairing harm within a generally more punitive context, is more appropriate and effective in dealing with corporate crime than traditional sanctioning responses. Repairing harm should not be conflated with 'restorative justice' *per se*. This is important, since 'repairing harm' can be *imposed* upon offenders (especially corporate offenders) without necessarily involving consensual agreement and/or 'conferencing' methods of negotiation. Company personnel, including senior managers, change. But to change company practices, especially those that pertain to the economic profit margin, requires regulatory and enforcement systems that penalise and sanction in