Land and Environment Court

New South Wales

Case Name:	Chief Executive, Office of Environment and Heritage v Clarence Valley Council
Medium Neutral Citation:	[2018] NSWLEC 205
Hearing Date(s):	24 October 2018 and 10 December 2018
Date of Orders:	21 December 2018
Decision Date:	21 December 2018
Jurisdiction:	Class 5
Before:	Preston CJ
Decision:	See orders at [130]
Catchwords:	Offences and penalties – sentence – knowingly harming an Aboriginal object – culturally modified scar tree – cutting down and removal of scar tree – restorative justice intervention in sentencing process – objective circumstances of the offence – undermining the statutory objects to conserve Aboriginal cultural heritage – significantly increased maximum penalty – substantial harm caused – practical measures to prevent harm – control over causes of offence – offence committed recklessly – medium objective seriousness – subjective circumstances of the offender – lack of prior convictions – early plea of guilty – remorse for the offence – assistance to authorities – unlikely to reoffend – retributive, preventative, reparative and restorative purposes of sentencing – monetary penalty directed to Aboriginal cultural heritage projects – publication and notification orders – order to establish training courses – payment of costs Sentencing – restorative justice conference – process for – agreement reached – use of conference and

agreement in sentencing

Legislation Cited:

Aboriginal Land Rights Act 1983
Crimes (Sentencing Procedure) Act 1999 ss 3A, 21A, 22
Criminal Procedure Act 1986 s 257B
National Parks and Wildlife Act 1974 ss 2A(2), 5, 86, 87(1), 90, 90A, 156B, 200(1), 205(1)
National Parks and Wildlife Amendment Act 2010
National Parks and Wildlife Regulation 2009 cll 80C, 80D
Protection of the Environment Administration Act 1991 s 6(2)

Cases Cited:

Anderson v Director-General of the Department of Environment and Conservation (2006) 144 LGERA 43; [2006] NSWLEC 12
Anderson v Director-General of the Department of Environment and Climate Change (2008) 163 LGERA 400; [2008] NSWCA 337
Axer Pty Ltd v The Environment Protection Authority (1993) 113 LGERA 357
Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority (1993) 32 NSWLR 683
Chief Executive of the Office of Environment and Heritage v Crown in the Right of New South Wales [2016] NSWLEC 147
Director-General of the Department of Environment and Climate Change v Rae (2009) 168 LGERA 121; [2009] NSWLEC 137
Elias v The Queen (2013) 248 CLR 483; [2013] HCA 31
Environment Protection Authority v Baiada Poultry Pty Ltd (2008) 163 LGERA 71; [2008] NSWLEC 280
Environment Protection Authority v M A Roche Group Pty Ltd [2015] NSWLEC 29
Environment Protection Authority v Waste Recycling and Processing Corp (2006) 148 LGERA 299; [2006] NSWLEC 419
Garrett v Williams (2007) 151 LGERA 92; [2007] NSWLEC 96
Inkson v The Queen (1996) 6 TASR 1
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25
Muldrock v The Queen (2011) 244 CLR 120; [2011]

HCA 39
Plath v Rawson (2009) 170 LGERA 253; [2009] NSWLEC 178
Plath v Vaccount Pty Ltd t/as Table Land Timbers [2011] NSWLEC 202
R v Campbell [2014] NSWCCA 102
R v Geddes (1936) 36 SR(NSW) 554
R v Howland (1999) 104 A Crim R 273; [1999] NSWCCA 10
R v Kilic (2016) 259 CLR 256; [2016] HCA 48
R v Thomson; R v Houlton (2000) 49 NSWLR 383; [2000] NSWCA 309
Ryan v The Queen (2001) 206 CLR 267; [2001] HCA 21
Veen v The Queen (No 2) (1988) 164 CLR 465; [1988] HCA 14

Texts Cited:

Mark Hamilton, "Restorative Justice Interventions in an environmental law context: Garrett v Williams prosecutions under the Resource Management Act 1991 (N2) and beyond" (2008) 25 Environmental and Planning Law Journal 263
John M McDonald, "Restorative Justice Process in Case Law" (2008) 33 Alternative Law Journal 41
Brian Preston, "The use of restorative justice for environmental crime" (2011) 35 Criminal Law Journal 135
Rob White, "Indigenous communities, environmental protection and restorative justice" (2015) 18 Australian Indigenous Law Review 43
Rob White, "Reparative Justice, Environmental Crime and Penalties for the Powerful" (2017) 67 Crime, Law and Social Change 117

Category:

Sentence

Parties:

Chief Executive, Office of Environment and Heritage (Prosecutor)
Clarence Valley Council (Defendant)

Representation:

Counsel:
Ms A Rose (Prosecutor)
Mr M Wright SC (Defendant)

Solicitors:

Office of Environment and Heritage (Prosecutor)
Marsdens Law Group (Defendant)

File Number(s): 2018/119684

Publication Restriction: Nil

JUDGMENT

A scar tree is harmed

1 Until May 2016, a culturally modified tree stood in Grafton, on the corner of Breimba and Dovedale Streets. The tree was either a Red Bean or Black Bean tree. It had a bifurcated trunk with scarring on two parts of it. The larger scar faced a south westerly direction and was approximately 1.4m tall and 40cm wide. The smaller scar faced a westerly direction and was higher up the trunk.

2 Various reasons for the scarring have been passed down by the knowledge holders to local Aboriginal people. Aboriginal elders have said that the scar tree is culturally significant to the local Gumbaynggirr people and that the scarring was made using a stone axe either as a directional marker directing visitors to nearby Fisher Park, or for ceremonial purposes in connection with other sites in the area, or by someone wanting to make a shield.

3 In 1995, the scar tree was registered as a culturally modified tree on the Aboriginal Site Register. In 2005, the information about the scar tree was transferred from the Aboriginal Site Register to the Aboriginal Heritage Information Management System ("AHIMS") maintained by the Office of Environment and Heritage ("OEH"). The scar tree was thereby identified as an Aboriginal object for the purposes of the *National Parks and Wildlife Act 1974* ("NPW Act"). Under s 86(1) of the NPW Act, it is an offence for a person to harm or desecrate an object that the person knows is an Aboriginal object.

4 The local government authority for Grafton and the Clarence Valley, Clarence Valley Council ("the Council"), lopped the crown of the scar tree in July 2013. The Council was issued with and paid a penalty notice for harming an Aboriginal object, in breach of s 86(2) of the NPW Act.

5 The lopping of the scar tree exacerbated the decline in the health of the tree. In 2015, the Council included the scar tree on the Council's annual stump

grinding list for removal of the tree. On 19 May 2016, the Council completely removed the scar tree. The scar tree was cut into four pieces, including a cut through the lower scar. Remnants of the scar tree were taken to the Council's nursery in Grafton. On 20 May 2016, the Council realised what it had done and self-reported to the OEH that, in completely removing the scar tree, it had harmed an Aboriginal object in breach of s 86(1) of NPW Act.

6 On 27 May 2016, the OEH after an investigation of the offence, seized the remnants of the scar tree pursuant to s 156B(4) of the NPW Act. On 9 June 2016, the remnants of the scar tree were relocated to the National Parks and Wildlife Service's premises at South Grafton, where they remain today.

The Council is prosecuted for harming the Aboriginal object

7 The Chief Executive of the OEH prosecuted the Council for an offence against s 86(1) of the NPW Act. The Council has pleaded guilty to the offence.

8 A sentence hearing has been held. The prosecutor tendered an agreed statement of facts. The prosecutor read the affidavit evidence of Ms Alexandra Simpson, a compliance officer with OEH, concerning the registration of the scar tree as an Aboriginal object and the investigation of the damage to the scar tree in 2013 and 2016; Mr Roger Duroux (or Uncle Roger), an elder of the Gumbaynggirr and Bundjalung tribes, concerning the cultural significance of the scar tree and the shock and sadness its removal caused him; Mr Brett Tibbett, a local Gumbaynggirr man who is the Chief Executive Officer of Grafton Ngerrie Local Aboriginal Land Council, concerning the cultural significance of the scar tree and the devastative effect the loss of the scar tree had on him and other members of the Aboriginal community; Mr Kerry Skinner, a local Gumbaynggirr man who is an Aboriginal Education Officer at South Grafton High School, concerning the cultural significance of the scar tree and the educational "Connection to Country" excursions he has led for students to the scar tree; Ms Lisa Southgate, a representative of the Grafton Aboriginal community and Gumbaynggirr people, who was previously employed as an Aboriginal Heritage Conservation Officer with OEH and realised the importance of the scar tree and registered it as an Aboriginal object on the Aboriginal Site

Register and AHIMS; and Ms Barbara Fahey, a retired teacher, who witnessed and reported to the Council the removal of the scar tree.

9 The Council read the affidavit of Mr Troy Anderson, the Director of Works and Civil at the Council, concerning the lopping of the scar tree in 2013 and the removal of the scar tree in 2016 and the steps taken by the Council in response to both incidents. Mr Anderson was cross examined by the prosecutor on his evidence.

10 At the end of the first day of the sentence hearing on 24 October 2018, the Council agreed to participate in a restorative justice conference with representatives of the Aboriginal communities whose cultural heritage had been harmed by the removal of the scar tree. A restorative justice conference was held on 22 November 2018, facilitated by an experienced restorative justice facilitator, Mr John McDonald, of ProActive ReSolutions. Mr McDonald provided a report on the restorative justice conference to the Court, which was tendered at the resumption of the sentence hearing on 10 December 2018.

11 The Court now needs to determine the appropriate sentence for the offence.

The restorative justice conference between the offender and the victims

12 The nature and purpose of a restorative justice conference was described in *Garrett v Williams* (2007) 151 LGERA 92; [2007] NSWLEC 96 at [41]-[51]. In that case, a restorative justice conference was held between a mining company, who had committed offences against s 90 of the NPW Act by destroying Aboriginal objects and damaging an Aboriginal place near Broken Hill, and representatives of the Aboriginal community who had an association with the objects and place. The restorative justice intervention in that case has been commented on: see John M McDonald, "Restorative Justice Process in Case Law" (2008) 33 *Alternative Law Journal* 41; Mark Hamilton, "Restorative justice intervention in an environmental law context: Garrett v Williams, prosecutions under the Resource Management Act 1991 (NZ) and beyond" (2008) 25 *Environmental and Planning Law Journal* 263; Brian Preston, "The use of restorative justice for environmental crime" (2011) 35 *Criminal Law Journal* 136; and Rob White, "Indigenous communities, environmental

protection and restorative justice" (2015) 18 *Australian Indigenous Law Review* 43.

13 The preparation for and process of the restorative justice conference in this case was described by Mr McDonald in his report to the Court.

14 Stage 1 involved preparation for the restorative justice conference. Mr McDonald read the agreed statement of facts, the affidavits read by the parties and the supporting material tendered by the parties at the sentencing hearing, which had been provided to him by OEH. Mr McDonald conducted preliminary interviews with over 20 people from the Aboriginal communities and Clarence Valley Council, including the people who had given affidavit evidence at the sentencing hearing. Mr McDonald met with and interviewed other people from the Council and the Aboriginal communities in the Clarence Valley. The interviews revealed a wide variety of experiences and opinions about how the scar tree came to be damaged and eventually removed, with the Council admitting responsibility to the Court.

15 Mr McDonald explained the restorative justice process, answering queries and concerns expressed by people he met, while acknowledging people's uncertainty in participating in the restorative justice conference, together with their willingness to do so and see what the process had to offer.

16 Stage 2 involved facilitating the restorative justice conference. The conference was held at the Gurehlgam Indigenous Healing Centre in Grafton. The conference commenced at 8:30am and concluded at 4:30pm on 22 November 2018. The process began with a Welcome to Country, an explanation of the significance of Welcome to Country and an explanation of a history of scar trees and their significance in the Clarence Valley. An opportunity was provided for all participants to introduce themselves individually by talking about their families, their relationship to the Clarence Valley, and connections they shared with each other, either growing up or working in the area, or working in related fields over the past years.

17 The conference then talked about the history of the scar tree in question, including the fact that it was registered on the AHIMS and had previously been damaged by Council staff. Mr McDonald said that:

> "The conversation was respectful, at times emotional, deeply personal, and was undertaken such that all participants had time to talk through their understanding of what had happened, the impact it had on all present as Aboriginal and non-Aboriginal people, and the impact it has had on Aboriginal communities more broadly. It was a respectful and genuine dialogue that allowed a deeper understanding of the significance of what had happened, how it came about, what might be learnt, and what can be done to repair the harm and ensure similar events don't occur."

18 An agreement was reached and signed by all persons present, with Mr McDonald checking that each part of the agreement was considered by all present to be fair and feasible.

19 Stage 3 involved a restorative justice conference agreement. Mr McDonald summarised the comprehensive agreement reached at the conference as focusing on:

> "- cultural awareness and skills developed for CVC [Clarence Valley Council] staff
>
> - supporting CVC Senior Managers and Planners to engage more effectively with Aboriginal people,
>
> - positive recognition of Aboriginal people to the wider CVC community,
>
> - improve consultation via the Clarence Valley Aboriginal Advisory Committee
>
> - employment and youth initiatives in the CVC area
>
> - a Tree Restoration and Interpretation Project directly related to the Scar Tree."

20 Mr McDonald recorded that as part of the conversation in the conference, the Mayor, the Deputy Mayor and the General Manager of the Council each personally apologised for what had happened. Their apologies were made at the conclusion of the conference, with a full appreciation of the gravity of the offence and the harm caused. In addition, the Council field officers who removed the scar tree as part of their work also offered a personal apology to those present. These apologies were all accepted without reservation.

21 The restorative justice conference agreement contained the following actions:

(1) The participants at the conference recommended that, if possible, any financial sanction imposed on the Council by the Court be paid to the Grafton Ngerrie Local Aboriginal Land Council to be utilised for work related to increasing awareness of local Aboriginal history and culture both inside the Council and across the Clarence Valley area generally.

(2) The Council is to implement cultural skills development training, designed and delivered in consultation with the local Aboriginal

community, for planning, senior management and field operations staff of the Council.

(3) The Council is to:

(a) develop strategies and tools to effectively engage with, promote and support Aboriginal people from the Clarence Valley;

(b) develop and implement strategies for local Aboriginal consultation in planning, development and environmental impact or change in order to identify cultural impacts, values and compliance responsibility under the NPW Act and other legislation concerning protection of Aboriginal cultural heritage; and

(c) teach appropriate Council staff to identify cultural items in the landscape, including culturally modified trees, bush tucker, natural resources and stone tool technology basics, and develop strategies and processes for staff to report cultural items in consultation with the Aboriginal community and OEH.

(4) The Council is to design and develop cultural interpretive material in the Clarence Valley area to address recognition and positive representation of Aboriginal people and places in the Clarence Valley, including recognising traditional lands and dual names for Bundjalung, Gumbaynggirr and Yaegl people and country in various locations throughout the valley and naming new estates, parklands or gardens after nominated Aboriginal persons or traditional names agreed by the Aboriginal community and including local Aboriginal people and artists in new naming consultations and proposals.

(5) The Council is to:

(a) review Clarence Valley Aboriginal Advisory Committee involvement and terms of reference in consultation with its members; and

(b) effectively apply the Aboriginal procurement policy on planning and development proposals to improve Aboriginal employment opportunities and assist with infrastructure management, acquisitions and developments in the community.

(6) The Council is to improve Aboriginal employment and youth initiatives in the Clarence Valley Council and business sectors, including to:

(a) acknowledge the skills and experience of the Clarence Valley Aboriginal Advisory Committee Members and Aboriginal community people to effectively identify programs, provide advice and implement change on programs available to the communities;

(b) engage the services of Aboriginal Elders, Knowledge Holders, Community Ambassadors and Members in a pay for service capacity;

(c) continually develop opportunities to increase the Clarence Valley Council's Aboriginal workforce numbers through youth training initiatives, consulting and long-term employment opportunities;

(d) apply Due Diligence processes and engage Aboriginal service providers to ensure compliance;

(e) apply the Aboriginal Procurement Policy to development planning ventures and engage Aboriginal community people and providers; and

(f) investigate and advocate ventures to promote Aboriginal employment in the business community.

(7) The Council is to undertake a tree restoration and interpretation project to address the site destruction and the use of the remaining timber from the scar tree. The Council agrees to:

(a) engage woodworker "Mick" at Ulmarra Woodworks to conduct an immediate insect treatment of the timber; investigate options to creatively reuse the remaining pieces; investigate options to reconstruct the scar sections of the tree; and provide advice on potentially sculpturing the timber through development of a community project;

(b) through research, develop an interpretive display defining the story of scar trees/cultural history in Grafton;

(c) identify areas to house the scar tree/interpretive display such as the library, or plan its inclusion into the proposed extensions of Grafton Art Galley; and

(d) examine how best to mark and commemorate the site, including what costs would be involved in achieving this.

22 Stage 4 involves following up the restorative justice conference and the agreement. Mr McDonald noted that the restorative justice conference was acknowledged by those people present as setting the stage for a new era in relationships and cooperation between the Aboriginal nations and communities in the Clarence Valley area and the Council itself. The agreement is comprehensive and involves a significant commitment by all parties. Mr McDonald agreed to stay in weekly contact with people responsible for implementing the agreement and to provide support for its full implementation. Mr McDonald has planned with the participants a follow up meeting in February 2019 to allow the group to report back to each other and to celebrate progress in the implementation of the agreement.

The process for determining the appropriate sentence

23 The Court, in order to determine the appropriate sentence, needs to consider the relevant circumstances of the offence and the offender, keeping in mind the relevant purposes for which the Court may impose the sentence. The facts of and the results of the restorative justice conference can be taken into account in this sentencing process, but the restorative justice conference is not itself a substitute for the Court determining the appropriate sentence for the offences committed by the Council.

The objective circumstances of the offence

The nature of the offence

24 The objective seriousness of an environmental offence is illuminated by the nature of the statutory provision, contravention of which constitutes the offence, and its place in the statutory scheme. A proper understanding of the purpose of creating an offence is assisted by consideration of the objects of the statute. A fundamental consideration of particular relevance to environmental offences is the degree by which, having regard to the maximum penalty prescribed for the offence, the offender's conduct could offend against the legislative objective, expressed in the offence: see *Director-General of the Department of Environment and Climate Change v Rae* (2009) 168 LGERA 121; [2009] NSWLEC 137 at [15] and cases therein cited.

25 The objects of the NWP Act are stated in s 2A(1) to include:

> "(b) the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including, but not limited to:
>
> (i) places, objects and features of significance to Aboriginal people, and
>
> (ii) places of social value to the people of New South Wales, and
>
> (iii) places of historic, architectural or scientific significance,
>
> (c) fostering public appreciation, understanding and enjoyment of nature and cultural heritage and their conservation"

26 The objects of the NPW Act are to be achieved by applying the principles of ecologically sustainable development: s 2A(2) of the NPW Act. The principles of ecologically sustainable development are defined is s 5 of the NPW Act to have the meaning described in s 6(2) of the *Protection of the Environment Administration Act 1991*. This definition provides that ecologically sustainable

development can be achieved through the implementation of certain principles and programs, including the precautionary principle, inter-generational equity, the conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms.

27 Of particular relevance to cultural heritage is inter-generational equity, which is described as requiring "that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations". The protection and conservation of places, objects and features of cultural significance to Aboriginal people implements inter-generational equity by ensuring that the present generation, who have inherited cultural heritage from previous generations, maintains, enhances and bequeaths that cultural heritage for the benefit of future generations: see *Anderson v Director-General of the Department of Environment and Conservation* (2006) 144 LGERA 43; [2006] NSWLEC 12 at [199], [200] and *Anderson v Director-General of the Department of Environment and Climate Change* (2008) 163 LGERA 400; [2008] NSWCA 337 at [85].

28 One of the principal means by which these objects are achieved in relation to Aboriginal cultural heritage is by the NPW Act prohibiting the harming or desecration of Aboriginal objects and Aboriginal places. This prohibition is in s 86 of the NPW Act, which is the offence provision in this case. The NPW Act enables a person to be relieved of the prohibition by applying for and have issued an Aboriginal heritage impact permit under s 90 of the NPW Act.

29 It is a defence to a prosecution for an offence under s 86 if the defendant shows that the harm or desecration concerned was authorised by an Aboriginal heritage impact permit and the conditions to which the Aboriginal heritage impact permit was subject were not contravened: s 87(1) of the NPW Act.

30 Before making an application for the issue of an Aboriginal heritage impact permit, the applicant must carry out an Aboriginal community consultation process in accordance with cl 80C of the National Parks and Wildlife Regulation 2009 ("the Regulation"). The persons to be consulted include Aboriginal persons who may hold knowledge relevant to the Aboriginal objects

or Aboriginal places that the applicant proposes to be harmed: cl 80C(2). The applicant is to consult about the methodology proposed to be used in the preparation of the cultural heritage assessment report and on the draft cultural heritage assessment report: cl 80C(6) and (8).

31 The application for an Aboriginal heritage impact permit must be in the prescribed form and contain the prescribed information: s 90A(2) of NPW Act. The application must be accompanied by a cultural heritage assessment report: cl 80D(1) of the Regulation. The cultural heritage assessment report is to deal with the following matters in cl 80D(2):

> "(a) the significance of the Aboriginal objects or Aboriginal places that are the subject of the application,
>
> (b) the actual or likely harm to those Aboriginal objects or Aboriginal places from the proposed activity that is the subject of the application,
>
> (c) any practical measures that may be taken to protect and conserve those Aboriginal objects or Aboriginal places,
>
> (d) any practical measures that may be taken to avoid or mitigate any actual or likely harm to those Aboriginal objects or Aboriginal places."

32 The cultural heritage assessment report is also required by cl 80D(3) to include:

> "(a) if any submission has been received from a registered Aboriginal party under clause 80C (including any submission on the proposed methodology to be used in the preparation of the report and any submission on the draft report), a copy of the submission, and
>
> (b) the applicant's response to each such submission."

33 The statutory provisions requiring prior application, heritage assessment and approval for the harming or desecration of Aboriginal objects and Aboriginal places are linchpins of the statutory scheme. An offence involving the harming or desecration of an Aboriginal object or an Aboriginal place without first applying for, undertaking heritage assessment and obtaining approval thwarts the legislative objective expressed in the statutory provisions and the objects of the NPW Act.

34 By causing harm to the Aboriginal object of the scar tree in this case, the Council has undermined one of the express objects of the NPW Act, namely the conservation of places, objects and features of significance to Aboriginal people and, in the circumstance of this case, the discrete cultural heritage of

the Aboriginal people of the Clarence Valley area. The Council's commission of the offence also hindered achieving the object in s 2A(1)(c) of the NPW Act, as the removal of the scar tree precludes the opportunity of fostering appreciation, understanding and enjoyment of the cultural heritage of the scar tree: see *Chief Executive of the Office of Environment and Heritage v Crown in the Right of New South Wales* [2016] NSWLEC 147 at [116].

35 The Council's commission of the offence also was inconsistent with the principles of ecologically sustainable development (see s 2A(2) of the NPW Act), by causing inter-generational inequity. The Council's removal of the culturally significant scar tree prevents the transmission of cultural heritage to future generations of Aboriginal people and other people of New South Wales.

36 The inconsistency of the Council's commission of the offence against s 86(1) of the NPW Act with the objects of the NPW Act is a relevant consideration when determining the appropriate sentence: *Chief Executive of the Office of Environment and Heritage v Crown in the Right of New South Wales* at [119].

Maximum penalty

37 The maximum penalty for an offence against s 86(1) of the NPW Act of knowingly harming or desecrating an Aboriginal object is, for a corporation, $1,100,000. The maximum penalty reflects the public expression by the New South Wales Parliament of the seriousness of the offence: see *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 698; *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39 at [31]. The maximum penalty fixed by the legislature for a particular offence is a measure of ordinal proportionality, the seriousness in which the legislature views the offence compared to other offences.

38 The maximum penalty for the offence was increased significantly in 2010. The *National Parks and Wildlife Amendment Act 2010* repealed the former s 90 of the NPW Act, which made knowingly destroying, defacing or damaging an Aboriginal object an offence, and replaced it with the current s 86 of the NPW Act. The penalty for the offence against s 86(1) of knowingly harming or desecrating an Aboriginal object was increased from 200 penalty units ($22,000) to 10,000 penalty units ($1,100,000). This represents a fifty fold

increase in the maximum penalty. The penalty for the offence against s 86(4) of the NPW Act of harming or desecrating an Aboriginal place was also increased fifty fold.

39 The fifty fold increase in the penalties for the offences of harming or desecrating Aboriginal objects or Aboriginal places reflects the increased seriousness with which the legislature (and the community) views the protection and conservation of Aboriginal cultural heritage and the offences of harming Aboriginal cultural heritage. This increased level of concern about the offences, as reflected in the increased maximum penalty, is to be reflected in the sentences which the Court impose: *R v Howland* (1999) 104 A Crim R 273; [1999] NSWCCA 10 at [17].

40 The maximum penalty provides a sentencing yardstick for the case before the Court: *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [31]; *Elias v The Queen* (2013) 248 CLR 483; [2013] HCA 31 at [27]. A yardstick is an instrument of measurement. The maximum penalty for an offence is used to measure the relevant features of a particular instance of an offence against a worse case: *R v Campbell* [2014] NSWCCA 102 at [28]. The sentencing court is "to consider where the facts of the particular offence and offender lie on the 'spectrum' that extends from the least serious instances of the offence to the worst category, properly so called": *R v Kilic* (2016) 259 CLR 256; [2016] HCA 48 at [19].

The objective harmfulness of the offence

41 The extent of harm caused or likely to be caused by the commission of the offence of harming an Aboriginal object is relevant to the objective seriousness of the offence: s 194(1)(a) of the NPW Act. In assessing the extent of harm caused, the significance of the Aboriginal object that was harmed and the views of Aboriginal persons that have an association with the Aboriginal object, must be considered: s 194(1)(b) and (f) of the NPW Act. It is an aggravating factor if the harm caused by the offence is substantial: s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999* ("Sentencing Act").

42 The scar tree was an Aboriginal object, being an object or material evidence relating to the Aboriginal habitation of the Clarence Valley area (see the

definition of "Aboriginal object" in s 5 of the NPW Act). The cutting down and the removal of the scar tree from the land on which it had been situated harmed the Aboriginal object (see the definition of "harm" in s 5 of the NPW Act).

43 The scar tree was of high significance to the Aboriginal people who had an association with the scar tree. Mr Roger Duroux, an elder of the Gumbaynggirr and Bundjalung tribes, said he was told by a male elder about 30 years ago that "the scarring was made by our people". Mr Duroux continued:

> "The Elder said that the scarring was made using a stone axe. I recall that we spoke about two culturally modified trees in Grafton township and a couple located on the outskirts of town. I am not aware of which trees he referred to that were located on the outskirts of town. I was told by the Elder that the tree was special and that it was possibly a "light tree" or floating tree which means that the bark could have been used to float on water for a specific purpose. I was told that the cuts could also have been made by someone wanting to make a shield."

44 Mr Brett Tibbett, a local Gumbaynggirr man, said he was told in 2005 or 2006 by an elder and then chairperson of the Grafton Ngerrie Local Aboriginal Land Council, Mr David Daley, that:

> "…the tree was a marker tree for the Aboriginal population in the area. This means the tree was used as a directional tree for visitors directing them to an area now known as Fisher Park (also a registered site on AHIMS). Fisher Park was traditionally a location where the Aboriginal population could get fresh water from a billabong, and was also a meeting place and trading area. This scarred tree was significant in that it was used and is linked to other areas of cultural significance. David Daley was a respected Elder in the Grafton area. He was a knowledge holder for the tree."

45 Mr Kerry Skinner, a local Gumbaynggirr man, said he was told about the scar tree in 2012, by his first cousin, John Skinner, another Gumbaynggirr man, who said:

> "This tree is a very important scarred tree because of its proximity to the Clarence River. It has been marked by our people and it is very old."

46 Mr Kerry Skinner said that, after speaking to Mr John Skinner and observing the scarring himself, "I came to understand and believe that the scarred tree was culturally significant to the local Gumbaynggirr population."

47 Ms Lisa Southgate, a representative and nominated spokesperson of the Grafton Aboriginal community and Gumbaynggirr people, who recorded the scar tree as a culturally modified tree, said that she first learnt of the scar tree

in 1995. Two Aboriginal women elders from South Grafton showed her the scar tree. The elders explained that the tree had been scarred for ceremonial purposes in connection with other sites (geographical features) in the area.

48 Members of the Aboriginal community spoke of the extent of emotional harm caused to them by the removal of the scar tree. The Council's removal of the scar tree in 2016 compounded the emotional harm caused by the Council's lopping of the tree in 2013.

49 Mr Duroux explained how the lopping of the scar tree in 2013 had affected him:

> "I could not believe what the workmen had done. It made me very sad that harm had been done to another piece of our culture, our history. This old scarred tree was very special to our community. I spoke to my wife about it that day. I cannot recall the exact words but I would have used works to the following effect. I recall being sad and I said: 'There goes another part of our history'."

50 Mr Duroux then described the impact on him of the removal of the scar tree in 2016:

> "It broke my heart. I couldn't believe it. I got the shock of my life. I slowed down to a stop in my car to look at it and someone beeped their horn at me. It didn't matter. I felt immediate loss and sadness. I said (to myself): 'There goes another bit of our history and culture that has just been taken away and for no reason. It's gone forever'
>
> …
>
> The scarred tree is gone forever now and this saddens me. I cannot share the story about the tree with my grandchildren now, or others in the community. It was a proud tree but it no longer proudly stands on that site."

51 Mr Tibbett described his reaction on hearing that the scar tree had been lopped in 2013:

> "I was very upset and disappointed to hear that this had happened. The tree was an important link to our community and culture. There are not many places within the Grafton town boundary where you can go and visit a significant cultural object that pre-dates European settlement. The loss of this tree is irreplaceable and there was only one of its kind."

52 Mr Tibbett then described his shock on hearing that the scar tree had been removed in 2016:

> "I felt shocked when I heard this. I felt like the Clarence Valley Council had disrespected me and the local Aboriginal community by removing the tree as it was culturally significant to us. I also know from my correspondence with Richie Williamson from the Clarence Valley Council 2014 that the Clarence Valley Council were aware of the scar tree's cultural significance.

> I felt like this action went against the GNLALC's main aim of protecting Aboriginal culture heritage values.
>
> …
>
> We have had a number of GNLALC meetings where the matter of the scar tree removal has been talked about. Other people in my community have talked to me about how they feel about the loss of the scarred tree. For example, one woman said words to the effect of: 'When are they going to start respecting our culture?' My father said: 'What? Again? I am disgusted at how this could be allowed to happen.'
>
> I am personally devastated at the loss of the scarred tree.
>
> Objects like the scarred tree are historically and culturally significant to all Australians and now that it has been removed, it is gone forever."

53 Mr Skinner said when the scar tree was lopped in 2013, it "looked lifeless". This made him "very upset". Mr Skinner described the effect that the removal of the scar tree in 2016 had on him:

> "I feel empty inside now that the scarred tree has gone. It was not just a tree to me. I saw it as a living testimony to our Aboriginal culture which everyone in Grafton could share and enjoy.
>
> I like taking people to see the scarred tree, particularly the kids. I would have kept taking people to see the tree if it was still there. But now I can't.
>
> I think that it is a shame that future generations won't be able to learn from the scarred tree. To me, losing the tree, you can't put it back. It is gone now. It is a shame."

54 Ms Southgate described her reaction and the reaction of the Aboriginal community on learning that the scar tree had been removed in 2016:

> "When I learned that the tree had been removed my first reaction was shock and sadness. The tree had been recorded by me to ensure its significance was recognised and it would be protected. Examples of standing scarred trees are decreasing. As far as I am aware, this tree is one of the few examples anywhere near the Grafton CBD. Aboriginal objects such as this are extremely important to the Aboriginal community as they provide a link between the present and the past and people's ongoing links to the culture and landscape. I am a respected member of my community and nominated spokesperson, particularly in relation to this matter. I can say that my community is extremely upset about the removal of this culturally significant tree, for the same reasons that I am personally upset as outlined above. The removal of the scarred tree has been raised as an agenda item at Aboriginal community meetings such as local Aboriginal Land Council and Goorie Inter-agency Forum. In these meetings, we have discussed our concerns, possible media involvement and I have provided updates and sought feedback about the issues."

55 The high significance in which the scar tree was held by the Aboriginal community and the shock and sadness that its removal has caused the Aboriginal community make the harm caused by the offence substantial. The

prosecutor submitted and the Council accepted that the removal of the scar tree has caused substantial harm to the Aboriginal community arising from the permanent loss of the culturally significant scar tree. This constitutes an aggravating factor under s 21A(2)(g) of the Sentencing Act.

The foreseeability of the harm caused by the offence

56 The extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused by the commission of the offence increases the objective seriousness of the offence: s 194(1)(d) of the NPW Act.

57 The Council in this case could reasonably have foreseen the harm caused to the scar tree and the emotional harm to the Aboriginal people who have an association with the scar tree.

58 The Council, for lopping the scar tree in 2013, was issued with a penalty notice for committing the offence of harming an Aboriginal object in breach of s 86(2) of the NPW Act. The Council thereby became aware that the scar tree was an Aboriginal object, registered in AHIMS. The Council undertook to OEH at the time that it would implement a range of actions in response to the incident, including:

> "a. Providing staff with updated training in accessing the AHIMS;
>
> b. Holding internal training on the OEH's publication: *Aboriginal Scarred Trees in NSW- A field manual* ("The Field Manual");
>
> c. Investigating the feasibility of incorporating OEH data into the Council's street tree database;
>
> d. Reviewing project and operational approval processes to ensure all approvals and assessments are completed;
>
> e. Training staff around the use of the DDCP [the *Due Diligence Code of Practice for Protection of Aboriginal Objects in NSW* published by the Department of Environment, Climate Change and Water on 13 September 2010];
>
> f. Engaging a consultant to prepare a Clarence Valley Aboriginal Heritage Study;
>
> g. Considering the recommendation of the Aboriginal Consultation Protocol subject to resourcing and funding."

59 Thereafter, the Council knew the scar tree was an Aboriginal object and that unless it improved its systems for managing Aboriginal objects, the scar tree

could be harmed again by Council field operations staff cutting down or removing the tree. The Council knew that the lopping of the scar tree in 2013 had caused emotional harm to the Aboriginal community and that any further harm to the scar tree would cause further emotional harm to the Aboriginal community.

The practical measures to prevent harm

60 The existence of, but the failure to take, practical measures to prevent, control, abate or mitigate the harm caused by the commission of the offence increases the objective seriousness of the offence: s 194(1)(c) of the NPW Act.

61 The Council could have taken simple measures to protect the scar tree so as to prevent Council field operations staff cutting down and removing the scar tree. Mr Anderson, the Council's Director Works and Civil, candidly observed:

> "I have reviewed the circumstances concerning the commission of the offence and I believe the offence was committed as a consequence of a failure by the Council to properly implement approved procedures and the failure by staff members to follow existing directions concerning the removal of trees, particularly in light of the previous incident in 2013 involving the same scar tree.
>
> In this regard it seems to me that the incident giving rise to the offence was caused by:
>
> (a) A particular staff member failing to follow the correct procedure detailed in a flow chart and project assessment template referred to later in this affidavit, and giving instructions for the removal of the tree without consulting his supervisor, coordinator or manager.
>
> (b) The absence of training for staff in the identification and maintenance of scar trees.
>
> (c) Poor communication of the 2013 incident within the organisation and poor follow up and training in the consequent measures adopted concerning removal of trees.
>
> (d) The absence of knowledge of the AHIMS Register by relevant staff and the failure to consult it.
>
> (e) The failure of the Council to ensure that the significance of the scar tree was recorded and known to staff following the 2013 incident.
>
> The events leading to the commission of the offence should not have occurred."

62 The Council should have implemented the undertakings it had advised OEH that it was going to implement in response to the incident of lopping the scar tree in 2013. The Council did not do so.

63 The prosecutor submitted, and the Council accepted, that the Council could have undertaken the following actions:

> "The Defendant could have informed everyone in its arboriculture team, following the lopping of the scar tree in 2013, about the trees' significance, the stop-work order and the issue of the Penalty Notice, instead of only discussing it with the Senior Field Operator. Had this occurred, two of the Field Operators involved in the removal of the scar tree in 2016 would have been aware of its cultural significance.
>
> The Defendant could have development a cultural awareness training program, in consultation with the Grafton Ngerrie Local Aboriginal Land Council ("GNLALC"), in 2014 about Aboriginal objects – including the scarred trees in the local government area. This could have been repeated on an annual basis for the workers in the arboriculture team, and again for new staff. It could have included training on how to use existing resources such as:
>
> (a) the *Due Diligence Code of Practice for Protection of Aboriginal Objects in NSW*;
>
> (b) the *Aboriginal scarred trees in NSW – A field manual*;
>
> (c) the AHIMS.
>
> If this had occurred, the Field Operators may have recognised the scarring on the tree was culturally significant and not have included it on the stump grinding list in 2015, or removed it in 2016.
>
> The Defendant could have also liaised with the GNLALC about remedial measures to protect the scar tree and implemented such measures.
>
> Finally, the Defendant could have incorporated data about Aboriginal objects from the AHIMS and other sources – including scarred trees – into the Defendant's street tree database. The Defendant then could have developed a system whereby the workers in the arboriculture team had to check the Defendant's street tree database and/or the AHIMS to see if a tree or stump they had selected for pruning or removal was culturally significant. As a further check in the process, the manager of the arboriculture team would have to review the list before approving the works."

64 Had the Council taken these measures, the Council's field operations staff may have recognised the scar tree as being culturally significant and identified it as a registered Aboriginal object, and may not have included it on the stump grinding list in 2015 or removed it in 2016. As the prosecutor submitted, there was a substantial and systemic failure on the part of the Council to take practical steps to prevent harm to the scar tree.

The control over the causes that gave rise to the offence

65 The extent to which the person who committed the offence had control over the causes that gave rise to the offence is an objective circumstance of the offence: s 194(1)(e) of the NPW Act.

66 The prosecutor submitted, and the Council accepted, that the Council had complete control over the causes giving rise to the offence. The scar tree was removed by the Council's field operations staff and constituted a failure of the Council's systems. The practical measures identified following the incident of lopping the scar tree in 2013 were not implemented so as to prevent the commission of the offence.

The reasons for committing the offence

67 Although the commission of an offence for a commercial gain increases the objective seriousness of an offence (s 194(1)(h) of the NPW Act and s 21A(2)(o) of the Sentencing Act), the Council did not commit this offence for commercial gain.

The state of mind in committing the offence

68 The prosecutor submitted that the Council was reckless in committing the offence. The prosecutor noted that, although the offence against s 86(1) of the NPW Act is a strict liability offence, the commission of the offence intentionally, negligently or recklessly will increase the objective seriousness of the offence: *Plath v Rawson* (2009) 170 LGERA 253; [2009] NSWLEC 178 at [98] and *Chief Executive of the Office of Environment and Heritage v Crown in the Right of NSW* at [129]. The prosecutor submitted that the Council was recklessly indifferent as to whether it caused harm to the Aboriginal object. The prosecutor cited the summary of the test for reckless indifference in *Plath v Vaccount Pty Ltd t/as Tableland Timbers* [2011] NSWLEC 202 at [98]:

> "The term recklessness describes the state of mind of an offender who, while performing or failing to perform an act, is aware of the risk that a particular consequence is likely, in the sense of probable or possible, to result from that act or omission (*Pemble v R* (1971) 124 CLR 107, *La Fontaine v R* (1976) 136 CLR 62 and *R v Crabbe* (1985) 156 CLR 464). Recently in *Blackwell v R* [2011] NSWCCA 93, the Court of Criminal Appeal described the mental element of "reckless" as (at [76]):
>
> > [76] The effect of this line of authority is that where the mental element of an offence is recklessness, the Crown must establish foresight of the possibility of the relevant consequence."

69 The prosecutor submitted that the Council was aware that the scar tree was an Aboriginal object. It was reasonably foreseeable to the Council that harm could be caused to the scar tree because it had caused harm to it in 2013. It was also reasonably foreseeable that failing to implement the undertakings that the

Council had made to the OEH in 2013 would result in further harm to the scar tree. The Council had this knowledge and this foresight when it, through the actions of the Council's arboriculture team, undertook the stump grinding program in 2016. The Council undertook the stump grinding program whilst it was aware that doing so without caution would probably lead to harm. The prosecutor submitted that the Council was therefore reckless when it caused harm to the scar tree. The Council accepted the prosecutor's submission that the offence can be characterised as reckless.

70 As an aggravating factor, the prosecutor bears the onus of proving, beyond reasonable doubt, that the Council committed the offence recklessly. I find that the prosecutor has discharged this onus.

71 The Council, as a body politic of the State, knew after the incident in 2013 that the tree was a scar tree that had been registered as a culturally modified tree on AHIMS and was therefore an Aboriginal object. The Council knew that it was an offence under the NPW Act to harm an Aboriginal object, as it had received a penalty notice for doing so in 2013. The Council undertook to take various actions to prevent a re-occurrence of the events that led to the harming of the scar tree in 2013. These actions included ensuring that the significance of the scar tree was recorded and known to the Council's field operations staff following the 2013 incident, and more generally, training of the Council's field operations staff in the identification and maintenance of scar trees and consultation of AHIMS to identify registered trees. The Council knew that if it did not take these actions there was a risk that the scar tree could be harmed again by the Council's field operations staff. That clearly foreseeable risk eventuated.

72 One of the Council's field operations staff, Mr Brown, was involved in lopping the scar tree in 2013 and was made aware after the OEH's investigation of the lopping incident in 2013 that the Council was fined as a result of this incident because the scar tree was an Aboriginal scar tree. In 2015 Mr Brown discussed with another field operator removing the scar tree and agreed to include it on the Council's annual stump grinding list. Another of the Council's field operation staff who removed the tree in 2016, Mr Martin, was also

involved in lopping the scar tree in 2013 and was aware that the Council had been fined for the lopping incident but was not aware that it was an Aboriginal scar tree until after the tree was removed in 2016.

73 The Council's field operations staff, who physically removed the scar tree, were not made aware that the tree was a culturally significant scar tree and did not check AHIMS or other information sources to ascertain whether the tree was an Aboriginal object, before removing the tree in 2016.

74 Although those field operators might not personally have had the knowledge and foresight concerning the scar tree that I have summarised above, this is not relevant to whether the Council, as a body, had that knowledge and foresight. The Council clearly did have that knowledge and foresight. The Council failed, however, to take action to ensure that its field operations staff had that knowledge and foresight and instead permitted its staff to continue to undertake arboriculture activities, knowing of the risk that the staff might harm Aboriginal objects such as the scar tree. The Council was therefore reckless when it caused harm to the scar tree.

Conclusion on objective circumstances

75 Having regard to the nature of the offence and the extent to which the commission of the offence offended the statutory objects, the high maximum penalty for the offence, the high degree of harm caused by the commission of the offence, the foreseeability of risk of harm, the existence of practical measures to prevent harm, the control over the causes that gave rise to the offence and the recklessness in the commission of the offence, the offence should be considered to be of medium objective seriousness. This falls with the range assessed by the prosecutor and the Council, who both assessed the offence to be serious and within the moderate to high range.

The subjective circumstances of the offender

76 Within the limits set by the objective seriousness of the offence, the Court may take into account the mitigating factors personal to the offender.

The lack of prior convictions

77 The Council has no prior convictions for an environmental offence. The prosecutor accepted that the penalty notice issued in 2013 for the Council's

conduct in lopping the scar tree in breach of s 86(2) of the NPW Act should not be considered to be a conviction for an offence, citing *Environment Protection Authority v M A Roche Group Pty Ltd* [2015] NSWLEC 29 at [25]. The lack of a record of previous convictions is a mitigating factor: s21A(3)(e) of the Sentencing Act.

The early plea of guilty

78 The Council has pleaded guilty to the offence. The prosecutor and the Council agreed that the plea of guilty should be treated as having been given at the earliest opportunity and should attract the maximum discount of 25% for the utilitarian value of the plea of guilty to the criminal justice system: s 21A(3)(k) and s 22(1) of the Sentencing Act and *R v Thomson; R v Houlton* (2000) 49 NSWLR 383; [2000] NSWCA 309 at [152]-[155], [160].

Remorse for the offence

79 The remorse shown by the offender is a mitigating factor if:

> "(i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and
>
> (ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both)": s 21A(3)(i) of the Sentencing Act.

80 The Council has provided evidence that it has accepted responsibility for its actions. The Council voluntarily and swiftly self-reported the commission of the offence to OEH. The Council cooperated with the OEH investigation of the offence. The Council pleaded guilty to committing the offence at the earliest opportunity. The Council has taken action since September 2017 to address the causes of the offence and variously resolved since June 2018 to take further steps to address the causes and consequences of the offence.

81 The Council has acknowledged the harm to the scar tree and the emotional harm to the Aboriginal people who have an association with the scar tree. The Council resolved on 17 July 2018 to:

> "1. Unreservedly apologise and express its extreme remorse to the Aboriginal communities of the Clarence Valley and the Land and Environment Court for the removal of a culturally modified tree, commonly known as a Scar Tree, located at the intersection of Breimba and Dovedale Streets, Grafton.
>
> 2. Upon finalisation of the legal proceedings, undertake consultation with the Clarence Valley Aboriginal Advisory Committee and Grafton Ngerrie Local

> Aboriginal Land Council with regard to suitable and acceptable future management of the site and any other site of significance that the Clarence Valley Aboriginal Advisory Committee care to nominate and installation of interpretive measures to tell the story of the history of the scar tree.
>
> 3. Seek proposals from the Clarence Valley Aboriginal Advisory Committee for the provision of suitable cultural awareness training of Council's staff.
>
> 4. Receive a report to the August 2018 meeting of Council, which provides the listing of all policies, protocols and procedures that are relevant to Aboriginal matters, and the removal and/or maintenance of trees, and that the report provide a schedule which details the timeframe for review of each of these items prior to December 2018."

82 At the meeting held on 21 August 2018, a report was provided to the Council concerning the matters concerned in point 4 of the resolution of the Council of 17 July 2018. The Council, upon considering the report of 21 August 2018, resolved that:

> "1. Council note the schedule of review of policies, protocols and procedures that are relevant to Aboriginal matters and the removal/or maintenance of trees.
>
> 2. Further reports be submitted to Council advising of the outcome of the scheduled reviews, following completion of the reviews."

83 The Council published a further public apology in local newspapers in September 2018. After consultation with Grafton Ngerrie Local Aboriginal Land Council, agreement was reached on the words to be used for a public apology to be made by the Council. The public apology was published in two local newspapers, the Daily Examiner and the Clarence Valley Independent on 19 September 2018 and was published in the Clarence Valley Coastal Views newspaper on 21 September 2018. The letter stated:

> "Letter to the Aboriginal People of the Clarence Valley
>
> It is difficult to find the right words to express the level of remorse the Clarence Valley Council has for the destruction of an Aboriginal scar tree in Grafton.
>
> The destruction of this tree does not represent who we are as an organisation nor does it reflect the respect we have for the Aboriginal community, its culture and beliefs and its history.
>
> The Council acknowledges the importance of the tree to the Aboriginal community and the deep hurt and sense of loss that its destruction has caused.
>
> This tree also helped the wider community to recognise and be educated about the ancient and enduring Aboriginal culture that was here before European settlement and continues today. It is a history of which we should all be proud and it is incumbent on us to show respect for the cultural traditions and objects.

> One of our six core values as an organisation is Respect. We have made a genuine promise to the community that we will be inclusive, treat people with courtesy and fairness, and ensure group and individual is valued and heard. In this instance we failed to meet our own values and those of the wider community.
>
> This apology is unreserved and heart felt. We place enormous value on our relationships with the Aboriginal community. We are stronger as individuals and as an organisation when we work together; when we recognise the importance of our respective cultures and their symbols. We have let the Aboriginal community down and for that we humbly apologise."

84 The letter was signed by the Mayor and the General Manager of the Council.

85 The Council readily agreed to participate in the restorative justice conference with representatives of the Aboriginal communities who suffered emotional harm by the Council's commission of the offence. The Council has paid the full cost of the restorative justice process to date (around $13,000) and has undertaken to pay the costs associated with the follow up of the restorative justice conference agreement. The Council's Mayor, Deputy Mayor and General Manager and the field operations staff in attendance at the restorative justice conference personally apologised to the Aboriginal people present for what had happened and for the emotional harm caused. The Council has undertaken to carry out the actions agreed in the restorative justice conference agreement, which include trying to make reparations for the harm caused by the commission of the offence.

86 The Council's genuine remorse for the offence is a mitigating factor.

Assistance to authorities

87 The Council has cooperated with the OEH investigation and in the preparation of the agreed statement of facts and the conduct of the sentence hearing: s 21A(3)(m) of the Sentencing Act.

The unlikelihood of reoffending

88 By reason of the Council's early plea of guilty, genuine remorse and actions to address the causes and consequences of the offence and the harm caused by the commission of the offence, I find that the Council is unlikely to reoffend: s 21A(3)(g) of the Sentencing Act.

The purposes of sentencing

89 In fixing the appropriate penalty for the offence, the Court needs to consider the purposes of sentencing relevant to the offence and the offender in this case. Section 3A of the Sentencing Act states that:

> "The purposes for which a court may impose a sentence on an offender are as follows:
>
> (a) to ensure that the offender is adequately punished for the offence,
>
> (b) to prevent crime by deterring the offender and other persons from committing similar offences,
>
> (c) to protect the community from the offender,
>
> (d) to promote the rehabilitation of the offender,
>
> (e) to make the offender accountable for his or her actions,
>
> (f) to denounce the conduct of the offender,
>
> (g) to recognise the harm done to the victim of the crime and the community."

90 Of relevance to the offence committed by the Council and the Council as the offender are the sentencing purposes that are retributive, preventative, reparative and restorative.

91 As to the retributive purposes, there is the need for the Court, through the sentence it imposes, to denounce the conduct of the Council, to hold it accountable for its actions, and to ensure it is adequately punished for the offence. The sentence should accord with the general moral sense of the community in relation to the offence that the Council has committed in the circumstances of this case: see *R v Geddes* (1936) 36 SR(NSW) 554 at 555; *Inkson v The Queen* (1996) 6 Tas R 1 at 15-17, 25, 29-31. The sentence needs to reflect the seriousness with which the informed and responsible public views crimes against the environment generally and Aboriginal cultural heritage in particular.

92 Statutory criminal provisions express the community's moral condemnation of conduct that causes or is likely to cause harm to the environment and Aboriginal people. The community's view of the moral reprehensiveness of harming or desecrating Aboriginal objects or Aboriginal places is reflected in the statutory provisions in the NPW Act and Regulation prohibiting harming or desecrating Aboriginal objects or Aboriginal places without first obtaining, and

acting in accordance with, an Aboriginal heritage impact permit. The moral reprehensiveness was emphasised by the legislative amendments in 2010 increasing fifty fold the maximum penalty for the offence of harming or desecrating Aboriginal objects or Aboriginal places.

93 The Court's duty is to take the community's view of crimes against the environment and Aboriginal cultural heritage into account in the sentencing process. If the Court fails to responsibly discharge the duty that has been entrusted to it by the community, confidence in the system of justice will be eroded: *R v Geddes* at 555; *Inkson v The Queen* at 16; and *Ryan v The Queen* (2001) 206 CLR 267; [2001] HCA 21 at [46].

94 The morality of retributive responses results in the principle of proportionality or just desserts or commensurate desserts. This principle is that the severity of punishment should be commensurate with the seriousness of the criminal conduct. Grave (and more morally repugnant) offences merit severe penalties. Minor (and less morally repugnant) misdeeds deserve lenient punishments. Disproportionate penalties, such as severe sanctions for minor wrongs or lenient sanctions for grave wrongs, are undeserved.

95 The principle of proportionality is concerned with observing a correspondence between the relative seriousness of the offence and the relative severity of the sentence. The relative seriousness of the offence is affected by the harm done or risked by the offence and the degree of culpability of the offender (see the earlier discussion in the section on the seriousness of the offence). The principle of proportionality operates as a limiting, but not a defining, principle in determining the appropriate sentence. The principle limits the maximum and the minimum of the sentence that may properly be imposed: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 490-491; [1988] HCA 14.

96 As to preventative purposes, prevention of crime can be achieved by deterrence of the offender and others, incapacitation of the offender (thereby achieving protection of the community) and rehabilitation of the offender. For an offence against the NPW Act committed by a corporation (for which imprisonment is not a sentencing option), deterrence and rehabilitation are relevant.

97 The sentence of the Court needs to achieve the preventative purposes of individual and general deterrence. The sentence needs to deter the offender from committing similar offences in the future. In this case, by reason of the Council's early plea of guilty, genuine remorse and actions to address the causes and consequences of the offence, I find the Council is unlikely to reoffend. This lessens the need for individual deterrence.

98 There is also a need for general deterrence. The sentence of the Court needs to operate as a powerful factor in preventing the commission of similar offences by other persons who might be tempted to do so by the prospect that, if they are caught, only light punishment will be imposed: *R v Rushby* [1977] 1 NSWLR 594 at 597-598. Courts have repeatedly stated, when sentencing for environmental offences, that the sentence of the Court needs to be of such magnitude as to change the economic calculus of persons in determining whether to comply with or to contravene environmental laws. It should not be cheaper to offend than to prevent the commission of the offence. Environmental crime will remain profitable until the financial cost to offenders outweighs the likely gains by offending.

99 Where a fine or other monetary penalty is determined to be appropriate, the amount needs to be such as will make it worthwhile to incur the cost of complying with the law and undertaking the necessary precautions. The amount of the monetary penalty must be substantial enough so as not to appear as a mere licence fee for illegal activity: *Axer Pty Ltd v The Environment Protection Authority* (1993) 113 LGERA 357 at 359-360. The sentence of the Court changes the economic calculus of persons who might be tempted not to comply with environmental laws or not to undertake the necessary precautions. Compliance with the law becomes cheaper than offending. Environmental crimes become economically irrational.

100 Sentences that have this effect result in persons who carry out activities likely to harm the environment, including Aboriginal cultural heritage, internalising the cost of preventing and controlling the harm. This is the polluter pays principle, one of the principles of ecologically sustainable development. Persons who generate pollution and waste should bear the cost of containment, avoidance

or abatement: s 6(2)(d)(i) of the *Protection of the Environment Administration Act*. The sentence of the Court should be such as to make it economically rational for such persons to incur the cost of containment, avoidance or abatement of pollution and waste: see *Environment Protection Authority v Waste Recycling and Processing Corp* (2006) 148 LGERA 299; [2006] NSWLEC 419 at [230]-[232].

101 To improve the effectiveness of sentences as a deterrent, sentences need to be publicised. Publication of sentences influences the perception of potential offenders in relation to the severity of sentences and the probability of being detected and punished. Where potential offenders are made aware of the substantial risks of being punished, many are induced to desist. Publication also increases the criminal stigma associated with the offence. This increases the deterrent effect for those potential offenders susceptible to criminal stigma, particularly corporate offenders: *Environment Protection Authority v Waste Recycling and Processing Corp* at [242].

102 Preventative purposes of sentencing can not only be achieved by deterrence; prevention of crime can also be achieved by reform and rehabilitation of the offender. By changing the offender's attitudes and behaviour, the offender is made less likely to commit crimes. Promotion of rehabilitation of the offender is one of the purposes of sentencing (s 3A(d) of the Sentencing Act). In an environmental context, rehabilitation of an offender might be achieved by ordering the offender to attend or establish training courses. In sentencing for offences against the NPW Act, the Court can under s 205(1):

> "(e) order the offender to attend, or to cause an employee or employees or a contractor or contractors of the offender to attend, a training or other course specified by the court,
>
> (f) order the offender to establish, for employees or contractors of the offender, a training course of a kind specified by the court."

103 As to reparative and restorative purposes, the sentence of the Court needs to recognise and repair the harm caused by the commission of the offence. The emphasis of reparative action is on repairing the harm caused by the commission of the offence. Reparative action can be focused on the environment or Aboriginal cultural heritage harmed by the commission of the offence. For offences against the NPW Act, the Court can order the offender to

prevent, control, abate or mitigate any harm caused by the commission of the offence and to make good any resulting damage: see s 200(1)(a) and (c) of the NPW Act. Reparative action can also be directed to another environment or other Aboriginal cultural heritage with a view to compensating for or offsetting the harm caused by the commission of the offence. For offences against the NPW Act, the Court can under s 205(1):

> "(c) order the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit,
>
> (d) order the offender to pay a specified amount to the Environmental Trust established under the Environmental Trust Act 1998, or a specified organisation, for the purposes of a specified project for the restoration or enhancement of the environment or for general environmental purposes,"

104 Restorative action is more personal and is directed to the victims of the crime and the community affected by the commission of the offence. As White succinctly states: "A restorative approach is concerned with promoting harmonious relationships by means of restitution, reparation and reconciliation involving offenders, victims, and the wider community": Rob White, "Indigenous communities, environmental protection and restorative justice" (2015) 18 *Australian Indigenous Law Review* 43 at 44. A restorative approach is encouraged by the purpose of sentencing in s 3A(g) " to recognise the harm done to the victim of the crime and the community".

105 One means of pursuing a restorative approach is by a restorative justice intervention, such as the restorative justice conference held in this case. The restorative justice conference in this case recognised and gave primary voice to the Aboriginal people whose cultural heritage had been harmed by the commission of the offence. The conference allowed the Aboriginal people to express their views on the significance of the Aboriginal object that had been harmed and how that in turn had harmed both them individually and the Aboriginal community generally. The conference provided a forum for the Aboriginal people to express their views on the matters that the Court is required to take into consideration in sentencing for an offence under the NPW Act: s 194(1)(a), (b) and (f) of the NPW Act.

106 The agreement reached at the restorative justice conference provided for harm reparation, social restoration, community harmony and problem solving,

thereby facilitating restorative justice: see Rob White, "Reparative Justice, Environmental Crime and Penalties for the Powerful" (2017) 67 *Crime, Law and Social Change* 117 at 129.

107 The purposes of sentencing are relevant in selecting the types of penalties that should be imposed for the offence committed by the Council.

108 A monetary penalty of an appropriate scale serves retributive purposes: it punishes the Council for harming the Aboriginal object, makes the Council accountable for its actions in harming the Aboriginal object and denounces the conduct of the Council. A monetary penalty of an appropriate scale also serves preventative purposes: it deters others who might be tempted to harm, or not take action to prevent harm to, Aboriginal objects.

109 Directing the monetary penalty to be paid, not be way of a fine, but to the Environmental Trust established under the *Environmental Trust Act 1998* or a specified organisation for the purposes of a specified project for the restoration or enhancement of the environment or for general environmental purposes serves reparative purposes. The money is directed to repair, by way of taking compensatory action, the harm caused by the commission of the offence.

110 Publication and notification orders serve the purposes of reprobation, prevention and restoration of victims and the community.

111 Publication and notification of the offence, including the circumstances of the offence, and its consequences and the orders made by the Court involves public reprobation: the publications and notifications record the severe disapproval and denunciation by the Court of the conduct of the Council.

112 Publication of the offence, including the circumstances of the offence, and its environmental and other consequences and the orders made against the Council achieves the purpose of general deterrence. Publicising the detection, prosecution and punishment of the offence in newspapers and publicly available media improves deterrence of others who might be tempted to harm, or not take action to prevent harm to, Aboriginal objects.

113 Notification of persons who are victims and other members of the Aboriginal communities who are interested in the offence committed by the Council of

harming an Aboriginal object and its consequences, and the orders made by the Court in sentencing the Council for the offence, promotes restorative purposes. Such notification is a public recognition of the harm done to the victims of the offence and the community.

114 Orders for the offender to attend or establish training courses serve the purposes of rehabilitation of the offender and thereby prevention of crime. By reforming and rehabilitating the offender through training, the offender is less likely to reoffend, thereby preventing crime.

Synthesis of the objective and subjective circumstances

115 The appropriate sentence of the Court needs to be determined having regard to the purposes for which the sentence should be imposed for the offence committed by the Council, the objective circumstances of the offence and the mitigating circumstances of the Council as the offender. The appropriate sentence may, and does in this case, involve a combination of different sanctions or types of penalties to achieve the different purposes of sentencing and thereby achieve a tailor-made sentence that fits the particular offence and the particular offender before the Court. I consider that five types of penalties should be imposed on the Council for the offence it committed.

116 First, I consider that a monetary penalty should be imposed. The level of the monetary penalty is to be determined by instinctive synthesis of the objective and subjective circumstances of the offence and the offender and the relevant purposes of sentencing the offender for the offence: *Markarian v The Queen* at [37]-[39], [51].

117 One of the factors that must be considered in determining the level of the penalty that should be imposed is the maximum penalty prescribed for the offence committed by the offender. The maximum penalty sets a sentencing yardstick for the case before the Court. It is used to consider where the facts of the particular offence committed by the particular offender lie on the spectrum from the less serious instances of the offence to the worst category: *R v Kilic* at [19]. The cardinal proportionality of the penalty imposed (the penalty level within the overall scale of punishment for the offence) should reflect the seriousness of the particular offence committed by the particular offender.

118 Synthesising all of these factors, I consider the appropriate amount of the monetary penalty for the offence committed by the Council is $400,000. This figure should be discounted by 25% for the utilitarian value of the plea of guilty, which results in amount of $300,000.

119 Second, I consider that this monetary penalty, instead of being paid by way of a fine, should be directed to a meaningful project or program that attempts to repair the harm caused by the commission of the offence by the Council.

120 The prosecutor and the Council both submitted that, instead of the amount of the monetary penalty being paid by way of a fine, the amount should be paid, under s 205(1)(d) of the NPW Act, to a specified organisation, the Grafton Ngerrie Local Aboriginal Land Council, for the purposes of promoting and protecting Aboriginal cultural heritage in Grafton and the Clarence Valley. The prosecutor and the Council noted the request of the participants in the restorative justice conference that:

> "…if possible, any financial sanction imposed on Clarence Valley Council by the Court be paid to the Grafton Ngerrie Local Aboriginal Land Council to be utilised for work related to increasing awareness of local Aboriginal history and culture both inside the Council and across the Clarence Valley area generally."

121 The prosecutor and the Council, in consultation with Grafton Ngerrie Local Aboriginal Land Council, suggested three projects and programs that would address the harm caused by the removal of the culturally significant scar tree:

(a) a feasibility study to establish a 'Keeping Place' in the Grafton area for Aboriginal cultural heritage items, including the long-term storage and/or display of the scar tree, and other items that have been repatriated that require restoration, storage and display for community members to visit for educational purposes;

(b) funding research into local Aboriginal cultural heritage, including scar trees, to inform the development of educational resources for the benefit of indigenous and non-indigenous people in the Grafton area to be toured in schools in 2019 and/or to establish a permanent exhibition in Grafton; and

(c) a series of one-day 'Clarence Valley Healing Festivals' to be held in the various local Aboriginal communities in the Clarence Valley throughout 2019 and 2020 to celebrate Aboriginal culture and promote reconciliation through dance, arts and crafts, food, medicine, language and Elder talks on cultural heritage, including scar trees, and a display of artefacts, including the scar tree if the carving is portable.

122 The Grafton Ngerrie Local Aboriginal Land Council has agreed to receive and to use any amount ordered by the Court to be paid to the Grafton Ngerrie Local Aboriginal Land Council for these projects and programs. The Grafton Ngerrie Local Aboriginal Land Council is a statutory body incorporated under the *Aboriginal Land Rights Act 1983*. One of its functions under that Act is to promote and protect Aboriginal culture and heritage. The use of the funds will be controlled by the *Aboriginal Land Rights Act* and will be subject to independent audits.

123 I consider an order in these terms is sufficiently specific to ensure that the monetary amount will be used for purposes that are likely to achieve a degree of reparation for the harm caused by the commission of the offence. This is important to facilitate the reparative purpose of sentencing. The harm caused by the commission of the offence was not only to the Aboriginal object of the scar tree, but also to the Aboriginal people to whom the scar tree was of high cultural significance. The proposed projects and programs seek to repair, as far as can be done, these harms to the Aboriginal cultural heritage and the Aboriginal people.

124 The proposed projects and programs also facilitate the restorative purpose of sentencing. The particular projects and programs chosen recognise the Aboriginal people who are the victims of the offence and the Aboriginal communities who are affected by the commission of the offence. This positive recognition seeks to redress the nonrecognition and misrecognition of Aboriginal cultural heritage and the Aboriginal people who are the knowledge holders and keepers of the cultural heritage that the commission of the offence manifested. However, the proposed projects and programs take this recognition beyond words of apology and consolation to the affected Aboriginal people to active agency by the Aboriginal people in redressing the harm caused by the commission of the offence and preventing future offending and harm to Aboriginal cultural heritage. The proposed projects and programs have been designed in consultation with and will be carried out by a local Aboriginal organisation who will involve the affected Aboriginal people and communities. This engagement and empowering of the Aboriginal people affected by the

commission of the offence is of particular importance having regard to the nature of the offence of harming the cultural heritage of the Aboriginal people.

125 Third, I consider that publication and notification orders should be made under s 205(1)(a) and (b) of the NPW Act. The prosecutor and the Council agreed on the publication and notification orders that should be made and the terms of the notices. I agree with the prosecutor and the Council that the Council should be ordered to publicise the offence (including the circumstances of the offence) and its consequences and the orders made against the Council in two ways: first, in various State and local newspapers and a national Indigenous newspaper and, second, on the Council's website and Facebook page. The Council should be ordered to give notification of the offence and its consequences and the orders made against the Council in two ways: first, by notifying the Local Aboriginal Land Council's in the local government area and the Clarence Valley Aboriginal Advisory Committee and second, by publication in the Council's annual report. The publication of the offence and its consequence and the orders made against the Council will serve the purpose not only of general deterrence of other persons from committing similar offences but also of recognition of the harm done to Aboriginal cultural heritage and the Aboriginal people and communities whose cultural heritage has been harmed.

126 Fourth, I consider that the Council should also be ordered to publicise that its payment of money to the Grafton Ngerrie Local Aboriginal Land Council to be used to promote and protect Aboriginal cultural heritage is as a result of the Council having committed an offence and being ordered by the Court to pay that money as a penalty for the offence, and not for other reasons such as altruism or social responsibility: see *Environment Protection Authority v Baiada Poultry Pty Ltd* (2008) 163 LGERA 71; [2008] NSWLEC 280 at [59].

127 Fifth, I consider that the Council should be ordered to establish a training course for its staff to reform attitudes and behaviour concerning Aboriginal cultural heritage. The prosecutor and the Council agreed that an order should be made under s 205(1)(f) requiring the Council to establish training courses for its employees concerning Aboriginal cultural heritage.

128 The Council had undertaken, at the time of the incident in 2013, to train its employees concerning Aboriginal cultural heritage. One of the actions agreed in the restorative justice conference agreement was to develop and deliver training on cultural skills and Aboriginal cultural heritage. Mr Southgate, as recommended in the restorative justice conference agreement, has developed two training courses. The first is a cultural skills development workshop to assist the Council's field operations staff to identify Aboriginal cultural heritage objects and sites in the field. The second is a cultural skills development workshop for senior management and planning staff to provide an overview of local Aboriginal communities and tools for positive and meaningful engagement and to provide information on the process of due diligence and compliance responsibilities under relevant legislation concerning Aboriginal cultural heritage. Implementing such training will lessen the risk of the Council committing a similar offence of harming Aboriginal objects in the future. I consider an order requiring the Council to establish training courses of the kind proposed is appropriate.

129 Finally, the prosecutor and the Council have agreed that an order should be made that the Council pay the prosecutor's costs in the agreed sum of $48,000. The prosecutor should be compensated for its costs in successfully prosecuting the Council for the offence.

The sentence imposed

130 The Court orders:

(1) Clarence Valley Council (the defendant) is convicted of the offence against s 86(1) of the *National Parks and Wildlife Act 1974* of harming an object that it knew was an Aboriginal object, as charged.

(2) The defendant, pursuant to s 205(1)(d) of the *National Parks and Wildlife Act 1974*, is to pay to Grafton Ngerrie Local Aboriginal Land Council, within 28 days of this order, the amount of $300,000, to be applied towards:

(a) funding a feasibility study to establish a 'Keeping Place' in the Grafton area for Aboriginal cultural heritage items, including the long-term storage and/or display of the scar tree, and other items that have been repatriated that require restoration, storage and display for community members to visit for educational purposes;

(b) funding research into local Aboriginal cultural heritage, including scar trees, to inform the development of educational resources

for the benefit of indigenous and non-indigenous people in the Grafton area to be toured in schools in 2019 and/or to establish a permanent exhibition in Grafton; and

(c) funding a series of one-day 'Clarence Valley Healing Festivals' to be held in the various local Aboriginal communities in the Clarence Valley throughout 2019 and 2020 to celebrate Aboriginal culture and promote reconciliation through dance, arts and crafts, food, medicine, language and Elder talks on cultural heritage, including scar trees, and a display of artefacts, including the scar tree if the carving is portable.

(3) Pursuant to s 205(1)(a) of the *National Parks and Wildlife Act 1974*, the defendant is to cause, within 28 days of this order and at its own expense, a notice in the form of Annexure 'A' to be placed within:

(a) the Sydney Morning Herald (within the first 12 pages at a size of at least 9cm wide);

(b) the Koori Mail (within the first 5 pages at a size of at least 7cm wide);

(c) the Grafton Daily Examiner (within the first 5 pages at a size of at least 7cm wide);

(d) the Clarence Valley Independent (within the first 5 pages at a size of at least 7cm wide);

(e) the Clarence Valley Coastal Views (within the first 5 pages at a size of at least 7cm wide);

(f) on the homepage of its website; and

(g) on its Facebook page.

(4) The defendant is to provide to the prosecutor complete copies of the pages of the publications in order (3) showing the notice, within 14 days of the date of publication of each of the notices.

(5) Pursuant to s 205(1)(b) of the *National Parks and Wildlife Act 1974*, the defendant is to:

(a) notify each of the Local Aboriginal Land Councils in its local government area and the Clarence Valley Aboriginal Advisory Committee of the offence (including the circumstances of the offence) and its consequences and the orders made against the defendant; and

(b) publicise the offence (including the circumstances of the offence) and its consequences and the orders made against the defendant in its Annual Report.

(6) All future references by the defendant to paying the monetary amount ordered by order (2) to Grafton Ngerrie Local Aboriginal Land Council to be used for the purpose of promoting and protecting Aboriginal cultural

heritage in Grafton and the Clarence Valley is to be accompanied by the following statement:

"Clarence Valley Council's funding of Grafton Ngerrie Local Aboriginal Land Council's programs for promoting and protecting Aboriginal cultural heritage in Grafton and the Clarence Valley is part of a penalty imposed on the Council by the Land and Environment Court after Clarence Valley Council was convicted of the offence against s 86(1) of the *National Parks and Wildlife Act 1974* of harming an Aboriginal object, being a culturally modified tree, in Grafton."

(7) Pursuant to s 205(1)(f) of the *National Parks and Wildlife Act 1974*, the defendant is to establish, and conduct by 30 April 2019, cultural skills development workshops for:

(a) its field staff in the Works and Civil department; and

(b) its senior management staff in the Works and Civil, Corporate and Governance, and Environment, Planning and Community departments,

in accordance with the outlines developed by Ms Lisa Southgate in Annexure 'B' addressing cultural heritage compliance, Aboriginal engagement and the identification of Aboriginal sites, objects and places in the local government area.

(8) Pursuant to s 257B of the *Criminal Procedure Act 1986*, the defendant is to pay to the Registrar of the Land and Environment Court, for payment to the prosecutor, the costs of the proceedings in the amount of $48,000.

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OEH v Clarence Valley Council Annexure A (236 KB, pdf)http://www.caselaw.nsw.gov.au/asset/5c1c1f22e4b0851fd68d08b4.pdf

OEH v Clarence Valley Council Annexure B (444 KB, pdf)http://www.caselaw.nsw.gov.au/asset/5c1c1f61e4b0851fd68d08b6.pdf