



GREENWAY CHAMBERS

DETERMINING A DEFENDANT'S CAPACITY TO PAY IN WORK HEALTH AND SAFETY SENTENCING

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INTRODUCTION

1. A Defendant's capacity to pay any fine sentenced by the Court is a key issue for parties to consider for sentencing in Work Health and Safety prosecutions. This paper provides a useful starting point for Prosecution and Defence to consider whether submissions as to a Defendant's capacity to pay should be made, and if so, how these may be presented or tested.
2. This paper will first demonstrate that it is the Prosecutor's duty to test the Defendant's evidence relating to capacity to pay. Secondly it will consider what is relevant in considering the Defendant's capacity to pay. Thirdly it will demonstrate how such evidence can be tested and provide a simple checklist for ways the prosecution can test such evidence. This paper is intended as a general, non-exhaustive overview of this area and relevant authorities.

BACKGROUND AND CONTEXT

3. In applying its discretion to set a fine for a Defendant to pay on sentencing, the Court is required to act in accordance with s 6 of the *Fines Act 1966* (NSW). Section 6 provides as follows:

“In the exercise by a Court of a discretion to fix the amount of any fine, the Court is required to consider:

- (a) such information regarding the means of the accused as is reasonably and practicably available to the Court for consideration, and
- (b) such other matters as, in the opinion of the Court, are relevant to the fixing of that amount.”

4. There has been an increase in the number of judgments that expressly refer to s6 of the *Fines Act 1966* (NSW) (irrespective of whether the Defendant has addressed the section on sentencing) and therefore an increased awareness of the impact of the above consideration on sentencing. Likewise, the Court has been active in testing the claims made by the Defendant when they have made submissions relating to capacity to pay.

DOES THE PROSECUTOR HAVE A DUTY TO CHALLENGE THE DEFENDANT'S EVIDENCE?

5. It is clear that the Prosecutor has a duty to challenge evidence led by a Defendant in relation to their capacity to pay where it is possible that a Court may fall into appealable error by accepting unchallenged evidence from the Defendant.
6. The *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) regulation 95 provides as follows:

“A Prosecutor:

- a) must correct any error made by the Opponent in address on sentence,

- b) must inform the Court of any relevant authority or legislation bearing on the appropriate sentence,
- c) must assist the Court to avoid appealable error on the issue of sentence, and
- d) may submit that a custodial or non-custodial sentence is appropriate.”

7. This is echoed in the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) at regulation 29:

“Prosecutor’s Duties

29.12 A Prosecutor:

29.12.1 must correct any error made by the opponent in address on sentence,

29.12.2 must inform the Court of any relevant authority or legislation bearing on the appropriate sentence,

29.12.3 must assist the Court to avoid appealable error on the issue of sentence, and

29.12.4 may submit that a custodial or non-custodial sentence is appropriate.”

8. Should the Prosecutor not test the evidence led by the Defendant regarding their capacity to pay there is a risk that the evidence would be accepted by the Court who may impose a lower fine, thus potentially falling into appealable error.

9. The case *CMB v Attorney General* (NSW), (2015) 89 ALJR 407 outlined the above duty clearly. French CJ and Gaegler J found:¹

“The Crown (by whomever it is represented) has a duty to assist a sentencing Court to avoid appealable error. That duty would be hollow were it not to remain rare that an appellate Court would intervene on an appeal against sentence to correct an alleged error by increasing the sentence if the crown had not done what was reasonably required to assist the sentencing judge to avoid the error”²

10. Disputed facts should be resolved by the accusatorial process testing the evidence before the Court applying the respective onus and standards of proof. In *O’Neil-Shaw v R*³ the Court found that counsel did not discharge their duty to the Court. The Court found there were significant procedural irregularities in circumstances where there was no agreed statement of facts and the Court was expected to resolve disputed issues in the absence of cross examination.⁴

¹ at [38]

²see also *R v Tait* (1979) 24 ALR 473 at 477)

³ [2010] NSWCCA 42

⁴ At [26] and [48]

WHAT IS RELEVANT TO THE DEFENDANT'S CAPACITY TO PAY?

11. In setting a fine, as with setting any sentence, the Court is required to consider whether a fine would be “crushing” on a Defendant.⁵ This results from a significant history of authority that states the Court should not hand down a sentence that would “crush” a Defendant. That is, the Court is required to ask if the proposed sentence is so severe that it would “crush” any hope or rehabilitation of the Defendant? If so, the sentence should not be imposed. Should a sentence be “crushing” on a Defendant, it is likely that there will be an increase in appeals to the appellate Court. Consideration will also be given to the total effect of sentences for multiple offences. *Regina v Rossi* (Unreported, Court of Criminal Appeal SA; 20 April 1998) cited with approval in *Regina v WC* [2008] NSWCCA 268 articulated this principle clearly in stating:

“There is a principle of sentencing known as the principle of totality, which enables a Court to mitigate what strict justice would otherwise indicate, where the total effect of the sentences merited by the individual crimes becomes so crushing as to call for the merciful intervention of the Court by way of reducing the total effect.”⁶

12. Despite the above the Court is required to be careful in the application of its discretion to avoid a crushing sentence in cases involving multiple offences, so as to avoid the suggestion that the Court offers some kind of discount for multiple offending.⁷ Whether the total sentence is crushing on a Defendant is only one consideration the Court is required to consider. This was highlighted in *Regina v MAK* [2006] NSWCCA 272 in which the Court stated:

“...This effect both increases the severity of the sentence to be served and also destroys such prospects as there may be of rehabilitation and reform. Of course in cases of multiple offending the offender may not be entitled to the element of mercy entailed in adopting such a constraint.”⁸

13. The offender's capacity to pay a fine is relevant but not decisive. The Court considered a similar fines provision, s 16C(1) *Crimes Act 1914* (Cth) in *Jahandideh v R*⁹, finding that the legislation required the Court to consider the financial circumstances of a Defendant before imposing a fine. However in doing so, the Court found that the above section did not dictate what fine should be imposed on a Defendant.¹⁰

14. Whether a fine would be “crushing” on a Defendant is only one of several factors the Court must take into account in sentencing. Other relevant considerations include the seriousness of the offence and its prevalence.¹¹ A Defendant's capacity to pay is part of the instinctive synthesis of all the objective and subjective factors that a judge must have regard to.¹²

⁵ *Regina v WC* [2008] NSWCCA 268 at [61]

⁶ *Regina v WC* [2008] NSWCCA 268 at [57]

⁷ *Regina v WC* [2008] NSWCCA 268 at [62]

⁸ At [17].

⁹ [2014] NSWCCA 178

¹⁰ [2014] NSWCCA 178 at [15].

¹¹ *Darter v Dinden* [2006] SASC 152 (2006) 94 SASR 505

¹² *Willoughby City Council v Rahmani* [2017] NSWLEC 166 at [52]

HOW CAN THE DEFENDANT'S EVIDENCE BE TESTED?

15. Recent authorities in both the NSW District Court and the NSW Land and Environment Court demonstrate that evidence filed by the Defendant to demonstrate an incapacity to pay is frequently incomplete and defective. However generally a Defendant (and where appropriate its directors) may file evidence of the following to demonstrate an incapacity to pay:
- Assets (including cash funds held by the Defendant)
 - Liabilities
 - Income
 - Outgoings
 - Expenses (including personal expenses of the directors)
16. Recent authorities arising from SafeWork prosecutions in the NSW District Court and Prosecutions in the Land and Environment Court have demonstrated a variety of ways that the Defendant's financial position and the financial position of its directors can be tested. Below is a non-exhaustive checklist of ways that a Prosecutor can test the claims of a Defendant that it lacks capacity to pay.

Past conduct of the Defendant and Borrowing Capacity

17. Past conduct of a Defendant, significantly how the Defendant has responded to and paid past penalties and tax debts will be relevant in assessing the Defendant's capacity to pay. For example, has the company experienced previous significant financial losses or tax debts? If so, what was the effect of these?
18. If previous debts of a similar size to the proposed fine have been paid by the company, it is open to the Prosecutor to demonstrate that the Defendant has capacity to pay a fine of the same size. That is, previous payments of the same quantum have demonstratively not crippled the company and so the proposed fine is appropriate. Given that a company has been able to pay a fine of a similar size in the past, it is likely that they have capacity to pay a fine of the same size as that before the Court.¹³
19. Arguably it is best practice for a Prosecutor to request the financial records of a Defendant dating back to a couple of years before the incident so that any pattern of past behavior can be considered. A Prosecutor can then prepare a response to any capacity to pay submissions that may be made by the Defendant.
20. For the same reasons as outlined above, the borrowing capacity of a Defendant will also be relevant in demonstrating whether a Defendant has capacity to pay a fine.¹⁴

¹³ See for example *SafeWork v Harris Holdings NSW Pty Ltd*; *SafeWork NSW v Harry Zizikas* [2017] NSWDC 299 at [140].

¹⁴ See for example *SafeWork NSW v CTN Construction Pty Limited* [2017] NSWDC 340 at [69].

Real Property

21. Real property (including shared property) may also demonstrate the value of the Defendant's capacity to pay.
22. Courts have demonstrated an interest in what real property the Defendant and/or its directors own. Property may also be relevant where a director's income has been artificially depressed due to them devoting a significant amount of their time to constructing a new council approved dwelling (including a residential dwelling). Significantly property construction also leads to the accrual of additional capital value to the Director's asset base.¹⁵ This is one example of the Court's willingness to go behind the figures submitted to the Court by the Defendant as proof of income.
23. The Courts have also demonstrated an interest in whether the Defendant has a financial interest in the development of any property carried out by the Defendant's spouse or another person.¹⁶
24. The Court may further consider whether the Defendant has been offered a bank advance for the purpose of an investment property, especially in circumstances where the Defendant has not disclosed income or capital value information concerning their investment property.

Financial Statements

25. Whether financial statements submitted by the Defendant have been signed and dated may be significant.
26. Where statements are not signed and dated, and they are annexed to an affidavit then it is assumed that the director asserts on behalf of the company that the company is not insolvent and can pay its debts if and when they are due.¹⁷

Checklist - Director

27. The Prosecutor should test the following areas in testing a director's claim that they lack capacity to pay:
 - Assets
 - Profit
 - Long/Short Term Borrowing
 - Cash Resources
 - Turnover

¹⁵ *Willoughby City Council v Rahmani* [2017] NSWLEC 166 at [47].

¹⁶ *Wollongong City Council v Eldridge* [2017] NSWLEC 35 at [183].

¹⁷ *SafeWork v Harris Holdings NSW Pty Ltd; SafeWork NSW v Harry Zizikas* [2017] NSWDC 299 at [140].

- Financial Position of a Director of the Defendant (if the Defendant is a corporation) or of the Defendant (if a person).
- Where the Director is an individual what is their actual income and expenses?

Checklist – Company

28. Below is a non-exhaustive checklist of how a Prosecutor may test the capacity of a company to pay:

- What assets does the company have?
- Are the assets liquid? Are they required for the profitability of the company?
- Are the financial statements provided by the Defendant complete and up to date?
- What was the profit made by the Defendant company in the past financial year?
- What was the income tax paid on that profit?
- Does the company have any long or short term borrowings?
- Does the company have any cash resources?
- What is the turnover of the company?
- Does the director of the Defendant company have capacity to fund one company from the income of another company in the same corporate group based on past actions?

Searches

29. It is open to the Prosecutor to be proactive in testing the Defendant's evidence and to make submissions regarding the Defendant's capacity to pay in anticipation of the Defendant's submissions.¹⁸ A Prosecutor may conduct a number of searches in readiness to refute a Defendant's claim that they lack capacity to pay.

30. Searches that a Prosecutor may undertake include the following:

- ASIC records
 - a search of the Defendant's ASIC records will demonstrate share ownership.
- Land value of Property

¹⁸ See for example: *Burwood Council v Abdul-Rahman (No 2)* [2017] NSWLEC 177 at [75]

- a search of land value of property owned by the Defendant may be relied upon by the Prosecution to demonstrate the value of the Defendant's property.¹⁹
 - Defendant's notices of assessment issued to them under the *Income Tax Assessment Act 1997* (Cth).
31. In summary, there has been an increased awareness of the Court's discretion to consider the Defendant's capacity to pay a fine ordered by the Court. Although evidence to date has often been poorly led on behalf of the Defendant in this area, it is the Prosecutor's duty to test such evidence. The Prosecutor may also make enquires into the Defendant's financial position in anticipation of any argument that may be made by the Defendant in this area.

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¹⁹ *Willoughby City Council v Hollis (No 2)* [2017] NSWLEC 176 at [52]

