No ‘get out of jail free’ card

THE JUDGMENT OF Boulton has provided a guideline for using CCOs in sentencing and is consistent with subsequent decisions of the Victorian Court of Appeal. By Harry Venice

Boulton v The Queen (Boulton) is a guideline judgment about how the community corrections order (CCO) should be used in sentencing. The introduction of CCOs has changed the sentencing landscape in Victoria, with the terms CCO and Boulton now inextricably linked. However, they are distinct entities and to have a clear understanding of both terms, it is important to first reflect upon what Boulton actually decided. Second, it is essential to explore what the Victorian Supreme Court of Appeal (the Court) has stated about Boulton and CCOs since the guideline judgment was delivered.

Why a guideline judgment?

On 22 December 2014 the Court gave its first guideline judgment in Boulton. The Court’s power to give a guideline judgment is contained in s6AB of the Sentencing Act 1991 (Vic). In Boulton the Director of Public Prosecutions made an application for the Court to give a guideline judgment because sentencing judges and magistrates needed guidance from the Court about sentencing considerations when granting a CCO. General guidance was needed by sentencing judges about when it was appropriate to grant a CCO, the duration of CCOs and attaching conditions to such orders. Guidance was also required about the interaction of CCOs with sentencing principles such as punishment, deterrence, rehabilitation, denunciation and the protection of the community.

What Boulton said

CCOs are ‘intrinsically punitive’

The Court expressed that a CCO was “intrinsically punitive” because of the mandatory conditions which must be complied with and that a CCO was “capable . . . of being highly punitive” depending on “the length of the order and the nature and extent of the conditions imposed”. The most obvious punitive conditions are compulsory community work and conditions which can significantly restrict an offender’s freedom of movement and association.

General deterrence

The Court remarked that although a sentence of imprisonment has been “until now” conceived of as providing the greatest degree of general deterrence, “[a] CCO can . . . provide substantial general deterrence, on account of the punitive effect [of both mandatory and discretionary conditions].”

Specific deterrence

The Court stated that a CCO, like a term of imprisonment, “can also provide very substantial specific deterrence”.

Second, there is a mandatory condition attached to every CCO that prohibits the commission of an offence and breaching this condition results in an offence which is punishable by imprisonment. The Court emphasised that the commission of an offence that breaches a CCO will potentially lead to the imposition of three separate penalties – sentencing on the new offence, resentencing on the original offence and sentencing for the breach of CCO.

Protection of the community

The Court stated that the focus of conditions attached to a CCO is to minimise the risk of re-offending by ensuring treatment to address the causes of offending and/or by prohibiting...
the offender from visiting places or associating with people which might lead to criminal activity. The Court concluded that “[i]n that way, a CCO can serve the purpose of protecting the community (which is the object of specific deterrence)”.

**Conditions can be more punitive**

The Court noted that conditions vary from case to case according to an offender’s particular circumstances, but that “the same condition (eg non-association) is likely to have a quite different impact on different offenders”. For some, “compliance with such a condition will require a radical change in behaviour, while for others in different circumstances the burden of compliance will be less significant”.

For example, a CCO of a longer duration would be more onerous and difficult to comply with for a repeat offender as opposed to someone with no priors. The repeat offender would have to undertake a “radical change in behaviour” and the “burden of compliance” is more significant.

**Conditions can be more severe**

The Court expressly stated that the relative severity of a penal sanction can be assessed by reference to its impact on the offender’s rights and interests:

“The more important the rights and interests intruded upon, and the more significant the intrusion, the severer the sanction. Attention should therefore be directed to the degree to which the sanction will affect fundamental rights and interests such as the offender’s freedom of movement, choice regarding his/her activities, choice of associates, and privacy”.

For example, there may be a repeat offender with alcohol abuse issues who is excluded from venues serving alcohol. The offender predominately socialises in such venues and it is where he usually sees his friends. To comply with this condition, this particular offender’s rights and interests such as freedom of movement, choice of activities, choice of associates and privacy would be greatly impacted. Conversely, someone with no prior offences that rarely drinks nor attends venues serving alcohol would not have their rights and interests as severely impacted.

**The ‘particular responsibility’ of defence counsel**

The Court highlighted “the particular responsibility” of defence counsel who wish to argue for the imposition of a CCO. When a CCO is proposed it is no longer sufficient to merely recite an offender’s personal circumstances, “counsel will need to make submissions directed at the formulation of an order which directly addresses those personal circumstances”. More specifically, attention will need to be paid to the formulation of conditions
which will address “the offender’s particular needs, and the causes of the offending, and which will promote the necessary changes in the offender’s life to reduce the risk of reoffending.” 13

We need to re-examine conventional wisdom about imprisonment

Due to the combined punitive and rehabilitative effect of a CCO, the Court stated that sentencing courts should “re-examine the conventional wisdom about the types of offending which ordinarily attract a term of imprisonment.”13

Is imprisonment the only option?

The Court explicitly stated that the sentencing court should ask itself:

“Given that a CCO could be imposed for a period of years, with conditions attached which would be both punitive and rehabilitative, is there any feature of the offence, which requires the conclusion that imprisonment, with all of its disadvantages, is the only option?”14

CCOs were intended for serious offences that risk imprisonment

The Court agreed with the then Attorney-General’s submission that a CCO was intended to be available in serious cases where an offender may be at risk of receiving an immediate custodial sentence, but the Court considers that immediate custody is not necessary to fulfil the statutory purposes of sentencing given the range of options provided by a CCO.15

Boulton does not apply to federal offences

It is also important to be aware that in Atanackovic v The Queen16 the Court, in a joint judgment delivered by Weinberg, Kyrour and Kaye JJA, held that Boulton “does not apply to the sentencing of federal offenders by Victorian courts”.17

The Court has clarified Boulton decision

Maxwell P, Weinberg and Priest JJA in their joint decision in DPP v Borg (Borg)18 addressed “what Boulton decided” under a heading of that same name in Borg.19 Most importantly, the Court in Borg gave the context within which to view the passage located in Boulton at [131] (the key Boulton passage). In Borg the Court concluded that Boulton decided the following:

CCOs changed the sentencing landscape, not Boulton

The sentencing judge in Borg commented that the guideline judgment in Boulton “changed the landscape of sentencing in this [S]tate”. The Court expressly corrected the common but mistaken belief that Boulton had changed the sentencing landscape in Victoria:

“It is important to emphasise that it was not the Court’s decision which had that effect. Rather, as the Court said in Boulton, it was the introduction of the CCO as a sentencing option which had ‘dramatically change[d] the sentencing landscape’.”20

The dramatic change in the sentencing landscape created by CCOs

The Court noted that the guideline judgment itself had explained why the advent of the CCO was such a dramatic change:

“The sentencing court can now choose a sentencing disposition which enables all of the purposes of punishment to be served simultaneously, in a coherent and balanced way, in preference to an option (imprisonment) which is skewed towards retribution and deterrence . . . “In short, the CCO offers the sentencing court the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender and of those who are dependent on him/her”22

Nothing in Boulton altered existing fundamental sentencing principles

In Borg the Court stated that “[t]he essential character of the sentencing court’s task remains unchanged”: 23

The Court then referred to McGrath v The Queen (McGrath)24 where the Court explained that:

”[N]othing said in Boulton altered the principle of parsimony, which has always been a fundamental sentencing principle under the Sentencing Act 1991 (‘the Act’) . . . “A sentencing judge has always been obliged to impose the least severe sentence necessary to achieve the purposes of sentencing. That obligation is enshrined in sss(3) and (4) of the Act, which oblige the court not to impose a sentence of confinement unless it considers that ‘the purpose or purposes for which the sentence is imposed’ cannot be achieved by a sentence that does not involve confinement . . . “In Boulton, the Court pointed out that in an appropriate case a CCO can achieve all of the purposes of sentencing, and can do so in cases which might previously have been thought to require a sentence of imprisonment.”24

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The Court in Borg25 made further reference to McGrath where the Court endorsed what was said in Hutchinson v The Queen (Hutchinson)26 where Priest JA (with the concurrence of Ashley JA) said:

“Acknowledging that a CCO might be appropriate ‘even in cases of relatively serious offences which might previously have attracted a medium term of imprisonment’, it should not be thought that Boulton offers a ‘Get Out of Jail Free’ card in situations where a sentence of imprisonment is necessary in a given case to satisfy the various purposes for which a sentence may be imposed. One of the purposes for which a sentence may be imposed is, of course, ‘to punish the offender to an extent and in a manner which is just in all of the circumstances’. There will be cases – indeed, many cases – where, having regard to the seriousness of the offending, a CCO will be insufficiently punitive to satisfy the need to punish the offender in a manner which, in all of the circumstances, is just.”27
The key passage in Boulton must be read in the context of McGrath and Hutchinson.

The Court expressly stated in Borg that: "It is against that background that the following statement by the Court in Boulton must be understood:

"It follows from what we have said that a CCO may be suitable even in cases of relatively serious offences which might previously have attracted a medium term of imprisonment (such as, for example, aggravated burglary, intentionally causing serious injury, some forms of sexual offences involving minors, some kinds of rape and some categories of homicide).

The sentencing judge may find that, in view of the objective gravity of the conduct and the personal circumstances of the offender, a properly-conditioned CCO of lengthy duration is capable of satisfying the requirements of proportionality, parsimony and just punishment, while affording the best prospects for rehabilitation." 28

Conclusion

McGrath and Hutchinson, particularly, should not be interpreted as cases that narrowed Boulton. Hutchinson stated that Boulton is not a “Get out of Jail Free” card while McGrath stated that Boulton did not alter existing fundamental sentencing principles such as parsimony. Both of these propositions are consistent with Boulton. A plea submission about Boulton that conflicts with what the Court stated in Hutchinson or McGrath reveals a misunderstanding of the law.

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3. Note 1 above, at [124].
4. Note 1 above, Appendix 1, paragraph 18.
5. Note 1 above, Appendix 1, paragraph 20.
6. Note 5 above.
7. Note 1 above, Appendix 1, paragraph 21.
8. Note 1 above, Appendix 1, paragraph 22.
9. Note 1 above, at [100].
10. Note 1 above, at [90].
11. Note 1 above, at [101].
12. Note 1 above, at [101].
13. Note 1 above, at [103].
14. Note 1 above, at [121].
15. Note 1 above, at [116].
17. Note 16 above, at [95].
18. DPP v Borg [2016] VSCA 53 (Borg).
19. Note 18 above, at [102]-[110].
20. Note 18 above, at [102], citing Boulton at [113].
21. Note 18 above, at [104], citing Boulton at [113] to [115].
22. Note 18 above, at [108].
25. Note 18 above, at [109].
27. McGrath at [53], citing Hutchinson at [17].
28. Note 18 above, at [110], citing Boulton at [131].