



Sentencing for environmental crime – the NSW experience

NJCA Conference – Canberra, 4 March 2018

Justice Tim Moore
NSW Land and Environment Court



Scope of the paper



- Pollution offences (water; air and ground pollution);
- Breaches of the *Environmental Planning and Assessment Act 1979* (NSW) (including charges of contempt for breaching court orders relating to land use planning matters);
- Clearing of protected vegetation (whether urban trees or broad-scale clearing of native vegetation for agricultural purposes);
- Innovative order making; and
- An unexplored but available penalty frontier.



The legislative history

- Pollution offences pre-1989
- The 1989 Act
- 3 tier approach
- Current statutory penalty levels



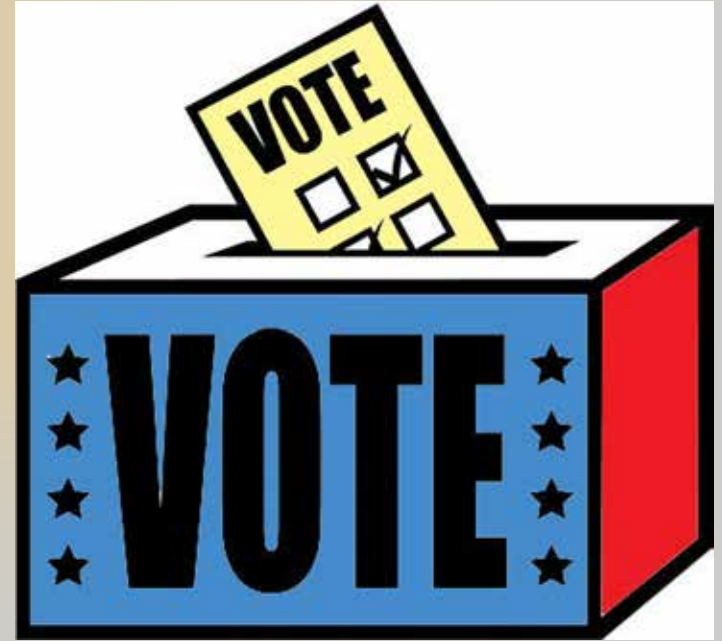


Part 8.3 of the POEO Act





Disclosure of political donations





Appellate Court supervision





Enforcing orders of the Court





Clearing the urban forest





Broad-scale land clearing





Contemporary penalty levels



— **Water pollution (\$1,030,000)** *Environment Protection Authority v Clarence Colliery Pty Ltd; Chief Executive, Office of Environment and Heritage v Clarence Colliery Pty Ltd* [2017] NSWLEC 82



— **Failure to disclose political donations (\$107,000)** *Secretary, Department of Planning and Environment v Shoalhaven Starches Pty Ltd* [2018] NSWLEC 23



— **Urban tree removal (\$60,000)** *Willoughby City Council v Rahmani* [2017] NSWLEC 166

— **Broad-scale clearing (\$393,750)** *Chief Executive of the Office of Environment and Heritage v Cory Ian Turnbull* [2017] NSWLEC 140



Restorative justice 01





Restorative justice 02





Publication orders





Writing an apology





Capacity to pay a fine





Monetary benefit orders

- **Power given by s 249 of POEO Act**
- **Incorporated by reference into EP&A Act**
- **Power not yet exercised**



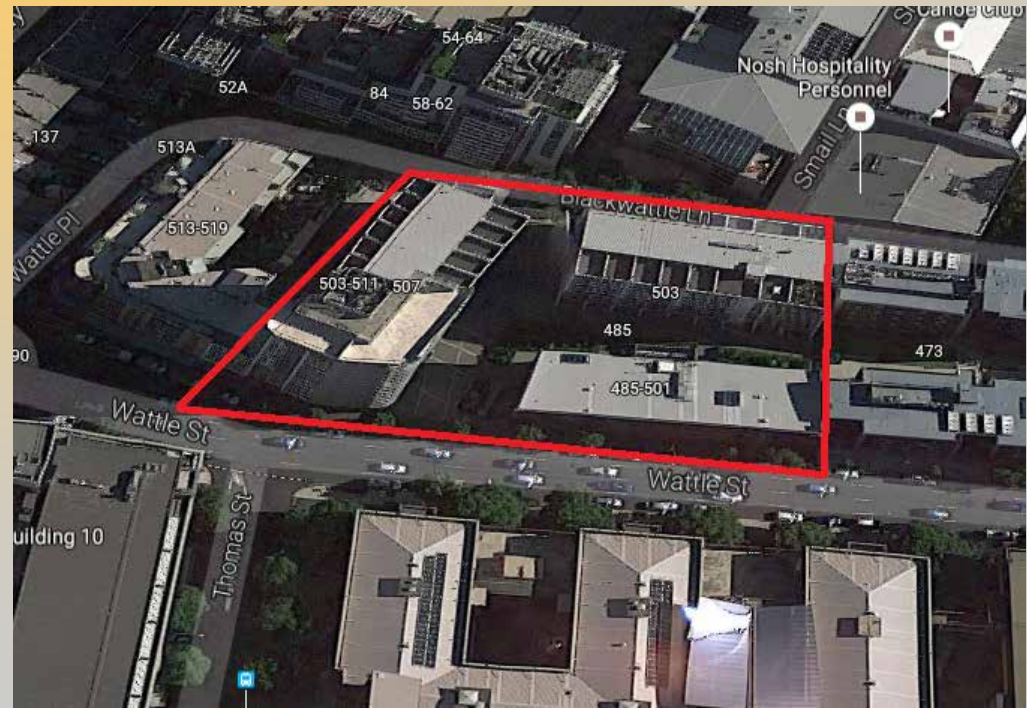


NSW case study– West Apartments and the mysteriously appearing extra apartments & space





The West Apartments' site





West Apartments Pty Limited v City of Sydney Council [2009] NSWLEC 1411



15. *..... In this case, a significant number of additional apartments have been added, at least one level in the commercial area arguably has been added and a significant additional area of floor space appears (and we say, advisedly, appears) prima facie to have been added.*



The expected West Apartments' outcome



**Gross realisations from
the extra levels**

A lot!



Costs

Council legals

\$150,000

Developer legals

~ \$100,000

“Contribution” to Council

Rumoured lowish six figures



Outcome

Likely a handsome profit!!



Potential NSW remedies to protect the public interest and avoid “unjust enrichment”

In NSW:

- q From 15 July 2015, legislative amendment now makes it possible to make a “monetary benefit order” following conviction for development without consent.
- q Such an order is for the payment of *an additional penalty of an amount the court is satisfied, on the balance of probabilities, represents the amount of any monetary benefits acquired by the offender, or accrued or accruing to the offender, as a result of the commission of the offence.*
- q The maximum fine for an offence does not act to limit the amount of such additional penalty
- q Up to half the amount ordered may be paid to the prosecutor





However



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- Ø Although the section provides that *regulations may prescribe a protocol to be used in determining the amount that represents the monetary benefit acquired by the offender or accrued or accruing to the offender*, no such protocol has been prescribed;
 - Ø There have been such provisions in 11 other NSW statutes for some years;
 - Ø I have been unable to find any instance of such an order being made under any statute;
 - Ø Making such an order is discretionary as to amount and any payment to the prosecutor.



“... and now for something completely different”

as in the sense used frequently in *Monty Python's Flying Circus*

The *Proceeds of Crime Act 2002 (UK)*





Where is Bishops Stortford?





The Bishops Stortford Football Club's site and the Timelast Ltd-owned land





The approved “park and ride” business for Stansted Airport





Timelast's "park and ride" business





The pre-enforcement history for the car park



- **Timelast Ltd is owned by Mr Del Basso**
- **The Timelast land is rented to the Football Club**
- **June 1999, an application was made to the local council for 201 parking spaces. Consent granted for match days only**
- **July 2000, an application for consent for “park and ride” refused**
- **Before and after July 2000, the Timelast land was used for “park and ride” without consent**
- **Mr Del Basso and a Mr Goodwin were the guiding and controlling minds at all times**



The enforcement history



- **August 2000, Council advises no consent for “park and ride” and use should cease**
- **January 2003, Council serves enforcement notice**
- **October 2003, planning appeal dismissed by Inspector**
- **February 2004, leave to appeal to the High Court is refused**
- **Use as “park and ride” continues uninterrupted**
- **September 2004, first prosecution and conviction. Appeals fail**
- **Use as “park and ride” continues uninterrupted**
- **January 2006, second prosecution**
- **June 2007, guilty pleas to second prosecution**



“... a nice little earner”



- Turnover of the “park and ride” business was £1,881,221.19
- After payment of taxes, rates, VAT and any other operating costs, Mr Del Basso’s and Mr Goodwin’s “profits” were each less than £180,000

Del Basso & Goodwin v R [2010] EWCA Crim 1119 (*Del Basso*) (but not much, by implication at [43])



The available amount – s 9 of the POC Act



The only effective limit to the amount which may be recovered is the totality of the assets owned by the person against whom the confiscation order is made.



The confiscation order in *Del Basso*

- Judge Baker QC made a confiscation order against Mr Del Basso under the *Proceeds of Crime Act 2002* for **£760,000**. This amount was the total of Mr Del Basso's assets.
- No order was made against Mr Goodwin as he had no assets





The underpinning rationale for *Del Blasso*

“.... The law, however, is plain. Those who choose to run operations in disregard of planning enforcement requirements are at risk of having the gross receipts of the illegal businesses confiscated. This may greatly exceed their personal profits. In this respect they are in the same position as thieves, fraudsters and drug dealers.”

First instance judgment of Judge Baker QC



The Court of Appeal

- An appeal to the Court of Appeal by Mr Del Basso was dismissed
Del Basso & Goodwin v R [2010] EWCA Crim 1119 (*Del Basso*)
- ***“The economic or environmental harm is only one part of the picture: the other is that a requirement to observe the law is imposed on all and Mr Del Basso and Mr Goodwin have only themselves to blame for their persistent failure to do so. The confiscation aspect of these proceedings does not represent an abuse of process”.***
Del Basso at [45] per Leveson LJ





The European Treaty on Human Rights & the POC Act



R v Waya [2012] UKSC 51 (not a planning case)





Further instances of confiscation orders confirmed on appeal (not appealed orders unknown)



1. In September 2012, Brent and Harrow Council obtained a confiscation order for £1,400,000 for conversion of a single house into 12 flats without planning permission.
2. In January 2013, South Buckinghamshire District Council obtained a confiscation order of £250,000 for unauthorised commercial use of green belt land.
3. In August 2013, Ealing Council obtained an £11,000 confiscation order for unlawful use of an outhouse building as a rental property.
4. In November 2014, London Borough of Brent obtained a ~£500,000 confiscation order for unlawful use of a building as multiple residences (approved as a shop & one flat)



Concluding thoughts on POC Act



- The attraction of the “surgical brutality” of the POC Act
- Could Australian States possibly agree to a POC-like Act applying for breaches of planning regimes?
- Could we (as judges) cope with the lack of discretion?
- If so, would the States trust local councils with POC Act powers and the \$\$ attraction of confiscation?





CONCLUSION