The scope of sentencing for environmental crime in NSW

Justice Tim Moore
Land and Environment Court of NSW 4 March 2018

Introduction

The purpose of this paper is to examine the present scope for sentencing for environmental crimes in New South Wales in three broad areas. These are:

- Pollution offences (water; air; and ground pollution);
- Breaches of the primary land use planning statute[1] (including charges of contempt for breaching court orders relating to land use planning matters); and
- Clearing of protected vegetation (whether urban trees or broad-scale clearing of native vegetation for agricultural purposes).

It is to be observed, at the outset, that this paper makes extensive references to the primary land use planning statute in New South Wales, the *Environmental Planning and Assessment Act 1979* (the EP&A Act). On 1 March 2018, that is, three days ago, a major overhaul of this legislation came into effect. Whilst, for the purposes discussed in this paper, there are no functional changes, the legislation does have an impact on the way the information in this paper is referenced[2].

Pollution offences

The legislative history for pollution offences

Historically, in New South Wales, offences for pollution have been created by medium-specific legislation for air[3] and water[4] pollution, whilst ground contamination had been dealt with under the legislation[5] which created the early New South Wales environmental regulator (the State Pollution Control Commission (the SPCC), the forerunner of the New South Wales Environment Protection Authority (the EPA)). Each of these statutes created specific medium-relevant nominated offences, with penalties, in the late 1980s, to a maximum of $40,000.

In 1988, there was a change of government in New South Wales, a change which led to a radical reforming of the criminal law concerning pollution offences. In 1989, the

[1] *Environmental Planning and Assessment Act 1979* (NSW)
[2] This arises because the provisions of the legislation have been significantly rearranged and old, long tried provisions have been moved to new statutory locations. The rearranged legislation also adopts a Dewey decimal system citation arrangement so that that previously numbered provision will, in the future, be s 1.1(a)(i). The rearranged legislation only became available in finalised form on the New South Wales legislation website on 1 March 2018. As a consequence, for the purposes of this paper, legislative references to the EP&A Act are made to the familiar citation structure.
[3] *Clean Air Act 1961* (NSW)
[4] *Clean Waters Act 1970* (NSW)
[5] *State Pollution Control Commission Act 1970* (NSW)

legislature passed the *Environmental Offences and Penalties Act 1989* (the 1989 Act), a statute which brought together in a single piece of legislation all of the relevant pollution offences. As originally formulated, the 1989 Act imposed a maximum penalty of $1,000,000 for a corporation and, in the case of an individual, $150,000 or 7 years' imprisonment, or both. This meant that, for the first time in New South Wales, a jail sentence was also available to be imposed on an individual convicted of a pollution offence.

In 1990,[6] the legislation adopted a three-tier hierarchy for the prosecution of offending conduct within its scope.

Tier 1 offences were those of the greatest seriousness. To obtain a conviction for a Tier 1 offence, the prosecutor had to demonstrate *mens rea* or reckless indifference or negligence on behalf of a defendant. The penalties available to be imposed on a convicted defendant, if successfully prosecuted for a Tier 1 offence, were, in 1991, a maximum fine of $250,000 for an individual and $1,000,000 for a corporation.

Tier 2 offences were ones of strict liability and provided a maximum fine of $60,000 for an individual and $125,000 for a corporation. In addition, daily penalties could also be imposed where the conduct was of an ongoing nature.

Tier 3 offences were those punishable by the issuing of an infringement notice which was accompanied by the imposition of a mandated fine. The fines were differentiated by having regard to the nature of the offending conduct and were set by a schedule established by regulatory instrument.

Although the medium-specific offences had been subsumed in the 1989 Act, the broader regulatory framework in the individual medium-directed statutes remained.

In 1991, the SPCC was replaced by the EPA. The EPA not only assumed all of the regulatory functions of the abolished body, but also had transferred to it a range of regulatory functions from other departments (an example was the transfer of regulatory functions arising under the *Radiation Control Act 1990* from the Department of Health to the EPA). These structural changes were effected by the enactment of the *Protection of the Environment Administration Act 1991*. This legislation did not effect changes to the 1989 Act.

Part of the brief to the EPA was to develop an integrated legislative structure for licensing of; regulating process for; and prosecuting crimes concerning what might be described as the "brown end of the spectrum" of human activity. This led, in 1997, to the passage of omnibus legislation entitled the *Protection of the Environment Operations Act 1997* (the POEO Act). The 1989 Act was absorbed into the POEO Act, retaining the three-tier structure earlier described.

The present penalty levels

The POEO Act draws a distinction drawn between penalties applied to Tier 1 offences committed wilfully, and offences committed negligently – with the penalties for the former set much higher. The present penalty levels for Tier 1 and 2 offences are:

[6] *Environmental Offences and Penalties (Amendment) Act 1990* (NSW)

- In the case of a corporation, the maximum penalty for a Tier 1 offence is $5,000,000 for an offence that is committed wilfully or $2,000,000 for an offence that is committed negligently. In the case of an individual, the maximum penalty for a Tier 1 offence is a fine of $1,000,000 or 7 years' imprisonment, or both, for an offence that is committed wilfully or $500,000 or 4 years' imprisonment, or both, for an offence that is committed negligently.

- In the case of a corporation, the maximum penalty for a Tier 2 offence is a fine of $1,000,000 and a further fine of $120,000 for each day the offence continues. In the case of an individual, the maximum penalty for a Tier 2 offence is a fine of $250,000 and a further fine of $60,000 for each day the offence continues.

For Tier 3 offences, the present range of infringement notice penalties which can be imposed by the EPA is between $80 and $15,000 for an individual and between $300 and $15,000 for a corporation. The penalties specified for nominated offences punishable by infringement notices are specified by regulation[7] and, therefore, are easier to adjust over time.

Enforcement

Enforcement for offences under the POEO Act lies primarily with the EPA. Prosecutions for offences falling within Tier 1 or 2, in the Land and Environment Court (the Court), are undertaken by the EPA. There is, however, an option for prosecuting Tier 2 offences or for dealing with contested Tier 3 infringement notices, by having those matters dealt with by a magistrate in the Local Court. In such instances, the Local Court has a jurisdictional limit of 1,000 penalty units, or $110,000, when dealing with Tier 2 offences. The Local Court does not have the power to impose sentences of imprisonment for environmental offences.

Severity and conviction appeals from the Local Court for environmental offences lie to the Court.

Contemporary penalties

In 2017, for the first time[8], the total financial penalties imposed in a single Tier 2 prosecution[9] has exceeded $1 million (water pollution from a coal mine being discharged a World Heritage Protected National Park). The total penalty actually imposed of a little more than a $1 million was arrived at after appropriate adjustments had been made to the assessed appropriate starting penalty[10], with the adjustments in favour of the offender having regard to the entry of early pleas of guilty and consideration of the other subjective factors weighing in favour of the defendant.

As later noted in the discussion on the restorative justice options available to divert financial penalties to fund either general or specifically nominated positive environmental outcomes, the orders in these proceedings adopted that beneficial

[7] Protection of the Environment Operations (General) Regulation 2009 (NSW) s 82 and Sch 6
[8] *Environment Protection Authority v Clarence Colliery Pty Ltd; Chief Executive, Office of Environment and Heritage v Clarence Colliery Pty Ltd* [2017] NSWLEC 82
[9] Prosecutions under the POEO Act and the *National Parks and Wildlife Act 1974*
[10] The assessed total starting penalty was $1,750,000

diversionary approach.

Discounts for guilty pleas

The *Crimes (Sentencing Procedure) Act 1999* requires, by the combination of ss 21A(3)(k) and 22, that regard being had to the utilitarian value to the administration of justice of guilty pleas. Although there is no statutory discount regime for this, the guideline decision of the Court of Criminal Appeal[11] established that, ordinarily, guilty pleas at the earliest appropriate opportunity should attract a discount on sentence (including of financial penalties) of 25%.

The additional orders powers in Part 8.3 of the POEO Act

The POEO Act contains a broad suite of additional order making powers – ones relevant to convicted offenders are individually discussed later.

However, for present purposes, it is necessary to note that, from 15 July 2015, the range of orders in Part 8.3 of the POEO Act was also made available under the EP&A Act by their referenced importation by virtue of s 126(2A) of the EP&A Act.

Failure to disclose political donations

There has been, over the past decade or so, a significant public controversy in New South Wales about the influence of political donations on the land use planning system. One of the consequences of this has been the banning of making of political donations by persons or entities that meet a statutory definition of being a developer. That ban has been upheld by the High Court[12] and found not to be an infringement of the implied right of freedom of political communication.

However, in addition in NSW, since 1 October 2008, there has been an obligation placed upon those persons making development applications, or making submissions about development proposals made by others, to disclose whether they have made any reportable political donations. The disclosure requirements are contained in the EP&A Act.

Failure to disclose reportable political donations, in the context of the land use planning system, is made an offence as a consequence of the insertion of s 147 into the EP&A Act. The relevant elements of this provision are in the following terms:

> **147 Disclosure of political donations and gifts**
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> (1) The object of this section is to require the disclosure of relevant political donations or gifts when planning applications are made to minimise any perception of undue influence by:
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> > (a) requiring public disclosure of the political donations or gifts at the time planning applications (or public submissions relating to them) are made, and

[11] In *R v Thompson; R v Houlton (2000) 49 NSWLR 383; [2000] NSWCCA 309*
[12] *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34

(b) providing the opportunity for appropriate decisions to be made about the persons who will determine or advise on the determination of the planning applications.

Political donations or gifts are not relevant to the determination of any such planning application, and the making of political donations or gifts does not provide grounds for challenging the determination of any such planning application.

.....

(11) A person is guilty of an offence under section 125 in connection with the obligations under this section only if the person fails to make a disclosure of a political donation or gift in accordance with this section that the person knows, or ought reasonably to know, was made and is required to be disclosed under this section. The maximum penalty for any such offence is the maximum penalty under Part 6 of the Election Funding and Disclosures Act 1981 for making a false statement in a declaration of disclosures lodged under that Part.

The form required for disclosure of such donations is accompanied by two pages of explanatory material detailing the requirements of the disclosure regime. Disclosures are obliged to be made when applications or submissions are lodged with a local consent authority, or are lodged with the Minister for Planning and Environment, and the development is of a type considered sufficiently significant to be determined by either the Minister or the Minister's delegate.

The requirement to disclose not only arises for a development proponent, at the time of lodging the development proposal, but also arises, separately, at any time a development proponent seeks to modify a development for which approval has been given.

These obligations to disclose are completely separate from the obligation to disclose which arises under the *Election Funding, Expenditure and Disclosures Act 1981* for the purposes of the Public Register of Reportable Political Donations.

Whilst there is no readily available information as to the extent of any issuing of penalty notices for such failures to disclose, there have been four prosecutions undertaken in the Land and Environment Court for breaches of these disclosure provisions.

In each of these proceedings, each defendant pleaded guilty. For three of proceedings, the maximum available penalty was $22,000 or twelve months jail for each offence. For the most recent case, the relevant maximum penalties had been doubled as a result of legislative amendments which took effect from 28 October 2014.

In all instances, the defendants were corporate entities, although the failures to disclose arose in differing circumstances.

The decision in the most recent case[13] was handed down on 2 March 2018. There were five charges and guilty pleas had been entered at the earliest opportunity – this giving rise to a discount on the total starting penalties[14] of 25%. There was a single aggravating factor. Limited positive subjectives resulting in only a modest further

[13] *Secretary, Department of Planning and Environment v Shoalhaven Starches Pty Ltd* [2018] NSWLEC 23
[14] $180,000

discount[15] and, after making allowance for totality and accumulation, the final total penalty imposed was $107,000. In addition, the defendant was ordered to pay the prosecutor's costs in the agreed sum of $40,000.

Appeals to the Court of Criminal Appeal

Although comparatively rarely invoked, sentencing by the Land and Environment Court is subject to the gentle supervisory guidance of the Court of Criminal Appeal, including on matters of severity of sentence.

In recent years, there has been one such severity appeal[16] and it was successful.

Although no fault was found in any of the matters dealt with by the primary judge[17] in his legal and factual analysis of the offending conduct to which the defendant had pleaded guilty (a Tier 2 prosecution for the discharge of contaminated water onto neighbouring farmland, resulting in the death of a number of cattle), on appeal the primary judge's imposition of a water pollution fine of $400,000 out of a total fine of $460,000 was considered by the appellate bench to be inappropriately severe, with the water pollution fine being reduced to $300,000 and thus the overall financial penalty being reduced to a total of $360,000.

The publication order made by the primary judge (including terms that had been contested at first instance) was not challenged on appeal.

Orders of the Court

Remedy or restrain orders

The Land and Environment Court (the Court) has broad, general order-making powers to remedy or restrain breaches of environmentally protective statutes. These powers are given for orders addressing offending conduct which is causing some form of pollution and also encompasses orders addressing breaches of land use planning regimes or the broad-scale clearing of native vegetation. The orders can require rectification works, such as revegetation of areas where clearing has taken place, but can also encompass environmentally restorative orders mandating that a convicted environmental offender pay for the cost of community-benefiting restoration projects undertaken on public land. Necessarily, the imposition of, and scope for, such orders is discretionary and unfettered, save for tests of proportionality.

For land use planning, local councils also have an order-making power[18] for the purposes of remedying or restraining breaches of local planning controls. There are two aspects of this local order-making power that are relevant to considering the sentencing powers of the Court.

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[15] A total discount of 27.5% resulted in a total penalty of $124,000 before consideration of the issues of totality and accumulation.
[16] *Dyno Nobel Asia Pacific Pty Ltd v Environment Protection Authority* [2017] NSWCCA 302
[17] *Environment Protection Authority v Dyno Nobel Asia Pacific Pty Ltd* [2017] NSWLEC 64
[18] *Environmental Planning and Assessment Act 1979* (NSW) s 121B

First, there is a right of appeal to the Court[19] to challenge the merits of the order which has been made. Such merit appeals are usually dealt with by a commissioner of the Court rather than by a judge. The powers of the Court are extensive and encompass modification of an order as well as the upholding or discharging of it. However, relevantly, after an appeal against a council order is determined, and the order is left on foot in some fashion, the continuing order then becomes an order of the Court and is capable of enforcement through the Court if it is breached.

There is a defined list of orders arising from land use planning issues which local councils can make, with the list setting out three elements in a table[20]. The elements are:

- The act or omission giving rise to the need to make an order;
- The scope of the remedies available to be ordered to address the problem; and
- The classes of persons upon whom the requirement to satisfy the order can be imposed.

Punishment for breaches of orders of the Court

As a superior court of record, the Court has the full range of powers available to it to deal with and, if necessary, punish for contempt persons or entities who fail to abide by the orders of the Court. Such enforcement action is undertaken by the body (state regulatory authority or local council) who had originally sought the orders.

The power of the Court to punish a contemnor is broad and, provided a notice of the possibility is affixed to a copy of the sealed orders of the Court when served on an alleged contemnor, the alleged contemnor is potentially liable to imprisonment and/or sequestration of property in addition to the imposition of fines. The requirement for such a notice is contained in the Uniform Civil Procedure Rules 2005[21].

Charges for contempt are brought before a judge of the Court on, perhaps, two or three occasions each year. The punishments will, if the charge is proved, generally involve the imposition of a fine and can include deferred fines that will only fall to be paid if the contempt is not purged by fulfilling whatever obligation has been imposed by the original order of the Court.

However, the Court does have the power to impose a sentence of imprisonment and to suspend such sentence conditionally upon the contemnor addressing rectification of the contempt. The power to impose a sentence of imprisonment on a contemnor and have that sentence carried out has only arisen once in the recent history of the Court when, in 2017, a three-month sentence was imposed[22] on a person who had previously been ordered to undertake remedial action on land under supervision of an engineer. The remedial action being to rectify impacts on neighbouring properties and on the public domain. However, the contemnor had decided to carry out further

[19] *Environmental Planning and Assessment Act 1979* (NSW) s 121ZK
[20] *Environmental Planning and Assessment Act 1979* (NSW) s 121B
[21] Part 40, r 7(3)
[22] *Lake Macquarie City Council v Gordon* [2017] NSWLEC 122

activities that were contrary to the remedial orders and where the supervising engineer had warned that this would be the case and that the work proposed in breach of the orders would not achieve the outcome sought by the remedial orders.

Arrest and extradition

The Court has the usual powers to ensure that a charged person is brought before the Court when they do not otherwise attend to answer a summons which has been served on them. This power extends to arresting an alleged contemnor[23] and having that person brought before the Court.

In one case currently before the Court, an accused who is charged with fly-dumping of asbestos contaminated waste material (and who has prior convictions[24] for such conduct) had moved to Victoria and did not attend to answer the summonses served on him by the EPA. The Court issued a warrant for his arrest, a warrant which was executed in Victoria, leading to his extradition to appear before the Court. He was held in custody for a period of time until a bail application was made for him by his legal representatives, leading to him being released from custody on conditional bail. He has now pleaded guilty to the various charges with a sentencing hearing to take place in mid-May.

Clearing of vegetation

Urban trees

There are only limited circumstances when it is not necessary to obtain the approval of a local council for the removal of any substantial tree in an urban area. Failure to seek approval prior to the removal of protected urban trees can be prosecuted as a breach of the EP&A Act, as the instruments protecting such trees and establishing the regime for seeking approval to remove are subordinate instruments derived from the EP&A Act framework. Prosecutions for removal of trees without consent are usually conducted by the relevant council before a magistrate in the Local Court.

However, prosecutions for such offences where a council considers that a serious breach has occurred can also be undertaken in the Land and Environment Court. Recent examples of prosecutions of this type have arisen when:

- The trees which were removed were members of an endangered ecological community[25] (fine imposed of $60,000);
- A significant number (74) of urban trees were removed, including trees on public open space[26] (fine of $16,000). The otherwise appropriate starting fine ($45,000) was moderated, having regard to the financial circumstances of the offender, and was set at a level equal to the fees that were paid by the property owner for the removal of the trees (in order to ensure that the contractor received no financial benefit from the crime to which he had pleaded guilty); and

[23] *Holroyd City Council v Khoury* [2016] NSWLEC 29
[24] *Bankstown City Council v Hanna* [2014] *NSWLEC 152*
[25] *Willoughby City Council v Rahmani* [2017] NSWLEC 166
[26] *Ku-ring-gai Council v Edgar* [2017] NSWLEC 49

- Where the removed tree was located in a designated heritage conservation area and made a contribution to the streetscape of that area[27] (fine of $50,000).

Although these cases are comparatively rarely prosecuted at the superior court level, such prosecutions are not confined to being taken against the contractor who undertook the tree removal[28] but can also arise from charges laid against the person who is the owner of the property and who has instructed the contractor who undertook the actual removal[29].

Indeed, the prosecution of a property owner who is alleged to have authorised the removal of the trees dealt with in *Ku-ring-gai Council v Edgar* is set down for a contested five-day hearing in mid-April (understood to be on the question of whether the property owner did, in fact, instruct and authorise clearing of the trees to the extent which was undertaken by the contractor). The offences giving rise to prosecutions for urban tree removal are strict liability ones.

Broad-scale native vegetation clearing

Prosecutions for broad-scale native vegetation clearing have arisen, until comparatively recently, as a consequence of the regulatory regime established by the *Native Vegetation Act 2003* (NSW) (the Native Vegetation Act). This legislation has recently been repealed and replaced with *Biodiversity Conservation Act 2016* (NSW). This new legislative regime, whilst establishing a different regulatory process to regulate the clearing of native vegetation, nonetheless broadly retains the same offence-creating structure as in the repealed legislation.

Prosecutions for unlawful broad-acre clearing of native vegetation have arisen from land clearing in north-western New South Wales, where extensive areas have been cleared in order to improve the agricultural utility of such land (usually by being able to undertake cropping activities rather than the land merely being suitable for grazing).

The regulatory regime has been significantly controversial amongst a comparatively small portion of the relevant farming community, as a number of its members believe that the State has no right to interfere with their ability to manage their land as they see fit for profitable agricultural activities. Reliance on what are considered by these landholders to be their inalienable rights derived from the Magna Carta[30] is often pressed in support of this proposition.

Although significant financial penalties[31] can be imposed for illegal broad-scale land-clearing, the compensatory revegetation orders able to be imposed[32] also effect significant financial burdens being put on the convicted defendant. The burdens not only arise from the costs of carrying out the required works necessary to achieve the revegetation outcomes, but also from the denial of the future anticipated financial benefits sought to be achieved from the original unlawful land clearance activity.

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[27] *Burwood Council v Abdul-Rahman (No 2)* [2017] NSWLEC 177
[28] *Ku-ring-gai Council v Edgar*
[29] *Burwood Council v Abdul-Rahman (No 2)* – op cit and *Willoughby City Council v Rahmani* op cit
[30] The original 1215 version executed by King John at Runymede
[31] *Chief Executive of the Office of Environment and Heritage v Cory Ian Turnbull* [2017] NSWLEC 140 where a fine of $393,750 was imposed
[32] See, for example *Turnbull v Director-General, Office of Environment and Heritage (No 2)* [2014] NSWLEC 112

This prosecution regime for broad-scale native vegetation land-clearing is not without tragic side consequences, as evidenced by the fact that one convicted landowner murdered[33] an environmental compliance officer, whose role involved investigation of and, where appropriate, preparation of prosecutions for such illegal land-clearing.

Funding environmental works as an alternative to a fine

Introduction

The Additional Orders provisions in Part 8.3 of the POEO Act also include s 250(1)(a), a provision which permits the making of orders to require a financial penalty that might otherwise have been imposed as a fine to be diverted for the purposes of carrying out environmental works.

There are two avenues by which this is achieved. These are discussed below:

(1) Diversion to a specific project

One form that this financial diversion process can follow is to require that the convicted offender fund a specific environmental project, generally one with some functional or geographic relationship with the location where the offending conduct occurred. For example, when there was a significant discharge of a water treatment plant chemical into a local waterway, part of the financial penalty imposed on the public utility[34] which owned the plant was to undertake an environmental restoration project at the Dungog[35] Common Recreation Reserve at a project cost of $150,000.

Such financing orders can be in either complete or partial substitution for the amount of the fine that would otherwise have been ordered.

When an order is proposed by a prosecutor that a specific environmental project be funded, the nature of the project and the maximum financial contribution to be made toward it are frequently settled in discussions between the prosecutor and the legal representatives of a defendant.

An agreement of this nature does not fetter the Court with respect to the quantum of the financial impost appropriate to be imposed on a convicted defendant, as the agreement will specify the maximum amount to be contributed to the project. If the quantum of the putative penalty identified by the Court is less than the cost of the project, the project will need to be revised to reflect the money available. If, on the other hand, the cost of the project is less than the financial impost considered appropriate by the Court, a fine can be

[33] *R v Turnbull (No. 26)* [2016] NSWSC 847 – Mr Turnbull convicted of the murder and sentenced with a non-parole period of 24 years

[34] *Environment Protection Authority v Hunter Water Corporation* [2016] NSWLEC 76. In addition a further $37,500 was ordered to be paid to the Environmental Trust discussed below.

[35] Dungog is a town in the Hunter Valley outside which the water treatment plant is located.

imposed above the project cost to bridge the difference or the difference ordered to be paid to the Environmental Trust[36] as discussed below.

These discretionary processes enable the Court to order that such financial diversion act as a form of environmental restorative justice rather than simply having the financial penalty form part of the financial income stream to consolidated revenue in the State Treasury.

(2) Payment to the Environmental Trust

In 1990, the New South Wales Government enacted legislation to establish three Environmental Trust Funds[37]. Initially, these Trusts were funded by pollution charges on businesses discharging industrial effluent into Sydney's sewerage treatment system.

In 1998, the three Environmental Trusts were rolled[38] into a single statutory Environmental Trust, a body funded, primarily, from consolidated revenue. The statutory objectives in the legislation establishing the Trust are:

> **7 Objects of Trust**
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> The objects of the Trust are as follows:
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> (a) to encourage and support restoration and rehabilitation projects in both the public and the private sectors that will or are likely to prevent or reduce pollution, the waste-stream or environmental degradation, of any kind, within any part of New South Wales,
> (b) to promote research in both the public and the private sectors into environmental problems of any kind and, in particular, to encourage and support:
> (i) research into and development of local solutions to environmental problems, and
> (ii) discovery of new methods of operation for New South Wales industries that are less harmful to the environment, and
> (iii) research into general environmental problems, and
> (iv) assessment of environmental degradation,
> (c) to promote environmental education and, in particular, to encourage the development of educational programs in both the public and the private sectors that will increase public awareness of environmental issues of any kind,
> (d) to fund the acquisition of land for national parks and other categories of dedicated and reserved land for the national parks estate,
> (e) to fund the declaration of areas for marine parks and for related purposes,
> (f) to promote waste avoidance, resource recovery and waste management (including funding enforcement and regulation and local government programs),
> (g) to fund environmental community groups,

[36] See, for example, *Environment Protection Authority v Custom Chemicals Pty Ltd* [2016] NSWLEC 146
[37] *Environmental Restoration and Rehabilitation Trust Act 1990; Environmental Research Trust Act 1990; Environmental Education Trust Act 1990*
[38] *Environmental Trust Act 1998*

(h) to fund the purchase of water entitlements for the purposes of increasing environmental flows for the State's rivers and restoring or rehabilitating major wetlands.

However, the Trust is also able to receive additional contributions, including contributions ordered to be paid to the Trust by the Court in lieu of a fine which might otherwise be imposed.

It is not uncommon, when an individual environmental project is not ordered to be funded, that a financial penalty which might otherwise be imposed will be diverted to the Environmental Trust[39].

Publication orders

Amongst the powers that are given to the Court by Part 8.3 of the POEO Act is one that enables the Court to make what is known as a "publication order". This power is contained in s 250(1)(a), a provision which reads:

250 Additional orders

(1) **Orders**

The court may do any one or more of the following:

(a) order the offender to take specified action to publicise the offence (including the circumstances of the offence) and its environmental and other consequences and any other orders made against the person,

A publication order requires a convicted defendant to place a "name and shame" advertisement in nominated publications. The advertisement will set out the nature of the offending conduct; the penalties and costs required to be paid and details of associated matters such as remediation orders.

As well as specifying the terms of the notice which is to be published, the orders will specify the publications in which it is to appear and the dimensions of the notice.

The imposition of a publication order is a penalty and, therefore, the comparatively recent availability of this power for land use planning offences could not have retrospective operation[40].

For offences prosecuted under the POEO Act, the making of a publication order has been an almost inevitable request made by the prosecutor. The terms of the proposed notice are usually settled between the prosecutor and the defendant. Occasionally, there is a contest as to the wording, with the legal representatives of the defendant usually seeking to soften the prosecutor's proposed description of the

[39] See, as examples, *Environment Protection Authority v Clarence Colliery Pty Ltd; Chief Executive, Office of Environment and Heritage v Clarence Colliery Pty Ltd* [2017] NSWLEC 82 ($1,050,000 in total to be paid to the Trust) and *Environment Protection Authority v P&M Quality Smallgoods Pty Ltd; Environment Protection Authority v JBS Australia Pty Limited* [2017] NSWLEC 89 ($150,000 in total to be paid to the Trust)

[40] *Secretary, Department of Planning and Environment v AGL Energy Limited; Secretary, Department of Planning and Environment v AGL Upstream Infrastructure investments Pty Limited* [2017] NSWLEC 2 at [125] to [133]

offending conduct.

Usually, the practice has been to order publication of such notices in relevantly circulating local or regional newspapers (for offences in the Hunter Valley, for example, publication might be ordered in the *Newcastle Herald* (circulating regionally) and the *Singleton Argus* (circulating in the community where the offending conduct occurred)).

However, for offending conduct by a major corporate, in addition to the general and specific deterrent value of publication of such notices on this regional or local basis, the general deterrent value will be enhanced if publication is required on a national basis to bring such prosecutions to the attention of the wider Australian business community. As a consequence, such convicted defendants have been required to place the "name and shame" notice in the nationally circulating *Australian Financial Review*[41]. In addition, because research has shown that odd-numbered pages (those on the right when a newspaper is open) are more closely examined (as are pages closer to the front of the publication). Publication orders can also specify the location within the publication where the notice is to appear. The orders specifying the publication of such a notice also usually require the time period after the making of the order within which the notice is to be published and mandate the provision of a copy of the page of the publication displaying the notice be provided to the prosecutor (and sometimes to the Court) within a specified period after publication[42].

As earlier observed, the power to order publication of name and shame notices for offences under the EP&A Act is of comparatively recent availability, with the first order[43] of this nature being made on 2 March 2018, only two days before this conference!

Apologising to affected individuals

The scope of the additional order-making power is sufficiently broad that it is possible to order that the managing director of a company that caused air pollution resulting in the temporary closure of a nearby business to respond to the individual employees who were affected.

In that instance, where a number of the employees who had been adversely affected by the air pollution impacting on the temporarily closed business needed to seek medical attention, the managing director of the polluting company was ordered[44] to write individual letters to each of the adversely affected employees of the nearby business apologising for the failure of his company's systems, thus causing the air pollution.

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[41] First occurring in mid-2009 in *Environment Protection Authority v Werris Creek Coal Pty Ltd; Environment Protection Authority v Holley* [2009] NSWLEC 124

[42] As to location and timing of notices, see, for example, *Environment Protection Authority v Dyno Nobel Asia Pacific Pty Ltd* [2017] NSWLEC 64 at [180] to [183]

[43] In *Secretary, Department of Planning and Environment v Shoalhaven Starches Pty Ltd* [2018] NSWLEC 23, prosecutions for failure to declare reportable political donations when making applications to amend an approved development.

[44] *Environment Protection Authority v Nulon Products Australia Pty Ltd* [2015] NSWLEC 153

The terms of the letter of apology formed part of, and were appended to, the terms of the decision. The requirement for those letters was in addition to a financial penalty of $120,000 and a publication order of a more general "name and shame" type.

Prosecution of an individual

It is rare, when a corporation is prosecuted for causing pollution, that an individual employee, one who is the primary actor in causing the pollution, is also prosecuted. However, it is not unheard of. In one comparatively recent incident involving the spilling of diesel fuel from a tugboat in Newcastle Harbour, because the vessel's engineer forgot to turn off a pump before finishing his shift, the Port Authority, unusually, elected to prosecute the engineer in addition to prosecuting the tugboat company. This resulted in a penalty of $81,000 being imposed on the engineer, in addition to a penalty of $600,000 imposed on the company.[45]

Having regard to capacity to pay a financial penalty

New South Wales has a statutory provision, applicable across all prosecutions for offending conduct when a financial penalty might be imposed that permits the moderation of what would otherwise be the appropriate penalty after having regard to the financial circumstances of the offender.

In cases where this issue has been raised in prosecutions in the Court, the Court has required provision of satisfactory evidence as to the assets and income of the individual defendant in determining whether or not to moderate the financial penalty which would otherwise be appropriate[46].

Paying the prosecutor's costs

As an order is almost inevitably made[47] that a convicted offender should pay the prosecutor's costs, the extent of those costs is a matter to be taken into account[48] when assessing the financial penalty appropriate to be imposed for the offending conduct giving rise to the conviction. However, having regard to the prosecutor's costs for such purposes does not mean that the fact that a costs order is to be made should automatically act in any fashion which significantly downgrades the otherwise applicable financial penalty[49].

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[45] *Newcastle Port Corporation trading as Port Authority of NSW v Dudgeon; Newcastle Port Corporation trading as Port Authority of New South Wales v Svitzer Australia Pty Limited* [2015] NSWLEC 139

[46] For an example where moderation was rejected because relevant financial information was not adequately disclosed, see *Wollongong v Eldridge* [2017] NSWLEC 35. For an instance where the otherwise appropriate financial penalty was reduced because of the financial circumstances of the defendant, see *Ku-ring-gai v Edgar* op cit.

[47] s 257B *Criminal Procedure Act 1986*

[48] *EPA v Barnes* [2006] NSWCCA 246

[49] See comments of Preston CJ in *Chief Executive of the Office of Environment and Heritage v Cory Ian Turnbull* [2017] NSWLEC 140 at [260] and [261]

It is to be observed that, in addition to ordering a convicted offender to pay a prosecutor's costs (as understood in a legal sense), the Court also has two supplementary powers concerning financial orders capable of being made.

First, the Court has the power[50] to order that a convicted defendant pay the prosecutor's investigation costs, these being expenses incurred by an environmental investigating authority, such as the EPA, when those costs (usually scientific) are necessarily incurred before a decision is made to commence prosecution.

Second, a prosecutor is entitled to seek an order that a moiety of any fine be paid directly to the prosecutor[51,52].

Monetary Benefit Orders – breaches of planning laws

Introduction

Amongst the wide range of additional orders potentially available by the application of Part 8.3 of the POEO Act to convicted offenders across the very broad spectrum of what can be regarded as environmental crime, as earlier discussed, s 249 gives the Court the power to impose a "monetary benefit order". The statutory provision is in the following terms:

> **249 Orders regarding monetary benefits**
>
> (1) The court may order the offender to pay, as part of the penalty for committing the offence, 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.
>
> (2) The amount of an additional penalty for an offence is not subject to any maximum amount of penalty provided elsewhere by or under this Act.
>
> (2A) The 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.
>
> (3) In this section:
>
> *monetary benefits* means monetary, financial or economic benefits.
>
> *the court* does not include the Local Court.

No protocol pursuant to s 249(2A) has been promulgated.

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[50] The power to make investigation costs orders is one of those additional powers given by s 248 in Part 8.3 of the POEO Act.

[51] s 122 *Fines Act 1996* (NSW)

[52] See a discussion in *Secretary, Department of Planning and Environment v AGL Energy Limited; Secretary, Department of Planning and Environment v AGL Upstream Infrastructure Investments Pty Limited* [2017] NSWLEC 2 as to whether it was still appropriate to make such an order in circumstances where a separate power now existed to order a convicted defendant to pay a prosecutor's investigation costs – holding that it was..

A provision giving this power now exists in a total of 11 statutes of a broadly environmental nature, including, for example, those regulating water management. There is no instance discoverable of the utilisation of the power to make such an order.

The precise scope of what might fall within the proper exercise of making such an order is undefined. However, it is clearly to be inferred that such an order, if made, is intended to deprive a convicted offender of enjoying any fruits from the offending conduct that are in excess of any penalty which might otherwise have been imposed punishment.

The purposes of this section of this paper are to set out, first, a case study from New South Wales of circumstances where, had there been a prosecution rather than a settlement negotiated by the relevant planning consent authority, the Council of the City of Sydney (the City Council), and had the developer then been convicted, making a monetary benefit order might have been appropriate.

This paper then discusses the position which applies in England, as a consequence of the application of the *Proceeds of Crime Act 2002 (UK)*. In circumstances where an offender has been convicted of breaches of land use planning law, this statute provides and interesting conceptual lens through which to examine how the monetary benefit order provisions in New South Wales law might be applied.

The New South Wales case study - *West Apartments*

Introduction

Before turning to discuss specifics of this case, it is appropriate to set out, briefly, the relevant aspects of the New South Wales land use planning regime applying under the EP&A Act framework. There is, relevantly, a two-step process.

First, an application is made to the relevant development consent authority proposing that approval be given to a particular development project. Plans for the proposed development are required to be provided to the consent authority showing sufficient detail to enable the consent authority to assess the plans against the relevant land use planning controls applying to the site of the proposed development. These plans, however, are not required to contain the necessary technical detail to enable construction to take place.

The second step is one which is vested in what is known as the Principal Certifying Authority (which can be the development consent authority but may also be a private consultant certifier retained by the developer). The Principal Certifying Authority is required to approve the detailed plans that permit construction. These second-stage plans are known as the Construction Certificate Plans. The statutory requirement applicable to them is that:

> *the design and construction of the building (as depicted in the plans and specifications and as described in any other information furnished to the certifying authority under clause 140) are not inconsistent with the development consent*,[53]

[53] Cl 145(1)(a) of the Environmental Planning and Assessment Regulation 2000

The West Apartments' development

In 2008/9, West Apartments was constructing a mixed use development on the south-western fringe of Sydney's CBD. The development which had been approved by the consent authority was one which, in its principal built form, comprised a multi-storey development of which the ground level was to be commercial/retail, whilst the remaining levels were to be residential apartments.

An issue arose between the developer and the City Council concerning how the legal title to the underground parking areas was to be subdivided. That dispute was unable to be resolved and the developer commenced merit appeal proceedings in the Court. The Chief Judge assigned two commissioners to hear and determine the merit appeal.

As is customary in development merit appeals in the Court, the proceedings commenced at 9.30 am on the first day with an inspection of the site. When the commissioners arrived, they discovered that, in lieu of the development for which development consent had been given, what had actually been constructed had added significantly additional floor space[54]. Upon enquiry as to how this had happened, the commissioners were advised that:

> "The additional levels were added as part of the Construction Certificate Plans."

The legal outcome

As the dispute being dealt with by the commissioners was an application to modify the original development consent to change the subdivision arrangements, the commissioners were obliged, as a jurisdictional prerequisite, to consider whether or not the development, as proposed to be modified, if the modification was to be approved, would result in a development that was substantially the same as the development which had originally been approved by the consent authority. In this instance, the commissioners did not need to determine the issues as there were other defects which warranted dismissal of the application.

Although there was the potential for the City Council to contemplate taking action under the EP&A Act to remedy the breach occasioned by the building of the additional levels or to have commenced criminal proceedings for failing to construct the building in accordance with the development consent plans (each of which paths could potentially have led to the making of a monetary benefits order), the City Council elected to take a pragmatic approach and negotiate an acceptable outcome. This involved, it is understood, payment of approximately $150,000 to recompense the City Council for its legal costs and a further substantial six-figure sum to the council to be applied for community development purposes. If this was, in fact, the effect of the negotiated outcome, it is also reasonable to assume that, by this process, there also remained a significant further residual financial benefit to West Apartments as the developer of the complex.

Although this might be regarded as an egregious example of conduct arising from land

[54] The Commissioners' judgment records, at [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." – *West Apartments Pty Limited v City of Sydney Council* [2009] NSWLEC 1411

use planning regulations which was potentially criminal, there have also been instances where prosecutions have been undertaken for unlawful development activities, and where, post 15 July 2015, the potential has been available to seek a monetary benefit order. However there have been no instances where this has occurred.

English use of the *Proceeds of Crime Act 2002 (UK)*

Introduction

The leading case concerning the use of the *Proceeds of Crime Act 2002* (UK) (the POC Act) is *Del Basso & Goodwin v R* [2010] EWCA Crim 1119 (*Del Basso)*, a case dealt with by the English Court of Appeal. To understand the import of this case in the environmental planning law enforcement framework in England, it is appropriate to outline a little of the underlying circumstances giving rise to the confiscation order made against Mr Del Basso.

The relevant land use background

Bishops Stortford is a town in some 61 kilometres in a generally northern direction from the centre of London. On the outskirts of the town is located Stansted Airport, one of the second-tier airports serving the Greater London area. As part of the planning approval for the airport, the airport's operating authority was given an exclusive licence to run a park-and-ride scheme, using designated parking areas within the grounds of the airport, for accommodating the vehicles of passengers.

On the fringe of the town closest to the airport, the Bishops Stortford Football Club had its football ground. The football ground had comparatively limited parking for fans attending club matches. Land adjacent to the football club was owned by Timelast Ltd, a company whose principals and guiding minds were Mr Del Basso and Mr Goodwin.

The local consent authority sanctioned an arrangement between Timelast and the football club whereby the Timelast land was used for additional parking for some 200 vehicles, with the approved arrangement being that this parking was to take place on match days only.

Mr Del Basso and Mr Goodwin had other ideas. In July 2000, Timelast made an application for consent to run a "park and ride" service from the parking area adjacent to the football club's land – an application which was refused.

Although they had no consent to use Timelast's land for "park and ride", Mr Del Basso and Mr Goodwin nonetheless established a park-and-ride scheme, operating in competition with the lawful scheme, providing services for passengers using Stansted Airport.

Before and after July 2000, the Timelast land was used for "park and ride" without consent. Mr Del Basso and Mr Goodwin were the guiding and controlling minds of Timelast at all relevant times.

Enforcement action against Mr Del Basso and Mr Goodwin

The relevant subsequent chronology was as follows:

- In August 2000, the Council advises no consent for "park and ride" and thus the use should cease;
- January 2003, the Council serves an enforcement notice;
- October 2003, a planning appeal against the refusal of the development proposal was dismissed by the Planning Inspector appointed by the Minister to hear the appeal;
- In February 2004, leave to appeal to the High Court against the Planning Inspector's decision is refused;
- However, use as "park and ride" continues uninterrupted;
- In September 2004, first prosecution and conviction. Appeals fail;
- Use as "park and ride" continues uninterrupted;
- In January 2006, a second prosecution;
- In June 2007, guilty pleas to the second prosecution.

At the sentencing hearing post the 2007 guilty pleas, the Prosecutor applied for a confiscation order under the POC Act.

The financial benefits of the "park and ride" business

Turnover of the "park and ride" business during its operation 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 not much less than £180,000.[55]

The relevant provisions of the POC Act

Not all of the provisions of the POC Act are relevant in cases where confiscation orders might be made for what would be regarded as land use planning crimes. Appendix 1 to this paper sets out a summary of relevant points arising from the application of the POC Act to such crimes, together with the citation of the relevant provision of the Act.

It is, however, important to note that 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[56].

The first instance hearing

The full decision of the first instance hearing on the application for confiscation order in

[55] *Del Basso* at [43]
[56] s 9(1) of the POC Act

Del Basso has not been published. However, the decision was relevantly quoted in the decision of the Court of Appeal. The relevant portion quoted was in the following terms:

> …. 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.[57]

The confiscation orders

Judge Baker QC, at first instance, made a confiscation order against Mr Del Basso under the POC Act for £760,000 – being the total available amount of Mr Del Basso's assets.

No order was made against Mr Goodwin as he had no assets

The decision of the Court of Appeal

Judge Baker's decision was appealed to the Court of Appeal. The appeal was dismissed.

The relevant comment made in the decision of the Court of Appeal for the purposes of this consideration is:

> 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[58].

Confiscation orders and human rights

Although not arising out of proceedings for a confiscation order concerning a conviction for an environmental or land use planning crime, the provisions of the POC Act have been challenged in the United Kingdom Supreme Court on the basis that they contravened the European Treaty on Human Rights[59]. There are three relevant elements from the leading judgement of Lord Walker given in dismissing the challenge to the POC Act, generally, whilst holding that there might be very limited unusual circumstances under which a confiscation order might be liable to be set aside. His Lordship made the following observations:

> The Crown Court no longer has any power to use its discretion so as to mould the confiscation order to fit the facts and the justice of the case, even though a confiscation order may arise in every kind of crime from which the defendant has benefited, however briefly[60].
>
> …

[57] First instance judgment of Judge Baker QC quoted with approval by Leveson LJ in *Del Basso* at [46]
[58] *Del Basso* at [45] per Leveson LJ
[59] *R v Waya* [2012] UKSC 51
[60] Ibid at [4]

> The order making duty can be seen … as subject to the qualification:
>
> > "except insofar as such an order would be disproportionate and thus a breach of Article 1, Protocol 1."
>
> It is necessary to do so in order to ensure that the statute remains Convention-compliant, as Parliament must, by section 3 of HRA, be taken to have intended that it should. Thus read, POCA can be "given effect" in a manner which is compliant with the Convention right. The judge should, if confronted by an application for an order which would be disproportionate, refuse to make it but accede only to an application for such sum as would be proportionate[61].
>
> …
>
> It will be only in very unusual circumstances that a confiscation order would be disproportionate and thus breach the Treaty obligations[62].

Planning offence cases following Del Basso

There appear to have only been a limited number of cases after the decision in *Del Basso* where there have been appeals against the making of confiscation orders arising out of land use planning offences. All four appeals failed. A list of the nature of those proceedings and their outcomes are set out in Appendix 2.

Conclusion

The New South Wales Parliament has provided, through statutory accrual over the last two-and-a-half decades, a comprehensive suite of sentencing tools able to be utilised by the Land and Environment Court when punishing offenders convicted of environmental crimes.

The availability of orders which divert what would otherwise be penalties accruing to the general state revenue, also enables the Court to effect specific or general environmental restorative justice outcomes.

The Court has sought to utilise the options available to it in a fashion which not merely provides specific deterrence for the convicted offender and general deterrence for the broader community, but one which embraces, in appropriate instances, restorative justice options.

As can be seen from the statutory provisions discussed, the range of penalties available, and the offences to which they apply, provide a strong and effective framework to address offending conduct across the full “brown” and “green” spectrum of the environmentally regulatory landscape.

The monetary penalties actually imposed, together with the utilisation of the other non-monetary options, show that the Land and Environment Court sentences

[61] Ibid at [16]
[62] Ibid at [25]

convicted environmental offenders in an appropriately stringent fashion, responsive to the legislature's reflecting of community expectations for such criminal activity.

There remains, however, one sentencing option, the imposition of a monetary benefit order, that has yet to be explored. No doubt, when an appropriate opportunity arises, the Court will utilise this power and, always subject to guidance from the Court of Criminal Appeal, prevent convicted environmental offenders from profiting from their criminal activity.

Like the theological mysteries, all will be revealed in the fullness of time!

Appendix 1

Jurisdiction

- The jurisdiction to make a confiscation order can be exercised by the Crown Court (equivalent to District/County Court) **(s 71)**
- If a person is convicted before a Magistrate's Court and the prosecutor proposes to seek a confiscation order, the Magistrate must commit the defendant to the Crown Court for sentence (the punishment then being limited to that available to the Magistrate but there being no limit on the confiscation order able to be made) **(s 70)**

Making a confiscation order

- Making a confiscation order is mandatory if the prosecutor asks for it **(s 6(3)(a))**
- Making a confiscation order is also at the discretion of the Court if one is not requested **(s 6(3)(b))**
- If the defendant has a "criminal lifestyle" (s 75) and he has benefited from his general criminal conduct, an amount is determined and a confiscation order made **(s 6(4)(a)&(b) and s 6(5))**
- If the defendant does not have a "criminal lifestyle" but he has benefited from his specific criminal conduct, an amount is determined and a confiscation order made **(s 6(4)(c) and s 6(5))**
- Confiscation orders are able to have default prison sentences attached if not satisfied (see *Hussain v The Crown (London Borough of Brent)* [2014] EWCA Crim 2344)

A "criminal lifestyle"

- For planning offences, a person has a "criminal lifestyle" if the offence:
    - constitutes conduct forming part of a course of criminal activity **(s 75(2)(b))**; or
    - is committed over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence **(s 75(2)(c))**
- For the present proceedings, if also convicted on 3 or more other offences from which he has benefited **(s 75(3)(a))**; or
- He was convicted on two separate occasions in the previous 6 years for offences from which he has benefited **(s 75(3)(b))**
- The benefit must be not less than £5,000 **(s 75(4))**

After finding a "criminal lifestyle"

- If a "criminal lifestyle" is found, four assumptions are mandated as applying after a determined date:
    - Any property transferred to the defendant was as a result of criminal conduct **(s 10(2))**;

- Any property held by the defendant was obtained as a result of criminal conduct **(s 10(3))**;
- Any expenditure by the defendant was from property obtained as a result of criminal conduct **(s 10(4))**; and
- For the purposes of valuing such property, it is assumed to be unencumbered **(s 10(5))**.

- These presumptions are rebuttable by a defendant (on the civil standard) **(s 10(6)(a))** and the Court may not make any such assumptions if there "would be a serious risk of injustice" by doing so **(s 10(6)(b))**

The scope of a confiscation order

- For the purposes of deciding the recoverable amount, the available amount is the aggregate of–
-
    - (a)the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and
    - (b)the total of the values (at that time) of all tainted gifts**. (s 9(1))**

Appendix 2

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)