Environmental Offences
Sentencing Principles and Evidentiary Issues

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I congratulate AELERT on its conference theme of "Working Together for Regulatory Compliance". As a person who has experience in law enforcement through the former National Crime Authority (now the Australian Crime Commission) and Queensland Criminal Justice Commission (now the Crime and Misconduct Commission) I recognise that cross-jurisdictional co-operation is vital to the effective discharge of your important functions. In an increasingly borderless world as with law enforcement it is essential that such co-operation exists internationally as well as nationally. In this regard I note that international speakers have been invited to address this conference. The exchange of information involved and the new networks established can be of great benefit to delegates in the future discharge of their functions.

As I am sure you will be aware, a majority of people who have contact with the criminal justice system have that contact with the Magistrates Court. Approximately 96 percent of all criminal matters are dealt with in this court. This is also the case with environmental offences. The information available to me is that since 22 June 1996

there have been 87 separate sentence proceedings for environmental offences in Queensland. All but 14 of these have taken place in the Magistrates Court.

My particular experience in the area arises from the prosecution of a number of environmental offences while in private practice, and presiding over one of those Magistrates Court trials. This was a prosecution for unlawful tree clearing. The decision as to conviction and sentence is presently the subject of an appeal to the District Court and resulted in a sentence to pay a fine of $125,000 and an amount of compensation for $85,353.40. Costs of $65,530.20 were awarded in favour of the complainant. I was greatly assisted in assessing cost by being provided with a Bill of Costs in taxable form. This is an approach that I hope will be adopted in all cases.

The purpose of this paper is to address two issues – sentencing principles and evidential issues.

When it comes to sentencing principles the maximum level of penalties available under Queensland environmental laws demonstrates the seriousness with which offences against these laws are regarded. Notwithstanding this sentences of imprisonment have been imposed in only 8 of the 87 proceedings that I have referred to. This reflects the fact that each case depends on its own facts. And in Queensland a sentence of imprisonment can only be imposed as the last resort.

When I discuss sentencing principles in more detail later in this paper I refer to the circumstances which the Queensland Court of Appeal has indicated as making a sentence of imprisonment more likely.

Before doing so I will direct my attention to some evidentiary issues which I have encountered both as a practitioner and as judicial officer.

Evidential Issues

The issues of evidence involved in proving a criminal offence are the same whether the offence is environmental or otherwise. For this reason I address some practical aspects of presenting evidence to the court. In doing so I should not be taken as abandoning my objectivity as a judicial officer to provide tips to law enforcement and the prosecution. My aim is to ensure that prosecutions are presented in such a way as to ensure that cases proceed efficiently and that time is not lost in adjournments and legal arguments that may otherwise be unnecessary.

The issue which has arisen in my experience on both sides of the bench is the manner of recording conversations which have the potential to be relevant evidence in any criminal proceedings which are subsequently instituted about the subject matter of the conversations.

Time will be saved in court proceedings if the conversations are recorded contemporaneously. The best means of achieving this is

by using a tape recorder. However you would be amazed at the number of cases in which the devices have failed to work, the batteries have failed or the conversations recorded are partly if not totally indecipherable. This is not limited to tape recorders used by environmental investigators.

If a tape recorder is not to be used (and even when it is, given the problems I have referred to) it is important that detailed notes be taken contemporaneously. If the notes can not be made at the time they should be made while the conversation is still fresh in the investigator's memory.

If the notes are not made in this way the investigator when appearing as a witness will be unable to refer to the notes in giving evidence but will have to totally rely on his/her memory of conversations which may often have occurred a significant time previously. This is likely to result in the witness stumbling through evidence in such a manner as is likely to draw out the proceedings.

The same effect is likely to occur if the notes are not made in an "I said" and "He/She said" style, and as far as possible recorded word for word. I have had experience of notes which are paraphrases of answers only, without any reference to the questions asked. This again slowed down proceedings.

The same result occurred in another case in which notes were made at different times and in different styles. In this case the tape

recorders batteries had failed, some rough notes were enlarged on in another document made later that evening, and that document was amended and annotated subsequently. Fortunately in this case the defendant's counsel did not object to the witness referring to the notes in order to give evidence at the trial. As a result time was saved, but not before some difficulty was experienced by the officer in giving evidence of the conversations. And, I might say, with some considerable embarrassment.

In addition to the inefficiencies that such methodologies introduce into the court proceedings, there is a risk for the prosecution that some or all of the conversations will not be admitted in evidence and, even if they are admitted, will not be regarded as reliable by the court.

Some years ago I prosecuted a case in which the investigators were supplied with pro-forma questions to ask each of the suspects. While this had the effect of ensuring there was no doubt about what was said, the lack of flexibility that this introduced into the questioning process was detrimental to the prosecution case. It resulted in answers being given but then not being followed up. It has the same ineffective result as a lawyer who writes out all his/her questions word for word and asks them without regard for the answer that is given.

However, much of this is a matter of gaining experience. It demonstrates the need for training of environmental officers in the techniques of investigation by people who have expertise in this area. This is particularly important because I am sure that the future will

bring an even greater emphasis on the investigation and prosecution of environmental offences.

It is obvious from what I have said that with a growing workload courts are concerned with the efficient conduct of proceedings which come before them. Both efficiency and justice can be promoted by full prosecution disclosure of all statements and documents relevant to its case at the earliest possible stage of proceedings. This is now recognised by the disclosure provisions of the Criminal Code. While these provisions do not currently extend to summary proceedings (and most environmental proceedings are conducted summarily) they are really a codification of common law principles that were already applied. Accordingly it is to be expected that there will be full prosecution disclosure in environmental prosecutions.

Full disclosure from my experience advances the prosecution case, and in most cases will result in early pleas of guilty with considerable cost saving for law enforcement and prosecution authorities, as well as for the community. Even if it does not achieve this result, it is likely to result in defence admissions reducing the issues in contest and the extent of evidence required to be called.

This is important because environmental prosecutions can involve some complex issues which can be simplified and explained by appropriately qualified expert evidence.

The court was greatly assisted in the tree clearing case to which I have referred by expert evidence of Mr Goulevitch, a principal scientist with the Queensland Department of Natural Resources and Mines. I understand that he has addressed you at this conference. His role was to conduct as analysis of aerial photographs and satellite mapping which enabled him to trace the change in vegetation on the relevant property over a 20 year period. He also did a cadastral survey on the property. The results of this analysis were presented to the court in a power-point presentation. There was no dispute by the defence about the areas that were cleared or their location.

This information was also used by another expert witness in determining the number of stems of commercial cypress pine trees that had been destroyed on the property. This was also not the subject of dispute.

This expert evidence was supplemented by booklets of photographs and copies of plans which were made available both to the defence and the court to enable the evidence to be more easily comprehended.

The result was a trial at which the issues were narrowed and both the prosecution and defence could more clearly tailor their evidence and cross-examination to the matters which were really in dispute. This reduced the length and cost of the trial and greatly assisted the court.

Sentencing Principles

The sentencing principles that a Queensland court must consider in sentencing any offender for a state offence, whether an environmental offender or otherwise, are prescribed by the *Penalties and Sentences Act* 1992.

This specifies the purposes for which sentences may be imposed on an offender. One of these purposes is:

> "to deter the offender or other persons from committing the same or a similar offence."

The principles of deterrence are of particular significance in sentencing an environmental offender. This is emphasised by the observations of the Queensland Court of Appeal in *R v Dempsey* [2002]QCA45.

This was a case in which the Court of Appeal that a sentence of 12 months imprisonment was not manifestly excessive for deliberately cutting down and removing, for commercial gain, 25 trees in an area of approximately one hectare of wet tropics world heritage listed rain forest.

Davies JA said:

> "This is an offence in which, in particular, the imposition of a custodial sentence may be a deterrent and, in my opinion, that is an important factor here."

McPherson JA said:

> "I also agree specifically with Mr Justice Davies' remarks about the custodial period and its effect in cases of this kind. An actual period of prison custody is likely to have a real deterrent effect on others minded to commit like offences over and beyond that in other cases. If offenders consider that they might succeed in escaping with nothing more than a financial penalty, it may be that they would take the risk of doing so for the profit that appears to be recoverable for acts like this."

Therefore offenders who engage in significant environmental destruction for commercial gain should be under no misapprehension that they only run the risk of a financial penalty if detected and prosecuted.

The nature and extent of the environmental damage caused will also be an important factor. This is consistent with the *Penalties and Sentences Act* which requires the court to have regard to any damage, injury or loss caused by the offender. As Williams JA (with whom the other members of the court agreed) said in *R v Moore* [2003] 1 Qld.R 205 at 205, 210:

> "From a general perspective the nature of the contaminating substance and the nature of the environment into which it has escaped, or has the potential to escape, will be material considerations and affect the gravity of the offences."

Therefore in *Little v Red Peak Forest Estate Pty Ltd*, 28 July 2005, Magistrate Previtera had regard to the potential harm, the area over which the environmental nuisance was caused and the activities and properties which were effected as a result. And in *Doonan v McKay*, 20 September 2004, I had regard to the size and quantity of the commercial cypress pine involved. In that case 19,702 trees were destroyed with a total loss and damage to the Crown which I calculated as $85,353.40.

The decisions of the Court of Appeal indicate that landowners, who destroy significant areas of protected vegetation, or cause other significant environmental damage, will be at peril of imprisonment.

And as was also said in *Moore* at 211:

> "Major environmental offences, particularly when there is a high degree of criminality involved because of the repetitive nature of the conduct, will call for the imposition of custodial sentences."

In that case the courts were not persuaded that a sentence of 18 months imprisonment was manifestly excessive for conduct that was negligent in the extreme and showed virtual contempt of the law.

Ultimately however all sentencing principles must be applied having regard to the circumstances of the particular case.

As also indicated by the Court of Appeal decisions I referred to, the degree of culpability will also depend upon whether the conduct in question was negligent or wilful. Although wilful is defined in some legislation as meaning intentionally or recklessly or with gross negligence. This was referred to in *R v Moore* at 208 where it was also noted that:

> "An offence after a previous conviction, or an offence after the offender had been put on notice of the possibility of a serious offence against the Act, would ordinarily attract a significantly higher penalty."

In addition, in accordance with *Penalties and Sentences Act*, the Court will consider the offender's character, age and intellectual capacity.

Issues such as whether the offender co-operated with the investigating agency, pleaded guilty (and if so, whether it was an early plea of guilty) and whether he/she has demonstrated remorse are just as relevant to the exercise of the sentencing discretion for an environmental offence as in any other case.

Further where an offender is convicted of more than one offence there will often be a close relationship between the offences or a pattern of behaviour which makes it appropriate to apply the principle that the penalty imposed should reflect the total criminality. The

application of the totality principle in the context of offences against environmental law was endorsed in *Moore* at 209.

Conclusion

As observed I consider that the future will bring an even greater emphasis on the investigation of environmental offences.

The courts will continue to be concerned with the efficient conduct of proceedings which come before them. It is important that prosecutions are presented in such a way as to ensure that the proceedings are not unnecessarily protracted.

Therefore it is essential that environmental officers be trained in the techniques of investigation by people who have expertise in this area. One area in which such training is required is in the manner of recording conversations which have potential to be relevant evidence in prosecution proceedings.

Both efficiency and justice will be promoted by prosecution disclosure of all statements and documents relevant to its case at the earliest possible stage of proceedings. In most cases this will result in early pleas of guilty with considerable cost saving for law enforcement and prosecution authorities as well as for the community.

For those prosecutions that do proceed to trial the often complex issues involved can be simplified and explained by appropriately qualified expert evidence.

Although sentences of imprisonment have only been imposed for a relatively small number of environmental in charges to date the Queensland Court of Appeal has identified circumstances in which the imposition of prison sentences is likely.

The decisions emphasise the importance of deterrence in sentencing environmental offenders, and that an actual period of imprisonment is likely to have a deterrent effect on others minded to commit like offences over and beyond that in other cases.

Land owners who destroy significant areas of protected vegetation, or cause significant damage will be at peril of imprisonment.

Ultimately however the decisions reflect the fact that the sentencing principles must be applied having regard to the circumstances of the particular case.