

Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

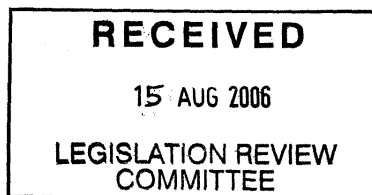


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The Hon. Peter Breen, M.L.C.

14 August 2006

Mr Allan Shearan MP
Chairman
Legislation Review Committee
Parliament House
Macquarie Street
Sydney NSW 2000



Dear Mr Shearan

I refer to your current review of Strict and Absolute Liability Offences in New South Wales and thank you for the opportunity to make a brief submission in the context of a case currently before the Land and Environment Court.

My constituent X is charged under section 98(2)(a) of the National Parks and Wildlife Act 1974 in that he applied a bird repellent to certain pipes under a residential building. The product called 'Scarecrow' did not have any warning on the label that it might cause death or injury to certain species of birds. In the event, 78 Welcome Swallows were harmed as a result of coming into contact with the product.

Because the offence of harming protected fauna is a strict liability offence, my constituent pleaded guilty at the first opportunity and co-operated fully in the investigation of the matter even though he never imagined that 'Scarecrow' might cause any harm to the birds. Nevertheless, the prosecution pursued the case with a vengeance and ran up a bill of \$6,500, which my constituent is expected to pay.

I enclose for your information a copy of the prosecutor's submissions on penalty and you will see that apart from the exorbitant legal bill, my constituent could spend six months in jail and incur a monetary penalty of \$96,800. These penalties are far in excess of what ordinary citizens should be expected to pay for offences they could never contemplate without the benefit of adequate warnings.

May I respectfully suggest that the Committee review all strict and absolute liability offences with a view, firstly, to providing a system of adequate warning before breaches can be committed, and secondly, that persons admitting their offences be allowed to pay fines and restitution without the need for court proceedings.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'P. Breen'.

IN THE LAND AND ENVIRONMENT COURT

Between

**DIRECTOR-GENERAL OF THE DEPARTMENT OF ENVIRONMENT AND
CONSERVATION**

(Prosecutor)

and

[REDACTED]

(Defendant)

SUBMISSIONS ON PENALTY

THE OFFENCES

1. The defendant has been charged with an offence under s 98(2)(a) of the *National Parks and Wildlife Act 1974* in that he harmed protected fauna.

MAXIMUM PENALTY

2. The maximum penalty for an offence against s 98(2)(a) of the *National Parks and Wildlife Act 1974* is \$11,000 (100 penalty units) and an additional \$1,100 (10 penalty units) in respect of each animal that is harmed or imprisonment for 6 months or both: s 98(2)(a) *National Parks and Wildlife Act 1974*.
3. Accordingly, the maximum penalties for this offence is **\$96,800** or imprisonment for 6 months or both, being \$11,000 plus an addition \$1,100 in respect of each animal that was harmed (namely 78 Welcome Swallows).

**ENVIRONMENTAL HARM ARISING FROM THE COMMISSION OF THE
OFFENCES**

4. The evidence shows that a total of 78 Welcome Swallows were affected by as a result of the commission of the offence. Approximately 27 Welcome Swallows were found dead, and approximately 51 Welcome Swallows were injured.

SENTENCING CONSIDERATIONS

5. In addition to the environmental harm arising from the commission of the offences the prosecution submits that the following factors are relevant to determining the appropriate penalty in this circumstance:

Objective seriousness of the offence

(i) The maximum penalty for the offence

6. The Prosecutor submits that the maximum penalty for each offence is relevant to determining the appropriate penalty in this circumstance and indicates the objective seriousness of each offence. The NSW Parliament has indicated that these matters are to be treated as an objectively serious offence by providing a maximum fine of \$11,000 an additional \$1,100 (10

penalty units) in respect of each animal that is harmed or imprisonment for months or both for an offence against s 98(2)(a) of the *National Parks and Wildlife Act 1974*

7. The maximum penalty available reflects the public expression by Parliament of the seriousness of the offence: *Camilleri's Stock Feeds Pty Limited v Environment Protection Authority* (1993) 32 NSWLR 683 at 698 (per Kirby P, Campbell and James JJ agreeing). The insertion of specific offences for harming protected fauna also indicates Parliament's specific intention to deter individuals from the type of conduct undertaken by the Defendant.

(ii) The objectives of wildlife protection legislation

8. The prosecution submits that the objectives of wildlife protection legislation is a relevant matter for the Court to consider in determining the objective seriousness of the offence. In *Bentley v BGP Properties* [2006] NSWLEC 34, Preston J outlined the objectives of such legislation in the context of an offence under s 118A(2) of the *National Parks and Wildlife Act 1974*. Preston J stated at [148] – [149] that such legislation was:

... designed to warn potential offenders of the seriousness with which the community views conduct which contravenes these requirements to protect threatened species, populations and ecological communities, to deter persons from such conduct and to punish those who nevertheless persist in engaging in such conduct.

The Court must be alive to considerations of this kind and, by the sentence it passes, show its abhorrence of crimes against the environment and significant components of it such as threatened species, populations and ecological communities.

9. The prosecution submits that these objectives are equally applicable to s 98(2)(a) of the *National Parks and Wildlife Act 1974* in relation to protected fauna and indicate that this matter is to be treated as an objectively serious offence.

(iii) The manner of the breach

10. The prosecution submits that the offence is serious given the circumstances of the case. The evidence shows that in total 78 Welcome Swallows were harmed as a result of the actions of the defendant. This represents a significant breach of the legislation, not merely a technical breach of the legislation.
11. The prosecution also submits that the offence is serious given that the actions of the defendant were negligent and could easily have been avoided. The defendant made no attempt to ascertain what types of birds came into the affected area to ascertain whether these birds were in fact non target protected bird species. In addition, the defendant made no effort to ascertain whether there were alternative methods to discourage the birds (which there were), prior to applying the repellent.

12. Following the discovery of the problem, the defendant also showed little concern for the plight of the birds and made less than effective efforts to clean up the area despite being instructed to do so.

THE NEED FOR DETERRENCE

13. Section 3A(b) of the *Crimes (Sentencing Procedure) Act 1999* provides that one of the purposes for which a court may impose sentence is “to prevent crime by deterring the offender and other persons from committing similar offences”. The prosecution submits that this consideration is relevant in the present case.

Specific deterrence

14. The prosecution submits that this consideration is relevant in the present case given the failure of the defendant to make any attempt to ascertain what harm may have resulted as a result of his actions. The prosecution submits that the penalty should comprise an element of specific deterrence in order to ensure that the defendant does not engage in such reckless behaviour and that the defendant complies with the legislation in future.

General deterrence

15. The prosecution also submits that general deterrence is a relevant consideration to reinforce to the rest of the community that harming protected fauna is not acceptable.
16. In *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at 367 Badgery-Parker J stated that “sentencing must embrace powerful considerations of general deterrence”.
17. The importance of general deterrence as a factor particularly relevant to environmental offences was also discussed in *Bentley v BGP Properties* [2006] NSWLEC 34. In that matter, Preston J stated at [139] – [141] that:

The sentence must serve the purpose of general or public deterrence. It is the duty of the Court to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those who might otherwise be tempted by the prospect that only light punishment will be imposed: R v Rushby [1977] 1 NSWLR 594 at 597 to 598.

This factor is particularly relevant to environmental offences. Persons will not be deterred from committing environmental offences by nominal fines: Environment Protection Authority v Capdate Pty Limited (1993) 78 LGERA 349 at 354 and Director-General, National Parks and Wildlife v Wilkinson [2002] NSWLEC 171 (27 September 2002) at paras 85 and 93 per Lloyd J.

The deterrent effect of a fine must send an important message that laws requiring the conservation of the environment and important components of it such as threatened species, must be complied with.

18. The prosecution submits that general deterrence is a particularly relevant consideration in this circumstance given the high level of community interest generated by the matter. In the circumstances, the prosecution submits that the penalty incorporate an element of general deterrence to ensure that the general public is aware of and appreciates the seriousness of the offence.

Section 10 of the Crimes (Sentencing Procedure) Act 1999

19. The prosecution submits that a dismissal under section 10 is not appropriate in any of the present cases for the following reasons:
- the offences in question were significant, not merely technical, breaches of the legislation;
 - the defendant's actions were negligent;
 - Stein J in the Land & Environment Court stated in *Hunter Water Board v State Rail Authority of NSW* (1992) 75 LGRA 22 at 23 "that it will be a rare case when a dismissal under section 556A [the predecessor to s 10] is seen as appropriate to an environmental offence...."
 - the NSW Parliament has indicated that these matters are to be treated as an objectively serious offence by providing a maximum fine of \$11,000 and an additional \$1,100 (10 penalty units) in respect of each animal that is harmed or imprisonment for 6 months or both, for offences under s 98(2)(a) of the *National Parks and Wildlife Act 1974*.

Prior History

20. The defendant has no prior convictions for environmental offences to the prosecutors knowledge.

COSTS

21. The prosecutor seeks prosecutor's costs in the sum of **\$6,500**
22. Note: Section 138(1) of the *National Parks and Wildlife Act 1974* provides that any money payable in respect of penalties and costs shall be paid into the National Parks and Wildlife Fund.