CITY OF SYDNEY LAW SOCIETY
CLE SEMINAR

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SENTENCING ENVIRONMENTAL OFFENDERS IN THE LOCAL COURT

PROCEDURE AND EVIDENCE

Magistrate Glenn Bartley
Local Court of New South Wales

About the Author

- BA(1974), LLB(1976), University of Sydney
- College of Law PLT course, 1976
- Qualified Mediator (LEADR), 1992
- Barrister, 1976-2006
- Member of Criminal Law Committee of NSW Bar Association, 1994-2005
- Magistrate of the Local Court of New South Wales, 2006 to date
- Presently headquartered at Downing Centre Local Court
- At the Bar, appeared for the State Pollution Control Commission and, when it was reconstituted, the EPA, in environmental prosecutions in the Land and Environment Court
- Appeared for the EPA in the seminal Court of Criminal Appeal case of Camilleri's Stock Feeds v EPA (1993) 32 NSWLR 683
- Conducted prosecutions for various NSW government agencies for illegal land clearing in the Western Division of NSW
- Appeared for the Forestry Commission of NSW in prosecutions in the Local Court and on appeal in the District Court
- Appeared for the Forestry Commission as an offender in sentencing proceedings in EPA prosecutions in the Land and Environment Court
- As a magistrate, has presided over many environmental prosecutions
- In 2012 addressed the annual EPLA Conference on environmental prosecutions in the Local Court
- In 2019 addressed the Young Lawyers Environment and Planning CLE Seminar on environmental prosecutions in the Local Court
- In 2020 prepared the original version of this paper for NSW Law Society Young Lawyers

1. Introduction

The focus of this paper is environmental offence sentencing proceedings in the Local Court of New South Wales. The paper discusses why evidence in such proceedings should be prepared properly and how that can be done. Appropriate and effective procedures also are considered.

The great majority of environmental prosecutions instituted in the Local Court ultimately become pleas of guilty, albeit that many pleas of guilty are entered only on the day set down for a defended hearing.

A major reason for this is that most environmental offences are offences of strict liability and there is reduced scope for defending prosecutions successfully. For example, the most commonly prosecuted offence in the Local Court is development without consent, that is, development not authorised at all or development extending beyond the limits of the development consent.

Such unauthorised activities include:

- Clearing trees or other vegetation
- Building extra rooms
- Building extra or extended balconies
- Constructing swimming pools
- Excavating additional sub-floor basement area approved for storage only and constructing an additional (basement) residential floor
- Breaches of conditions for constructing approved buildings, including blocking footpaths and roads, and inadequate sediment control
- In areas with rivers and bays: filling in natural shorelines and constructing flat linear terraces for outdoor dining, all without any authority.

Too often, preparation of an offender's case in mitigation of penalty is inadequate and the conduct of the offender's case is too perfunctory. That is not in an offender's interests and is counter-productive financially.

Two main areas of improvement are needed in the conduct of environmental offence sentencing proceedings in the Local Court:

- Prosecutors' statements of agreed facts need to be prepared and considered carefully by both sides and be taken more seriously by both sides. Prosecutors should deploy legal practitioners to draft, or at least thoroughly and accurately settle, proposed statements of agreed facts.

- An offender's evidence on sentence needs to be in writing and separate from submissions to be made on behalf of the offender.

A rolled-up address from the bar table with bare assertions of fact intermingled with submissions is no longer tenable or acceptable. Assertions of fact from the bar table are not evidence. Submissions must be based on written, and any subsequent oral, evidence. An offender's case should be prepared thoroughly and with particularity.

For brevity, this paper is expressed in the imperative. However, feedback sent to the author via the Chief Magistrate's Office, the addresses of which are at the end of this paper, would be most welcome.

Although there are relatively few citations in this paper, the author aims to augment it in a fuller paper with citations at a later stage. The citations would include those on the list of References at the end of this paper. Feedback would enhance the augmented paper.

2. The Appeal System

Appeals against severity of sentences for environmental offences imposed by the Local Court cannot be made to the District Court. Instead, such appeals go directly to the Land and Environment Court of NSW.

A quick, ramshackle skirmish in the Local Court followed by a partly or wholly underprepared fumble in the District Court is not an option.

Essentially, the avenue of appeal from the Local Court is straight to the Land and Environment Court.

As you well know, the Land and Environment Court is a specialist superior court with commensurate standards. A severity appeal is not a hearing de novo but by way of rehearing. It is a rehearing on both:

- The evidence admitted in the Local Court.
- Any additional evidence adduced on appeal.

The Land and Environment Court needs to be able to identify what was the evidence that was admitted in the Local Court. It needs to distinguish such evidence from:

- Evidence that was tendered but rejected.
- Submissions to the Local Court.

The evidence admitted at first instance in the Local Court has an armchair ride into evidence in the appeal because, in the legislation, the starting point for evidence in the appeal is the evidence admitted below.

If an offender's legal representative is not thorough at first instance and has to attempt to supplement the evidence on appeal, the offender may have greater admissibility hurdles to clear. Standards and sharpness of scrutiny of that extra evidence on appeal by the prosecution probably will be higher. Examination by the Land and Environment Court of the evidence sought to be adduced for the first time on appeal is likely to be more exacting and expert than by the Local Court (a generalist court) and, for that reason, such additional evidence has a greater risk of being rejected.

Most evidence adduced on behalf of an appellant offender is admitted because usually it is adduced to fill a gap in the evidence before the Local Court, for example, financial evidence in relation to an offender's capacity to pay a fine. However, the Land and Environment is unlikely to be impressed with attempts to adduce fresh evidence on appeal to effect a wholesale change in the version adduced by the offender in the Local Court.

3. Maximum Penalty

The next consideration is the maximum penalty. It is very high. The most common offence that is prosecuted in the Local Court is development not in accordance with consent: Tier 2, s.9.53, Environmental Planning and Assessment Act 1979. The maximum monetary penalty for such an offence is $2 million for a company and $500,000 for an individual.

The Local Court scales down from the maximum of $2 million/$500,000, which is reserved for a worst possible case. The Local Court's limit of jurisdiction of $110,000 is merely a cut-off. For example, if the appropriate penalty in a sentencing proceeding was determined to be $150,000 then the Local Court would impose $110,000. The Local Court does not begin scaling down from $110,000.

It is common for Local Court fines to be well into five figures (but below, not at, $110,000).

Over the past quarter century, the statutory maximum monetary penalties generally have been increasing and the Land and Environment Court sentencing levels have been increasing (of course, in accordance with consistency in sentencing principles).

In my view, even during the period of a particular maximum monetary penalty, the general pattern of sentencing of the Land and Environment Court has comprised an upward trend. (See the paper presented by Justice Pepper of the Land and Environment Court cited in the attached References, paras 104 and 110.)

It should be appreciated that the older the case cited on behalf of an offender as a "comparable" sentence, the more likely it is to be discounted as "dated". Contemporary standards require historical sentencing patterns to be reconsidered. Provision needs to be made to account for views changing over time about the sentence that should be imposed in particular cases: *Burwood Council v Abdul-Rahman (No 2)* [2017] NSWLEC177 [70]-[71]; *CE, OEH v Turnbull* [2017] NSWLEC 140 [240].

So the environmental offender for whom you are appearing in the Local Court is in the big league financially in most cases, that is, at risk of fines greater than the usual range of a few hundred to a few thousand dollars for traffic, assault, domestic and dishonesty offences.

When small-scale developers come to the Local Court unrepresented and underprepared, often they are fixated on the "outrageousness" of a penalty infringement notice amount – up to $6,000. They have not paid it and it is too late to do so. They cannot back out and reverse the process. In most cases, they are facing a much bigger total of fine and costs in court. However, if you are consulted by a developer before the deadline for paying the penalty infringement notice has expired, you should urgently consider whether to advise that it be paid.

The great majority of developers who do not pay the penalty infringement notice, and instead court elect, end up paying much more when one adds up the amount of the fine, prosecution costs and your professional costs of acting and appearing. The fine alone is likely to be more than the penalty infringement notice amount. Furthermore,

s.10 dismissals are rare. Even if the fine is less than the penalty infringement notice amount, and even if the offender is a first offender, it is most probable that the offender will get a conviction and therefore a criminal record.

If you have a developer as a regular client, warn the developer about the above, including the deadline for paying a penalty infringement notice. Advise the developer to consult you immediately he/she/it gets an infringement notice. Generally, it is cheaper simply to pay the penalty infringement notice.

However, if you find yourself in court appearing for an environmental offender to mitigate sentence, you will need to embark on a process of managing his/her/its expectations by explaining the realities outlined in this paper. Often that is a slow process, and results in the prosecution not proceeding expeditiously, the ultimate utilitarian discount declining and the recoverable prosecution costs increasing.

4. Professional Costs

Essentially, an offender must pay the prosecutor's costs in regulatory prosecutions, including in sentencing proceedings, including environmental sentencing proceedings.

Costs are compensatory. Generally, in such prosecutions, actual costs are awarded.

Generally, the amount of the fine may be reduced to a degree having regard to the amount of costs to be ordered against the offender (although it is difficult to reconcile all of the case law on this subject). However, costs cannot be mitigated by reference to the factors relevant to mitigation of penalty. The ability of an offender to pay costs generally is not a relevant consideration in quantifying costs to be ordered against the offender.

Prosecutors should walk into court with an itemised and quantified schedule of costs or, better, send it in advance to their opponent. An offender is entitled to notice of the amount of costs claimed and how such costs are calculated, in order that the claim can be considered properly. If a costs claim is served on an offender at a late stage in sentencing proceedings, then an avoidable adjournment may result.

If a sentencing proceeding goes for longer than expected and allowed for in the schedule of costs, then the prosecutor can serve an updated schedule, especially if, as commonly occurs, the offender is disorganised and needs additional time to prepare evidence after an avoidably late plea of guilty.

From my own cases, and having consulted experienced practitioners, the main ranges of prosecutors' costs of and incidental to sentencing proceedings (where a defended hearing did not commence) appear to be approximately:

- In the Local Court: $3,000 - $20,000.
- In the Land and Environment Court: $18,000 - $120,000, but usually in the $40,000 - $60,000 range.

5. Three Other Reasons why Environmental Offenders Prosecuted in the Local Court usually are in the Financial Big League

The Land and Environment Court case law is to the following effect:

- Less weight is given to prior good character as most environmental offenders have a clean record and generally are of good character, but general deterrence generally is paramount.

- Section 10 dismissals are rare as the offender should be held accountable by a conviction and penalty.

- There should be an economic disincentive to committing environmental crimes. The financial gains of offending should be outweighed by the fines: see Justice Pepper's paper, para 100.

Thus all of the considerations identified so far in this paper generally are tending to result in substantial fines. Therefore, there is a financial benefit for an offender in investing legal fees in mitigation of sentence in the Local Court.

6. Statements of Agreed Facts

Generally, in environmental offence sentencing proceedings, there are more disputes about facts for sentence, including on central issues, than in assault, traffic, dishonesty or domestic offence sentencing proceedings. Generally, in environmental offence sentencing proceedings, there is more additional offender's evidence.

Service of a prosecution brief of evidence, or even a preliminary brief, is not compulsory under the Criminal Procedure Act 1986 or Criminal Procedure Regulation 2017. However, that should be done voluntarily by the prosecuting authority at an early stage. Doing so helps concentrate the minds of the accused and his/her/its legal representative. It enables the proceedings to be conducted efficiently.

The Local Court is likely to be sympathetic to an adjournment application by an accused pleading guilty who says that he/she/it cannot respond adequately to the prosecution evidence that has been served on the day of appearing in court.

The prosecutor should have a draft statement of agreed facts ready for negotiation with the offender. It should be served on the first mention day, or preferably be emailed or posted in advance of that day.

A statement of agreed facts should have the following features:

- Although it should be as concise as possible, it should be comprehensive by stating all of the relevant facts for sentence. The facts should be stated precisely.
- The statement of agreed facts should be as self-sufficient as possible, and rely as little as possible on supporting material. The evidence in what otherwise would be supporting material should be distilled into the statement of agreed facts as much as possible.

- However, supporting material would reasonably include photos, plans and any trail of notices and correspondence that an offender has disregarded.
- There should not be evidence of aggravating facts in the supporting material, for example, in a statement of a neighbour, who has complained about a development consent being exceeded, that is not in the statement of agreed facts. Aggravating evidence should be distilled into the statement of agreed facts.
- Actual or potential harm to the environment or other public interests should be precisely but fully stated in the statement of agreed facts.
- Unless relevant to explain a chain of events, the statement of agreed facts should not baldly recite the terms of complaints by neighbours or other members of the public. It should state those complaints as facts. The case law is to the effect that complaints as such attract no weight as facts for sentence.
- It is essential in environmental offence sentencing proceedings that statements of agreed facts be drafted, or at least thoroughly and precisely settled, by a skilled legal practitioner. Too often compliance officers or other Council officers draft such statements and the council solicitor does not thoroughly overhaul and augment them. Council compliance officers and inspectors do not have sufficient legal knowledge or skills to be solely responsible for a statement of agreed facts.

It is common for offenders to agree to a draft statement of agreed facts, with or without negotiations, and whether or not they are represented, and then later in their own evidence attempt to contradict or qualify the statement of agreed facts. That can become messy legally and factually, time-consuming, and can imperil the integrity and viability of the plea of guilty and, potentially, sentence.

So at the earliest stage possible, the prosecutor should apply to the court to order that the law of evidence applies to the sentencing proceeding. That is because, in a sentencing proceeding, the rules of evidence do not apply unless they are ordered to apply.

The effect of the rules of evidence being ordered to apply is prescribed in sections 4, 191 and 192 of the Evidence Act 1995. The effect is that the statement of agreed facts cannot be contradicted or qualified without an application to do so by the court and without subsequent leave of the court being granted.

In *Environment Protection Authority v Ramsey Food Processing Pty Ltd* [2009] NSWLEC 152 [16] Biscoe J said:

> *"The onus is on the party seeking leave to contradict or qualify agreed facts to make out a case for leave including as to the circumstances in which they came to agree the facts. An application to contradict or qualify agreed facts after considered negotiation and legal advice, particularly when made as late as the hearing, challenges the integrity of the agreed facts procedure and should be approached with caution. There has to be an incentive for parties to agree facts. To allow a party to back out of such an agreement easily does not encourage agreement in the first place. In a general sense, there is*

prejudice in denying to a party the right to rely on something that they reasonably thought was agreed."

Those considerations were applied in *EPA v Mouawad (No.4)* [2023] NSWLEC 76 [43]-[46]. They usually preclude later attempts in an offender's case to undermine or chip away at the statement of agreed facts.

In the Local Court, offenders and sometimes their legal representatives can be disorganised, underprepared and have no clear strategy. They are more likely to consent to an application that the law of evidence applies if the application is made early. If the application is made at a later stage and in the middle of a dispute about facts for sentence, then it is likely that the application will be opposed opportunistically and the sentencing proceeding is at risk of becoming complicated and protracted, and at risk of imploding.

An order by the court at an early stage that the laws of evidence apply provides the ground rules for a sentencing proceeding from the outset. Such an order enables the sentencing proceeding to progress efficiently and economically.

It follows from the above that it is critical for an offender's legal representative to negotiate a statement of agreed facts with the prosecutor very carefully. Where the rules of evidence have been applied, a court will give no weight to later evidence of an offender that contradicts or qualifies the contents of the statement of agreed facts.

7. Offender's Evidence

The prosecution has the burden of proving incriminating and aggravating facts beyond reasonable doubt.

However, an offender has the burden of proving favourable matters on the balance of probabilities. That requires cogent evidence. The brevity and informality that may properly apply to an assault or traffic plea is inappropriate and financially dangerous in an environmental offence sentencing proceeding.

A central requirement of a Local Court sentencing proceeding for an environmental offence is that the evidence and submissions not only of the prosecutor, but also of the offender, must be separated.

An offender should give evidence initially by written statement or affidavit. It may also be appropriate to adduce corroborating photographs, plans and, if relevant, any material correspondence or financial records. Of course, the offender will be liable to be cross-examined on that evidence.

8. The Sentencing Hearing

This paper already has given some guidance about what to do at court and in the courtroom. Some additional guidance follows.

When I was preparing my address to the 2012 EPLA Conference, I am had the benefit of suggestions from an experienced Justice of the Land and Environment Court. That judge told me that, in a severity appeal, one of the predominant items that the Land

and Environment Court often received from the Local Court was a huge bulldog clip. Within it was a photocopy of the court attendance notices and a “melange of material”, with no or no adequate indication of what was admitted evidence, rejected evidence or submissions. The judge observed that, when scrutinising the transcript, a rolled up conglomerate spiel from the bar table often cannot properly be dissected into evidence and submissions. The judge told me that it was particularly difficult isolating what evidence was admitted in the Local Court when different legal representatives are appearing in the severity appeal in the Land and Environment Court.

Subsequently, the conduct of environmental offence sentencing proceedings in the Local Court has improved and the difficulties outlined above have abated.

Thus in the Local Court documentary evidence should be marked as exhibits. The statement of agreed facts, photographs, plans, notices and correspondence and the offender’s statement or affidavit should be marked as exhibits. Where practicable, legal representatives should encourage the court to give the documents separate exhibit numbers for ease of reference, efficiency and precision in submissions and the eventual judgment. In particular, such an orderly process should be encouraged by prosecutors.

The Land and Environment Court case law enunciating principles for sentencing environmental offenders by now is vast. Furthermore, there are innumerable allegedly comparable cases for most of the main kinds of offences. So bring to court three highlighted copies of the main authorities that you rely on – one for yourself, one for your opponent and one for the court. Magistrates usually do not have associates and have little time to do electronic legal research. They should be given a whole authority rather than simply a brief oral reference to the asserted parts of a case relied upon. Bring along a complete hard copy of the whole case. Magistrates are experienced lawyers and will want to satisfy themselves about various aspects of a case that is cited.

9. Unrepresented Offenders

Unrepresented accused often appear in the Local Court living in the past and aggrieved by the amount of the penalty notice. They have little or no idea of their much greater financial exposure in a prosecution. Often they do not appreciate that there may be a big financial freight train hurtling towards them.

Prosecutors opposed by an unrepresented offender should give to the presiding magistrate a copy of *Hudson v Director-General, DECCW* [2012] NSW CCA 92 [94]-[98] and the title page. In Hudson, the Court of Criminal Appeal held that the LEC judge should have told a self-represented offender of:

- His exposure to significant financial penalties.

- His right to adduce evidence and make submissions in mitigation of penalty, including evidence giving rise to a belief that he was entitled to clear the land in that case.

In a prosecutor's cross- examination of an unrepresented offender, the prosecutor may wish to ask non-leading questions on arguable aspects of mitigation before commencing traditional cross-examination on them. No one wants an avoidable appeal.

10. Sentencing Principles

The principles to be applied on sentence for the commission of an environmental offence is a very large and diverse subject. A good start would be to read those principles in the cases cited in the References at the end of this paper.

In an environmental offence sentencing proceeding, whether in the Land and Environment Court or in the Local Court, evidence needs to be prepared and a party's case needs to be conducted in the light of applicable sentencing principles.

11. Brief Contribution to NSW Young Lawyers' Six Discussion Points

When preparing the original version of this paper for NSW Young Lawyers in 2020, they raised six discussion points. The six points and the author's (updated) responses are as follows. The responses relate only to environmental prosecutions in the Local Court.

1. Which recent cases do you consider could have achieved a more just, quick and cheap outcome if they had been approached in a more procedurally efficient manner, and what suggestions do you have for practitioners in the light of those cases?

Response – *Pesic v Sutherland Shire Council* [2019] NSWLEC 38 [13](k), [37]-[38]. There was a significant delay in pleading guilty and then an unsuccessful application to change the plea during the sentencing hearing. Subsequently, the proceedings were unproductively complicated and unduly protracted by the offender. The Local Court reduced the utilitarian discount from the maximum available of 25% for a plea of guilty at the earliest opportunity to 5%. Such 5% reduction was not challenged in an (unsuccessful) severity appeal to the Land and environment Court. Preston CJ said:

> *"Although at the low end of the range, I find that, in all the circumstances, a utilitarian discount of 5% is maintainable. Mr Pesic's plea of guilty had very little utilitarian value for the criminal justice system. There was very little saving of time or expense by Mr Pesic pleading guilty, rather than not guilty, and indeed he changed his plea once and applied to change it a second time although he was unsuccessful. Time and cost was expended in dealing with this unsuccessful application to reverse his plea of guilty."*

Furthermore, the statement of agreed facts simply asserted complaints. Thus the prosecutor did not prove harm to the environment. Preston CJ agreed [25]. In consequence, the Local Court reduced the costs claimed by the council by 10% [17](n). The costs figure was not altered on appeal.

Relevant suggestions for practitioners are made in this paper.

2. How would you like to see environmental prosecution/civil enforcement proceedings run in your respective courts and… what were the main things you hate seeing practitioners do?

Response - In relation to procedure and evidence in environmental offence sentencing proceedings, the whole of this paper is the contribution to this discussion point.

3. How have the various changes to the statutory regime (EP&A Act, POEO Act) over the past two decades changed how environmental prosecutions and civil enforcement proceedings are run, and in your opinion have they adversely impacted on successful prosecutions or enforcement matters?

Response – the distinction between tier 1 and tier 2 offences, introduced in 2015, gives rise to consideration of the applicability of De Simoni principles. This complicates sentencing submissions and judicial fact-finding. See *Pesic* (above) [26]-[30], and:

- *EPA v Hanna* [2018] NSWLEC 80 [119]
- *Water NSW v Barlow* [2019] NSWLEC 30 [57]-[72]
- *Environment Protection Authority v John Michelin & Son Pty Ltd* [2019] NSWLEC 88 [112]
- *Environment Protection Authority v Minto Recycling Pty Ltd* [2019] NSWLEC 91 [29]-[44]
- *Environment Protection Authority v Sydney Water Corporation* [2019] NSWLEC 100 [143]-[168]
- *Environment Protection Authority v Hughes* [2019] NSWLEC 108 [79]-[91]
- *EPA v Sydney Water Corporation [2021] NSWLEC 4 [158] ff*
- *City of Parramatta Council v Grand Epping Pty Ltd [2021] NSWLEC 70 [119]-[120]*
- *Secretary, Dept of Planning and Environment v Sell and Parker Pty Ltd [2022] NSWLEC 60 [317]-[368]*

4. Have the statutory disclosure provisions in section [247A ff] of the Criminal Procedure Act helped or hindered environmental prosecutions?

Response – in the Local Court, an accused environmental offender has no statutory obligation to disclose evidence in advance of the trial. However, if the prosecution is "ambushed" at the trial, or even in a sentencing proceeding, for example by expert evidence, it may have good prospects of obtaining an adjournment, which in turn may add to the costs order against the offender if there is an eventual sentence. The legal representative of an accused/offender facing sentence should give consideration to serving evidence in advance. That would provide the prosecuting authority with time to consider and give instructions about such evidence, thereby avoiding delay and additional costs.

5. What scope is there for Local Court magistrates to assist in smaller scale environmental prosecutions that are commenced in the Land and Environment Court when they could have been commenced in the Local Court?

Response - Most environmental offences attract fines of less than $110,000. Therefore, most environmental offence prosecutions could be considered for commencement in the Local Court. However, the proceedings should be prepared and conducted thoroughly. That is addressed in this paper.

6. What do you think the future of environmental prosecutions/civil enforcement is going to look like? Do you see this as an area that will be growing?

Response - In the Local Court, a preferred future for the conduct of environmental offence prosecutions is outlined in this paper. As to the volume of prosecutions, the extent to which many local councils are enforcing the law against development without or beyond consent is questionable.

Feedback

Feedback would be appreciated. Please send it to Magistrate Glenn Bartley, care of one of the following addresses of the Chief Magistrate's Office:

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Maximum Penalty

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Burwood Council v Abdul-Rahman (No 2) [2017] NSWLEC 177 [70]-[71]
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Justice Rachel Pepper's seminar paper, "How to Lead a Successful Life of Crime in the Land and Environment Court of NSW: An (Updated) Guide to Criminal Prosecutions in the Court", 5 March 2016 [104],[107] (available on the LEC website)

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