Land and Environment Court
New South Wales

Case Name:	Hornsby Shire Council v Henlong Property Group Pty Ltd (No 2)
Medium Neutral Citation:	[2019] NSWLEC 17
Hearing Date(s):	19 February 2019
Date of Orders:	28 February 2019
Date of Decision:	28 February 2019
Jurisdiction:	Class 5
Before:	Robson J
Decision:	See orders at [85]
Catchwords:	ENVIRONMENTAL OFFENCE – sentence – guilty plea – carrying out development prior to compliance with deferred commencement condition of consent – felling of native trees and shrubs – objective seriousness of the offence – subjective circumstances of the defendant
Legislation Cited:	Crimes (Sentencing Procedure) Act 1990 (NSW) ss 3A, 21A Criminal Procedure Act 1986 (NSW) ss 257B, 247E, 257G Environmental Planning and Assessment Act 1979 (NSW) ss 76A, 125 Hornsby Local Environmental Plan 2013
Cases Cited:	Axer Pty Ltd v Environment Protection Authority (1993) 113 LGERA 357 Ballina Shire Council v Ian Watson [2006] NSWLEC 827 Bentley v BGP Properties Pty Ltd [2006] NSWLEC 34; (2006) 145 LGERA 234 Blue Mountains City Council v Carlon [2008] NSWLEC 296 Burwood Council v Abdul-Rahman (No 2) [2017] NSWLEC 177 Burwood Council v Doueihi [2013] NSWLEC 196;

(2013) 200 LGERA 152
Burwood Council v Erector Group Pty Ltd; Burwood Council v Liverpool Developing Pty Ltd [2017] NSWLEC 20
Burwood Council v Jarvest Pty Ltd [2011] NSWLEC 109
Cabonne Shire Council v Environment Protection Authority [2001] NSWCCA 280; (2001) 115 LGERA 304
Cameron v Eurobodalla Shire Council [2006] NSWLEC 47; (2006) 146 LGERA 349
Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority (1993) 32 NSWLR 683
Canterbury-Bankstown Council v Naji [2016] NSWLEC 101
Council of the City of Shoalhaven v Wilson [2015] NSWLEC 93
Environment Protection Authority v Ballina Shire Council [2006] NSWLEC 289; (2006) 148 LGERA 278
Environment Protection Authority v Ballina Shire Council [2006] NSWLEC 289; (2006) 148 LGERA 278
Environment Protection Authority v Barnes [2006] NSWCCA 246
Environment Protection Authority v Borg Panels Pty Ltd [2016] NSWLEC 71
Environment Protection Authority v Hardt [2007] NSWLEC 284
Environment Protection Authority v Unomedical Pty Limited (No 4) [2011] NSWLEC 131
Environment Protection Authority v Wambo Coal Pty Limited [2016] NSWLEC 125
Environment Protection Authority v Waste Recycling and Processing Corporation [2006] NSWLEC 419; (2006) 148 LGERA 299
Erector Group Pty Ltd v Burwood Council; Liverpool Developing Pty Ltd v Burwood Council [2018] NSWCCA 56
Gittany Constructions Pty Ltd v Sutherland Shire Council [2006] NSWLEC 242; (2006) 145 LGERA 189
Gore v R; Hunter v R [2010] NSWCCA 330; (2010) 208 A Crim R 353
Hawkesbury City Council v Johnson; Hawkesbury City Council v Johnson Property Group Pty Limited (No 2) [2009] NSWLEC 6; (2009) 210 LGERA 34
Hili v The Queen; Jones v The Queen (2010) 242 CLR 520; [2010] HCA 45
Hunters Hill Council v Carter [2018] NSWLEC 84
Hunters Hill Council v Gary Johnston [2013] NSWLEC 89
Hunters Hill Council v Liu [2018] NSWLEC 108

Ku-ring-gai Council v Edgar [2017] NSWLEC 49
Minister for Planning v Moolarben Coal Mines Pty Ltd [2010] NSWLEC 147; (2010) 175 LGERA 93
Mosman Municipal Council v Menai Excavations Pty Ltd [2002] NSWLEC 132; (2002) 122 LGERA 89
Muldrock v The Queen (2011) 244 CLR 120; [2011] HCA 39
Parramatta City Council v Cheng [2010] NSWLEC 94
Parramatta City Council v Sua trading as Foxy Tree Services [2010] NSWLEC 93
Pittwater Council v Scahill [2009] NSWLEC 12; (2009) 165 LGERA 289
Plath v Rawson [2009] NSWLEC 178; (2009) 170 LGERA 253
Power v Penthill House Pty Ltd (1993) 80 LGERA 247
R v O'Neill [1979] 2 NSWLR 582
R v Olbrich [1999] HCA 54; (1999) 199 CLR 270
R v Slattery (1996) 90 A Crim R 519
R v Thomson; R v Houlton (2000) 49 NSWLR 383; [2000] NSWCCA 309
R v Wickham [2004] NSWCCA 193
Secretary, Department of Planning and Environment v Boggabri Coal Pty Limited [2014] NSWLEC 154
Secretary, Department of Planning and Environment v Shoalhaven Starches Pty Ltd [2018] NSWLEC 23
Shoalhaven City Council v Hayes [2018] NSWLEC 65
Veen v The Queen (1979) 143 CLR 458; [1979] HCA 7
Veen v The Queen (No 2) (1988) 164 CLR 465; [1988] HCA 14
Warringah Council v Bonanno [2012] NSWLEC 265
Willoughby City Council v Livbuild Pty Ltd [2015] NSWLEC 34
Willoughby City Council v Rahmani [2017] NSWLEC 166
Wingecarribee Shire Council v O'Shanassy (No 6) [2015] NSWLEC 138

Category: Sentence

Parties: Hornsby Shire Council (Prosecutor)
Henlong Property Group Pty Ltd (Defendant)

Representation: Counsel:
D Jordan SC with G Lewer (Prosecutor)
C R Ireland (Defendant)

Solicitors:
Pikes & Verekers (Prosecutor)
McKees Legal Solutions (Defendant)

File Number(s):	2017/00385910
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JUDGMENT

1 Henlong Property Group Pty Ltd, the defendant, has pleaded guilty to an environmental offence against s 125(1) (as it was at the material time) of the *Environmental Planning and Assessment Act 1979* (NSW) ('EPA Act') in that, on 17 February 2017, it carried out specified development that the Hornsby Local Environmental Plan 2013 ('LEP 2013') provided may not be carried out except with development consent in circumstances where no such consent was in force.

2 The offence involved the defendant felling seven large live native trees and some smaller trees and shrubs on land it owned known as 79-87 Malton Road, Beecroft, being Lot 2 in Deposited Plan 847605 ('subject land'). The subject land is located in the Local Government area of Hornsby Shire Council.

3 A hearing on sentence took place on 19 February 2019. The Court's task is to determine and impose the appropriate sentence on the defendant for the offence it has committed.

4 Having regard to the objective seriousness of the offence and the subjective circumstances of the defendant, for the reasons that follow, I consider that the appropriate sentence is to fine the defendant $28,000. The defendant must also pay the prosecutor's costs of the proceedings.

Evidence

5 The parties prepared and tendered a document styled "Agreed Facts" which contained detailed background facts in relation to the matter. In addition to this document, the Court received the following evidence:

(1) Affidavit of Jian Hua Zhou sworn 15 February 2018;

(2) Affidavit of Dr Peter Smith sworn 23 March 2018;

(3) Statement of Dr David Robertson dated 18 December 2018;

(4) Statement of Dr Peter Smith styled "Comments on Dr Robertson's Statement of Evidence";

(5) Statement of Dr Robertson styled "Response to Peter Smith";

(6) Bundle of documents styled "Defendant's Bundle of Documents"; and

(7) Oral evidence of Dr Smith and Dr Robertson.

Background

6 Before summarising the salient facts, and to provide context, it is relevant to note that, prior to the works the subject of the charge being undertaken, that is the unauthorised felling of the trees and vegetation clearing ('works'), a development consent had been granted by this Court on 27 May 2016 ('consent') that would have otherwise permitted the removal of the trees that were felled. The consent was granted on condition that it was not to operate unless or until Hornsby Shire Council was satisfied as to the preparation and provision of management plans in relation to vegetation and bushfire management and fauna management as contained in a detailed deferred commencement condition. The essential fact was that, as at 17 February 2017, the date of the offence, the consent was not operative as the deferred commencement condition had not been complied with.

7 The trees were felled by an arborist company at the direction of the defendant through its sole director and sole shareholder, Mr Jian Hua Zhou and Mr Gordon Xu, the project manager.

8 The offence is one of strict liability meaning that the defendant need not have intended to commit the offence to incur liability. As the defendant has pleaded guilty, it has admitted the essential elements of the offence per *R v O'Neill* [1979] 2 NSWLR 582 at 588.

9 Although there remained some disputed facts at the hearing, relating primarily to the risk of potential further environmental harm that may have been caused by the felling of the trees prior to the consent becoming operative, the majority of background facts were uncontroversial.

The consent

10 On 7 February 2013, the defendant lodged a development application seeking approval to subdivide the subject land into six lots with associated works. Five of the lots were to be residential lots and had indicative "building envelopes" marked on the approved plans.

11 The subject land was the site of a locally significant vegetation community and a known habitat for threatened fauna species (the Powerful Owl, the Gang-gang Cockatoo and the Grey-headed Flying-fox) and threatened flora species (Leptospermum deanei or Deane's Tea-tree).

12 On 7 October 2015, Hornsby Shire Council refused the development application as insufficient information was provided to determine the environmental impact of the proposed development. Henlong Property then commenced Class 1 appeal proceedings in this Court.

13 On 27 May 2016, after a conciliation conference, the appeal proceedings were disposed of and the consent was granted subject to 65 conditions imposed pursuant to s 80(3) (as it was at the material time) of the EPA Act, including a specific condition that the consent was not to operate until Hornsby Shire Council was satisfied as to matters specified in the condition which provided:

> **2. Deferred Commencement Condition of Consent**
>
> Pursuant to Section 80(3) of the *Environmental Planning and Assessment Act 1979*, this consent does not operate until the following information is submitted to Council:
>
> a) **Integrated Vegetation and Bushfire Management Plan**

i) An Integrated Vegetation and Bushfire Management Plan for the management of the native vegetation along Malton Road and within the Asset Protection Zone (as specified in Condition 45). The Plan will apply to each of the newly created allotments where a future dwelling will occur (5 lots);

ii) The Plan must be prepared by a suitably qualified bush regenerator or restoration ecologist who is a vegetation management specialist and has at least 5 years' experience in the management of native bushland and at least a TAFE Certificate III in Bush Regeneration or Conservation and Land Management – Natural Area Restoration qualifications;

iii) The Plan must be prepared in consultation with a Bushfire Management Consultant and include strategies for management of the Asset Protection Zones in a manner that has the least impact on the natural environment and maintains indigenous vegetation for the benefit of the Byles Creek corridor function and include, but not be limited to, the following:

   a. The appointment of a Project bush regenerator or restoration ecologist to oversee the implementation of the Plan;

   b. Consideration of the recommendations of the Environmental Assessment (Flora & Fauna) Report prepared by Ecological Surveys & Planning, January 2014 and the Assessment of Proposed Development at Lot 2 DP 847605, 79-87 Malton Road Beecroft on Threatened Species of Fauna Report prepared by Gaia Research pty Ltd, October 2012;

   c. Consideration of the recommendations of the Amended Bushfire Assessment Report (Reference No. 2013/15A) prepared by Bushfire Safety Solutions, February 2013;

   d. Weed control and suppression using bush regeneration methods;

   e. Habitat protection including hollow-bearing tree retention and the potential population of threatened Leptospermum deanei habitat;

   f. The restoration of all disturbed areas using bush regeneration techniques;

   g. Consideration of the NSW Rural Fire Service document Standards for Asset Protection Zones (APZ) which outlines how an APZ should be created;

   h. Consideration of all the trees approved for removal as per Condition 6;

   i. Identification of all trees proposed for removal and retention, clumps of vegetation to be retained including the

Leptospermum deanei hybrid population (including potential hybrid plants too small for identification but growing in the vicinity of identified hybrids), areas of exposed rock cover contributing to reduced fuel loading;

j. Permanent marking of the extent of the APZ at the intersection of boundaries of proposed lots 1-5 and proposed lot 6;

k. Permanent marking of the extent of the Leptospermum deanei hybrid population as shown on Plan Showing Location of Leptospermum deanei x trinervium prepared by Rygate Surveyors and dated 24/03/2016;

l. Retention of an uncleared native vegetation buffer at least 5m in radius around the Leptospermum deanei hybrids and potential hybrids. Vegetation within the buffer is to be managed for conservation of the Leptospermum deanei hybrid population. The extent of the buffer is to be permanently marked.

b) **Fauna Management Plan**

A Fauna Management Plan to manage the loss of habitat resources for tree dependent fauna prepared by a qualified and experienced ecologist.

The Plan must include, but not be limited to, the following:

i) The appointment of a Project Ecologist to oversee the implementation of the Fauna Management Plan;

ii) Tree hollows potentially to be salvaged from trees within the development area and placed within the bushland areas within Lot 6 to be considered and areas of Byles Creek dedicated to Council in consultation with the Project ecologist and Council's Natural Resources Branch;

iii) Special consideration and protection must be made for hollow-bearing Tree No. 69 (a large Angophora costata) that contains a potential nest site for endangered Gang-gang Cockatoos. This tree is located in the APZ of proposed Lot 4;

iv) A requirement for the Project Ecologist to be onsite during any tree removal and/or earthworks that will impact the rock escarpment or rock outcrops to re-locate displaced fauna that may be disturbed during this activity.

Such information must be submitted to Council within thirty-six (36) months of the date of this Consent.

Upon Council's written satisfaction of the information referred to in Deferred Commencement Condition 1 [sic 2], the following conditions of development consent apply:

...

14 Subject to compliance with the deferred consent condition, condition 6 permitted the removal of 36 identified trees on the subject site. The trees identified in condition 6 were generally within areas of anticipated disturbance. The consent incorporated documents assessing the risk of environmental harm at the site, including protected species and provided conditions to manage and minimise environmental harm.

The clearing

15 As at 17 February 2017, when the works were undertaken, the prosecutor had not been provided with the information required in the consent condition, specifically, an integrated vegetation and bushfire management plan and a fauna management plan. Accordingly, at the time of the works on 17 February 2017, the consent was not operative.

16 Despite this, prior to the removal of the trees, the defendant had retained the services of an arboricultural business, All Arbor Services Pty Ltd ('All Arbor Services') to carry out the clearing work. On 17 November 2016, Nicolas Lloyd, a director of All Arbor Services, who had been contacted previously by the defendant, was provided with a plan dated 24 March 2016 showing the location of the "leptospermum trinervium x deanei" (which had been specifically provided for in the consent) within the subject land. Thereafter, on 17 February 2017, Mr Lloyd, having earlier negotiated an agreement in relation to a fee for the tree removal and a starting date, attended the subject land and was instructed by the defendant to remove the trees enumerated in condition 6 of the consent. Mr Lloyd and Aaron Erbacher, an independent contractor engaged by All Arbor Services to remove the trees, marked each of these trees for removal with a pink painted cross.

17 After the tree clearing works had commenced, Mr Lloyd confirmed with Mr Zhou that he was only intending to remove trees identified in condition 6. Mr Lloyd then left the site and, in his absence, the works were supervised by Mr Erbacher on the instruction that all the trees marked with pink crosses were to be felled and removed. However, upon complaint by nearby residents,

Council officers attended the subject land and a stop work order was issued by Hornsby Shire Council after the trees the subject of the offence had been felled. The officers spoke with Mr Zhou, who told them that he was the owner of the property; had instructed that the works be carried out; and was aware of the deferred commencement condition. Mr Zhou later gave an undertaking that the defendant would not carry out any further development on the subject land without first obtaining development consent or complying with the deferred consent condition.

18 Although eight trees, one of which was a camphor laurel (a weed) had been felled, 27 other trees that were marked for removal with pink crosses were not removed due to the intervention of the officers. The marked trees would have been permitted to be removed pursuant to condition 6 if the consent had been operative.

19 As well as non-compliance with the deferred commencement condition, other protective measures required under the consent were not strictly adhered to. These included:

(1) providing and maintaining erosion and sediment control measures throughout the construction period (condition 16);

(2) erecting tree protection fencing around certain trees prior to commencement of any works (condition 23); and

(3) ensuring the project arborist was present onsite whenever trees were being removed to ensure trees were protected and pruning undertaken in accordance with the relevant Australian Standards (condition 26).

20 In relation to condition 16, there is no evidence of any erosion or sediment movement occurring as a result of the works that were undertaken. In relation to condition 23, the trees which required but lacked protection fencing were not affected by the works undertaken.

21 Subsequent inspection of the subject land revealed that the cleared trees showed no evidence of hollows which otherwise were required to be salvaged in accordance with the fauna management plan mandated by the consent. Some small trees, shrubs and ground cover vegetation were cleared beyond the building envelopes, but none of the larger numbered trees were cleared or marked for removal.

22 Dr Peter Smith, a consultant ecologist, estimated the area affected by the clearing undertaken on 17 February 2017, to be approximately 1,165 m^2.

23 There is no evidence that the protected species outlined at [11] above were impacted by the works, however, importantly, there was agreement (Agreed Facts at [96]) in relation to the environmental harm that occurred as a result of the defendant's conduct as follows:

> 96. Environmental harm was caused by reason of the tree removal, being the removal of seven trees (excluding the Camphor Laurel given that this species is a weed), and other smaller trees and shrubs that meet the definition of a tree under Part 1B.6.1 of the [Hornsby Development Control Plan 2013].

24 Subsequent to the works on 17 February 2017, the defendant prepared further material addressing the matters in the deferred consent condition and the prosecutor has confirmed that it is now satisfied that the requirements of the deferred consent condition have been addressed and that the defendant is now able to act on the consent.

Legislative Framework

25 The EPA Act provided (at the material time):

> **76A Development that needs consent**
>
> (1) **General**
>
> If an environmental planning instrument provides that specified development may not be carried out except with development consent, a person must not carry the development out on land to which the provision applies unless:
>
> (a) such a consent has been obtained and is in force, and

(b) the development is carried out in accordance with the consent and the instrument.

(2) For the purposes of subsection (1), development consent may be obtained:

(a) by the making of a determination by a consent authority to grant development consent, or

(b) in the case of complying development, by the issue of a complying development certificate.

...

125 Offences against this Act and the regulations

(1) Where any matter or thing is by or under this Act, other than by or under the regulations, directed or forbidden to be done, or where the Minister, the Secretary, a council or any other person is authorised by or under this Act, other than by or under the regulations, to direct any matter or thing to be done, or to forbid any matter or thing to be done, and that matter or thing if so directed to be done remains undone, or if so forbidden to be done is done, a person offending against that direction or prohibition shall be guilty of an offence against this Act.

...

Additional evidence

26 The prosecutor and the defendant called expert ecological evidence. The prosecutor relied upon the affidavit and oral evidence of Dr Smith and the defendant relied primarily on the report and oral evidence of Dr Robertson.

27 Dr Smith and Dr Robertson agreed that the works did not result in significant impacts on any threatened flora and fauna species. No significant or lasting ecological damage outside what was referred to as the "permissible" clearing area was evident. Dr Robertson concluded that strict compliance with the deferred commencement condition would have been unlikely to have made a major difference to the outcome of the works.

28 Whilst Dr Smith agreed that the works did not result in any major ecological damage beyond what would have been permitted, he considered it relevant that the clearing work had been stopped by Council officers at an "early stage" (and this prevented what may have been the removal of a further 27 trees). He further opined that, in this circumstance, it was unknown how much

additional ecological damage would have been done if the unauthorised works had not been stopped. He also noted that the works were carried out without implementing the specific consent condition requirements for minimising environmental harm and he referred to certain protection measures that were not undertaken. He found that the risk of environmental harm would have been increased if these measures were ignored.

29 Despite the material agreement between the ecological experts as to the extent of the harm (in particular that it did not result in any major ecological damage beyond that which would have been permitted), there was disagreement as to what would have been done if the management plans had been deployed. Dr Robertson's position was that although such management plans may have brought benefits (and accepting that some clearing was undertaken outside the areas otherwise designated), the management plans were not "absolutely essential" for clearing within a pre-specified clearing envelope. Despite this, he agreed that unsupervised clearing would have the potential to cause unplanned and undesired impacts but there was no evidence to show that such impacts had occurred at the time the clearing was stopped.

Approach to and purposes of sentencing

30 It is a principle of sentencing law that the sentence imposed for an offence must reflect, and be proportionate to, the objective circumstances of the offence and the personal or subjective circumstances of the offender: *Veen v The Queen* (1979) 143 CLR 458; [1979] HCA 7 at 490 and *Veen v The Queen (No 2)* (1988) 164 CLR 465; [1988] HCA 14 at 472.

31 In fixing the appropriate penalty for an offence, the Court needs to consider the purposes of sentencing relevant to the offence and the offender. Section 3A of the *Crimes (Sentencing Procedure) Act 1990* (NSW) ('CSP Act') identifies the purposes of sentencing an offender. Relevant to the present matter, it provides:

> **3A Purposes of sentencing**
>
> The purposes for which a court may impose a sentence on an offender are as follows:
>
> (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,
>
> ...
>
> (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.

32 In addition, s 21A of the CSP Act identifies a number of considerations that a court must take into account when sentencing, including aggravating factors (s 21A(2)) and mitigating factors (s 21A(3)). To the extent that the matters set out in these provisions are relevant to the matter before me, I have had regard to them in the consideration that follows.

33 Although the defendant's plea of guilty entails acceptance of the proof beyond reasonable doubt of the elements of the offence, the prosecutor nevertheless still carries the onus of proving beyond reasonable doubt any aggravating factors for the purpose of sentencing: *Gore v R; Hunter v R* [2010] NSWCCA 330; (2010) 208 A Crim R 353 at [27] and [105], and *R v Wickham* [2004] NSWCCA 193 ('*Wickham*') at [27]. For mitigating factors, the onus of proof lies upon the defendant on the balance of probabilities: *Wickham* at [27], and *R v Olbrich* [1999] HCA 54; (1999) 199 CLR 270 at [27].

Objective circumstances

34 The primary consideration in sentencing is the objective gravity or seriousness of the offence which has two principal components; the precise acts of the offender and the consequences of those acts.

35 Factors relevant to determining the objective gravity of an offence under the EPA Act were identified in *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC

34; (2006) 145 LGERA 234 ('*Bentley*') at [163], *Gittany Constructions Pty Ltd v Sutherland Shire Council* [2006] NSWLEC 242; (2006) 145 LGERA 189 at [110] ('*Gittany*'), and *Plath v Rawson* [2009] NSWLEC 178; (2009) 170 LGERA 253 at [48]. These factors include the nature of the offence, the maximum penalty, the reasons for the commission of the offence, the state of mind of the offender, the objective harmfulness of the offender's actions, the foreseeability of the risk of harm, and the practical measures to avoid harm. It is also necessary to consider the environmental harm, if any, caused to the environment and the defendant's control over the causes of the harm. Further, the Court may take into account the statutory scheme which establishes the offence: *Blue Mountains City Council v Carlon* [2008] NSWLEC 296 at [48], and *Mosman Municipal Council v Menai Excavations Pty Ltd* [2002] NSWLEC 132; (2002) 122 LGERA 89 at [35].

36 These factors mirror those which the parties have raised as relevant to the objective seriousness of the offence currently before the Court. In addition, they have been applied in numerous subsequent decisions of this Court, including *Environment Protection Authority v Unomedical Pty Limited (No 4)* [2011] NSWLEC 131 at [32], *Wingecarribee Shire Council v O'Shanassy (No 6)* [2015] NSWLEC 138 at [149], *Environment Protection Authority v Wambo Coal Pty Limited* [2016] NSWLEC 125 at [57], and more recently *Secretary, Department of Planning and Environment v Shoalhaven Starches Pty Ltd* [2018] NSWLEC 23 at [25].

Nature of the offence

37 Given that this case centres around development undertaken in the absence of an operative consent, a key consideration for this Court to take into account is the need to uphold the statutory scheme for orderly planning in NSW, provided for in the EPA Act: *Canterbury-Bankstown Council v Naji* [2016] NSWLEC 101 at [15], and *Burwood Council v Doueihi* [2013] NSWLEC 196; (2013) 200 LGERA 152 at [9]-[10]. As noted by Preston CJ of this Court in *Pittwater Council v Scahill* [2009] NSWLEC 12; (2009) 165 LGERA 289 ('*Scahill*') at [46]:

There is a need for the upholding of the integrity of the system of planning and development control. This system depends on persons taking steps to obey the law by ascertaining when development consent is required and then obtaining development consent before carrying out development: *Byron Shire Council v Fletcher* (2005) 143 LGERA 155 at [60]-[61]; *Cameron v Eurobodalla Shire Council* at [72]-[80]; *Byers v Leichhardt Municipal Council* [2006] NSWLEC 82 at [83], [85]; *Gittany Constructions Pty Ltd v Sutherland Shire Council* at [104]; and *Garrett v Freeman (No 5)* (2009) 164 LGERA 287 at [58]. Development must be carried out in accordance with the terms of the development consent obtained: *Gittany Constructions Pty Ltd v Sutherland Shire Council* at [105].

38 Although a number of these cases concerned development undertaken without consent, I consider the comments are apposite here and I consider that the legislative scheme enshrined in the EPA Act requires that the integrity of the system of planning is not subverted, irrespective of any actual physical environmental harm occasioned by a given offence: *Gittany* at [105], *Scahill* at [46], and *Willoughby City Council v Livbuild Pty Ltd* [2015] NSWLEC 34 at [62]. Further, if development consent has been obtained as in this case, it is also integral that the conditions of such consent are complied with.

39 In considering the statutory scheme for orderly planning in NSW it is instructive to have regard to the objects of the EPA Act as outlined in s 5 (as it was at the material time):

5 Objects

The objects of this Act are:

(a) to encourage:

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

(ii) the promotion and co-ordination of the orderly and economic use and development of land,

...

(vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and

...

40 Planning approvals are one means by which the State government seeks to achieve these objects, and to ensure the efficient and sustainable development of NSW. These approvals are central to maintaining the integrity of the NSW planning system, and this informs the consideration and assessment of the seriousness of an offence. Offences which undermine the integrity of the regulatory scheme are objectively serious: see *Secretary, Department of Planning and Environment v Boggabri Coal Pty Limited* [2014] NSWLEC 154 at [19].

41 The prosecutor submits that the present case involved the breach of a consent ordered by this Court by agreement at the end of appeal proceedings brought by the defendant. That is, the defendant consented to the imposition of the condition in the orders that it then contravened and that this circumstance differentiates the present conduct from other cases where an offender may have been ignorant of a law of general application.

42 This provides an added element of seriousness in that it involves an express disregard to orders of the Court.

43 I find that the conduct of the defendant has undermined the principles that underpin planning and development consent.

Maximum penalty

44 By the operation of s 125(1) of the EPA Act (in force as at 17 February 2017), the defendant's breach of s 76A(1) constituted an offence. The offence was a Tier 2 offence with a maximum penalty of $2 million (for a corporation): s 125B(2)(a).

45 Whilst it is the function of the Court to assess the seriousness of the offence, this substantial maximum penalty reflects Parliament's view of the seriousness of this type of offence: *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 698. As such, it is relevant that in 2014, Parliament increased the maximum penalty for corporations from $1.1 million to $2 million. An increase in the maximum

penalty for an offence is an indication that sentences for the offence should be increased: *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39 at [31] and that such an indication must be taken by the courts as reflecting community standards in relation to the gravity of the offence as perceived by the community. The obvious intention of the change is that the existing sentencing patterns are to move in an upward manner: *R v Slattery* (1996) 90 A Crim R 519 at 524. Despite this, I am conscious that, as considered below, there is a spectrum of offending behaviour, and relevant to the present matter, a less serious offence still remains a less serious offence: *Cabonne Shire Council v Environment Protection Authority* [2001] NSWCCA 280; (2001) 115 LGERA 304 at [37].

Environmental harm

46 The level of environmental harm occasioned by the offence is an important consideration in determining the objective seriousness of environmental offences. The concept of harm in relation to environmental offences is broad: *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419; (2006) 148 LGERA 299 ('*Waste Recycling and Processing*') at [145]-[147].

47 The prosecutor accepts that the trees that were removed were among those permitted to be removed had the consent been operative and that this is a matter that substantially reduces the objective seriousness of the offence.

48 Despite this, the prosecutor submits that although actual environmental harm was envisaged by the consent, there existed at the time of the works, a real risk of further environmental harm being caused to the subject land because, based upon the agreed facts, had the prosecutor not intervened, there was a likelihood that further trees would have been removed.

49 The prosecutor also says that the Court should consider the fact that the consent required that a "project arborist" be onsite whenever the trees were removed and that it is agreed between the parties that, irrespective of the satisfaction of the deferred consent condition, there was no "project arborist"

appointed, the arborist appointed by the defendant had left the site before the clearing (which was conducted by contractors) began, and the clearing only stopped when Council officers arrived soon after the commencement of the works.

50 The prosecutor also raises the failure to implement measures to identify and protect the trees requiring special protection (in accordance with the agreed facts). The effect of this failure meant that certain trees were at particular risk during the works. In addition, the prosecutor says that the failure to appoint an onsite "project ecologist" during the works as required by the consent meant that there was no person present to ensure the protection of features of ecological significance. Although the prosecutor accepts that there is no evidence that fauna was disturbed, it maintains that there was clearly a risk that flora could be so disturbed.

51 The prosecutor also points to the facts that first, the conduct took place on land that was in a sensitive area containing a number of threatened species; second, there was a failure to submit the required documents and receive notice that the consent was operative; and, third, the failure to implement the provisions of the consent during the works, all add to the risk of environmental harm. The prosecutor submits that the offending was not a spontaneous act and was part of a planned and organised activity over a number of months and that the above matters considered together add to the objective seriousness of the offending conduct.

52 Based upon the evidence of Dr Robertson, the defendant submits that while the objective seriousness of the offence is impacted by the level of environmental harm, there is no evidence capable of satisfying the Court (beyond a reasonable doubt) that there was any significant environmental harm that would not have arisen anyway from compliance with the consent. It says the conduct should be seen as a "procedural" or "technical" breach and does not create additional environmental harm in or of itself. It also notes that the vegetation within the cleared area has to some extent recovered since the conduct. It reiterates the agreed fact that the majority of the trees and other

vegetation that had been cleared were within areas that had been permissible to clear had the consent been operative. In those circumstances, the defendant submits that this is a case where there was no significant environmental harm caused over and above that which was already authorised to incur "in time" and no evidence of any risk of further environmental harm.

53 I am conscious that the matter of likely environmental harm may be seen to go beyond the elements of the offence that are conceded by the plea of guilty and, to that extent they must be proven by the prosecutor beyond reasonable doubt: *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at 361. I find that there is no compelling evidence of any serious or lasting environmental harm beyond that which is authorised by the consent. Despite this, as I have found above, there has been damage to the integrity of the planning regime and while I accept that the subsequent conduct by the defendant has now regularised the consent (to the extent that it could be, given that part of the work had been undertaken), the consent had been granted on the basis of the specific deferred commencement condition which regulated the proposed conduct of activities on the subject land after careful consideration by the prosecutor having regard to the sensitivity of the site.

State of mind

54 The prosecutor submits that the failure to act in accordance with the deferred consent condition involved a series of deliberate acts committed in circumstances where the defendant, through Mr Zhou, understood that the deferred consent condition required further matters to be addressed and material lodged prior to commencing any works (Mr Zhou's affidavit at par [9]).

55 As noted above, the offences against s 125(1) of the EPA Act are strict liability offences and hence mens rea is not an element of the offence: *Power v Penthill House Pty Ltd* (1993) 80 LGERA 247 at 253. Despite this, the state of mind of an offender at the time of the offence can have the effect of increasing the seriousness of the crime. Thus, a strict liability offence that is

committed intentionally will be objectively more serious than one that is committed unintentionally or non-negligently: *Gittany* at [123].

56 The defendant, being a company, can only act through actual persons. Here, the directing mind and will of the corporation is to be found primarily in the actions of Mr Zhou, its sole director and shareholder, as well as Mr Xu, the project manager. Mr Zhou gave evidence (affidavit 15 February 2019) that "around September 2016, I had become aware that the deferred commencement condition of the consent required further reports to be lodged prior to work commencing". He further deposed that Mr Gordon Xu was appointed project manager and that "Henlong expected Mr Xu to ensure the project was properly managed for Henlong".

57 In relation to the defendant's state of mind, I accept the prosecutor's submission that the failure to act in accordance with the deferred commencement condition involved a series of acts undertaken in circumstances where the defendant was aware, through Mr Zhou, that the deferred commencement condition required further reports to be lodged prior to commencing any works and that, despite this knowledge, the defendant went to some effort to engage an arborist and was represented onsite (by Mr Zhou and Mr Xu) directing the works which constituted the offence be undertaken. I also take into account that the defendant is involved in property development and Mr Zhou, as described in his affidavit, is a property developer.

The extent to which the defendant had control over the causes

58 The defendant submits that a series of "innocent mistakes and internal and external mix-ups" led to the removal of the trees and vegetation. The defendant properly does not submit that the mistakes were "reasonable", but relies upon the apology for these acts in the affidavit of Mr Zhou. The defendant further submits that its "degree of fault" is ameliorated by the fact that professional arborists carried out the tree removal and that in the

circumstances the commission of the offence was unintended and not at all deliberate.

59 Despite the above, the defendant accepts, and I so find, that it had control over the causes which gave rise to the commission of the offence.

Foreseeability of risk of harm

60 The defendant accepts, and I so find, that while the environmental harm which occurred was itself reasonably foreseeable, this was because it had already been approved of in the consent. In my view, this is not a matter of significance and I consider that acting without an operative consent because the deferred consent condition had not been attended to makes the harm foreseeable.

Practical measures which may have been taken to prevent or mitigate the environmental harm

61 I find, and the defendant accepts, that practical measures could and should have been taken to mitigate the possibility of the incident occurring more particularly by ensuring that proper attention had been given to the matters required in the deferred consent condition.

Conclusion on objective seriousness

62 I take into account, as submitted by the prosecutor, that a material feature of this case is that the defendant is a property developer and had engaged with Hornsby Shire Council in relation to the development application that led to the consent. I also find that the conduct of the defendant has undermined the principles that underpin the planning regime and this adds to the seriousness of the offence. As such, I do not find that the offending conduct should be considered a "procedural" or "technical" breach as submitted by the defendant.

63 A difficulty arises in relation to offences contrary to s 125(1) of the EPA Act, if for no other reason than because that offence covers such a large range of

different potential circumstances and offending. This case does fall below the mid-range of seriousness for this type of offence but I consider that it does not fall within the very low category as contended for by the defendant. I find that the conduct was contrary to a specifically designed deferred consent condition and that the defendant, as submitted by the prosecutor, was directly involved in promulgating that condition through the conciliation conference in this Court. That fact combined with the fact that there was environmental harm places this matter above the very low category as contended for by the defendant.

64 I find that there has been environmental harm, although I accept there is agreement between Dr Smith and Dr Robertson that there was no major ecological damage beyond that which would have been permitted. While I also take into account, as opined by Dr Smith, that it is unknown how much additional ecological damage would have been done if the unauthorised clearing works had not been stopped, I do not consider this particularly relevant. Of more relevance is the fact that the work that was carried out was undertaken without implementing the specific consent condition requirements for minimising environmental harm. So that there is no doubt, I do not place weight upon the fact that there *may* have been greater harm caused if Council officers (and neighbours) had not intervened at an early stage of the works. In that regard, while I find that there were some minor works undertaken outside the area that had otherwise been the subject of the consent, it is still a fact that work was undertaken without implementing the consent condition which provided requirements for minimising the environmental harm as stated by Dr Smith. I also take into account Dr Robertson's evidence where he (in Exhibit 2) agreed that the unsupervised clearing that took place had the potential to cause unplanned and undesired impacts, however, I find that there is no evidence to show that such impacts had occurred.

65 Having regard to the factors discussed above including the nature of the offence, the maximum penalty, the limited degree of actual environmental harm caused by the defendant's conduct constituting the offence, the foreseeability of the risk of harm to the environment, and the existence of

practical measures to avoid that risk, as well as the defendant's control over the causes of the harm to the environment, the offence should be considered to be at the lower level of medium objective gravity or seriousness.

Subjective circumstances

66 Consideration of the subjective circumstances requires consideration of those matters that relate to the defendant itself, rather than to the offences that give rise to the charge to which it has pleaded guilty. The matters that I take into account include the defendant's lack of prior convictions; the assistance given by the defendant to the authorities; the timing of the plea of guilty; the defendant's remorse; and the need for specific and general deterrence.

67 These matters are reflected in s 21A(3)(f), (g), (i), (k) and (m) of the CSP Act which provides for mitigating factors which I have taken into account in determining an appropriate sentence.

Prior convictions and good character

68 The defendant was incorporated in 2011 and while it is accepted by the prosecutor that the defendant is of good character in a general sense, the prosecutor notes, that this is not a case where the defendant has sought to lead evidence to establish a significant measure of good community standing by way of references or by evidence of substantial community commitment and good works.

Contrition and remorse and assistance to authorities

69 I accept that the defendant has provided assistance to the authorities, has shown contrition and remorse, and has entered a relatively early guilty plea. Although the defendant has not demonstrated its contrition and remorse by "taking actions" in a manner identified by Preston CJ in this Court in *Waste Recycling and Processing* at [203], I accept and note that the expression of remorse by the defendant through its sole director, Mr Zhou, is consistent with

Mr Zhou's earlier expression of contrition during the investigation that was undertaken by the prosecutor in June 2017.

70 In relation to the subjective circumstances, the defendant makes the following submissions: first, the defendant fully cooperated with the investigation and prosecution; second, it has now corrected "the omission" that led to the charges by lodging further reports such that the prospect of the incident recurring is eliminated; and third, it has formally expressed regret for the incident and has provided a formal apology as well as pleading guilty in circumstances where it is accepted that the defendant has no prior convictions. The defendant submits that these matters should be taken into account in relation to the discrete subjective sentencing and considerations.

Guilty plea

71 The prosecutor submits that the plea was entered at a later stage in the proceedings after the matter was before the Court on a number of occasions and after a notice pursuant to s 247E of the *Criminal Procedure Act 1986* (NSW) ('s 274E Notice') had been filed by the prosecutor and after a 10 day hearing had been fixed. However, the prosecutor accepts that the plea of guilty was entered some months before the hearing was due to commence and that this led to a saving in terms of court time ultimately required to resolve the matter.

72 The defendant submits that the plea was entered after a separate charge against Mr Zhou personally had been withdrawn and dismissed and that in the circumstances where the matter had been listed for a 10 day contested hearing, the plea has had significant utilitarian value particularly in relation to time and expense associated with what may have been two contested trials.

73 The manner in which the Court deals with the entry of guilty pleas and the utilitarian discount for pleas is well-understood: see *R v Thomson; R v Houlton* (2000) 49 NSWLR 383; [2000] NSWCCA 309. Taking into account the matters above and noting that the proceedings were commenced on 21 December 2017, that the s 247E Notice was filed and served on 10 April

2018, that the matter was set down for hearing with a 10 day estimate on 4 May 2018, and that the plea was entered on 16 November 2018, I find that it is appropriate to apply a discount of 20% on the sentence that would otherwise have been imposed.

Deterrence

74 This Court has often stated, and I accept, that sentences imposed for offending against environmental planning laws must recognise the significant public interest in supporting and promoting adherence to the planning system. As such, I find that deterrence is an important consideration in sentencing for environmental offences. This has been stated in many cases, including *Cameron v Eurobodalla Shire Council* [2006] NSWLEC 47; (2006) 146 LGERA 349 ('*Cameron*') at [71]-[81], *Gittany* at [103]-[104] and *Burwood Council v Erector Group Pty Ltd; Burwood Council v Liverpool Developing Pty Ltd* [2017] NSWLEC 20 at [67]-[69]. It is also accepted that persons will not be deterred from committing environmental offences by only nominal fines: see *Bentley* at [139]-[141], [150]-[151] and *Environment Protection Authority v Ballina Shire Council* [2006] NSWLEC 289; (2006) 148 LGERA 278 at [67]. A key purpose of deterrence is to ward off others committing similar offences and the assumption that only a "light punishment" will be imposed: *Waste Recycling and Processing* at [228].

75 The importance of deterrence in environmental offences was recently reiterated by the Court of Appeal in *Erector Group Pty Ltd v Burwood Council; Liverpool Developing Pty Ltd v Burwood Council* [2018] NSWCCA 56 ('*Erector Group*') at [126], where Bathurst CJ, with whom Hoeben CJ at CL and Button J agreed, stated:

> The fact that what might be described as an "unintentional" or "mistaken" offence attracts a significant maximum penalty shows that the object of the legislation is not only to deter deliberate offences against the EPA Act, but also to ensure that proper regard is paid to its requirements. Property developers, such as the appellants, need to be aware that, if they are not punctilious in their compliance with the requirements of the EPA Act, then they may be liable to stringent penalties.

76 I find that in accordance with the comments in *Erector Group*, along with the comments by Preston J in *Environment Protection Authority v Ballina Shire Council* [2006] NSWLEC 289; (2006) 148 LGERA 278 at [65]-[68], that general deterrence is an important consideration in this matter. In view of my finding that the defendant is contrite and it appears that, apart from this particular project, the defendant will not be inclined to engage in further property development projects, the defendant entered a relatively early guilty plea and has a lack of prior convictions, I consider that specific deterrence has a lesser role to play.

77 I find that it is clear that the offence was contrary to a specifically designed deferred consent condition and, as submitted by the prosecutor, the defendant, as a property developer, was directly involved in promulgating the consent orders in this Court. In these circumstances, I consider that general deterrence requires that such conduct is shown to be unacceptable. Therefore, although general deterrence is an important consideration in the imposition of penalties for planning and environmental offences: *Gittany* at [102]-[103], this is particularly the case in this matter given the defendant engaged in property development and compliance with planning laws is fundamental to that business: *Johnson (No 2)* at [103], and *Cameron* at 364-366.

Consistency in sentencing

78 In determining the appropriate penalty, the Court should be consistent with any pattern of sentencing for like offences. Despite being referred to a number of sentencing decisions of this Court, it appears that there are few cases involving breaches substantially similar to the present.

79 The prosecutor referred to the following cases: *Council of Camden v Tax* [2004] NSWLEC 448; (2004) 137 LGERA 368, *Cameron v Eurobodalla Shire Council* [2006] NSWLEC 47; (2006) 146 LGERA 349, *Hawkesbury City Council v Johnson; Hawkesbury City Council v Johnson Property Group Pty Limited (No 2)* [2009] NSWLEC 6; (2009) 210 LGERA 34 ('*Johnson (No 2)*'),

Minister for Planning v Moolarben Coal Mines Pty Ltd [2010] NSWLEC 147; (2010) 175 LGERA 93, *Burwood Council v Jarvest Pty Ltd* [2011] NSWLEC 109, *Warringah Council v Bonanno* [2012] NSWLEC 265, *Hunters Hill Council v Gary Johnston* [2013] NSWLEC 89, *Council of the City of Shoalhaven v Wilson* [2015] NSWLEC 93, *Ku-ring-gai Council v Edgar* [2017] NSWLEC 49, *Burwood Council v Abdul-Rahman (No 2)* [2017] NSWLEC 177, *Willoughby City Council v Rahmani* [2017] NSWLEC 166, *Shoalhaven City Council v Hayes* [2018] NSWLEC 65, *Hunters Hill Council v Liu* [2018] NSWLEC 108, and *Hunters Hill Council v Carter* [2018] NSWLEC 84.

80 In addition to a number of the above cases, the defendant also referred the Court to *Ballina Shire Council v Ian Watson* [2006] NSWLEC 827, *Parramatta City Council v Sua trading as Foxy Tree Services* [2010] NSWLEC 93, and *Parramatta City Council v Cheng* [2010] NSWLEC 94.

81 I have had regard to the matters considered and the range of penalties imposed by this Court and the decisions to which I have been referred. As stated, I do not find any of them of significant assistance given the disparity between the scope of the offending in most of those matters and the scale of the offending in this case. Further, each case turns upon its particular facts and caution must be exercised in considering other cases because of the "...invevitable disparity between subjective and objective circumstances applicable to those cases, compared to the same circumstances found to exist in this case": *Environment Protection Authority v Borg Panels Pty Ltd* [2016] NSWLEC 71 at [45].

82 In considering the cases to which I was referred, I am also conscious of the statement of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [54]:

> ...a history of sentencing can establish a range of sentences that have in fact been imposed. That history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits... "Sentencing patterns are, of course, of considerable significance in that they result from the application of the accumulated

> experience and wisdom of first instance judges and of appellate courts." But the range of sentences that have been imposed in the past does not fix "the boundaries within which future judges must, or even ought, to sentence". Past sentences "are no more than historical statements of what has happened in the past. They can, and should, provide guidance to sentencing judges, and to appellate courts, and stand as a yardstick against which to examine a proposed sentence". When considering past sentences, "it is only by examination of the whole of the circumstances that have given rise to the sentence that 'unifying principles' may be discerned" (citations omitted).

Appropriate sentence for the offence

83 Adopting an instinctive synthesis approach, considering all the relevant objective and subjective circumstances I have discussed earlier, for the purpose of sentencing, I find the appropriate monetary penalty is $35,000. This amount should be reduced for the utilitarian value of the early plea which I have assessed at 20%. This results in a monetary penalty of $28,000.

Costs

84 The prosecutor seeks its costs as agreed or assessed pursuant to s 257B of the *Criminal Procedure Act 1986* (NSW). The defendant has agreed to pay the prosecutor's costs as agreed or assessed but submits that in determining the penalty that the Court imposes it should take into account any order against the defendant for payment of the prosecutor's costs with reference to *Environment Protection Authority v Hardt* [2007] NSWLEC 284 at [66] citing *Environment Protection Authority v Barnes* [2006] NSWCCA 246 at [78]-[88]. Although there was some reference in submissions to the prosecutor's costs being in the vicinity of $150,000, I do not give this matter any significant consideration in my determination of the appropriate penalty.

Orders

85 The Court makes the following orders:

(1) Henlong Property Group Pty Ltd (ACN 149 767 993) is convicted of the offence as charged.

(2) Henlong Property Group Pty Ltd (ACN 149 767 993) is fined the sum of $28,000.

(3) Henlong Property Group Pty Ltd (ACN 149 767 993) is to pay the prosecutor's costs of the proceedings in the amount as may be determined under s 257G of the *Criminal Procedure Act 1986* (NSW).

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I CERTIFY THAT THIS AND THE 26 PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR THE JUDGMENT OF THE HONOURABLE JUSTICE J. E. ROBSON.

Pritchard
Associate

Date 28 February 2019

Land and Environment Court
New South Wales

Case Name:	Hornsby Shire Council v Henlong Property Group Pty Ltd
Medium Neutral Citation:	[2019] NSWLEC 16
Hearing Date(s):	19 February 2019
Date of Orders:	19 February 2019
Date of Decision:	19 February 2019
Jurisdiction:	Class 5
Before:	Robson J
Decision:	Prosecutor's application to rely upon further expert evidence allowed
Catchwords:	PRACTICE AND PROCEDURE – criminal law – application by prosecutor to tender short reply to expert report EVIDENCE – criminal law – prosecutor sought to tender comments on expert report – whether relevant – whether defendant unfairly prejudiced by tendering comments – tender allowed
Legislation Cited:	Evidence Act 1995 (NSW) ss 4, 135, 137
Category:	Procedural and other rulings
Parties:	Hornsby Shire Council (Prosecutor) Henlong Property Group Pty Ltd (Defendant)
Representation:	Counsel: D Jordan SC with G Lewer (Prosecutor) C R Ireland (Defendant) Solicitors: Pikes & Verekers (Prosecutor) McKees Legal Solutions (Defendant)
File Number(s):	2017/00385910

JUDGMENT

1 The defendant has pleaded guilty to an environmental offence against s 125(1) (as it was at the material time) of the *Environmental Planning and Assessment Act 1979* (NSW) ('EPA Act'). On the first day of this Class 5 sentence hearing, Mr Jordan, senior counsel for the prosecutor, sought to rely upon a two-page document prepared by Dr Smith styled "Comments on David Robertson's Statement of Evidence" ('Dr Smith's note'). Mr Ireland, counsel for the defendant, objected to the tender. Having considered the material, including the expert evidence that had been filed and served, and submissions made, I allowed the tender of Dr Smith's note (which became Exhibit B) and deferred the giving of reasons. My reasons follow.

2 In accordance with earlier directions, both the prosecutor and the defendant had filed expert ecological reports (of Dr Peter Smith and Dr David Robertson respectively). Dr Smith's primary report, attached to his affidavit sworn 23 March 2018, was provided to the defendant and in response the defendant filed Dr Robertson's Statement of Evidence on 19 December 2018.

3 Mr Ireland's submissions opposing the receipt of Dr Smith's note may be shortly stated. First, given the directions made for the conduct of the proceedings including the filing of evidence (by Molesworth AJ in November 2018), the defendant was content, having provided the Statement of Evidence of Dr Robertson, for the sentence hearing to proceed without cross-examination of Dr Smith. Second, Dr Smith's note (in its final form) was only provided a short time ago. Third, Dr Smith's note does not comply with the expert witness code of conduct. Fourth, the Court's receipt into evidence of Dr Smith's note may affect the high level of utilitarian discount that the defendant applies for consequent upon the early plea of guilty. Fifth, there are differences in the material now sought to be relied upon by Dr Smith and his earlier material, in that he now raises matters regarding what may have happened if the clearing of the land had in fact complied with the deferred commencement condition. In these circumstances, Mr Ireland submits that

(subject to a ruling being made pursuant to s 4 of the *Evidence Act 1995* (NSW) ('Evidence Act')) Dr Smith's note should be rejected having regard to ss 135 and 137 of the Evidence Act. Mr Ireland reiterates that there is no express subscription to the expert code of conduct although he acknowledges that Dr Smith subscribed to the code in his earlier affidavit.

4 Mr Jordan made short submissions. First, the issue of risk (which is further addressed by Dr Smith) is relevant in this sentencing matter because it addresses the risk of damage to ecologically-sensitive areas on the subject land. Second, there was no direction in relation to service of "reply" evidence by the prosecutor. Third, the prosecutor should be entitled to provide a response to the detailed material provided by Dr Robertson. Fourth, there is no material prejudice to the defendant because it has already obtained a response to Dr Smith's note from Dr Robertson and, should Dr Smith's note be admitted, the prosecutor raises no objection to the defendant relying upon this additional memorandum of Dr Robertson. Fifth, in summary, any additional material in Dr Smith's note goes to matters of clear relevance, is confined in ambit, and is a response to Dr Robertson's primary report.

5 Having considered the expert material of both Dr Smith and Dr Robertson, the detailed Statement of Agreed Facts, and having heard submissions, my reasons for admitting the evidence can be briefly stated:

(1) The material in Dr Smith's note is responsive to Dr Robertson's detailed Statement of Evidence and goes to matters which are relevant;

(2) Dr Robertson has already prepared a detailed response to Dr Smith's note which has been provided to the prosecutor;

(3) Although there was no direction for a response from Dr Smith to Dr Robertson's primary report, in the circumstances, there is no material prejudice primarily because Dr Robertson has considered and replied to Dr Smith's note; and

(4) In the circumstances, having regard to ss 135 and 137 of the Evidence Act (noting that the application of these sections depends upon the Court giving a direction pursuant to s 4(2) of the Evidence Act), I am comfortable that the material in Dr Smith's note is not unfairly prejudicial, misleading or confusing. Its receipt into evidence would not result in an undue waste of time. In relation to s 137 of the Evidence Act, and generally, it follows that I do not consider that there is any unfair prejudice to the defendant.

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I CERTIFY THAT THIS AND
THE 2 PRECEDING PAGES ARE
A TRUE COPY OF THE REASONS FOR
THE JUDGMENT OF THE HONOURABLE
JUSTICE J. E. ROBSON.

Pritchard
Associate

Date 19 February 2019