

MINISTER FOR ENVIRONMENT HERITAGE AND THE
ARTS

Applicant

ROCKY LAMATTINA & SONS PTY LTD

ACN 007 420 822

First Respondent

ROCCO LAMATTINA

Second Respondent

JOINT SUBMISSIONS OF APPLICANT AND FIRST RESPONDENT

INTRODUCTION

1. These submissions are made jointly on behalf of:
 - 1.1. the applicant, the Minister for Environment, Heritage and the Arts ("the Applicant"); and
 - 1.2. the first respondent, Rocky Lamattina & Sons Pty Ltd ("the Respondent").
2. These proceedings allege a contravention of subsection 18(3) of the *Environment Protection and Biodiversity Conservation Act 1999* (the Act) by the Respondent. It is also alleged that the second respondent, Mr Lamattina, contravened section 484 of the Act by being knowingly concerned in and party to the contravention of subsection 18(3) by the Respondent or alternatively that he failed to take reasonable steps to prevent the contravening conduct of the Respondent, in contravention of section 484.
3. The Respondent admits the contravention pleaded in the statement of claim. The Applicant does not press for findings with respect to the conduct of Mr Lamattina, and withdraws the claim against him.
4. The Applicant and the Respondent jointly request the Court to, as against the Respondent:
 - 4.1. make a declaration that the Respondent, by causing the clearance of native vegetation from the property known as "Acacia Downs" and more properly described as Certificate of Title Volume 5400 Folio 622 Sections 324, 325, 326, 327 and 328 in the Hundred of Hynam in the State of South Australia (the Property) between April 2004 and July 2005, took an action likely to have a significant impact on a listed threatened species included in the endangered category, namely the South-eastern Red-tailed Black Cockatoo (*Cayptorhynchus banksii graptogyne*) in contravention of section 18(3) of the Act;
 - 4.2. order that the Respondent pay a pecuniary penalty pursuant to section 481 of the Act;

Filed on behalf of the Applicant by:

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- 4.3. make an order that the Respondent pay an agreed amount of costs to the Commonwealth of Australia in the amount of \$22,500; and

The parties have reached agreement as to the terms of the proposed orders.

5. The Applicant and the Respondent recognise that under section 481 of the Act, it is for the Court to determine the quantum of any pecuniary penalty that should be ordered. These submissions are made to assist the Court in coming to its own assessment of the level of penalty to be imposed and the orders to be made.
6. The entirety of the material presented by the parties to the Court for its consideration comprises:
 - 6.1. the amended statement of claim filed in these proceedings;
 - 6.2. the statement of agreed facts; and
 - 6.3. these joint submissions.
7. These joint submissions summarise the conduct the subject of the proceedings, the legal principles applicable to the imposition of a penalty, and why the proposed orders are appropriate.

THE PARTIES

8. During the relevant period from April 2004 to July 2005, the Respondent was the registered proprietor of the Property and was engaged in the production and distribution of carrots throughout South Eastern Australia.
9. The Applicant has and had at all material times the functions and powers conferred upon him pursuant to section 481(1) of the Act.

THE CONDUCT

10. The conduct involves a contravention of subsection 18(3) of the Act, in relation to which a declaration and pecuniary penalty is sought.

Conduct which is likely to have a significant impact on a listed endangered species

11. Between April 2004 and July 2005, the Respondent took an action ("the Action"), namely, it caused the clearance of not less than 170 trees from the Property. The trees were of the species *E. leucoxyton*, *E. camaldulensis* and *E. fasciculosa*. The trees removed from the Property included an undetermined number of very old, large trees and also an undetermined number of younger trees.
12. The South Eastern Red-tailed Black Cockatoo (*Calyptorhynchus banksii graptogyne*) ("the Cockatoo") is listed as an endangered species pursuant to sub-section 178(1) of the Act. The Property is within the known range of the Cockatoo and is part of an area mapped as nesting habitat that is critical for the survival of the species.

13. The Cockatoo is considered endangered because of its small population size and continuing habitat loss.
14. The parties have agreed that the Action is likely to adversely affect habitat which is critical for the survival of the Cockatoo. While the location of all nesting sites is not known, the Property is within a region which is recognised as one of the remaining strongholds of nesting for Cockatoos in South Australia and the area on the Property which was cleared could have supported up to six (6) nesting pairs.
15. The Cockatoo has traditional nesting areas where it returns to breed. The removal of the potential nesting trees is likely to lead to reduced nesting success in this area and a reduced recruitment of new Cockatoos into the population. Most known nest trees of the Cockatoo are paddock trees (of the type removed), and there is little of this habitat type left in South Eastern South Australia.
16. In addition to a reduction in suitable nesting habitat for the Cockatoo, it is also likely that the Action will reduce the area of occupancy of the Cockatoo with respect to the stringybark feeding habitat which adjoins the Property. As the Property will support fewer nesting pairs of Cockatoos, fewer Cockatoos will occupy and utilise the adjoining stringybark feeding habitat.

THE CONTRAVENTION

17. The Applicant alleges, and the Respondent admits, that the Action is a contravention of subsection 18(3) of the Act.

PENALTY: RELEVANT FACTORS AND APPLICABLE LEGAL PRINCIPLES

18. Subsection 481(3) of the Act sets out the following matters to which the Court must have regard in determining an appropriate level of penalty:
 - 18.1. the nature and extent of the contravention; and
 - 18.2. the nature and extent of any loss or damage suffered as a result of the contravention;
and
 - 18.3. the circumstances in which the contravention took place; and
 - 18.4. whether the person has previously been found by the Court in proceedings under this Act to have engaged in any similar conduct.
19. In the matter of *Minister for the Environment and Heritage v Greentree (No 3)*¹, Sackville J in considering the quantum of pecuniary penalty to be imposed pursuant to section 481 of the Act noted that subsection 481(3) is very similar to subsection 76(1) of the *Trade Practices Act 1974* ("the TP Act").
20. The parties in *Greentree* accepted that the approach that had been applied in proceedings for pecuniary penalties under the TP Act was appropriate (subject to necessary adaptations) to proceedings for pecuniary penalties under the Act. Sackville J acknowledged that the

¹ [2004] FCA 1317 (14 October 2004) at paragraph 8

principles formulated in the context of subsection 76(1) of the TP Act provide guidance in proceedings for pecuniary penalties under the Act, although they cannot be transferred uncritically into the context of proceedings seeking the imposition of penalties for environmental damage. With this in mind, the Applicant and the Respondent submit that this approach should also be adopted in these proceedings.

Imposition of pecuniary penalty

21. In addition to the matters specifically referred to in subsection 481(3), the Court can have regard to other relevant matters. The principles relevant to the assessment of a pecuniary penalty were addressed by French J in *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076 AT 52, 152-52, 153 (hereinafter referred to, for convenience, as the "French factors"). The French factors relevant to the consideration of a pecuniary penalty under the Act are set out below:
 - 21.1. the size of the contravening company;
 - 21.2. the deliberateness of the contravention and the period over which it extended;
 - 21.3. whether the contravention arose out of the conduct of senior management or at a lower level; and
 - 21.4. whether the company has shown disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention.
22. Those considerations were approved and expanded upon by the Full Court of the Federal Court in *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285 and *J McPhee and Son (Aust) Pty Ltd v ACCC* (2000) 172 ALR 532 (where relevant) as follows:
 - 22.1. whether the contravening company has engaged in similar conduct in the past;
 - 22.2. the economic effects of the conduct; and
 - 22.3. the financial position of the contravening company.
23. In *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 41-375 (at 40,169), Burchett J stated that the total penalty for related offences ought not to exceed what is proper for the entire contravening conduct involved (the "totality principle" known in the criminal law). This approach was also confirmed by Goldberg J in *ACCC v Australian Safeway Stores Pty Limited* (1997) 145 ALR 36, at 53.
24. Similar contraventions should incur similar penalties, other things being equal (Full Court in *NW Frozen Foods Pty Ltd v ACCC* (at 295)), albeit that the Full Court cautioned that "other things were rarely equal where contraventions of the TP Act are concerned" (at 295). The Applicant and the Respondent submit that this approach is also appropriate to the consideration of penalties to be imposed under the Act.
25. It has long been accepted that a principal object under section 76 of the TP Act is deterrence (see *TPC v Stihl Chainsaws (Aust) Pty Limited* (1978) ATPR 40-091 AT 17,896 PER Smithers J). In *TPC v CSR Ltd* at 52,152 French J stated:

The principal, and I think probably the only, object of the penalties imposed by s.76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act.

26. This approach was approved by the majority of the Full Federal Court in *NW Frozen Foods Pty Ltd v ACCC*. See also *ACCC v Dataline* [2007] FCAFC 146, at para [60].
27. Deterrence has two aspects: specific deterrence in respect of the actual contravener and general deterrence of others "who may be disposed to engage in prohibited conduct of a similar kind." (*Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 2 FCR 296 at 297 - 298, per Toohey J). The Full Court in *NW Frozen Foods Pty Ltd v ACCC* made it clear (at 294 - 295) that:

The Court should leave no room for any impression of weakness in its resolve to impose penalties sufficient to ensure the deterrence, not only of parties actually before it, but also of others who might be tempted to think that contraventions would pay...

28. The issues of general and specific deterrence were also considered in *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301, where Goldberg J concluded at [39] that:

The penalty imposed must be substantial enough that the party realises the seriousness of its conduct and is not inclined to repeat such conduct. Obviously the sum required to achieve this object will be larger where the Court is setting a penalty for a company with vast resources. However, as specific deterrence is only one element and general deterrence must also be achieved, consideration of the party's capacity to pay must be weighed against the need to impose a sum which members of the public will recognise as significant and proportionate to the seriousness of the contravention.

29. A penalty must not be so high as to be oppressive: Smithers J in *TPC v Stihl Chainsaws (Aust) Pty Limited* at 17,896 and *NW Frozen Foods Pty Ltd v ACCC* at 293. In considering what may be oppressive, Merkel J stated in *ACCC v Leahy Petroleum (No 2)*(2005) 215 ALR 281 at [10] that:

I therefore respectfully agree with the observations of Smithers J, referred to by Burchett and Kiefel JJ in *NW Frozen Foods*, to the effect that, a penalty that is no greater than is necessary to achieve the object of general deterrence, will not be oppressive.

30. The High Court outlined the process for assessment of criminal sanctions where such penalties are not fixed by statute in *Markarian v The Queen* (2005) 215 ALR 213. That process is also applicable to the assessment of pecuniary penalties under s76 of the TP Act, and the parties submit to the consideration of penalties to be imposed pursuant to s 481 of the Act. The penalty for a contravention of section 18(3) of the Act for a corporation is 50,000 penalty units (or \$5.5 million)². In respect of the process of assessment penalties in the context of the TP Act, see *ACCC v Liquorland (Australia) Pty Ltd (ACN 007 512 419)* [2005] FCA 683, where their Honours held:

- 30.1. the Court's assessment of the appropriate penalty is a discretionary judgment based on all relevant factors (see[27]);

"...careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst

² A penalty unit is \$110.00 pursuant to section 4AA *Crimes Act 1914* (Cth)

possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick" (see[31]);

- 30.2. it will rarely be appropriate for a Court to start with the maximum penalty and proceed by making a proportional deduction from that maximum (see[31]);
- 30.3. the Court should not adopt a mathematical approach of increments or decrements from a predetermined range, or assign specific numerical or proportionate value to the various relevant factors (see[37]);
- 30.4. it is not appropriate to determine an "objective" sentence and then adjust it by some mathematical value given to one or more factors such as plea of guilty or assistance to authorities (see[37]);
- 30.5. the Court "may not add and subtract item by item from some apparently subliminally derived figure" to determine the penalty to be imposed (see [39]);
- 30.6. since the law strongly favours transparency, accessible reasoning is necessary in the interest of all, and, while there may be occasions where some indulgence in an arithmetical process will better serve the end, it does not apply where there are numerous and complex considerations that must be weighed (see[39]).

Agreement on Appropriate Penalty

31. The Applicant and the Respondent have reached agreement as to the pecuniary penalty to be recommended to the Court for its consideration in respect of the contravening conduct. As noted above, the Applicant is not proceeding against Mr Lamattina, and therefore no pecuniary penalty is sought against him.
32. In applying the above principles to the conduct of the Respondent, and having regard to the factors and circumstances outlined below, the Applicant and the Respondent submit that a penalty of \$110,000 is appropriate, and is within the range of penalty a Court would order in these circumstances.

The Court's Approach to Agreements on Pecuniary Penalty

33. Litigation to establish contraventions of the Act can be potentially very complex, time consuming and costly. It is in the public interest for litigation to be concluded in the shortest time frame that is consistent with justice being done between the parties, thus freeing the Courts and the parties to deal with other matters. To that end, the Court has generally looked with favour upon negotiated settlements, providing that their terms recognise that the ultimate responsibility for the making of the orders to resolve the proceedings lies with the Court (see *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 41-375; *NW Frozen Foods v ACCC* (1997) 71 FCR 285; see also *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72.
34. Provided that the Court is satisfied that the means of reaching agreement and the terms of the orders are appropriate, the Applicant also submits that it is in the public interest for the Court to make orders in litigation concerning the Act on the terms that have been agreed between parties so as to encourage parties to assist the Applicant in his investigations and achieve negotiated settlements. The Court has recognised that, in addition to savings in time

and costs, there is a public benefit in imposing agreed pecuniary penalties where appropriate as parties would not be disposed to reach such agreements where there are unpredictable risks involved (*NW Frozen Foods v ACCC (1997) 71 FCR 285 at 291*).

35. In *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc.* (1999) 161 ALR 79, French J said:

"The question whether an undertaking is to be accepted or a consent order made is not concluded by a finding that it is within the power of the Court to do so. The power of the Court to make the orders sought is "defined and conferred by public law not by private agreement": Fiss, "Against Settlement" (1984) 93 Yale Law Journal 1073. In the exercise of that power the Court is not merely giving effect to the wishes of the parties, it is exercising a public function and must have regard to the public interest in doing so. This principle applies to the resolution of private litigation by consent orders or undertakings. A fortiori it applies to proceedings brought by the Crown or public or statutory authorities to enforce the law in the public interest. The Court has the responsibility to be satisfied that what is proposed is not contrary to the public interest and is at least consistent with it...."³

36. The approach taken by the Court in decisions such as *NW Frozen Foods* and the cases referred to in footnote 2 below was approved of by the Full Court in *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Limited* [2004] FCAFC 72.
37. There have been numerous decisions of the Federal Court since the mid 1990s accepting that penalties agreed between the Australian Competition and Consumer Commission and respondents, when found to be within the range that the Court would consider appropriate, ought be imposed. A list of these authorities is included with these submissions at Annexure "A".
38. The Applicant and the Respondent submit that it is appropriate that a similar approach should be taken to negotiated settlements arising out of civil penalty proceedings in respect of agreed contraventions of the Act. The Court has previously ordered payment of an agreed pecuniary penalty pursuant to the Act in *Minister for Environment and Heritage v Wilson* (2004) FCA 6 and *Minister for Environment and Heritage v Warne* (2007) FCA 599.

PENALTY: APPLICATION OF THE PRINCIPLES

The nature, extent and circumstances of the contravening conduct

39. The contravening conduct took place between April 2004 and July 2005 and involved the removal of not less than 170 trees from a wide area on the Property at the direction of Mr Lamattina. The conduct occurred in the context of an application for approval to clear native vegetation having been made by the previous owner of the Property, and refused by the South Australian Native Vegetation Council (NVC) prior to the Respondent purchasing the Property. In addition, Mr Lamattina had attended a meeting with a representative of the South Australian Department of Water, Land and Biodiversity Conservation with respect to

³ See also *Trade Practices Commission v Allied Mills Industries Pty Ltd (No 4)* (1981) 37 ALR 256, at 259; *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 at 733-734; *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 41-375 at 40,165-40,166; *Trade Practices Commission v CC (New South Wales) Pty Limited (No 2)* and (No 6) (1995) ATPR 41-406 at 40,498 and 41-431 at 40,851; *Trade Practices Commission v Hymix Industries Pty Limited* (1995) ATPR 41-369 at 40,102-40,103; *Trade Practices Commission v Simsmetal Limited* (1996) ATPR 41-449 at 41,512; *Australian Competition and Consumer Commission v Pioneer Concrete (Qld) Pty Limited* (1996) ATPR 41-457 at 41,582.

making an application to clear trees from the Property at which he was advised that any application would not be able to be considered for several months.

40. Mr Lamattina Snr decided upon the action which was undertaken without reference to the other directors of shareholders of the company.
41. At the time the Respondent undertook the Action, Mr Lamattina was not aware that the Cockatoo was an endangered species, nor did he appreciate that the clearance of the trees was likely to have a significant impact on the Cockatoo. However, he did make the decision on behalf of the Respondent to clear the trees in frustration at not being able to readily obtain permission from the authorities to do so lawfully and in circumstances where the company was in difficult financial circumstances.

Amount of loss or damage caused as a result of the contravention

42. The specific loss or damage resulting from the conduct is not quantifiable, but can be considered in the context of the particular conduct. The intention of the conduct was to increase the area on the Property which could be irrigated, and therefore, increase the financial return from the Respondent's cropping enterprises. While this was the intention of the conduct, the parties agree that the Respondent sold the Property for an amount less than the price for which it was purchased by the Respondent.
43. The conduct of the Respondent undermines some of the objects of the Act as set out in section 3(1), being:
- (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
 - (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
 - (c) to promote the conservation of biodiversity; and
 - (ca) to provide for the protection and conservation of heritage; and
 - (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples;

and is serious in that:

- 43.1. loss of habitat is a threat to the Cockatoo's recovery;
- 43.2. the type of trees cleared from the Property included those of the type preferred as nesting habitat by the Cockatoo, and these trees take significant time to mature (approximately 200 years); and
- 43.3. the highly specialised feeding requirements of the Cockatoo, coupled with the requirement that such food source must be close to their nest site make the species particularly vulnerable to conduct of the type engaged in by the Respondent.
44. However, the parties jointly submit that the scientific evidence available does not suggest that the Action has had an immediate impact of significance on the Cockatoo and as such the conduct, while serious, is to be considered at the lower end of the spectrum in terms of total penalty to be imposed.

Similar conduct in the past - whether the contravener has previously been found by the Court to have engaged in similar conduct

45. The Respondent has not been found to have engaged in any contraventions of the Act in the past. The Respondent has been convicted for contraventions of the *Native Vegetation Act 1991* (which also relate to the clearance on the Property and an adjacent property leased by the Respondent) in proceedings instituted by the NVC in the South Australian Magistrates Court. The Respondent was fined \$29,750 in those proceedings for the clearance of trees from the Property. Mr Lamattina was fined \$21,250 in those proceedings for the clearance of trees from the Property.
46. The penalty has been appealed to the Supreme Court and argued before the Honourable Justice Layton. A copy of the grounds of appeal relied upon in those proceedings are annexed as Annexure "B".
47. The Respondent is also the subject of civil proceedings instituted by the NVC, in which an order for remediation in relation to the Action is sought. A copy of the Summons filed by the NVC is included with the Statement of Agreed Facts.
48. Under the Native Vegetation Act s31B it is provided that where the ERD Court is satisfied that the respondent has cleared native vegetation in contravention of the Act, the Court *must* make an order against the respondent under s31A(6)(d) requiring the respondent to make good the breach in a manner specified by the Court.
49. There is little discretion provided and the overwhelming likelihood is that the respondent will be required to spend significant sums making good the removal of the vegetation.
50. The parties agree that it is appropriate for this Court to have regard to the penalty and likely remediation in the State Courts as being matters that should reduce the quantum of the pecuniary penalty that would otherwise be ordered.

The size of the contravening company

51. The Respondent is a family owned and operated company which employs between 75 to 80 people. The shareholding of the Respondent is as follows:
 - 51.1. Mr Lamattina - one ordinary fully paid ordinary share;
 - 51.2. Ms Agata Lamattina - one ordinary fully paid ordinary share; and
 - 51.3. The R & A Lamattina Trust - 99,998 fully paid shares.
52. The duties and responsibilities of the Directors of the Respondent are as follows:
 - 52.1. Mr Lamattina - organises the purchase of and development of new projects relating to the Respondent and the financial management of the Respondent generally;
 - 52.2. Angelo Rosario Lamattina - coordination of washing of produce, packing, sales and distribution of carrots;

52.3. Phillip Lamattina - coordination and organisation of growing and harvesting of crops grown by the Respondent and associated farm works; and

52.4. John Paul Lamattina - coordination and organisation of growing and harvesting of crops grown by the Respondent and associated farm works.

53. It is agreed that Mr Lamattina is in effect that Managing Director of the Respondent, and that any penalty imposed upon the Respondent is a penalty imposed upon Mr Lamattina.

54. At the time the conduct took place, the other properties owned by the Respondent and on which its grew most of its produce, had been experiencing drought conditions for a number of years, as a result of which the Respondent suffered an associated reduction in revenue achieved from the production and distribution of carrots.

55. A statement setting out the Respondent's financial position for the period 2003 to 2007 is included with the Statement of Agreed Facts. The parties submit that a penalty in the amount proposed will have a significant deterrent effect on the Respondent, and will not impose an unreasonable burden upon it.

The deliberateness of the contravention and the period over which it extended

56. The conduct in clearing the trees was deliberate, however the parties agree that the Action was not undertaken with any specific knowledge of the Cockatoos and that there was no intent on the part of the Respondent to have a significant impact on the Cockatoo.

57. However, the conduct of the Respondent was reckless. A copy of the NVC decision to refuse the previous owner of the Property permission to clear trees was included with the contract for sale of the Property which was available to the Respondent prior to and following the purchase of the Property. The Respondent ought to have been aware that the trees were significant wildlife habitat.

Whether the contravention arose out of the conduct of senior management or at a lower level

58. The contravention of the Respondent arose out of the conduct of its managing director, Mr Lamattina.

Whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention

59. The Respondent is cooperating with the Applicant by making appropriate admissions and in seeking resolution of these proceedings on a joint basis. The parties jointly submit that this a substantial mitigating factor towards the appropriate penalty. The Applicant has conducted an investigation into this matter since 2005. Since the investigation commenced, the Respondent has made its representatives available for interview and given access to its properties to assist in assessing whether remediation could be undertaken to offset the damage caused by the Action. Mr Lamattina has made full and frank admissions on behalf of the Respondent and himself and has expressed contrition for the conduct.

60. The proposed penalty for the Respondent includes a reduction from that which the Applicant would recommend to the Court absent cooperation.

The financial position of the respondents

61. The Respondent does not lack capacity to pay the pecuniary penalty in the amount recommended to the Court.

The deterrent effect of the proposed penalty

62. As noted above, deterrence has two aspects: specific deterrence in respect of the actual contravener and general deterrence of others who may be disposed to engage in prohibited conduct of a similar kind.
63. The parties submit that specific deterrence is not a significant factor in the determination of the appropriate penalty in this matter. The Respondent submits, and the Applicant accepts that there is little risk of the Respondent knowingly contravening section 18 of the Act in the future in relation to the Cockatoo.
64. The Applicant submits, and the Respondent accepts, that a significant penalty is nonetheless warranted to deter other landowners in a similar position, directly or by their agents, from taking an action likely to have a significant impact on the Cockatoo (or other endangered species).
65. In particular, the proposed penalty is likely to have a strong deterrent effect and to demonstrate to the public and the business community that such manner of conduct by individuals is reprehensible and totally unacceptable. The quantum of pecuniary penalty needs to demonstrate that such conduct will not be tolerated by the Court and will be punished severely.
66. It is submitted that the proposed pecuniary penalty is at an appropriate level to achieve specific and general deterrence, in the circumstances of this case.
67. The Court has previously considered the quantum of pecuniary penalties to be imposed pursuant to the Act in the following matters:
- 67.1. *Minister for Environment v Greentree* (No 3) [2004] FCA 1317;
- 67.2. *Minister for Environment and Heritage v Wilson* (2004) FCA 6; BC200400018; and
- 67.3. *Minister for Environment and Heritage v Warne* (2007) FCA 599; BC200703006.
68. The parties submit that the Court should consider the conduct of the Respondent as more serious than the conduct referred to in *Wilson* and *Warne* above, but not as serious as the conduct which was the subject of proceedings in *Greentree*.

Recommended penalties

69. The Applicant and the Respondent jointly submit that the imposition upon the Respondent of a penalty of \$110,000 is appropriate in respect of its contravention of section 18 of the Act. Having regard to the application of the principles in *Markarian* (as used by their Honours in *ACCC v Liquorland (Australia) Pty Ltd*), the proposed penalty represents 2% of the maximum penalty which can be imposed by the Court on a corporation pursuant to section 481 of the Act and reflects the parties' submission that the offending conduct is at the lower end of the

scale. This proposed penalty also equates to approximately 20% of the maximum penalty which could be imposed upon an individual pursuant to section 484 of the Act, and the parties submit this is relevant to the assessment of penalty in light of Mr Lamattina's role in the conduct of the Respondents and that any penalty upon the Respondent is essentially a penalty upon Mr Lamattina.

CONCLUSION

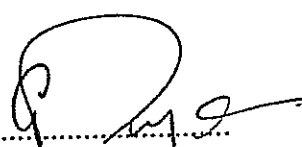
70. The attached minute of orders provides for:
- 70.1. a declaration against the Respondent;
 - 70.2. the payment of a pecuniary penalty by the Respondent in the proposed amount; and
 - 70.3. a payment by the Respondent towards the Applicant's costs of the proceedings in an agreed amount of \$22,500.
71. The Respondent consents to the making of the orders in the attached terms.
72. In light of all the facts and circumstances referred to above, it is jointly submitted by the Applicant and the Respondent that the orders contained in the attached minute of order are:
- 72.1. within power;
 - 72.2. appropriate to be made by the Court in all the circumstances;
 - 72.3. in the public interest; and
 - 72.4. will dispose of the proceedings against the Respondent in relation to the relief sought.

Date: 21 April 2009.


.....
Kate Sullivan

A solicitor employed by
Australian Government Solicitor
Solicitor for the Applicant

Date:


.....
Chris Ryan
Solicitor for the first respondent

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA
DISTRICT REGISTRY

NO SAD 182 OF 2007

MINISTER FOR ENVIRONMENT
HERITAGE AND THE ARTS
Applicant

ROCKY LAMATTINA AND SONS PTY LTD
ACN 007 420 822
First Respondent

ROCCO LAMATTINA
Second Respondent

ANNEXURE "A"

The following pages are "Annexure A" referred to in the Joint Submissions of the Applicant and the First Respondent dated 21 April 2009.

Filed on behalf of the Applicant by:
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Annexure "A" - cases involving agreement on quantum of pecuniary penalty

- *TPC v CC (NSW) Pty Limited & Ors* (1994) ATPR 41-363, (1995) ATPR 41-406, (1995) ATPR 41-415 and (1995) ATPR 41-431;
- *TPC v Amatek Limited* (Federal Court, Lockhart J, 24 November 1994 unreported);
- *TPC v TNT & Ors* (May 1995) ATPR 41-375;
- *TPC v Hymix Industries* (May 1995) ATPR 41-369;
- *TPC v Simsmetal & Ors* (1996) ATPR 41-449;
- *ACCC v Pioneer Concrete (Qld) Pty Ltd* (1996) ATPR 41-457;
- *ACCC v Jaycee Rectification and Building Services Pty Ltd* (1996) ATPR 41-539;
- *ACCC v Ampol Petroleum (Victoria) Pty Ltd* (1996) ATPR 41-469;
- *ACCC v Hymix Industries Pty Limited* (1996) ATPR 41-465;
- *TPC v Monier Roofing Ltd* (1996) ATPR 41-464;
- *ACCC v. Alice Car & Truck Rentals Pty Ltd & Ors* (1997) ATPR 41-582;
- *ACCC v. Foamlite (Australia) Pty Ltd* (1998) ATPR 41-615;
- *ACCC v Cromford Pty Ltd* (1998) ATPR 41-618;
- *ACCC v SIP Australia Pty Ltd* [1999] FCA 858;
- *ACCC v. Tubemakers Australia Pty Ltd* (2000) ATPR 41-745;
- *ACCC v. Sundaze Pty Ltd* (2000) ATPR 41-736;
- *ACCC v. Tyco Australia Pty Ltd & Ors* (2000) ATPR 41-740;
- *ACCC v Simsmetal & Ors* (2000) ATPR 41-764;
- *ACCC v Roche Vitamins Australia Pty Ltd* [2001] FCA 150;
- *ACCC v ABB Transmission and Distribution Ltd* (2001) ATPR 41-839;
- *ACCC v Midland Brick Co Pty Ltd & Ors* [2004] FCA 93;
- *ACCC v McMahon Services Pty Ltd (ACN 008 274 020) (No. 1)* [2004] FCA 1171;
- *ACCC v Liquorland (Australia) Pty Ltd* [2005] FCA 683.

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA
DISTRICT REGISTRY

NO SAD 182 OF 2007

MINISTER FOR ENVIRONMENT
HERITAGE AND THE ARTS

Applicant

ROCKY LAMATTINA AND SONS PTY LTD

ACN 007 420 822

First Respondent

ROCCO LAMATTINA

Second Respondent

ANNEXURE "B"

The following pages are "Annexure B" referred to in the Joint Submissions of the Applicant and the First Respondent dated 21 April 2009.

Filed on behalf of the Applicant by:

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FORM 1

F.D.N.

IN THE SUPREME COURT OF SOUTH AUSTRALIA
No: ~~183~~2of 2008

BETWEEN:

ROCKY LAMATTINA & SONS PTY LTD
The First Defendant (The First Appellant)

and

ROCCO LAMATTINA
The Second Defendant (The Second Appellant)

and

PAUL LESLIE GOULD
(Native Vegetation Group, Department of Water, Land and Biodiversity
Conservation)
Informant (Respondent)

NOTICE OF APPEAL

Filed on behalf of the First and Second Appellants, Rocky Lamattina and Sons Pty Ltd
and Rocco Lamattina by Christopher James Ryan : Ryans Lawyers
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Settled by:

Christopher James Ryan

Date and time of filing or transmission:

NOTICE OF APPEAL

The defendants, Rocky Lamattina and Sons Pty Ltd and Rocco Lamattina appeal to a single Judge of the Supreme Court of South Australia against the judgments of a Magistrate of the Magistrates Court of South Australia sitting at Mount Gambier on the 27th of November 2008 being the fines imposed in respect of the offence for which the defendants were convicted.

Date of judgment / order: 27th of November 2008 sentence

Date of grant of permission: Not required

Judicial Officer appealed from: His Honour Mr WAG Morris SM

File No. of Court appealed against: MCMTG 07 1677

Respondent's Address: C of Native Vegetation Group, Department of
Water, Land and Biodiversity Conservation.
1 Richmond Road, Keswick SA 5035

Judgment appealed against: (a) That in respect of that offence, the first defendant be fined \$68,000 and the second defendant be fined \$51,000.

The appeal is against the whole of the judgment.

The grounds of appeal are:

1. That the learned Magistrate erred in fact and law by giving inadequate weight to the following factors:
 - (a) That the First Appellant and the Second Appellant were first offenders;

- (b) The previous good character of the First Appellant and the Second Appellant;
 - (c) The early pleas of guilty to all counts;
 - (d) Full and frank admissions made by the Second Appellant Rocco Lamattina to the authorities;
 - (e) The extensive cooperation shown by the Appellants.
2. That the Learned Magistrate erred in failing to properly consider the version of facts most favourable to the Appellants.
 3. That the Learned Magistrates erred in giving disproportionate weight to the principal of general deterrence to the exclusion of all other principals of sentencing.
 4. That the Learned Magistrate erred in sentencing in giving inadequate weight to:
 - (a) The civil proceedings for rehabilitation of the land.
 - (b) The parallel Commonwealth proceedings pursuant to the Environment Protection and Biodiversity Conservation Act 1992 in the Federal Court related to the same incident;
 5. That the learned Magistrate erred in imposing penalties which were grossly disproportionate to previous penalties imposed by the Magistrates Court in relation to the same offence.
 6. That the learned Magistrate erred in law in misunderstanding the nature of his discretion pursuant to Section 18A of the Criminal Law Sentencing Act.
 7. The learned Magistrate imposed fines that were manifestly excessive in all the circumstances .
 8. Such further or other grounds as supplied by Counsel prior to the hearing of the appeal.

The appellant seeks the following orders:

1. That the fines against both the first and second defendants be quashed.
2. That in lieu of the fines imposed by the learned Magistrate, some lesser fines be imposed upon the Appellants, as deemed appropriate by this Honourable Court.

The Registrar of the Magistrates Court of South Australia is requested:-

1. To advise the Registrar of the Supreme Court of the existence of the appeal and afford that Court access to any electronic file relating to this matter; and
2. To forward to the Registrar all hard copy material relevant to the appeal, which is not contained in such electronic file.

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Solicitor for the Appellant