

BALLINA LOCAL COURT

ENVIRONMENTAL PROTECTION AGENCY

-V-

SIMON FEODOROFF

PLEA IN MITIGATION AND SUBMISSIONS ON COSTS

PLEA IN MITIGATION

**Relevant principles for sentencing**

1. Mr Feodoroff pleads guilty to the two charges of transporting waste to a place that cannot lawfully be used as a waste facility for that waste contrary to s 143 of the *Protection of the Environment Operations Act 1997* (POEO Act).
2. Many decisions of the Land and Environment Court and the Court of Criminal Appeal have considered the principles for sentencing for environmental offences, including under the POEO Act.<sup>1</sup> However, the decisions of Lloyd J in *Environment Protection Authority v Davis* [2005] NSWLEC 643 and Pain J in *Environment Protection Authority v Barnes* [2006] NSWLEC 2 are of particular assistance in relation to the considerations for sentencing in this case as they involved a similar offences against s 143 of the POEO Act. The *Barnes* case involved illegal disposal of septic waste in the Lismore area in analogous circumstances.<sup>2</sup>

**Section 241 of the POEO Act considerations**

3. Actual disposal of waste to land or harm to the environment is not an element of the offence charged. Rather, offences under s 143 of the POEO Act involve “transporting waste to a place that cannot lawfully be used as a waste facility for

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<sup>1</sup> See generally, the review of the case law by Preston CJ in *Environmental Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419; (2006) 148 LGERA 299 at [138]-[244], applying, in particular, the decisions in *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357; and *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683.

<sup>2</sup> *Environment Protection Authority v Pannowitz*; *Environment Protection Authority v Steepleton Pty Limited* [2005] NSWLEC 175 (Lloyd J); *Environment Protection Authority v Fernando and Another* [2003] NSWLEC 281 (Talbot J); and *Environment Protection Authority v Australian Pacific Oil Company Pty Limited and Others* [2003] NSWLEC 279 (Talbot J); *Environment Protection Authority v Nechakoski* [2002] NSWLEC 61 (Pearlman J) also involved offences against s 143 but the circumstances were quite different.

that waste”.<sup>3</sup> However, harm to the environment is a relevant consideration in sentencing all offences against the POEO Act because of s 241 of the Act, which provides:

**241 Matters to be considered in imposing penalty**

- (1) In imposing a penalty for an offence against this Act or the regulations, the court is to take into consideration the following (so far as they are relevant):
  - (a) the extent of the harm caused or likely to be caused to the environment by the commission of the offence,
  - (b) the practical measures that may be taken to prevent, control, abate or mitigate that harm,
  - (c) the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence,
  - (d) the extent to which the person who committed the offence had control over the causes that gave rise to the offence,
  - (e) whether, in committing the offence, the person was complying with orders from an employer or supervising employee.
- (2) The court may take into consideration other matters that it considers relevant.

***Extent of harm caused or likely to be cause to the environment***

4. There was a relatively minor extent of harm caused or likely to be caused to the environment in this case in comparison to other cases prosecuted under the POEO Act,<sup>4</sup> including offences against s 143. The grease waste and wash-down water caused die back in grasses, ferns and other low lying vegetation where it was deposited by Mr Feodoroff. While grease waste does not dissolve in water and would resist being washed away during a rainfall event, it contaminated the soil at the point it was disposed of and had some potential to move into a watercourse.

***Practical measures that may be taken to prevent, control, abate or mitigate***

5. The site has now been remediated by Northern Waste and all contaminated soil removed to appropriate waste facilities.<sup>5</sup>

***Foreseeability of the harm***

6. Mr Feodoroff could reasonably have foreseen the contamination of the soil at the disposal site.

***Extent of control over the causes that gave rise to the offence***

7. Mr Feodoroff had control over the causes that gave rise to the offence. The offences were deliberate and not accidental, although not pre-meditated or planned beforehand.

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<sup>3</sup> However, under subs 143 (3C), “it is a defence in any proceedings for an offence under this section if the defendant establishes that the waste transported by the defendant was not deposited by the defendant or any other person at the place to which it was transported.” Note also that “premises”, “waste” and “waste facility” are defined in the dictionary of the Act.

<sup>4</sup> E.g. see *Environmental Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419; (2006) 148 LGERA 299.

<sup>5</sup> See the Written Statement of Simon Feodoroff, 26 June 2008.

***Complying with orders from an employer or supervising employee***

8. In committing the offences Mr Feodoroff was not complying with orders from an employer or supervising employee.

**CSP Act principles**

9. The *Crimes (Sentencing Procedure) Act 1999* (CSP Act) also provides general principles for sentencing. Section 3A provides the purposes of sentencing, which include adequately punishing the offender for the offence and preventing crime by deterring the offender and other persons from committing similar offences. Section 21A of the Act sets out aggravating, mitigating and other factors in sentencing.

***Punishment***

10. Given Mr Feodoroff's very limited means to pay a fine, imposition of a fine equivalent of 2 weeks wages would be suitable punishment in the circumstances of this case. His current weekly wages are \$691 after tax,<sup>6</sup> which would indicate a fine of \$1,400 would be appropriate punishment.

***Deterrence***

11. General deterrence is a major consideration in imposition of penalties, including of this type.<sup>7</sup> Some general deterrence for other offenders has been partially achieved in this case simply by choice of the prosecution of Mr Feodoroff personally, rather than Northern Septic which employed him and was vicariously liable for his actions.
12. Personal deterrence in this case is of limited relevance as Mr Feodoroff has ended his employment as a waste transporter and now works as a pump technician in Queensland.<sup>8</sup>

***Guilty plea***

13. Mr Feodoroff's early plea of guilty is a matter to be taken into account.<sup>9</sup> In *Environment Protection Authority v Barnes* [2006] NSWLEC 2 at [44] Pain J noted that a plea of guilty entitles a defendant to a range of 10-25% discount in penalty.<sup>10</sup>

***No commercial profit***

14. The fact that Mr Feodoroff received no commercial profit from the offences is a relevant matter to be taken into account. The Courts have repeatedly stated that when sentencing for environmental crime the sentence needs to be of such

<sup>6</sup> See the Written Statement of Simon Feodoroff, 26 June 2008.

<sup>7</sup> *Environment Protection Authority v Davis* [2005] NSWLEC 643 at [27] (Lloyd J).

<sup>8</sup> See Written Statement of Simon Feodoroff, 26 June 2008.

<sup>9</sup> Section 22 of the CSP Act.

<sup>10</sup> Citing *R v Thomson*; *R v Houlton* (2000) 49 NSWLR 383; *R v Sharma* (2002) 54 NSWLR 300.

magnitude as to change the economic calculus so that it should not be cheaper to offend than prevent the commission of the offence.<sup>11</sup>

15. At the time the offences were committed Mr Feodoroff was employed by Northern Septic for a wage of approximately \$18 per hour before tax and \$495.00 weekly after tax and did not share in the profits of the business. He earned no profit from the offences and although he saved time by not properly disposing of the waste, if he had done so he would have been paid for his work at his normal hourly rate.

### **Limited means to pay a fine**

16. Section 6 of the *Fines Act 1996* provides that 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

17. Mr Feodoroff has very limited means to pay a fine and the prosecution costs. His current weekly wages after tax are \$691 and he has no assets other than a family car, a motorbike, and household goods. He has two children aged 11 and 9 years old at school. His wife works but the combined the family has only \$100-200 per week to spare in the family budget.<sup>12</sup>

### **Comparative sentences**

18. The decisions of Lloyd J in *Environment Protection Authority v Davis* [2005] NSWLEC 643 and Pain J in *Environment Protection Authority v Barnes* [2006] NSWLEC 2 involved similar offences against s 143 of the POEO Act as in the present case.<sup>13</sup>

19. In the *Davis* case Lloyd J imposed a fine of \$5,000 for a waste transporter who deliberately disposed of 2,000 litres of septic waste into the Tweed River, 400m upstream of the inlet point for the water supply to the township of Uki. Lloyd J considered an appropriate penalty in that case was \$8,000 but discounted it to \$5,000 taking into account the circumstances of the case, including the defendant's limited means to pay a fine. The maximum fine available in that case was \$120,000.

20. In the *Barnes* case Pain J imposed fines totalling \$4,500 on a waste transporter who pleaded guilty to two counts of illegal disposal of septic waste in the Lismore

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<sup>11</sup> *Environmental Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419; (2006) 148 LGERA 299 at [229].

<sup>12</sup> See Written Statement of Simon Feodoroff, 26 June 2008.

<sup>13</sup> *Environment Protection Authority v Pannowitz*; *Environment Protection Authority v Steepleton Pty Limited* [2005] NSWLEC 175 (Lloyd J); *Environment Protection Authority v Fernando and Another* [2003] NSWLEC 281 (Talbot J); *Environment Protection Authority v Australian Pacific Oil Company Pty Limited and Others* [2003] NSWLEC 279 (Talbot J); and *Environment Protection Authority v Nechakoski* [2002] NSWLEC 61 (Pearlman J) also involved offences against s 143 but the circumstances were quite different.

area. Her Honour gave a discount of 25% for the early plea of guilty<sup>14</sup> and would have imposed a much higher penalty had the prosecutor's costs (of \$15,727.13) not been so great.<sup>15</sup> The maximum fine available in that case was \$120,000.

21. A point of distinction from the *Davis* and *Barnes* cases is that they were proceedings in the Land and Environment Court in which the maximum fines were \$120,000. Since those cases the maximum penalty for an individual for an offence against s 143 of the POEO Act prosecuted in the Land and Environment Court has been raised to \$250,000. However, as these proceedings have been brought summarily in the Local Court, s 215 of the POEO Act limits the maximum monetary penalty that the Court may impose for the offence to 200 penalty units or \$22,000.<sup>16</sup>

### Appropriate penalty range

22. The offences in the present case lie at the low end of the scale of offences against s 143 of the POEO Act. Having regard to the matters set out above and the lower maximum penalty for the offences when compared with the sentences imposed in *Davis* and *Barnes*, the appropriate penalty range is between \$1,000 and \$2,000. Such a penalty will be a significant punishment to Mr Feodoroff as it is equivalent to 2 weeks wages for him, after tax.

### SUBMISSIONS ON COSTS

23. The EPA seeks \$12,294.25 as investigation costs under s 248 of the PEO Act.

#### 248 Orders regarding costs and expenses of investigation

- (1) The court may, if it appears to the court that a regulatory authority has reasonably incurred costs and expenses during the investigation of the offence, order the offender to pay to the regulatory authority the costs and expenses so incurred in such amount as is fixed by the order.

...

- (3) In this section:

**costs and expenses**, in relation to the investigation of an offence, means the costs and expenses:

- (a) in taking any sample or conducting any inspection, test, measurement or analysis,  
or  
(b) of transporting, storing or disposing of evidence,  
during the investigation of the offence.

24. The EPA's investigation costs appear unreasonable in a number of regards, including the fact that multiple site visits were conducted and the EPA purports to charge Mr Feodoroff for the cost of travel expenses for staff from Sydney. These travel costs are the result of the EPA's administrative structure being centralised on Sydney and impose an unfair burden on people in regional areas. If the EPA is entitled to travel costs, it should be limited to travel costs from the nearest EPA office, which is Lismore.

25. The EPA also seeks \$10,382.75 as its "professional costs" under s 215(1)(a) of the *Criminal Procedure Act 1986*. "Costs" are defined in s 211 and s 215 provides as follows:

<sup>14</sup> *Environment Protection Authority v Barnes* [2006] NSWLEC 2 at [44].

<sup>15</sup> *Environment Protection Authority v Barnes* [2006] NSWLEC 2 at [53].

<sup>16</sup> A penalty unit being \$110: s 17 *Crimes (Sentencing Procedure) Act 1999*.

**211 Definition**

In this Part:

**professional costs** means costs (other than court costs) relating to professional expenses and disbursements (including witnesses' expenses) in respect of proceedings before a court.

**215 When costs may be awarded to prosecutor**

- (1) A court may at the end of summary proceedings order that the accused person pay the following costs to the registrar of the court, for payment to the prosecutor, if the accused person is convicted or an order is made against the accused person:
  - (a) such professional costs as the court considers just and reasonable,
  - (b) court costs, to be paid to the registrar for payment to the prosecutor if the costs have been paid by the prosecutor or, if they have not been so paid, to be paid to the registrar of the court. ...
- (2) The amount that may be awarded under subsection (1) (b) for court costs is:
  - (a) the filing fee for a court attendance notice, or
  - (b) such other amount as the court considers to be just and reasonable in the circumstances of the case. ...

26. The EPA's professional costs also appear unreasonable. Multiple staff have dealt with the matter in what appears to be simply the result of staff turn-over at the EPA without furtherance of the prosecution case. It is unreasonable for the EPA to seek costs for multiple staff to "review the file". It is also difficult to see how it was necessary for a lawyer to attend an on-site conference and take a statement (as done on 11/07/2006), charging for 6 hours at \$1,100. This task was one that should have been done by investigation staff, not a lawyer and it is not a reasonable professional cost. The EPA also seek costs for time spent negotiating with Mr Feodoroff's solicitor but those negotiations were conducted on a "without prejudice" basis and, therefore, should not create a liability for costs.
27. Considering the relatively minor nature of the offence involved here, it is submitted that professional and investigation costs should be limited to the order of \$1,000-\$3,000. Imposition of these costs can be taken into account to reduce or off-set the penalty that Mr Feodoroff is order to pay<sup>17</sup> as the imposition of costs amounts in effect to further penalty for him even though the intention of costs is to compensate the successful party not punish the losing party.

**Chris McGrath  
Counsel**

**26 June 2008**

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<sup>17</sup> *Environment Protection Authority v Barnes* [2006] NSWLEC 2 at [53].