

Publication: Australian Environment Review
Date: April 2009
Page No: 31
Author(s): Kim Glassborow (of Holding Redlich)
Publisher: LexisNexis Butterworths

Environmental offences – recent decisions in the Land and Environment Court

Environmental offences – recent decisions in the Land and Environment Court

Tougher penalties are being handed down in the Land and Environment Court for the commission of environmental offences, with recent decisions seeing substantial fines being imposed. These recent cases, including the *Minister for Planning v Coalpac Pty Limited* and the *Director-General of the Department of Environment and Climate Change v Hudson*, are illustrative of how the Court is dealing the sentencing of those who commit environmental offences in a range of offences. When considering these recent cases as compared with the earlier decisions of *Eurobodalla Shire Council v Christensen* and the Chief Judge's decision in *Cameron v Eurobodalla Shire Council*, it is clear the range of penalties are sharply increasing.

The functions of sentencing are varied. In New South Wales, sentencing purposes are set out in the section 3A of the *Crimes (Sentencing Procedure) Act 1999*:

- (a) to ensure that the offender is adequately punished for the offence;
- (b) to prevent crime by deterring the offender and other persons from committing similar offences;
- (c) to protect the community from the offender;
- (d) to promote the rehabilitation of the offender;
- (e) to make the offender accountable for his or her actions;
- (f) to denounce the conduct of the offender;
- (g) to recognise the harm done to the victim of the crime and the community.

To the extent that is it possible to discern an approach under the guidance criteria as set out in the *Crimes (Sentencing Procedure) Act 1999*, the following may be said about sentencing environmental offenders.

- Where the offence does not result in environmental harm and is not done for financial gain and perhaps regarded as inadvertent, the penalty will probably be relatively minor.
- At the other end of the scale, if there is significant environmental harm and the offence was done deliberately and for commercial advantage then the penalty is likely to be significant.
- Even if there is no environmental harm, but the offence was deliberate and gives rise to financial gain, again the penalty is likely to be significant.

The elements of a sentence need to reflect, at best, the objective gravity of the offence committed and the subjective circumstances of the offender. The heads of consideration relevant to the Court in determining sentences involve the objective circumstances in determining the seriousness of the crime, the maximum available penalty and the need for specific and general deterrence.

General deterrence is particularly relevant, given these offences are against the environment and not individuals. Crimes committed against the environment risk the integrity of the planning / approvals system, where certain activities or works may require approval. Where environmental offences are committed, the sentence, where appropriate, must deter the commission of similar offences.

In the *Minister for Planning v Coalpac Pty Limited* [2008] NSWLEC 271, the Court determined that the appropriate penalty to impose upon the defendant was a fine of \$200,000 for producing more coal than what was permitted under the approval. This was also the first Class 5 matter for a breach of under Part 3A of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*. Before this case, the highest fine imposed for any offence under the EP&A Act was \$95,000 in *Penrith City Council v 24/7 Waste Bins Pty Ltd & Anor* [2002] NSWLEC 186.

Coalpac owns and operates the Invincible Colliery, an open cut coal mine near Lithgow. In September 2006 the Minister for Planning granted project approval for extensions to the mine and rehabilitation activities. Between 7 September 2006 and 6 September 2007, Coalpac produced 635,277 tonnes of saleable coal from the mine. The approval only permitted an annual production cap of 350,000 tonnes of coal in a year. The additional coal produced was 80% more than the annual cap.

Coalpac pleaded guilty to a breach of section 125 for carrying out development without the approval of the Minister under section 75D(2) of the EP&A Act. It had no record of any prior environmental offences. The maximum penalty for an offence under section 125 is \$1,100,000.

Biscoe J, in imposing the fine on Coalpac, found that,

“notwithstanding the absence of actual environmental harm, there has been damage to the integrity of the planning system. The Defendant acted quite intentionally over a significant period of time, particularly after June 2007, in committing this offence, in order to obtain a financial advantage. Importantly, the defendant has, as a result, derived gross revenue amounting to millions of dollars ... It is plain that the defendant has derived substantial financial advantage from its conduct.” [paras 55-56]

The Coalpac decision highlights what objective factors are taken into account in determining a sentence including the nature and purpose of the Minister’s condition authorising the annual cap,

and the need for the penalty to act as a general deterrence to others contemplating breaching the EP&A Act. Particularly, where the offender has no regard to the planning system and the commission of the offence results in no actual environmental harm and financial gain, the Court will consider this to be sufficiently serious to warrant a tougher penalty.

The decision of Lloyd J in the *Director-General of the Department of Environment and Climate Change v Hudson* [2009] NSWLEC 4 concerned the clearing of native vegetation under the *Native Vegetation Act 2003 (NV Act)*. The offences incurred a significant fine totalling \$408,000. The defendant Mr Hudson, and his wife owned a property in Moree and had authorised the clearing of 486 hectares of native vegetation in 2006 and 2007. Mr Hudson alleged the clearings were undertaken for weed management.

Mr Hudson was charged under the NV Act, namely that:

1. he authorised the clearing of some 486 hectares of native vegetation otherwise than in accordance with development consent or a property vegetation plan, contrary to section 12 of the NV Act; and
2. he failed to comply with a notice issued under section 36(2) of the Act to the extent that he was capable of complying with it.

In imposing the sentence, Lloyd J remarked that,

“the land cleared by Mr Hudson ... was precisely of the kind of native vegetation that s 12 of the Native Vegetation Act is designed to protect. The extent of the clearing – 486 hectares – is substantial. The penalty should properly reflect the deliberate nature of the offence which was committed despite the express instructions given to Mr Hudson that native trees were not to be cleared. The clearing was carried out as part of the agricultural activities on the land and in that sense the offence was part of a commercial operation – that is, it was motivated by commercial considerations.” [para 86]

Finally, the decisions of Pain J in *Hawkesbury City Council v Johnson; Hawkesbury City Council v Johnson Property Group Pty Limited* [2008] NSWLEC 138 and (No 2) [2009] NSWLEC 6, resulted in penalties totalling over \$30,000 for illegal tree clearing. Both the landowner Mr Johnson and his company were found guilty of the same offence under section 125(1) of the EP&A Act of unauthorised land-clearing contrary to section 76A(1)(a) of the EP&A Act. In determining the objective seriousness of the offence, Pain J held that although the defendants relied on advice that the clearing was lawful, they acted recklessly as more should have been done to clarify whether the clearing was lawful before it commenced. However, the defendants had not acted in a manner which aggregated the circumstances of the offence.

These three cases are to be compared with the decisions of *Eurobodalla Shire Council v Christensen* [2008] NSWLEC 134, the Chief Judge’s decision in *Cameron v Eurobodalla Shire Council* [2006] 146 LGERA 349 and *Eurobodalla Shire Council v Wheelhouse* [2006] NSWLEC 98, where the Court has upheld Local Court sentences and in one decision increased the penalty. In the Christensen appeal, the Council was unsuccessful in appealing the sentence imposed (being fine of \$750) by the Magistrate for clearing land contrary to the development consent. The defendant had cleared over double the authorised amount of land. The Court was not satisfied that

the sentence was manifestly outside the available sentencing range, given the circumstances of the land-clearing where there was no financial gain by the owner.

The 2006 decision of the Chief Judge in *Cameron v Eurobodalla Shire Council* evaluates the objective and subjective circumstances in determining a sentence within the appropriate range for the commission of the offence. The appellant (Mr Cameron) unsuccessfully appealed the decision of Local Court sentence of a \$10,000 fine for the lopping of a significant gum tree, on public land, in front of his house to improve his water views. The tree was subject to a Tree Preservation Order and the failure to comply with the order was a failure to comply with section 76A(1) of the EP&A Act, attracting criminal liability under section 125 of the EP&A Act. In dismissing the appeal, Preston J remarked,

“in this case, the appellant deliberately caused the lopping of the tree so as to derive aesthetic and financial benefit; in short, for greed.” [para 69]

In considering these Eurobodalla decisions it is apparent the Court, in dismissing the appeals, considered the lack of financial gain in by Mr Christenssen as compared with the greater financial motivation of Mr Cameron in damaging trees on public land to be a consideration particularly relevant in determining the appropriate sentence.

Finally, in the decision of Lloyd J in *Eurobodalla Shire Council v Wheelhouse* the Court, in upholding the Council’s appeal, increased the \$600 fine imposed by the Local Court to \$10,000 for cutting down two mature gum trees and a mature cedar tree, without consent. All these trees were located on his neighbour’s property. The Court considered the offender’s action to be serious and the original penalty of \$600 to be manifestly inadequate. Lloyd J considered the offence, carrying out development without consent, contrary to section 125 of the EP&A Act, so serious the penalty would normally be in the range of about \$20,000. However the Court imposed a penalty at the lower end of the scale taking into account the particular circumstances of the offender. It is clear that where offences are considered to be very serious the penalty range must reflect this.

The difficulties faced by the Court when determining the appropriateness of a sentence within the sentencing range for environmental offences are clear. If anything, the commission of offences resulting in significant environmental harm will, most likely, result in tougher penalties being handed down.

Recognising the degree of environmental harm resulting from offences and the need to impose measured and carefully considered sentences, within the appropriate range, as well as the need for deterrence is a reminder of just how difficult determining sentences can be.

However, it is clear that the increase in penalties, particularly in light of the Coalpac and Hudson decisions, is signalling a message that the Court is prepared to impose greater fines under the EP&A Act and NV Act to.