

# Case Note

## *Chief Executive, Office of Environment and Heritage v Clarence Valley Council*

Sally Ashton\* and Sarah Etherington\*\*

### I. CASE CITATION

*Chief Executive, Office of Environment and Heritage v Clarence Valley Council* [2018] NSWLEC 205

### II. FACTS

In May 2016, Clarence Valley Council removed a tree from a street corner in Grafton. This tree had cultural significance for the local Gumbaynggirr people, as it had been scarred by the tribe in times past. It had been registered on the Aboriginal Site Register, thus identifying it as an Aboriginal object for the purposes of the *National Parks and Wildlife Act 1974* (NSW). Under the Act, a person must not harm or desecrate an object that the person knows is an Aboriginal object.<sup>1</sup> The tree was removed after a prior lopping of the tree in 2013, for which the council received and paid a penalty under the same Act. Subsequent to the removal of the tree, the council self-reported and pleaded guilty to the offence as charged. The council agreed to participate in a restorative justice conference with representatives from the affected Aboriginal communities. This conference took place on 22<sup>nd</sup> November 2018.

### III. PROCEDURAL HISTORY

As the Council had pleaded guilty to the offence at first instance, there was no prior or subsequent procedural history. The case was heard by Preston CJ.

### IV. ISSUES

The issues revolved around sentencing and the impact the restorative justice conference had on sentencing considerations. Attention was also directed to the objective circumstances of the offence; the subjective circumstances of the offender; the purposes of sentencing; and synthesising the objective and subjective circumstances.

### V. THE RESTORATIVE JUSTICE CONFERENCE

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<sup>1</sup> *National Parks and Wildlife Act 1974* (NSW) s 86(1).

At the end of the first day of the sentencing hearing on 24 October 2018, Preston CJ recommended that the parties enter into a restorative justice conference. The Council agreed to this and a conference was held on the 22 November 2018 between the council and “representatives of the Aboriginal communities whose cultural heritage had been harmed by the removal of the scar tree.”<sup>2</sup> The purpose and use of restorative justice conferencing was outlined by Preston CJ in *Garrett v Williams* (2007)<sup>3</sup> and the principles outlined in that case were referred to in the judgment here. There, it was recommended that the parties enter into a restorative justice conference in order to “help deliver a deeper resolution.”<sup>4</sup> His Honour outlined that a restorative justice programme “seeks to achieve restorative outcomes”<sup>5</sup> and brings victims, offenders and “other individuals or community members affected by a crime”<sup>6</sup> together in order to participate actively in forming a resolution with the help of a facilitator. Here, Preston CJ drew on the common law principles established in that case and the United Nations Office on Drugs and Crime’s (UNODC) Handbook on Restorative Justice Programmes (2006) in order to make his recommendations.

The restorative justice conference was facilitated by Mr John McDonald and followed a classic Victim-Offender Mediation model. Stage One (1) of the conference involved Mr McDonald reviewing items including the agreed statement of facts, affidavits read by the parties and other materials presented at the sentencing hearing.<sup>7</sup> He then conducted individual interviews with members of the respective parties, including over 20 people from Aboriginal communities and the Clarence Valley Council. He used this time to explain the restorative justice process and addressed any queries that people had about the process.

Stage Two (2) was the restorative justice conference. It began with a Welcome to Country and an explanation of the cultural and historical significance of scar trees to Aboriginal people. Individuals present were then given the opportunity to introduce themselves and explain their relationship to the parties and their connection with Clarence Valley.<sup>8</sup> Following this, Mr McDonald went on to detail the history of the scar tree in question and outlined the damage which had been inflicted on the tree. In a previously published apology<sup>9</sup>, the Council had acknowledge the importance of the tree and the significance of its loss to the Aboriginal community; adding that the tree provided both Indigenous and non-Indigenous communities with the opportunity to appreciate and respect Aboriginal culture.

Mr McDonald reported that over the course of the conference,

*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*

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<sup>2</sup> *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* [2018] NSWLEC 205, 10.

<sup>3</sup> 151 LGERA 92.

<sup>4</sup> John McDonald, ‘Restorative Justice Process in Case Law’ (2008) 33 *Alternative Law Journal* 41, 41.

<sup>5</sup> *Garrett v Williams* (2007) LGERA 92, 41.

<sup>6</sup> *Ibid.*

<sup>7</sup> Above n 2, 14.

<sup>8</sup> *Ibid* 16.

<sup>9</sup> *Ibid* 83.

*impact it had on all present as Aboriginal and non-Aboriginal people, and the impact it has had on Aboriginal communities more broadly*<sup>10</sup>

The conference was concluded when an agreement was reached and signed by all persons present. It was also reported that leaders of the Clarence Valley Council personally apologised to the Aboriginal people for what had happened, and that the apology was “accepted without reservations.”<sup>11</sup>

Stage three (3) was the agreement itself. Containing seven actions, the comprehensive agreement focused on improving cultural awareness and engagement amongst Clarence Valley Council staff, management and planners. This included improved communication, consultation and relationships between the Council and local Aboriginal people. As one of the actions, the parties to the agreement recommended that any financial sanction imposed on the Council for this offence be paid to the Grafton Ngerrie Local Aboriginal Land Council to help raise cultural awareness.<sup>12</sup> The majority of the agreement focused on increasing cultural awareness in the Council and the Community, and implementing improved policies in relation to Aboriginal and youth employment in the Council.<sup>13</sup>

Stage four (4) of the restorative justice process was an agreement that Mr McDonald would stay in weekly contact with those responsible for implementing the agreement in order to provide them with support in doing so. A follow up meeting was scheduled for February 2019<sup>14</sup> to allow the parties to report back and celebrate progress.<sup>15</sup>

## VI. DECISION

Preston CJ was clear about the role of the restorative justice conference on sentencing considerations. He stated that ‘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’.<sup>16</sup> It was thus necessary to heed the other relevant factors in determining an appropriate sentence.

### *A. The objective circumstances of the offence*

This is measured against the statutory purpose and requirements against which the offence occurred. Considerations included: the nature of the offence; maximum penalty; the objective harmfulness; the foreseeability of the harm caused; the practical measures to prevent harm; the control over the causes that gave rise to the offence; the reasons for committing the offence; and the state of mind in committing the offence.

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<sup>10</sup> Ibid 17.

<sup>11</sup> Ibid 20.

<sup>12</sup> Ibid 21.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid 22.

<sup>15</sup> To date, no updated information has been provided about the follow up meeting.

<sup>16</sup> Above n 2, 23.

The court found that the harming or desecration of an Aboriginal object or place without application for approval contravened the purposes of the NPW Act.<sup>17</sup> By removing the scar tree, the opportunity for the transmission of cultural heritage was denied, thereby causing intergenerational inequity.<sup>18</sup>

The council knew that the scar tree was an Aboriginal object as a result of the prior lopping of the tree and the emotional harm that had been caused in that instance.<sup>19</sup> Additionally, although undertaking in 2013 to implement steps to prevent any repeat of the harm, Council did not do so.<sup>20</sup> In fact, ‘there was a substantial and systemic failure on the part of the Council to take practical steps to prevent harm to the scar tree’.<sup>21</sup>

The council had the knowledge and foresight of harm, even if it did not inform the relevant staff of this. By knowing the risks of harm, the court found the council was reckless when it caused harm to the tree.<sup>22</sup>

The offending was assessed as medium objective seriousness.<sup>23</sup>

#### *B. The subjective circumstances of the offender*

In this case, the mitigating factors the court may consider with respect to the specific offence include: the lack of prior convictions; the early plea of guilty; remorse for the offence; assistance to authorities; and the unlikelihood of reoffending.

The court acknowledged that the council had demonstrated that it accepted responsibility for their actions, cooperated with an investigation and pleaded guilty to the offence at the earliest opportunity. It had taken steps to ensure that the causes and consequences were acknowledged and addressed and had issued a heartfelt apology in several different mediums to the Aboriginal people that had an association with the scar tree.<sup>24</sup> Additionally, Preston CJ acknowledged that “Council readily agreed to participate in the restorative justice conference”.<sup>25</sup> He considered the fact that Council had paid for the restorative justice process so far and that they had undertaken to carry out the terms of the agreement in order to make “reparations for the harm caused.”<sup>26</sup> Preston CJ acknowledged that these actions demonstrated the Council’s genuine remorse for the offence.<sup>27</sup> The court found in light of these facts, the Council was unlikely to reoffend.<sup>28</sup> He also found that the restorative justice conference had contributed towards the reparation and restoration elements of the sentencing process by recognising and giving a primary voice to the Aboriginal People affected by the offence.<sup>29</sup>

#### *C. The Sentence*

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<sup>17</sup> Ibid 33.

<sup>18</sup> Ibid 35.

<sup>19</sup> Ibid 59.

<sup>20</sup> Ibid 62.

<sup>21</sup> Ibid 64.

<sup>22</sup> Ibid 74.

<sup>23</sup> Ibid 75.

<sup>24</sup> Ibid 80-87.

<sup>25</sup> Ibid 85.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid 86.

<sup>28</sup> Ibid 88.

<sup>29</sup> Ibid 105.

‘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’.<sup>30</sup>

In this case, the judge considered that five different types of penalty be imposed.

1. A monetary penalty of \$400,000 with a 25% discount for the early guilty plea, therefore, \$300,000.<sup>31</sup>
2. That the payment of the fine be directed ‘to a meaningful project or program that attempts to repair the harm caused by the commission of the offence by the Council’,<sup>32</sup> namely to the Grafton Ngerrie Local Aboriginal Land Council for use of three specific projects identified by the Land Council:
  - i. Funding a feasibility study to establish a ‘Keeping Place’ in the Grafton area for Aboriginal cultural heritage items;
  - ii. Research into the development of educational resources for local Aboriginal cultural heritage; and
  - iii. Funding of ‘Clarence Valley Healing Festivals’ to celebrate Aboriginal culture and promote reconciliation.
3. Within 28 days of the order to publicise the offence, including the circumstances and consequences of the offence, in various State, local and Indigenous newspapers, as well as on the Council’s website and Facebook page. It must give notification of the offence to local Aboriginal authorities and include it in their Annual Report. They must also provide evidence of this to the court within 14 days of publication.
4. The Council must publicise its payment of money to the Land Council is a result of and penalty for committing the offence, not for any other altruistic reason.
5. Develop cultural skills workshops for all field staff in the Works and Civil department, along with senior staff in that and other departments.

## VII. CONCLUSION

Preston CJ considered that a restorative justice conference was appropriate in light of the reparative and restorative (among others) purposes of sentencing.<sup>33</sup> It is a personal and relational approach, ‘directed to the victims of the crime and the community affected by the commission of the offence’.<sup>34</sup> Whilst not a substitute for sentencing, it ‘provided a forum for

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<sup>30</sup> Ibid 115.

<sup>31</sup> Ibid 118.

<sup>32</sup> Ibid 119.

<sup>33</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

<sup>34</sup> Above n 2, 104.

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'.<sup>35</sup>

Here, Preston CJ found that the actions agreed to in the restorative justice conference, including the training program for Council employees and the recommendation that any financial penalty be paid to the Grafton Ngerrie Local Aboriginal Land Council were appropriate measures to help facilitate a just outcome. It is evident that the restorative justice conference had a considerable impact on the formulation of Preston CJ's decision. It is important to note that this case is only the second example of restorative justice conferencing being used in the Land and Environment Court of New South Wales.<sup>36</sup> Preston CJ has previously extensively outlined how restorative justice conferences and other forms of Alternative Dispute Resolution can aid in achieving just, quick and equitable outcomes in Environmental Courts and Tribunals.<sup>37</sup> Whilst some other authors have suggested that restorative justice conferencing can help to "turn conflict into cooperation."<sup>38</sup>

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<sup>35</sup> Ibid.

<sup>36</sup> See also *Garrett v Williams* (2007) LGERA 92.

<sup>37</sup> Brian Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 *Journal of Environmental Law*, 365-393, 379-381.

<sup>38</sup> Above n 5, 42.