

**Land and Environment Court  
New South Wales**

<b>Medium Neutral Citation</b>	Gordon Plath of the Department of Environment, Climate Change and Water v Lithgow City Council [2011] NSWLEC 8
<b>Hearing Dates</b>	26 July 2010
<b>Decision Date</b>	11/02/2011
<b>Before</b>	Sheahan J
<b>Decision</b>	<p>1. In both matters, the defendant is convicted of the offence against s 118A(2) of the <i>National Parks and Wildlife Act 1974</i>, as charged in the summonses filed 17 December 2009;</p> <p>2. In respect of the charge in matter No. 50081 of 2009, the defendant is fined the sum of \$90,000;</p> <p>3. In respect of the charge in matter No. 50082 of 2009, the defendant is fined the sum of \$15,000;</p> <p>4. The defendant pursuant to s 205(1)(d) and Schedule 3 [68] of the <i>National Parks and Wildlife Act 1974</i>, and in lieu of orders 2 and 3, is to pay within 28 days of this order to " <i>Industry &amp; Investment NSW</i>", the amount of \$105,000 to be used by the Derelict Mines Program to assist in site rehabilitation at the Glen Davis Oil Shale Quarry Site, located in the Capertee Valley NSW.</p> <p>5. All future public references by the defendant to its contribution to the rehabilitation of the Glen Davis Oil Shale Quarry Site in the Capertee Valley shall be accompanied by the following passage:</p> <p style="padding-left: 2em;"><i>" Lithgow City Council's contribution to the funding of rehabilitation of the Glen Davis Oil Shale Quarry Site in the Capertee Valley is part of a penalty imposed on it by the Land and Environment Court of NSW after Council was convicted of two offences of picking threatened species, an offence against s 118A(2) of the National Parks and Wildlife Act 1974 ."</i></p> <p>6. The defendant, pursuant to s 205(1)(a) and Schedule 3 [68] of the <i>National Parks and Wildlife Act 1974</i>, is to place a notice in the first 5 pages of the Lithgow Mercury at a minimum size of 10cm by 25cm in the form of Annexure 'A', within 14 days of this order.</p> <p>7. The defendant is to pay the prosecutor's costs, as agreed, in the sum of \$25,000 within 28 days of this order.</p> <p>8. <i>Exhibit P1</i> is to be retained in the court's file.</p>
<b>Catchwords</b>	ENVIRONMENTAL OFFENCES: early pleas of guilty - discount - public authority with environmental responsibilities - environmental record - threatened species damaged by Council's roadworks - measuring environmental harm caused - remedial actions now taken - sentencing principles and considerations - prosecutor's costs
<b>Legislation Cited</b>	Crimes (Sentencing Procedure) Act 1999 Environmental Planning and Assessment Act 1979 National Parks and Wildlife Act 1974 Protection of the Environment Operations Act 1997 Threatened Species Conservation Act 1995
<b>Cases Cited</b>	Axer Pty Ltd v Environment Protection Authority (1993) 113 LGERA 357 Bentley v BGP Properties Pty Ltd [2006] NSWLEC 34 Bentley v Gordon [2005] NSWLEC 695 Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority (1993)

# JUDGMENT

## INTRODUCTION

- 1 **His Honour:** The defendant, Lithgow City Council ('Council'), has pleaded guilty to **two charges** brought by the prosecuting department ('DECCW' or 'the department') under s 118A(2) of the *National Parks and Wildlife Act 1974* ('*NPW Act*') concerning the picking of plants of threatened species, which are listed as " *endangered* " in Part 1 of Schedule 1 of the *Threatened Species Conservation Act 1995* ('*TSC Act*').
- 2 The guilty pleas were entered on the first return date (12 February 2010). As Council has admitted to the essential elements of the two offences, this judgment concerns the sentences to be imposed.
- 3 The hearing of the matter was greatly facilitated not only by extensive written submissions filed by both parties, but also by their agreement in May 2010 on a Statement of Agreed Facts ('SOAF'), and, on 20 July 2010, just prior to the hearing, on an addendum to it ('the addendum'). Both these agreed documents, and their annexures, are in evidence (as *Exhibit P1* ), and need not be set out in full. They will remain in the court's file.
- 4 It is conceded that the Council cooperated with the prosecutor throughout the investigation and the proceedings, and that it is entitled to a substantial (if not the maximum) discount on account of its very early plea. It is also noted that the Council has agreed to pay the prosecutor's costs, in the sum of \$25,000, and has also agreed to the making of orders under s 205 of the *NPW Act* (which is relevantly similar to s 250 of the *Protection of the Environment Operations Act 1997* ('*POEO Act*') ).

## THE CHARGES AND PARTICULARS

- 5 The offences were committed between about 22 April **2008** and 2 May 2008 at or near Port Macquarie Road, Glen Alice ('the road'), which is in the Capertee Valley, an area added to the Council local government area in 2004 from Rylestone Shire. Glen Alice is generally 90km north of Lithgow, and south-east of Kandos and Rylestone. The offences occurred as a result of routine road maintenance works conducted by two Council employees in the Glen Alice area.
- 6 The prosecuting department received a complaint on Friday 2 May 2008, that roadworks along the road may have disturbed the threatened species populations. The investigation commenced with a visit to the site on 12 May 2008 by two DECCW officers, but the defendant Council was not notified of the investigation into the offences until November 2008.
- 7 The charges were laid on 17 December 2009. The first charge (50081) concerns the picking of 76 plants of the species *grevillea obtusiflora* . The second charge (50082) concerns the picking of one plant of the species *phebalium bifidum* . The affected *grevillea* plants were of the subspecies *fecunda* , is endemic to the Capertee Valley, and the *phebalium* species also is found only in that area. (See generally SOAF pars 4-10).
- 8 The prosecutor relies on the particulars agreed in pars 46(a), (b) and (c) of the SOAF, namely that prior to the works:
  - (a) The Council did not consider the potential impact of the works on threatened species;

- (b) No on-site assessment was undertaken by any supervisor or manager from Council staff;
- (c) No environmental assessment or Review of Environmental Factors ('REF') was undertaken, in accordance with part 5 of the *Environmental Planning and Assessment Act 1979* ('EPA Act').

- 9 The prosecutor also relies upon the fact that it warned Council in November/December **2006**, after the department received information alleging damage to *grevillea* along Home Hills Road and Port Macquarie Road, allegedly also the result of road maintenance and grading works undertaken by Council employees (SOAF pars 15-17 and detailed below at [17]ff).
- 10 The particulars of the offences charged in these proceedings make clear that the picking of the plants occurred through the carrying out by employees of the Council of roadworks " *which cut, pulled up, destroyed, dug up, removed and/or injured the plants* ". Those road maintenance activities were carried out through the use of a bulldozer and a self-propelled vibrating roller (SOAF pars 2, 26 and 27).

## **THE PENALTY**

- 11 As both these species are " *endangered* ", not merely " *vulnerable* ", the penalty is that nominated in s 118A(2)(a), namely:

" *2,000 penalty units or imprisonment for 2 years or both, and an additional 100 penalty units in respect of each whole plant that was affected by or concerned in the action that constituted the offence*".

- 12 The parties are agreed that the maximum penalties, based on the agreed facts of this case, would be:

\$1,056,000 and/or two years imprisonment for picking 76 *grevillea obtusiflora subsp. facunda* plants; and  
\$231,000 and/or two years imprisonment for picking one *phebalium bifidum* plant.

## **THE SWORN EVIDENCE**

- 13 In addition to the SOAF and the addendum, the prosecutor relied upon evidence given by the department's Senior Threatened Species Officer, David Matthew **Coote**, in his affidavit dated 10 June 2010, filed in reply to affidavit evidence relied upon by the Council, namely an affidavit from Roger Stephen **Lembit**, a self-employed ecological consultant, dated 27 May 2010.
- 14 On behalf of DECCW, Mr Coote consults with the Department of Planning, including on reviews of development applications, threatened species impact statements, licence applications, Part 3A developments and applications under the Biodiversity Banking and Offsets Scheme. He has made repeated visits to the road and has conducted numerous targeted surveys for both species along that road and elsewhere. He has also engaged with various private landowners living along the road, as well as with Council representatives, over conservation management recommendations arising from threatened species surveys.
- 15 Mr Lembit actually swore two affidavits, the second dated 27 July 2010, and was cross-examined at the hearing. His qualifications and experience are well known in the court, and in his affidavit of 27 May 2010 he deposed that he has worked extensively through the Central Tablelands and Blue Mountains, including the Capertee Valley. He has advised other public sector bodies regarding potential impact on *grevillea* species. Once engaged by solicitors for the Council on 28 February 2010, he prepared a flora assessment report which is annexed to the first affidavit.

16 The defence also relied upon an affidavit sworn by Andrew Christopher **Muir** , Council's Group Manager Regional Services, on 28 May 2010. Mr Muir has been employed by the Council since April 1983 and has been Group Manager since 9 October 2006. Prior to that appointment, he was manager of Environmental & Planning Services. He is responsible for the oversight of three Council divisions, including " *operations* " which covers roadworks, maintenance, grading, etc. Since June 2009 the Operations Division now comes under a different group manager.

## COUNCIL ROADWORKS

17 Mr Muir notes that the Council is responsible for some 440km of unsealed roads, 15% of which came with the Rylestone Shire transfer in 2004. Council's Operations Division has a total staff of 48 and a road crew staff of 15. The annual budget for the maintenance of unsealed roads is approximately \$715,000, insufficient to maintain all unsealed roads on a systematic or frequent basis. He deposes that " *most maintenance work is organised according to need based on the state of repair of the road as observed by Council staff or as reported to Council via complaints from members of the public* ".

18 At least one roaming crew would work in the Glen Alice area for several months each year. A team of two employees, one driving a grader, and the other a roller, carry out the work. Servicing of mitre drains is a key part of that task, as they drain water from roads and can fill up with sediment. The drains are cleared out to maintain road safety. The roller is used to compress the road surface after it has been graded and the adjoining drains cleared. These teams generally work in tandem on 2km sections going up one side, and back the other. While the grader is in a particular area, the Assistant Works Coordinator, in consultation with the grader operator, assesses which roads are in need of maintenance, and responds to requests or complaints.

19 At the time of the offence, the Council had a " *Safe Work Method Statement* " for maintenance grading works, but no documented procedure or written instructions for employees in relation to site assessment, works assessment, or completion of maintenance works on the road (SOAF par 29).

20 Other relevant employees of the Council (apart from Mr Muir) at the time of the offences are identified in par 30 of SOAF. Stephen **Darlington** was Operations Manager, responsible for " *overall control and management of [Council's] operations* ". The ganger/grader operator Ian **Dray** and the roller operator Aaron **Pender** were carrying out routine maintenance works on unsealed roads in the relevant area between February and May 2008. They were not new to the task. They had been instructed by the Assistant Works Coordinator (Rural), Ernie **Hughes** , to carry out routine maintenance works in the Glen Alice area, including the grading, rolling and the cleaning of mitre drains along the road. Mr Dray was the lead employee at the site and made the decision as to whether the road(s) actually needed work. (SOAF pars 31-34).

21 As these works occurred some 90km north of Lithgow, Mr Dray and Mr Pender did not attend the Council yards each day. They worked relatively autonomously for the February to May period, leaving their machinery onsite at the end of each working day. They were in contact with Mr Hughes by radio or mobile phone as necessary. The Council's Works Engineer, Chris **Schumacher** , who supervised Mr Hughes, did not attend Glen Alice during the period. (SOAF pars 35-39).

22 Between 22 April and 2 May 2008, Mr Dray and Mr Pender spent four days carrying out road maintenance work in the subject area. (Work records show they were working at the relevant site

on 22-23 April and 1-2 May). They completed their work in accordance with the then accepted general road maintenance practices of the Council.

- 23 Prior to those works they had received no instruction that their regular conduct was in any way unacceptable. They had not been previously advised about threatened species issues in that area, or the Council area more generally, and became aware of such issues only after most of their work (over 75%) in the Glen Alice area had been completed. At some stage during that April-May period, Mr Hughes verbally cautioned Mr Dray to avoid " *trees* " on the road. (SOAF pars 40-43).
- 24 Mr Hughes has stated (SOAF par 44) that he was aware of the joint site inspection by officers of both the department and Council in 2006, and that it related to a threatened species issue, but had not seen a map of threatened species locations in the Council area, and had never been advised by Mr Schumacher about threatened species issues of which he should be aware in relation to the road.
- 25 Mr Schumacher says (SOAF par 45) that, prior to the works, he was aware of the department's letter to Council dated 15 December 2006 (at tab 5), to which I will return, and that he had made Council supervisors aware of it. He says he had instructed supervisors that workers were not to widen or go off the roads in that area, but that he accepted existing mitre drains would still be cleared out as a matter of course, because of their safety importance.
- 26 The prosecutor acknowledges, in the addendum to the SOAF, that it is not possible to conduct road maintenance works along the relevant section of the road without impacting on individual *grevillea* plants. Accordingly, it is agreed between the parties that there needed to be a management process in place which sought to ensure that road maintenance activities do not threaten the viability of the populations of threatened species along the roadside (addendum par 3).

## **THE OFFENCES INTERVENE**

- 27 On Friday 2 May 2008, DECCW received an email from a local resident complaining that Council roadworks along the road may have disturbed the threatened species populations. Senior DECCW officers (David Coote and Mark Clyne) went to investigate the road on 12 May (SOAF pars 47-50), and identified 16 sites where there was evidence of roadworks. These can be characterised in three groups - mitre drain sites, road edge sites, and the turnaround point (SOAF pars 51-52). DECCW acknowledges that mitre drains need to be cleared out on a regular basis to maintain their effective function in clearing the road of water (SOAF par 53).
- 28 The sites surveyed were mapped (SOAF par 54 and tab 8). At each site the officers identified, counted, and recorded harmed *grevillea* and *phebalium* . Harmed plants included " *plants with broken, removed or lacerated branchlets; flattened or partly flattened plants; and plants that had been partly uprooted or entirely removed from soil* " (par 55). Photographs were taken (tab 9) and the resultant investigation was tabulated (par 57). There were six samples taken. 76 *grevillea* and one *phebalium* plants were identified as damaged. Further results appear at tab 10 (par 58), but par 59 notes that "*the numbers of damaged plants of each type may be minimums as all piles of soil were not searched by the officers* ".

## **THE DEPARTMENT'S INVOLVEMENT WITH COUNCIL**

- 29 In November 2006, DECCW, then known as the Department of Environment and Conservation

('DEC'), received information alleging damage to *grevillea fecunda* along Home Hills Road and Port Macquarie Road in or near Glen Alice, as a result of road maintenance and grading works undertaken by the Council. Following an inspection by DEC officers on 16 November 2006, a meeting was held with officers of Council and a field inspection undertaken on 27 November 2006. Council officers were shown what *fecunda* looked like, and some plants were tagged to identify areas where road grading could continue without damage to threatened plants (SOAF pars 15-17).

30 The discussions on the field inspection were formalised in the letter from DEC to Council dated 15 December 2006 (SOAF par 18, and [25] above). A map showing the locations of threatened plant species in the Council area, including the two subject species, was included (see tab 5). The letter commented:

*" The area already graded on Port Macquarie Road prior to our inspections has not been thoroughly searched yet.*

*The DEC expects that Lithgow City Council will consider threatened species in all future environmental assessments prior to works being undertaken, as it has an obligation under Part 5 of the Environmental Planning and Assessment Act 1979. Threatened species data can be found in the Atlas of NSW wildlife ...*

*I strongly encourage further consultation with DEC prior to any proposed roadworks taking place in the areas indicated in this letter and attached maps " .*

31 The letter provided an internet link to the NPWS Grevillea Recovery Plan dated September 2001 (SOAF par 19 and tab 6). Section 8.3.3 of that Plan (on p 25) clearly identifies road management activities, including grading, widening and slashing, as a major threat, along with herbicide application. Appendix 1 to the Plan contains " *site information* ". Site " *F2* " is the road (p 4), where approximately 500 *fecunda* plants were identified by surveys in 1998-99 - the " *largest site* " of *fecunda* . The Appendix notes that:

*"...there is a high priority to keep this site intact and undisturbed. It is located on an unsealed road, and borders freehold farmland.*

*There are a number of potential threats:  
roadside management such as grading or weed spraying.  
clearing or grazing of sites on freehold land.  
fire, particularly frequent fires, lightning/burn-off escapes/arson."*

32 The correspondence was **personally addressed** to Mr Muir, but Council's electronic document management system confirms that the letter was in fact not forwarded to him. He did not become aware of it until November 2008, when the regional manager of the department mentioned " *an endangered species issue at Port Macquarie Road, Glen Alice in another unrelated meeting* ", well after the offence had occurred. Mr Muir opines that this amounts to " *a serious and regrettable breakdown in communication and action on behalf of the Council* " .

33 The document management system indicates that the letter was directed to Council's Environmental Health Officer, David Durie, and to Mr Schumacher, on 22 December 2006. Both officers " *noted* " the letter on 3 and 2 January 2007 respectively. The system does not indicate that any formal action was taken, beyond notation.

34 In the approximately 18 months between November 2006 and April 2008, Council made no substantial changes to its internal processes for dealing with and managing threatened species issues in its areas (SOAF par 21). Mr Muir relevantly deposes (in par 8) that it is " *highly likely that if the letter of December 2006 had been brought to my attention at that time, the subsequent offence would not have occurred as I would have implemented measures to inform the relevant staff of the issue and put in place training and procedures with the assistance of DECCW* " .

- 35 Between July and December 2007, DECCW carried out a survey project in the Capertee Valley, with a focus on the two relevant species. As a result, DECCW produced a technical report in January 2008 and draft conservation management recommendations for management of populations of these plants along the two roads in February 2008 (SOAF par 20).
- 36 The survey project's Technical Report and a draft set of management recommendations were forwarded to Council on 17 April 2008 (SOAF par 22 and tab 7). They were addressed to Darlington, but their submission to Council regrettably coincided with the commission of these offences.
- 37 Darlington was contacted by DECCW on 7 August 2008 regarding the possibility of installing signs along the road in accordance with the recommendations. Council agreed to the signage proposal on the basis that DECCW would provide the signs, but for various reasons they were not provided until January 2009. The signage was installed on the two roads on that date (SOAF pars 23-24).
- 38 Mr Muir notes (in par 11) that "[i]t is also regrettable that the steps which the Council had undertaken with the assistance of DECCW, particularly the installation of signs warning road users of the existence of threatened species in the vicinity, were not implemented until after the date of the offence in April/May 2008".
- 39 The conservation management recommendations (second item attached to the letter in tab 7) note "threats" (in s 3.4 on p4), to both *grevillea* and *phebalium*, as:

*current: the chief threat to roadside populations is direct damage to and removal of plants and habitat associated with infrastructure maintenance activities (e.g. road work and repair of telecommunications cable)*

*anticipated: competition for space and light (as areas regenerate)*

*potential: inappropriate fire regimes: fungal root-rot (Phytophthora) infection ; grazing by rabbits and feral goats; weed invasion".*

- 40 The recommendations to Council are set out in s 7.1 of that document (p14) as follows:

*1. erect Significant Roadside Environment Area signs at strategic points along Home Hills and Port Macquarie Roads*

*2. prior to undertaking road and roadside maintenance activities, assess potential impacts on roadside Grevillea and Phebalium populations using the Environmental Impact Assessment Guidelines for G. obtusiflora (NPWS 2000)*

*3. avoid roadside Grevillea and Phebalium populations during road and roadside maintenance activities*

*4. permit establishment of monitoring plots on roadside and yearly monitoring of populations by DECC*

*5. undertake opportunistic monitoring of the Phebalium and Grevillea population along roadsides; where necessary report observations to DECC*

*6. observe hygiene protocols in the vicinity of Phebalium and Grevillea patches."*

## **COUNCIL'S RESPONSE POST-INCIDENT**

- 41 Since the 2008 incident (SOAF par 70) the Council has instructed relevant employees that the turning of machinery should occur only in appropriate areas in order to avoid or minimise damage to roadside vegetation. Officers of the department have instructed relevant Council employees in the identification of a threatened species and have reached agreement on the location of appropriate signage. The SOAF records (par 70(c)) that the Council had commenced the process of preparing a Standard Working Procedure ('SWP') for maintenance works on roads in the Capertee Valley. The procedure was adopted on an interim basis on 8 March 2010 subject to final review by Council's consultant ecologist (Mr Lembit), and comment by the department. The ecologist was also to assist in the preparation of a property management plan ('PMP') under the TSC Act .

- 42 Between the filing of the SOAF and of the addendum, Council filed Mr Muir's affidavit (on 28 May

2010). Mr Muir listed the following steps taken by Council to " *ensure there is no repeat occurrence* " (see Muir's affidavit par 13):

*"(a) Installed signs warning road users of the existence of threatened species in the vicinity on Port Macquarie, Home Hills and Wolgan Roads.*

*(b) Provided information to DECCW pursuant to a notice under the [POEO Act] dated 18 December 2008.*

*(c) Arranged for Council staff to participate in recorded interviews with a DECCW investigator on 18 May and 19 June 2009.*

*(d) Conducted training of more than 25 operational staff members about Grevillea obtusiflora located along Home Hills and Port Macquarie Roads.*

*(e) consented to a Statement of Agreed Facts being tendered in these proceedings.*

*(f) Prepared and adopted on an interim basis a Standard Working Procedure - Maintenance Management of Roadsides in the Capertee Valley ('SWP') and provided a copy of to DECCW for its review and comment.*

*(g) Engaged a respected Ecologist to provide it with advice and to prepare a Property Management Plan under s.113B Threatened Species Conservation Act 1995 ('PMP') or similar to cover future road maintenance works on Council's unsealed roads".*

43 Paragraph 10 of the addendum indicates that the SWP document has now been finalised, and it appears as Annexure 'A' to the addendum. It was issued on 12 July 2010 and focuses on *grevillea* .

44 The SWP notes that Capertee Valley has long been recognised as a " *Biodiversity Hot Spot* ", i.e. a location where there is an unusual number of endemic species which occur nowhere else in the world. Many species are threatened because their habitat has been cleared for a variety of reasons, or is very small, and they are localised in limited numbers. The SWP document recognises that this makes these threatened species, including *grevillea* and *phebalium* , very vulnerable to any impacts such as fire, clearing, or roadside management activities, including grading, drain-clearing, and weed spraying.

45 The procedures set out in the SWP document (s 3.3) involve closer direction, guidance and advice, and formal induction processes outlining the rare plants of the valley. Staff are to be provided with a package of species profiles. Formal review and induction processes are to be adopted - the minimum being an annual refresher course on rare plants of the valley to ensure that all staff are competent and adequately understand their responsibilities.

46 In a further effort to avoid recurrence of these offences, a REF, supported by an Environmental Management Plan ('EMP'), will be prepared for all future road maintenance works (addendum pars 4-7). Such works are required to maintain a safe road surface, but they constitute a threat to these species, and will need to incorporate controls to limit the impact on them. The controls envisaged include: (1) A review of the number, design, location and necessity of mitre drains; (2) Restriction of turn areas to existing driveways or designated marked zones away from the vegetation; (3) Avoidance of disturbance of soils, leaf and surface vegetation away from road verges and existing mitre drains; and (4) Suspension of work during wet periods to limit potential for soil compaction, erosion and the spread of pathogens.

47 Council also accepts (addendum par 7(g)) the need for " *training for plant operators and supervisors regarding the identity and location of threatened species populations, with species profiles being provided as part of health, safety and environment induction training* ".

48 The SOAF (in par 69) identifies the following mitigation measures that were available to Council, **pre** -offence:

(a) It could have assessed potential impact of roadside management activity in accordance with the *EPA Act* and the environmental impact assessment guidelines annexed in Appendix 4 of the Recovery Plan, and then implemented procedures found necessary.

(b) It could have better trained its supervisory and ground staff on how to fulfil its obligations with respect to threatened species while performing their duties.

(c) It could have installed " *Significant Roadside Environmental Area* " signage along the road.

(d) It could have adopted protocols which prevent pathogen and/or weed evasion, such as washing down machinery prior to work being done in sensitive areas.

49 The Council's submissions dated 22 July 2010 (par 34-5) acknowledge that the most important measures required of road crews involved in future roadworks are:

(1) to be aware of the existence of endangered species - by signs, supervision, induction, refresher and profile documents;

(2) to avoid moving road maintenance equipment off previously disturbed parts of the road (e.g. to turn around or avoid oncoming vehicles); and

(3) to minimise the introduction of pathogens and weeds by washing down Council equipment in advance of road maintenance works.

Each of these measures has been implemented and will be incorporated in the proposed EMP.

50 Had all these controls been in place at the time of the offences, it would have reduced the number of *grevillea* plants picked, but it is accepted that several plants would be picked as part of any approved road maintenance works (addendum pars 8-9). The sub species *fecunda* is capable of establishing on disturbed ground associated with mechanical disturbance of soil along roads (SOAF pars 7 and 63).

## EVIDENCE OF ENVIRONMENTAL HARM

51 The SOAF addresses questions of **actual** environmental harm (pars 61-64) thus:

Actual harm to *grevillea* : 76 plants were " *picked* ", representing

(a) 10% of the *fecunda* population located in the public easements on the road, and

(b) approximately 2.5%-3% of the total *fecunda* population.

Actual harm to *phebalium*: one plant was " *picked* ", representing

(a) 1%-2% of the population located in the public easements on the road, and

(b) 0.5% of the total *phebalium* population.

52 The SOAF notes (in pars 62-64) that:

*" Harm to large adult plants which bear many flowers and higher levels of fruit and seed has a greater impact on the persistence of the species than harm to immature plants which tend in some cases to have higher levels of natural mortality... Approximately 60% of the plants which were picked were immature plants, in the sense that no fertile material (flowers, fruits) were (sic) evident or they were relatively small in height and/or spread.*

*Grevillea ... fecunda ... can be a good recoloniser of disturbed ground, after events such as roadworks, provided the disturbance has left root-stocks and/or rhizomes intact in the soil. There is no data pertaining to individual plants as to whether this occurred in this case.*

*There is evidence that some rootstocks were wholly uprooted or damaged to the point where regeneration is unlikely... There are several plants ... where only aerial parts ... appear to have been damaged; in these cases regeneration ... is at least likely..."*

53 **Potential** harm, dealt with in the SOAF (at par 65), would include (as evaluated for actual consequences as at May 2010):

(a) Introduction of pathogens especially "Pc": Infection of new sites is common as a result of earthmoving equipment. Once introduced, it is extremely hard to eradicate or contain. Many species of *grevillea* or *phebalium* have been found to be susceptible and earthmoving events, like

the works in this case, are exactly the type of event that spreads Pc in the absence of precautionary measures.

(b) Soil compaction: It is clear from the photographs in the SOAF (tab 9) that compaction can have, but not necessarily, a significant adverse effect on moisture retention, suitability for seedlings, and penetration by shoots from underlying seeds.

(c) Weeds: The works could have resulted, through lack of adequate planning, in the introduction of aggressive environmental species of weeds.

(d) Loss of leaf litter layer: This area generally has a low level of leaf litter. Early post-offence photographs suggested a probable effect on leaf litter levels.

54 However, as at May 2010, there was no symptomatic evidence of pathogens, no quantifiable evidence of actual harm to either species through soil compaction, no evidence of weed establishment as a result of the disturbance, no evidence of major changes to leaf litter levels, and no demonstrable adverse effects on the subject plants.

## THE EXPERT EVIDENCE

### MR LEMBIT

55 Mr Lembit's flora assessment report contains a lot of valuable ecological information regarding both species, drawing on the relevant literature. In it, Mr Lembit comments:

*" Most of the mitre drains supported Grevillea obtusiflora ssp. fecunda plants including plants which appeared to have regenerated over the past eighteen months. It was not possible to determine whether these regenerating plants had grown from root suckers or from seed. Similar occurrences of young plants were observed within the road verge on either side of the Road."*

56 *Phebalium bifidum* were more difficult to detect as it was outside of the flowering season. The physical damage to *grevillea* plants appeared to be related to either vehicle movement along Port Macquarie Road or water runoff along the road associated with rainfall prior to the date of inspection. The road supports a large population of *grevillea* generally in a healthy condition and from a range of age classes. The majority of the plants observed were adult i.e. capable of flowering or flowering.

57 He opines that it is not possible to conduct road maintenance works along the relevant section of Port Macquarie Road without impacting on individual *grevillea* plants, so there needs to be a management process in place to ensure road maintenance activities do not threaten the viability of the populations of either *grevillea* or *phebalium*. He suggested that this could be achieved with an EMP for the two roads.

58 Council approved Mr Lembit's proposal to commence work on the preparation of a management plan, on 23 March 2010. That plan could fulfil the requirements of a PMP under s 113B of the *TSC Act*. Mr Coote suggested that the Council would be better to proceed by way of an REF supported by an EMP. Council has instructed Mr Lembit to conduct an REF, supported by an EMP.

59 In his first affidavit (at pars 18-31), Mr Lembit surveyed the activities of other public sector agencies in respect of maintenance activities that would normally be expected to impact on threatened species. In his conclusion he opined that "*road maintenance of unsealed roads in the Capertee Valley would be ... approved through an appropriate process and control system. Such works would need to incorporate controls to limit impact on threatened species such as grevillea obtusiflora ssp. Fecunda and Phebalium bifidum*".

60 He suggested (in par 33) the following likely controls:

*"the restriction of turn around areas to existing driveways or designated and marked zones away from the threatened species,*  
*the reduction of the number of mitre drains cleared during each period of maintenance activity e.g. clear every second drain,*  
*the avoidance of disturbance of soils, leaf litter and surface vegetation away from road verges and existing mitre drains,*  
*a prohibition on the construction of additional mitre drains and maintenance works on mitre drains being restricted to the current footprint,*  
*provision for wash down of vehicles prior to entering the Capertee Valley,*  
*suspension of work during wet periods to limit potential for soil compaction, erosion and spread of pathogens, and*  
*training for plant operators and supervisors regarding the identity and location of threatened species populations, with species profiles being provided as part of health, safety and environment induction training."*

61 He opined that had such controls been in place at the time of the offence, the number of *grevillea* plants picked by the subject works would have been between 40 and 62. He explained those numbers on the basis of the SOAF. His lower figure assumes that all road edge plants and half of the mitre drain plants would have been picked. His higher figure assumes that all road edge and mitre drain plants would have been picked.

## **MR COOTE**

62 The prosecutor asked Mr Coote to comment on the SWP document, and on Mr Lembit's first affidavit. He opined that the SWP document needed to be more comprehensive and detailed, and he particularised his concerns. While he supports staff induction and regular refreshers, he does not think it is realistic to expect staff to read the *Grevillea Recovery Plan*. They need a purpose-designed guide to the specific threatened species plants with photos showing the variation in form and appearance of each species, exactly where they are known to occur, etc. Signage cannot be relied upon to remind staff.

63 Mr Coote is generally supportive of Mr Lembit's evidence, but believes that an important control is missing from the list in Mr Lembit's par 33 (see [60] above), namely:

*"... a review should be carried out of the number, type and location of mitre drains in areas with threatened species issues. This review should be completed so as to assess whether:*

- i. all such mitre drains need to be maintained in the future, and*
- ii. whether the location of these mitre drains can be shifted or redesigned in order to continue to assist operation of the road but reduce the impact of the mitre drains on sensitive populations and their habitat".*

64 Council officers told him that at least some mitre drains on the road are probably surplus to needs.

65 Mr Coote accepts that the estimate of 40 plants is probably reasonable, but " *without knowing what such controls and mitigative actions will be, this figure could be even lower* ".

## **MR LEMBIT'S RESPONSE**

66 In Mr Lembit's second affidavit of 21 July 2010, he deposes to having conducted a site inspection of the road on 2 July 2010 as part of his work on the REF in relation to road maintenance works on the two roads. " *The primary purpose of that inspection was to determine the number of plants associated with mitre drains which may be affected by future road maintenance activities* ". In his search for mitre drains, he drew on the work done by Mr Coote (see tab 7 of SOAF). He counted the populations of both species in the 16 mitre drains along the subject road, 13 on the northern

side, and three on the southern. He counted 96 *grevillea* in the areas adjoining drains, and nine within the drains, and three *phebalium* adjoining the drains, and one within.

67 In consultation with Council officers, Mr Lembit reviewed the number and location of existing mitre drains along the relevant section of Port Macquarie Road, and he comments as follows (par 5):

*" The road is formed from native material which is highly erodible in nature. As the road has been constructed without the introduction of any new material the road level is quite close to the level of the adjacent land. The road winds and undulates and there is evidence of water flowing across the road surface which has caused the deterioration of the road surface".*

He annexes a photo showing a channel having formed across the road.

68 Council engineers have told him (c.f. what Mr Coote says he was told - [64]) that all of the 16 drains are essential for the proper drainage of the road in order to ensure safe travelling surface between maintenance sessions.

69 In consultation with engineers, Mr Lembit has also examined the possibility of reducing the frequency of clearing the drains. The engineers have informed him that clearing alternate drains in each maintenance session is not feasible, as it is likely that most will need to be cleared in each session, with the usual time period between sessions being 1-2 years. The drains fill with sediment and cease to function. Failure of the drains would cause erosion of the road surface and likely necessitate more frequent road maintenance than would otherwise be the case.

70 The court was told that no further road maintenance works would be performed until the REF is completed, with the finalisation of an associated EMP. That part of Port Macquarie Road had not been maintained since the offence, and was deteriorating.

71 In par 9 of his affidavit he deposes as follows:

*" On the basis of the population counts I have undertaken it is my opinion that if road maintenance works occur on that section of Port Macquarie Road within the next few months it is likely that at least the nine Grevillea plants and one Phebalium plant occurring within the mitre drains will be picked. Based on the number of plants affected during road maintenance works in 2008, I expect that another 10 to 30 Grevillea plants would be picked on either side of the drains. In addition I expect that 15 to 30 Grevillea plants would be picked on the road side as it is not practical or feasible to reduce impacts on plants occurring on the road verge. Therefore in total I expect that if road maintenance works were to occur in coming months those works would result in the picking of between 30 and 65 Grevillea plants and at least one Phebalium plant. It is also likely to result in the death of between 5 and 10 Grevillea plants. This level of impact is expected in spite of the controls and mitigation measures which are to be applied through the development of the Review of Environmental Factors and Standard Working Procedure. This level of impact is consistent with the estimate expressed in my affidavit of 27 May 2010."*

## **MR LEMBIT CROSS-EXAMINED**

72 In his oral evidence, Mr Lembit testified that work on the REF was continuing, but that he had concluded, since his second affidavit, his estimate of harm. He adhered to the numbers quoted in his affidavit material and sees no further need to change the procedures.

## **SENTENCING PRINCIPLES**

73 The purposes of sentencing are set out in s 3A of the *Crimes (Sentencing Procedure) Act 1999* ("*CSP Act*"). Relevant purposes in cases involving environmental offences include:

- " (a) to ensure that the offender is adequately punished for the offence,*
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,*
- ...*
- (d) to promote the rehabilitation of the offender,*
- (e) to make the offender accountable for his or her actions,*
- (f) to denounce the conduct of the offender,*

(g) to recognise the harm done to the victim of the crime and the community ."

74 A basic principle of sentencing is that the sentence must reflect both the objective circumstances of the offence and the personal or subjective circumstances of the defendant: *Veen v The Queen* (1979) 143 CLR 458.

75 As noted above (at [12]), the maximum penalty on the agreed facts of this case would be:

\$1,056,000 and/or two years imprisonment for picking 76 *Grevillea obtusiflora subsp.fecunda* plants; and \$231,000 and/or two years imprisonment for picking one *Phebalium bifidum* plant.

76 These represent potentially very serious penalties, and, as the authorities have noted, constitute a public expression by Parliament of the community's view of the gravity of the offences involved. See *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority ("Camilleri's Stock Feeds")* (1993) 32 NSWLR 683, per Kirby P (at 698).

77 Ms McCulloch, for the defendant, refers to the High Court's decision in *Markarian v The Queen* [2005] HCA 25; 228 CLR 357, where Gleeson CJ, Gummow, Hayne and Callinan JJ (at [31]) stated:

" It follows that 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 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 . "

78 Matters to be considered on sentencing for offences under the *NPW Act* are listed in s 194. Those relevant in this case are:

" (a) the extent of the harm caused or likely to be caused by the commission of the offence,

...

(c) the practical measures that may be taken to prevent, control, abate or mitigate that harm,

(d) the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused by the commission of the offence,

(e) the extent to which the person who committed the offence had control over the causes that gave rise to the offence,

... "

79 Other relevant considerations appear (with some overlap) in s 21A(2) and (3) of the *CSP Act* .

80 Section 21A(2) sets out aggravating factors. The only factor (beyond those in s 194 of the *NPW Act* ) relevant to the present case is " (d) the offender has a record of previous convictions ".

81 Section 21A(3) sets out mitigating factors, and the defence draws attention in this case to these in particular:

"( a) the injury, emotional harm, loss or damage caused by the offence was not substantial,

...

(g) the offender is unlikely to re-offend,

(h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise,

(i) the remorse shown by the offender for the offence...

...

(k) a plea of guilty by the offender (as provided by s 22),

...

(m) assistance by the offender to law enforcement authorities (as provided by s 23)."

82 In sentencing, regard must be given to the culpability of the defendant and the individual circumstance that led to the commission of the offence, including the **reason the offence was committed** . See *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357, per

Badgery-Parker J at 366. Consideration of this factor usually revolves around whether the offence was committed for financial or commercial gain. See s 21A(2)(o) of the *CSP Act* and s 194(1)(h) of the *NPW Act* .

- 83 A **plea of guilty** constitutes admission of the essential legal ingredients of the offence charged. See *R v O'Neill* [1979] 2 NSWLR 582, at 588B. An early plea of guilty also entitles the defendant to the highest utilitarian value of a discount under s 22 of the *CSP Act* , unless there are other factors affecting the appropriate level of the discount: *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383.
- 84 Under s 3A(b) of the *CSP Act*, it is the duty of the court to see that the sentence operates as a powerful factor to prevent the commission of similar crimes by those who might otherwise be tempted by the prospect that only light punishment will flow. " *General deterrence is of central importance* " when courts are sentencing for environmental offences. *Pittwater Council v Scahill* (2009) 165 LGERA 289 at [45] (emphasis added).
- 85 Appropriate sentencing is necessary to retain public confidence in the system of justice.
- 86 The principle of **even-handedness** (or parity) requires that the court consider the general pattern of sentencing for the offence charged and sentence consistently. *R v Visconti* [1982] 2 NSWLR 104. However, each case put forward as a guide must be closely examined.
- 87 The court also needs to apply the **totality principle** to the criminality involved - the two offences in this case were committed in the same activity at the same time and place. *R v Holder* [1983] 3 NSWLR 245.

## APPLICATION OF THE RELEVANT PRINCIPLES

- 88 The parties are in broad agreement on the appropriate considerations. Indeed, the Council nominated (in subs pars 17-18) virtually all of the above matters, and one other (the " *nature of the defendant* ") as relevant. I turn now, therefore, to apply them to the evidence, having regard to the serious penalties provided for in the legislation (see [11]-[12] above), and to the recent clarification of the correct approach to the " *instinctive synthesis* " required of a sentencing judge - see Biscoe J in *Minister for Planning v Hunter Quarries Pty Ltd* [2010] NSWLEC 246, at [11]-[13].

## THE STATUTORY CONTEXT

- 89 The relevant objects of the *TSC Act* (s 3) are to conserve biological diversity and promote ecologically sustainable development, and to prevent extinction and promote recovery of threatened species, populations and ecological communities. Section 3 goes on to require the elimination or management of " *certain processes* " that threaten the survival or evolutionary development of threatened species populations and ecological communities, and to ensure that the impact of any action affecting threatened species populations and ecological communities is properly assessed.
- 90 In this case there was no prior appropriate environmental assessment. No process was in place for that and, in the absence of a permit or some such authority, the prosecutor submits (par 13) that the charged offences undermine the achievement of those objects of the *TSC Act*.
- 91 The objects of the *NPW Act* (s 2A) relevantly include the conservation of nature, including, but not limited to, the conservation of habitat, ecosystems and ecosystem processes, and of biological

diversity at the community, species and genetic levels. The objects of that Act are to be achieved by applying the principles of " *ecologically sustainable development*" ('ESD').

- 92 Those ESD principles are defined in s 6 of the *POEA Act* . They involve four considerations - (1) the precautionary principle, (2) intergenerational equity, (3) conservation of biological diversity and ecological integrity, and (4) improved valuation, pricing and incentive mechanisms.
- 93 The prosecutor submits (par 16) that ESD cannot be achieved without compliance with assessment processes mandated by statute. Activities which have environmental impacts are to be assessed and considered prior to commencement rather than retrospectively.
- 94 As the prosecutor observed (par 10), the penalty regime imposed by the parliament for these offences indicates that " *picking threatened species can seldom, if ever, be regarded as a trivial offence* ".

## **EXTENT OF HARM OR LIKELY HARM**

- 95 All habitats of the *grevillea* are significant due to the limited area in which it occurs and the innate sensitivity of its habitat. Roadside management activities are recognised in the Recovery Plan as a potential threat. These offences occurred in the largest known site of the subspecies *fecunda* and it is a high priority to keep that site intact and undisturbed. In that context, the prosecutor submits that the harm caused to the *grevillea* was significant and, therefore, objectively serious. The prosecutor also says that the consideration of those factors must lead to the conclusion that the harm caused to the *phebalium* was " *not insignificant* ", and, therefore, " *contributes to the objective seriousness of that offence* " (prosecutor subs pars 31 and 32).
- 96 The prosecutor submits that the present offences are objectively serious because road maintenance work was carried out in an inappropriate manner, in breach of the precautionary principles of environmentally sustainable development. The objective seriousness of the breach is exacerbated by the fact that the defendant is a determining authority charged with responsibility for enforcing and implementing the exact system with which it has failed to comply in this case (prosecutor subs 18-19).
- 97 As Preston ChJ noted in *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34, at ([175]):
- " The seriousness [of harm] lies not only in the actual death or damage to the plants of the threatened species and their habitats at the time of the commission of the offence but also in the potential for harm which the acts constituting the picking of plants might entail "*.
- 98 The **actual harm** to individual plants was direct and, in some cases, permanent. The picking involved breaking, removing and lacerating branchlets of plants, flattening or partially flattening plants, and partially uprooting or entirely removing plants from the soil. *Fecunda* occurs only in the Capertee Valley and there are five populations, including two located in conservation areas. As noted in SOAF, the charges reflect harm to 10% of the largest known population and to between 2.5%-3% of the total known population, of the *grevillea* . In the case of *phebalium* just one plant represents harm to 1%-2% of the local population and 0.5% of the total known population (see SOAF par 61).
- 99 Irrespective of whether the alleged **potential harm** eventuated, the potential at the time of the offences, in terms of risk, was real and, therefore, relevant. I agree with the prosecutor that the absence of evidence of this potential harm being realised is a matter of chance, rather than the

result of any action by the defendant to prevent it.

100The prosecutor submits that the *grevillea* offence is at the higher end of the low to medium scale of objective seriousness and that the *phebalium* offence should be considered as being at the lower end of objective seriousness.

101The defendant submits that the harm to the environment while actual, is neither substantial nor long term, and that, in comparison with the examples in a schedule of s 118A(2) cases it produced to the court, the present case " *would fall at the lowest end of the scale of seriousness* " when all its aspects are considered (subs 54-5).

102On the other hand, it acknowledges its failure to take the actions recommended in the letter of 15 December 2006, and " *accepts that as at the date of the offence it ought to have been aware of the need to assess the environmental impact of road maintenance works. However, the offence was not committed intentionally or in deliberate defiance of the law*". (See subs pars 25, 28, and 31).

103While Council accepts that the risk of harm in the absence of assessment was foreseeable, it notes that some harm is a necessary consequence of the road maintenance activity. " *The environmental assessment of future road works will necessarily involve balancing the needs and safety of road users against the risk and degree of environmental harm which those works may cause* " (subs par 32).

## **FORESEEABILITY**

104In November 2006, employees of the defendant had been shown the location and appearance of threatened species. On 15 December 2006, one month later and sixteen months prior to the offence, the defendant was clearly put on notice that its routine roadworks in the area had damaged threatened species. While that letter did not come to the notice of the officer to whom it was addressed (Muir), it was " *noted* " by two senior Council officers (see [33] above). There was no noticeable response, and no apparent effort by Council to pass on the " *warning* " to relevant operational personnel.

105Council's established procedures did not ensure that the prosecutor's forewarning was appropriately dealt with. Nor was it heeded. These offences, therefore, cannot be considered unforeseen or unintended accidents. The completion of road maintenance works in the absence of appropriate planning assessment created a clearly foreseeable risk of harm, even without the forewarning. Foreknowledge can be presumed on the facts.

## **PRACTICAL MEASURES AVAILABLE**

106In the absence of appropriate environmental assessment processes, it cannot be determined with any certainty the extent to which the harm caused by the offences could have been reduced, but some reduction could be expected because a regime of appropriate controls placed on the works would ensure impact was considered, and, therefore, limited.

107In its submissions the prosecutor (at par 43) nominates the following practical measures which could have been put in place to minimise a risk of harm (ideally all of the following):

1. Review of mitre drains in threatened species areas.
2. Restriction of turn-around areas.

3. Training of operators and supervisors in identification and location of threatened species populations.
4. Training of operators and supervisors in acceptable protocols to follow when completing road maintenance works in sensitive areas.
5. Determination of an accurate and workable definition of the road margins to ensure roads can be properly maintained and their impacts minimised.

108The prosecutor says (in par 44):

*" In the absence of assessment, evaluation and consideration of threatened species impacts and mitigation options, the Defendant has abrogated any responsibility for the consequences of their [sic] actions and their impact on the environment. In doing so they have subverted the planning system process and have disregarded the impact of their activities on the environment in circumstances where the impact could have been at the least minimised, and potentially significantly minimised, by precautionary consideration of the works ".*

109Council submits (at par 36) that it investigated the possibility of reducing the number of, or relocating or reducing the frequency of the cleaning of mitre drains, but found it not to be feasible in terms of road safety and future road maintenance (see [63]-[69] above).

## **CONTROL OVER CAUSES**

110Council, in its failure to implement the above practical measures, failed to control the activities of its officers in carrying out road works.

## **STATE OF MIND**

111The state of mind of an offender may increase the seriousness of the offence. The defendant in this case failed to prioritise compliance with the relevant environmental and conservation legislation through its management and organisational arrangements. The prosecutor does not submit that the offences were committed intentionally, but they did result from a series of deliberate decisions, and the failure to consider the impact of roadworks on known threatened species populations, and the Council's failure to heed and respond appropriately to the forewarning. *Camilleri's Stock Feeds* (at 700) makes clear that a strict liability offence committed intentionally or negligently is objectively more serious than one committed unintentionally or non negligently. Peer knowledge can be imputed to the defendant, so that the strict liability offence becomes more serious.

## **CONCLUSION ON OBJECTIVE CIRCUMSTANCES**

112The offences committed by the Council, considered on the totality principle ([87] above), are objectively serious.

## **PRIOR OFFENCES**

113The prosecutor notes in its submissions (pars 60-62) that Council has been fined by this court on three occasions in the last seven years for various environmental offences, each involving the breach of a condition of an environment protection licence. In 2003 a fine of \$6,000 was imposed for a March 2002 incident at a sewerage treatment plant, and in 2007 total fines of \$48,750 for two breaches on 31 December 2005 at a water treatment plant, in the absence of any evidence of actual environmental harm.

114 In the 2003 offence, a Council employee failed to comply with a condition of the licence because he was not made aware of it. In the second and third convictions in 2007, the Council twice failed to comply with licence conditions, even when given a second chance in the form of time extensions and an opportunity to address non-compliance, and when the contravention impeded implementation of a precautionary approach. See *Environment Protection Authority v Lithgow City Council* [2007] NSWLEC 695.

115 Those earlier offences involved systemic failures in Council's management and operation of treatment plants. The defendant failed to prioritise compliance with the conditions of the licence, and failed to respond, in a timely and effective manner, to notice of non-compliant environmental performance.

## **UNLIKELY TO RE-OFFEND/PROSPECTS OF REHABILITATION**

116 The Council submits that the court should be satisfied that it would not commit similar offences in the future. Having stopped road maintenance work in the Capertee Valley pending the completion of Mr Lembit's REF, Council says, shows that it is now taking seriously its environmental responsibilities in executing its governmental functions, and, assuming the future adoption of the REF, is unlikely to re-offend.

117 The court can only observe that much which Council ought already have done still needs to be done if those submissions are to be proven sound.

118 I accept the prosecutor's general submissions that the Council has not taken seriously its obligations as a local government authority, but not the submission that negative inferences should be drawn from Council's failure to **complete** the (admittedly) overdue REF any earlier than the evidence suggests.

## **REMORSE OR CONTRITION**

119 In respect of demonstrated contrition on the part of the Council, Mr Muir (par 12) deposes that both the Mayor and the General Manager have expressed to him " *their sincere regret that the offence occurred* ". He says that the Council prides itself on its record in environmental matters and the offence is a serious and embarrassing black mark against that record. Council was not notified of the offence at the time, but once notified, it fully cooperated with DECCW, and has attempted to ensure there is no repeat occurrence (see Muir's affidavit par 13 - [42] above).

120 Mr Muir also says (in par 14) that Council and its officers are very sorry for the harm that has been caused. While not permanent, it is quantifiable and real and Council " *intends to ensure that in future all appropriate measures are taken to minimise the harm which may be caused to threatened species as a result of road maintenance works* ". This will be done initially by training and the implementation of both the SWP and the PMP. Council will embrace the financial and human resources burden imposed by these decisions.

## **PLEA OF GUILTY**

121 The plea of guilty having been entered at the earliest opportunity, and there being no factors adversely affecting the value of the plea, the Council is entitled to the highest *Thomson* discount of 25%.

## **ASSISTANCE TO PROSECUTOR**

122 Upon notification by the department on 25 November and/or 18 December 2008, Council readily cooperated with the prosecutor, not least in seeking and reaching agreement on the SOAF, the addendum, costs, and the suggested s 205 orders.

## **NATURE OF THE DEFENDANT, AND REASONS FOR THE OFFENCES**

123 Carrying out public works, essential for its civil role, does not absolve Council of its responsibility to observe relevant environmental protection legislation and principles.

124 In the context of a strict liability offence, preventable by conduct on the part of the defendant, its status as a public authority does not entitle it to leniency. See *Environment Protection Authority v Tenterfield Shire Council* [2000] NSWLEC 229.

## **GENERAL AND SPECIFIC DETERRENCE**

125 There is a need for the sentence imposed in this matter to act as a **general deterrent** to other persons and public authorities committing similar offences ([84] above). The cost to Councils, in terms of time, money and resources, of taking precautions to avoid damaging threatened species must become accepted as an ordinary cost of their operations. The fine should indicate how worthwhile it would be to incur those costs.

126 In some cases it can be shown that a defendant could do nothing more than it did to avoid committing the offences, but in this case the defendant actually did nothing to avoid committing them. Positive steps must be taken if Councils are to ensure that their official activities are conducted in accordance with sound planning and environmental protocols.

127 In terms of **specific deterrence**, the prosecutor submits (pars 59ff) that the court should give significant weight in this matter to the objective seriousness of the offences, given the forewarning, and its failure to act. Council has a history of convictions indicating systemic failures ([115] above). "*The defendant is in the business of environmental assessment or regulation and therefore, irrespective of the above forewarnings, should have been aware of the importance of assessment of works activities in areas where threatened species will be affected*" (subs 59).

128 Council's prior criminality indicates that it has, over time, paid inadequate regard to the environmental protection legislation, by which it is bound, and in respect of which it insists upon compliance by others.

129 As Cowdroy J observed in *Environment Protection Authority v Forestry Commission of New South Wales* [2004] NSWLEC 751 (at [34]):

*"... the nature of the undertaking of the defendant requires a high degree of care in the fulfilment of its operations. For this reason there is a need for specific deterrence to remind those in authority of a need to observe maximum safeguards for the environment"*.

## **SENTENCING PARITY**

130 Ms McCulloch identified several recent decisions of this court to aid the court in finding an

appropriate penalty. In particular, reference was made to *Garrett v Langmead* [2006] NSWLEC 627, where the defendant received an order under s 10 of the *CSP Act*, and paid the costs of the prosecutor after a plea of guilty to removing seven large trees in the process of constructing a dwelling. An endangered ecological community was significantly adversely affected.

131 In the present case, on the other hand, significant proportions of total populations were seriously harmed, representing significant environmental harm, and the vastly different subjective circumstances of the offender in that matter are not present.

132 The court also examined

- (1) *Bentley v Gordon* [2005] NSWLEC 695, where a fine of \$30,000 was imposed (out of a maximum of \$55,000) for the clearing of land that resulted in the loss of 7,000 clumps of Black Eyed Susan, as well as other impacts such as weed infestation, and increased frequency of fire;
- (2) *Bentley v BGP Properties Pty Limited* (cited in [97] above), where Gordon's employer was fined \$40,000 in relation to the same offence; and
- (3) *Plath v Hunter Valley Property Management Pty Limited* [2010] NSWLEC 264, where Preston ChJ fined the defendant company \$37,500 for clearing land which affected between 210 and 260 threatened items;

and found no case directly comparable with the present.

## **AGREEMENT TO PAY PROSECUTOR'S COSTS**

133 As already noted, the Council has agreed to pay the costs of the prosecutor in the sum of \$25,000.

The Council considers (subs par 58) the amount of costs to be " *substantial, particularly having regard to the seriousness of the offence* ", but the fact that it has agreed to pay the prosecutor's costs must be taken into account on penalty. See *Plath v Hunter Valley Property Management Pty Limited* [2010] NSWLEC 264, at [78] and [88].

## **APPROPRIATE PENALTY**

134 It is clear from what I have written that I consider these offences, taken together, to be quite serious failures on the part of Council as a public environmental authority.

135 One of Council's witnesses said that Council prided itself on its environmental record, but the court finds that record to be demonstrably quite poor, and its policies, processes and practices were not adjusted to improve it. The comment I have just quoted ([133]) from the defendant's costs submissions, and other submissions made during the hearing, indicate a serious lack of appreciation on Council's part as to how seriously these failures should be viewed.

136 The Council's failures " *in the field* " occurred at a long-recognised " *biodiversity hotspot* ", and the senior officers of the Council had been warned and briefed to take greater care of it. The Council's reaction to the proven significance and vulnerability of that part of the valley, and to how easily it may be damaged beyond what is acceptable, as a result of necessary Council maintenance, was both tardy and grossly inadequate.

137 Significant environmental harm was done because Council seriously failed in its public duty and afforded relevant options a low priority.

138 Having regard to all the considerations canvassed above, involving both objective and subjective circumstances, and to the maximum penalties against which the Council must be sentenced (namely fines of \$1,056,000 and \$231,000, leaving aside the imprisonment options, for the *grevillea* and *phebalium* offences respectively) and the need for both general and specific deterrence, the appropriate penalty in the present case would comprise fines of \$120,000 in relation to the *grevillea* offence and \$20,000 in relation to the *phebalium* offence .

139 Applying the discount of 25% for the early guilty pleas, those fines would be reduced to \$90,000 and \$15,000 respectively, a total of \$105,000 (less than 10% of the maximum).

140 The parties have agreed upon appropriate orders to make under s 205(1)(a) and (d) of the *NPW Act*. The notified project under s 205(1)(d) is the rehabilitation of the Glen Davis Oil Shale Quarry site in the Capertee Valley, as part of the Derelict Mines Program of the NSW Department of Primary Industries. The court has been provided with some background information to the project and considers it an appropriate application of the funds the Council must now find.

141 The form and wording of an advertisement to appear in the *Lithgow Mercury* under s 205(1)(a) have been agreed, and the court is content to make such an order.

## ORDERS

142 Accordingly the orders of the court are:

1. In both matters, the defendant is convicted of the offence against s 118A(2) of the *National Parks and Wildlife Act 1974*, as charged in the summonses filed 17 December 2009;
2. In respect of the charge in matter No. 50081 of 2009, the defendant is fined the sum of \$90,000;
3. In respect of the charge in matter No. 50082 of 2009, the defendant is fined the sum of \$15,000;
4. The defendant pursuant to s 205(1)(d) and Schedule 3 [68] of the *National Parks and Wildlife Act 1974*, and in lieu of orders 2 and 3, is to pay within 28 days of this order to " *Industry & Investment NSW* ", the amount of \$105,000 to be used by the Derelict Mines Program to assist in site rehabilitation at the Glen Davis Oil Shale Quarry Site, located in the Capertee Valley NSW.
5. All future public references by the defendant to its contribution to the rehabilitation of the Glen Davis Oil Shale Quarry Site in the Capertee Valley shall be accompanied by the following passage:  
  
" *Lithgow City Council's contribution to the funding of rehabilitation of the Glen Davis Oil Shale Quarry Site in the Capertee Valley is part of a penalty imposed on it by the Land and Environment Court of NSW after Council was convicted of two offences of picking threatened species, an offence against s 118A(2) of the National Parks and Wildlife Act 1974 .* "
6. The defendant, pursuant to s 205(1)(a) and Schedule 3 [68] of the *National Parks and Wildlife Act 1974*, is to place a notice in the first 5 pages of the *Lithgow Mercury* at a minimum size of 10cm by 25cm in the form of Annexure 'A', within 14 days of this order.
7. The defendant is to pay the prosecutor's costs, as agreed, in the sum of \$25,000 within 28 days of this order.
8. *Exhibit P1* is to be retained in the court's file.

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## [Annexure 'A' - Lithgow City Council - Guilty of threatened species offences \(PDF\)](#)

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Last updated 21 December 2010