Land and Environment Court

Environment Protection Authority v Ramsey Food Processing Pty Ltd [2010] NSWLEC 23 (24 February 2010)

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NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: Environment Protection Authority v Ramsey Food Processing Pty Ltd [2010] NSWLEC 23

PARTIES: PROSECUTOR:Environment Protection Authority

DEFENDANT:Ramsey Food Processing Pty Ltd

FILE NUMBER(S): 500735007450075 of 2008

CATCHWORDS: ENVIRONMENTAL OFFENCES :- sentencing considerations - offence of polluting waters of a creek and tributary - offence of occupier failing to notify appropriate regulatory authority of the pollution incident as soon as practicable after becoming aware of it - pollutant untreated effluent from defendant's abattoir which escaped as result of a split pipe and a valve being open

LEGISLATION CITED: Crimes (Sentencing Procedure) Act 1999, ss 3A, 21AFines Act 1996, s 6Protection of the Environment Operations Act 1997, ss 120, 148

CASES CITED: Azzopardi v R [2001] HCA 25; (2001) 205 CLR

50Bentley v BGP Properties Pty Ltd [2006] NSWLEC 34, 145 LGERA 234Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority (1993) 32 NSWLR 683Environment Protection Authority v Barnes [2006] NSWCCA 246Environment Protection Authority v Boral Australia Gypsum Ltd [2009] NSWLEC 26Environment Protection Authority v Ghossayn [2009] NSWLEC 181Environment Protection Authority v Hanson Precast Pty Ltd [2008] NSWLEC 285Environment Protection Authority v Nalco Australia Pty Ltd [2007] NSWLEC 831Environment Protection Authority v Ramsey Food Processing Pty Ltd [2003] NSWLEC 82, 125 LGERA 369Environment Protection Authority v Snowy Hydro Pty Ltd [2008] NSWLEC 264, 162 LGERA 273Environment Protection Authority v Waste Recycling and Processing Corporation [2006] NSWLEC 419, 148 LGERA 299Markarian v The Queen [2005] HCA 25, 228 CLR 357Ngo v Fairfield City Council [2009] NSWCCA 241, 169 LGERA 56 R v Thomson [2000] NSWCCA 309, 49 NSWLR 383RPS v R [2000] HCA 3; (2000) 199 CLR 620 Veen v R [1979] HCA 7; (1979) 143 CLR 458Weissensteiner v R [1993] HCA 65; (1993) 178 CLR 217

CORAM: Biscoe J

DATES OF HEARING: 1 - 4 September 20097 - 9 September 20091 - 2 December 20098 December 200910 December 2009

JUDGMENT DATE: 24 February 2010

LEGAL REPRESENTATIVES

PROSECUTOR:Mr D JordanSOLICITORS:Environment Protection Authority

DEFENDANT:Mr A DjemalSOLICITORS:Hannigans

JUDGMENT:

THE LAND AND

ENVIRONMENT COURT

OF NEW SOUTH WALES

BISCOE J

24 February 2010

50073 of 2008

50074 of 2008

50075 of 2008

ENVIRONMENT PROTECTION AUTHORITY v RAMSEY FOOD PROCESSING PTY LTD

JUDGMENT

1. **HIS HONOUR**: The defendant, Ramsey Food Processing Pty Ltd, has pleaded guilty to, and is now being sentenced for, three offences.
2. Two of the offences are against s 120 of the *Protection of the Environment Operations Act* 1997 (***POEO Act***) for polluting the waters of, respectively, the Musk Valley Creek and the Musk Valley Creek Western Tributary at South Grafton between Monday 8 and Friday 12 October 2007. The pollutant was untreated effluent from the defendant's abattoir which escaped as a result of a split pipe and a valve being open.
3. The third offence is against s 148(4) in that, being the occupier of premises on which a pollution incident occurred so that material harm to the environment was caused or threatened, it failed to notify the appropriate regulatory authority, as soon as practicable after becoming aware, on 8 October 2007, of the incident and failed to provide all relevant information about it. The defendant did not notify the incident to the appropriate regulatory authority, the Environment Protection Authority (**EPA**), until the morning of Friday 12 October 2007.
4. Sections 120 and 148 relevantly provide;

"**120 Prohibition of pollution of waters**

(1) A person who pollutes any waters is guilty of an offence.

(2) In this section:

pollute waters includes cause or permit any waters to be polluted.

148 Pollution incidents causing or threatening material harm to be notified

(1) **Kinds of incidents to be notified**

This Part applies where a pollution incident occurs in the course of an activity so that material harm to the environment is caused or threatened.

...

(4) **Duty of occupier of premises to notify**

The occupier of the premises on which the incident occurs must, as soon as practicable after the occupier becomes aware of the incident, notify the appropriate regulatory authority of the incident and all relevant information about it."

THE EVIDENCE

1. There is a lengthy statement of agreed facts. However, significant facts remain in issue.
2. The defendant owns and operates the South Grafton abattoir at Armidale Road, South Grafton.
3. Mr Stuart Ramsey is the defendant's chief executive officer.

THE DEFENDANT'S ACTIVITIES

1. The defendant is the holder of an environment protection licence issued by the EPA under the *POEO Act*.
2. The licence authorises the defendant to carry out livestock processing and rendering activities on land located at Armidale Road, South Grafton (**licensed premises**).
3. At all times between Monday 8 October and Friday 12 October 2007, inclusive (**material dates**) the defendant was carrying on the licensed activities at the licensed premises. On the material dates Mr Ramsey was present at the licensed premises only on Thursday 11 October 2007. He normally attended one day per week at least.

THE LICENSED PREMISES

1. The licensed premises comprise five separate lots with a total area of approximately 150 hectares, owned by companies related to the defendant.
2. At all times between the material dates the defendant managed and controlled the licensed premises, including the infrastructure thereon and the licensed activities carried on there.

THE PLANT AND THE EFFLUENT TREATMENT SYSTEM

1. Situated on the licensed premises are cattle holding pens, a cattle rendering and processing plant, and an effluent treatment system for treating and irrigating abattoir waste product to paddocks surrounding the plant.
2. The plant consists of holding pens, slaughter floors, a rendering plant, a flotation tank and a "save-all". The function of the save-all is to collect and strain all the raw effluent, comprising cattle by-product, from the slaughter floors and meat processing room. The raw effluent includes a combination of blood, fat and the remains of cattle offal, flesh and bones.
3. The save-all in effect reduces the viscosity of the raw effluent. It is the first part of a three stage screening process of the abattoir waste product, before the resulting untreated effluent is pumped from the plant to the treatment ponds. The save-all removes all coarse solids from the raw effluent before the raw effluent with finer solids is washed into a pit. The next stage of screening involves the raw effluent with finer solids passing through a fan separator where the finer solids are removed.
4. The resulting liquid untreated effluent is then pumped from the plant through underground pipes to a series of anaerobic and aerobic treatment ponds, which are located approximately 750 metres south of the plant. The effluent pipes leading to the treatment ponds run under irrigation paddocks. The treatment ponds are located on top of a hill.
5. The function of the treatment ponds is to break down untreated abattoir effluent through a series of chemical, biological and physical processes.
6. The licence requires the defendant to then "irrigate" treated effluent

to the irrigation paddocks in accordance with the provisions of an irrigation management plan. The defendant does so by spraying the irrigation paddocks with treated effluent from the treatment ponds on a rotational basis.

THE DEFENDANT'S AGENTS

1. Mr Michael Considine and his wife, Mrs Elizabeth Considine, direct and own Drama Pty Ltd (A.C.N. 008 524 427).
2. Mr Paul Allen is the sole director and owner of Paul Allen Contracting Services Pty Ltd (A.C.N. 098 390 133).
3. The defendant contracts each of those companies to provide services in relation to the licensed activities. Mr Considine and Mr Allen perform the services of each company to the defendant personally.
4. In effect, Mr Considine oversees the plant, whereas Mr Paul Allen purchases livestock and oversees that part of the licensed premises surrounding the plant, including the treatment ponds and the effluent treatment system. In practice, Mr Considine reports directly to Mr Ramsey. Mr Allen reports to each of Mr Considine and Mr Ramsey, but mostly to Mr Considine.
5. Mr Ramsey gave evidence. He agreed that his eyes and ears on the ground were Mr Considine and Mr Allen. They were not called to give evidence. While the defendant no longer appeared to have contact with Mr Considine, Mr Allen was available to give evidence. Mr Allen still worked for the defendant and was in regular contact with Mr Ramsey to whom he is related. Mr Ramsey accepted that Mr Allen was the best person with whom he was still in contact to explain what happened in the week in question. Mr Allen could have provided a complete explanation as to the situation on Monday 8 October 2007, the delay in notifying the regulatory authority, the extent of the spill and so on. He did provide the defendant with an affidavit merely attaching photographs he took in 2008, which the prosecutor tendered.
6. Generally, no inferences are to be drawn against an accused from the accused's silence: *Azzopardi v R* [2001] HCA 25; (2001) 205 CLR 50, *Weissensteiner v R* [1993] HCA 65; (1993) 178 CLR 217, *RPS v R* [2000] HCA 3; (2000) 199 CLR 620. In the present case, the issue is not one of an accused person's right to silence. The issue is one of an offender at a sentencing hearing. I draw the inference that Mr

Allen's evidence could not have assisted the defendant in proving any of the facts that it seeks to prove in mitigation. Nevertheless, even without that inference I would make the same findings as to those facts.

LOCATION OF THE CREEK AND TRIBUTARY

1. Musk Valley Creek and its tributary, Musk Valley Creek Western Tributary, run through the licensed premises.
2. The creek and tributary are each natural watercourses. The watershed in which each is located form a sub-catchment to the greater watershed surrounding the Clarence River catchment.
3. The tributary is comprised of a series of interconnected pools of water of varying size and depth, which just prior to Monday 8 October 2007 were not running water holes.
4. The plant is located approximately 10 metres from the eastern bank of the creek and approximately 40 metres downstream of the confluence of the creek and tributary.

THE SPILL

1. At approximately 8.30am on Monday 8 October 2007 Mr Allen undertook a routine, daily inspection of the defendant's effluent treatment system.
2. During the inspection, Mr Allen observed pooling of untreated abattoir effluent around and in the vicinity of a valve. During the course of a recorded interview with EPA investigators in January 2008, Mr Allen described what he saw at 8.30am on Monday 8 October 2007 as follows:

"It was wet. 3 metres by 3 metres, if not 4 metres by 4 metres ... It was just a lot of water, just like a bog... lt was sort of running. It was running towards the creek, like trickling. There appeared to be no solids in the creek."

1. After completing a routine, daily check of the pipes on Monday 8 October 2007, Mr Allen wrote on a printed daily maintenance checklist: "valve turn on. Should not have been on" and "found broken pipe on northern side of valve that should not have been on in the rye grass paddock. Contacted Rural Irrigation to fix".
2. Subsequent excavation of soil in the vicinity of the valve by the

defendant's contractor on Wednesday 10 October 2007 revealed to the defendant that an underground pipe (**unused pipeline**) had split on or prior to Monday 8 October 2007. The split measured 3.5 metres in length.

3. Untreated abattoir effluent had been spilling from the fractured, unused pipeline for an unknown period of time prior to 8.30am on Monday 8 October 2007. There was also bubbling of pooled, untreated abattoir effluent at the valve.
4. In annexure 1 to the agreed statement of facts are photographs taken by EPA investigators on Friday 12 October 2007 of the excavated and fractured unused pipe.
5. In annexure 2 to the agreed statement of facts are photographs taken by EPA investigators on Friday 12 October 2007 that depict the extent of the spill surrounding the fractured split pipe.
6. In annexure 3 to the agreed statement of facts are photographs taken by EPA investigators on Friday 12 October 2007 that depict the extent of the spill surrounding the valve.
7. The valve and the unused pipeline are each located in a rye grass paddock that is bordered to the east and west by the creek and tributary, respectively. The rye grass paddock is located on the licensed premises and approximately 150 metres south of the plant.
8. Between the material dates, the spill fell, descended, washed and percolated – and thus escaped - into the creek and tributary.

NOTIFICATION TO MR CONSIDINE AND HIS INSPECTION ON THE MONDAY

1. Upon discovering the spill at 8.30am on Monday 8 October 2007, Mr Allen immediately notified Mr Considine by telephone as to the extent and gravity of the spill and the escape. Mr Allen expressly told Mr Considine, “we've got a problem". He specifically advised Mr Considine that "there is a crack in the effluent pipe to dam” and that “run off was near the creek".
2. At 8.40am, Mr Considine inspected the location of the spill with Mr Allen.

NOTIFICATION TO MR RAMSEY ON THE MONDAY

1. In a record of interview conducted on 17 January 2008, Mr Considine told EPA investigators that he informed his boss, Mr

Ramsey, of the incident on Monday 8 October 2007.

MR ENSBEY'S INQUIRY ON THE TUESDAY

1. On the morning of Tuesday 9 October 2007 the EPA received a telephone complaint that an unpleasant odour was emanating from the licensed premises the previous afternoon. Consequently, an EPA officer, Mr Scott Ensbey, telephoned Mr Considine. However, Mr Considine did not disclose that a spill had occurred. He said that the odours were due to a burp effect of a cooker at the abattoir. Assuming this to be correct, nevertheless the opportunity was squarely there, but was not taken, to inform Mr Ensbey of the spill.
2. In a record of interview conducted in September 2008, Mr Ramsey told EPA investigators that he "got a phone call on Monday morning from Paul Allen", that Mr Allen told him that "there'd been a split in the pipe", that he asked Mr Allen, "had anything escaped into the creek?", to which Mr Allen replied, "no". Mr Ramsey then told EPA investigators, "that's why we didn't report it because it wasn't a major and I told him to get the pipe fixed immediately and to direct the water up the other pipes so that there was no more release there". Mr Ramsey's evidence was to similar effect.

MR SCIBERRAS' OBSERVATIONS ON THE TUESDAY OR WEDNESDAY

1. On Tuesday 9 or Wednesday 10 October 2007 a downstream landowner, Mr Sciberras, was walking on his property and noticed dead fish and a stench from the creek, which was black and dirty and smelt.

MR RAMSEY'S INSPECTION ON THE THURSDAY

1. Following the defendant's excavation of the fractured part of the unused pipe on the Wednesday, Mr Ramsey himself inspected the valve and the fractured part of the pipe on Thursday 11 October 2007. He told EPA investigators during a record of interview on 3 September 2008 that "there was some dead patches around it where the sediment had laid and it obviously wasn't a huge leak...the sediment would not have settled there if it was a huge leak. If it was coming out in a rush it would have rushed everywhere". He also stated that "there hadn't been any of that run into the creek because all of the grass was still green along the creeks. And if it had run into

the creek it'd be dead".

2. During this interview, Mr Ramsey also told EPA investigators that at the time that he inspected the spill on Thursday 11 October 2007, he was aware that "there was a big storm" on Monday 8 October 2007 and that the "creek had run then". He also stated that on Thursday 11 October 2007 he had inspected each of the creek and tributary on either side of the spill and had not noticed any discolouration in the water or odour emanating from the watercourses.
3. I do not accept that Mr Ramsey did not notice discolouration or odour on the Thursday. I accept the evidence of Mr Ensbey, an EPA officer, who inspected the creek upstream and downstream on the Thursday and observed that it was black and smelly: see [48] – [55] below. The evidence of Mr Sciberras establishes that on the preceding Tuesday or Wednesday, the creek was black and smelly downstream.

MR ENSBEY'S INSPECTION ON THE THURSDAY

1. On Thursday 11 October 2007, the EPA received further information concerning the defendant. Consequently, that afternoon Mr Ensbey attended the property of Mr Sciberras. He observed that the creek running through his property for a distance of approximately 150 metres consisted of a series of interlinked pools, each approximately one to four metres in width and that its waters were black and smelt of rotting organic matter, similar to other anoxic waters that he has observed and sampled in the past. He observed dead fish and eels and numerous dead minnows. There were more than 20 dead specimens. He also observed other small fish and eels gasping for air and two eels that had ejected themselves onto the bank. He drove about 3.1 kilometres south and observed that the creek waters were clean.
2. That afternoon, Mr Ensbey inspected the creek where it flowed through the licensed premises about 1.1 kilometres upstream of the defendant's abattoir. At that point the creek was brown not black and did not smell.
3. Mr Ensbey then proceeded to the abattoir and met with Mr Considine and Mr Allen. He informed them of the fish kill that he had observed downstream and told them he was seeking to find a possible source of the pollution that caused the fish kill. He asked Mr Considine

whether he was aware of anything on the licensed premises that may have caused the fish kill. Neither Mr Considine nor Mr Allen indicated that they were aware of anything that could have contributed to the fish kill and pollution of the creek. In my view, it must have been obvious to them that the effluent spill the previous Monday could have contributed, to say the least.

4. In a bid to locate the source of the pollution, Mr Ensbey, accompanied by Mr Considine and Mr Allen, walked and inspected the water in the creek upstream from the plant for approximately 1.2 kilometres. On this length, the creek was divided into interconnected ponds, varying greatly in size and depth. The connectivity between them varied from a slight, restricted trickle to a more open flow.
5. During the first 250 metres of that inspection, they walked along the eastern bank of the creek. It was very black, appeared and smelt anoxic as it had at Mr Sciberras' property and it had only a slight trickle. Dead eels were observed at one location. Mr Ensbey did not inspect the tributary.
6. Approximately 170 metres upstream of the plant, they crossed from the eastern bank to the western bank of the creek. There Mr Ensbey saw pooled water approximately 30 metres to the north-west in the rye paddock. He asked Mr Considine and Mr Allen what the ponded water was. Mr Allen replied that it was "rain runoff". Therefore Mr Ensbey, at that time, concluded that it was unrelated to the pollution incident. Later, on 12 or 13 October 2007, while inspecting and testing on the rye paddock, it became clear to him that the ponded water was adjacent to and directly a result of the spill.
7. The men re-crossed to the eastern bank of the creek and walked upstream for about a kilometre to a location approximately 200 metres east-north-east of the treatment ponds. The water there was very turbid and brown but did not have the same odour, black and anoxic conditions or dead biota that had been observed in downstream pools. Mr Ensbey observed liquid flowing down a small gully into the creek. At the time Mr Ensbey suspected that liquid effluent was running off into the creek from nearby irrigated paddocks and that this was the probable cause of the downstream conditions. Mr Considine and Mr Allen told Mr Ensbey this was the first time they were aware of the discharge.
8. Later that day Mr Ensbey took water samples at the said gully and

where it flowed into the creek. There was no odour at either location.

NOTIFICATION OF THE SPILL TO THE EPA ON THE FRIDAY

1. The defendant, through its agent's officer, Mr Considine, first notified the EPA of the spill and escape at 8.40am on Friday 12 October 2007.
2. At that time, Mr Considine rang Mr Ensbey to inform him that the defendant intended to collect water and eel samples from each of the creek and tributary. Mr Considine then told Mr Ensbey, "there is a split in the reserve effluent line that may have caused pooling and runoff of effluent into the creek." Mr Considine further told Mr Ensbey that the split may have occurred last week.
3. There has been no explanation by the defendant as to why this information was not notified to the EPA earlier.

INSPECTION BY THE EPA AND COUNCIL ON THE FRIDAY

1. Following such notification, Mr Ensbey and EPA operations officer, Ms Shari Murphy, inspected the licensed premises that day. They observed the fractured, unused pipe and evidence of the escape for the first time.
2. Mr Ensbey and Ms Murphy photographed and filmed the spill and escape. They then conducted extensive and targeted water sampling at multiple sites in the creek and tributary.
3. The westerly, north-easterly and south-easterly directions along which untreated abattoir effluent fell, descended, washed and percolated from the location of the spill into each of the creek and tributary was immediately apparent to Mr Ensbey and Ms Murphy on 12 October 2007.
4. Mr Ensbey met with council officers at the abattoir and inspected a creek pool near the bridge about 200 metres downstream of the plant. The water was black and there were dead catfish and eels as well as eels gasping for breath. They drove to a causeway about 900 metres downstream: there was no sign of black water or dead or dying fish or eels. They walked upstream along the creek back toward the abattoir. At a point about 500 metres downstream of the bridge they saw black water trickling though interconnected pools and a dead fish.
5. The council officers continued walking upstream without Mr Ensbey

(who was taking water samples) until they arrived at Mr Sciberras' property where there were several dead fish floating in black water. They walked upstream to a pool about 100 metres downstream from the bridge where there was a very large black pool of water.

6. That afternoon Mr Ensbey and Ms Murphy attended the abattoir and requested Mr Considine and Mr Allen to show them the split pipe. The effluent surrounding the split pipe was untreated, still wet and approximately ten centimetres deep in the area around the split pipe.
7. Mr Ensbey told Mr Considine and Mr Allen that he thought that the spill most likely killed the dead fish he had seen downstream. Mr Allen said he did not think the spill had made it to the creek. In response to a question from Mr Ensbey, Mr Allen said he first noticed the spill on the Monday morning, that the pipe must have split over the weekend and that he had arranged for the defendant's plumbers to come and dig up and fix the pipe.
8. Mr Ensbey observed that the effluent had spread uniformly to cover an area of approximately 300 square metres around the split pipe and that there were three distinct pathways along which it had apparently escaped to the creek and tributary. He took photographs and collected water samples on that day and following days. The samples were analysed by a laboratory.

CHARACTERISTICS OF THE SPILL

1. The untreated abattoir effluent comprising the spill was of an infectious nature and contained faecal coliforms. Coagulated blood and solidified fat could be seen in the untreated abattoir effluent. It smelt strongly of abattoir waste. The untreated abattoir effluent was wet and boggy.
2. At the time that EPA investigators first discovered the fact of the spill, on the morning of Friday 12 October 2007, the spill was approximately 10 centimetres deep in an area covering approximately 300 square metres immediately around the fractured, unused pipeline.
3. In a record of interview with EPA investigators on 17 January 2008, Mr Considine stated that Ramsey removed between one and four bins of solids away from the area around the valve on Monday 8 October 2007.
4. In annexure 4 to the agreed statement of facts are photographs taken

by EPA investigators on Friday 12 October 2007 depicting the thickness of the untreated abattoir effluent at such location.

5. A rainfall event occurred during the afternoon of Monday 8 October 2007. Bureau of meteorology records for the Grafton Olympic Pool show 11.4 mm of rain (with thunder in the previous 24 hours).
6. The rainfall event caused the spill to spread to cover a greater area of approximately 6000 square metres in the rye grass paddock. The untreated abattoir effluent became progressively less thick as one walked away from the fractured, unused pipe and valve.
7. In annexure 5 to the agreed statement of facts are photographs taken by EPA investigators on Friday 12 October 2007 that depict the extent of the escape from such location.
8. The untreated abattoir effluent that reached the creek and tributary was in liquid form. It has not been proved that solids entered the creek and tributary.

FUNCTION OF THE VALVE AND T-BAR

1. The valve forms a T-junction between the unused pipeline and a pipeline (**main pipeline**) through which the defendant pumps untreated abattoir effluent from the plant to the treatment ponds. The main pipeline meets the valve from the east and exits towards the south. The unused pipeline is laid in a north-south direction and meets the valve at its southern end. The unused pipeline is kept permanently closed by a further valve at its northern end.
2. Prior to 2006, the defendant pumped untreated abattoir effluent from the plant to the treatment ponds through the unused pipeline. However, as a result of a prior pollution incident, the EPA directed the defendant to reroute the effluent pipeline. The valve was installed during such process.

OPENING OF THE VALVE

1. The valve is capable of being opened and closed by way of manual manipulation using a mechanical implement known as a "T-bar".
2. Prior to Monday 8 October 2007 and between the material dates the defendant kept a T-bar permanently inserted into the valve. The T-bar had been in place since the valve was installed in 2006.
3. The valve and the T-bar are surrounded by a wooden fence. The valve is capable of being accessed and manipulated by any person if

the T-bar remains inserted into the valve.

4. In annexure 6 to the agreed statement of facts is a photograph taken by EPA investigators on Friday 12 October 2007 that depicts the valve and T-Bar.
5. The prosecutor and the defendant are unable to agree as to the way in which the valve came to be open as discovered on 8.30am on Monday 8 October 2007.

CAUSE OF THE SPILL

1. The spill was caused by the fact of the valve being open as at 8.30am on Monday 8 October 2007, the consequent pumping of untreated abattoir effluent from the main pipeline into the unused pipeline, the consequent splitting of the capped (by the valve at the northern end) unused pipeline under pressure, and the consequent escape of untreated abattoir effluent into the rye grass paddock through each of the unused pipeline and valve, respectively.

CAUSE OF THE ESCAPE

1. The escape was directly caused by untreated abattoir effluent falling, descending, washing and percolating in westerly, north-easterly and south-easterly directions across the rye grass paddock and into the creek and tributary, respectively. The three directions along which untreated abattoir effluent fell, descended, washed and percolated into the creek and tributary, respectively, are depicted in the photographs in annexure 5 to the agreed statement of facts, which were taken by EPA investigators on Friday 12 October 2007.
2. The magnitude of the escape was increased by a heavy rainfall event occurring during the afternoon of Monday 8 October 2007.
3. Had the defendant taken practical measures to prevent the escape of raw effluent into the creek and tributary, the extent of actual harm caused to the aquatic ecosystem in the creek and tributary would have been reduced, as would have the potential harm to the health of human beings.

DEFENDANT'S CONTROL OVER SECURITY OF VALVE

1. At all times prior to Monday 8 October 2007, the defendant had management and control over the security of the valve and the T-Bar that the defendant kept permanently inserted into the valve.
2. During the afternoon of Monday 8 October 2007 (the exact timing of

which cannot be agreed by the parties), the defendant caused the valve to be closed by an apprentice of its contractor, Rural Irrigation Supplies, and the defendant switched the flow of untreated abattoir effluent back over to the main pipeline. Thereafter, the defendant pumped untreated abattoir effluent to the treatment ponds in the usual way.

3. Dangerous lightning forced the apprentice to discontinue his inspection of the valve shortly prior to the occurrence of the rainfall event.

REMEDIATION OF CREEK AND TRIBUTARY

1. Following the inspection on Friday 12 October 2007, a council officer advised Ms Smith, an EPA operations officer, that the creek should be bunded and pumped, with a media release warning residents of pollution in the event of significant rain over the weekend.
2. At the request of the EPA, the defendant's earthmoving contractor constructed a bund on Saturday 13 October 2007 around as much untreated abattoir effluent as was practical to prevent further runoff into each of the creek and tributary. Actual environmental harm to the creek and tributary had in fact already been caused by this point in time.
3. Between Saturday 13 and Sunday 21 October 2007, the defendant worked with the EPA and Clarence Valley Council to pump contaminated waters from each of the creek and tributary, primarily into the defendant's effluent treatment system and for a brief time into council's sewer main as well as directly onto the land of downstream residential property owners.
4. The cost to the defendant of the bund and cleanup was approximately $16,427.

PHOTOGRAPHS

1. In annexure 7 to the agreed statement of facts is a copy of an aerial photograph showing the extent of the spill and the location of the spill relative to downstream residential lots and the Clarence River.
2. In annexure 8 to the agreed statement of facts is a copy of an aerial photograph showing the location of each of the plant, treatment ponds, bridge, sampling sites and the fractured, unused pipe relative

to the boundaries of the licensed premises, which are marked in black outline.

VOLUME OF DISCHARGE OF EFFLUENT

1. Between Friday 5 October 2007 and Sunday 7 October 2007, inclusive, the defendant pumped between 1,442,000 and 4,454,000 litres of untreated abattoir effluent through the main pipeline from the plant to the treatment ponds.
2. 0n Monday 8 October 2007, the defendant pumped between 85,000 and 969,000 further litres of untreated abattoir effluent through the main pipeline.
3. Because the valve was open on Monday 8 October 2007, there was an opportunity for an unknown volume of untreated abattoir effluent to flow from the main pipeline into the fractured, unused pipe under pressure.

EXTENT OF ACTUAL HARM TO AQUATIC ECOSYSTEMS

1. Together, the spill and escape of untreated abattoir effluent into each of the creek and tributary caused actual harm to the aquatic ecosystem in each water body.
2. The defendant and the prosecutor disagree as to the extent to which the spill and escape were responsible for causing actual harm to the aquatic ecosystem in each water body.
3. A one kilometre section of the creek and a 300 metre section of the tributary were each visibly polluted by the untreated abattoir effluent. Over those lengths each water body appeared black and anoxic, and smelt odorous. The visible pollution slug reached as far downstream as the residential property of the Scibberras family.
4. The nature of such harm involved changes to the physical and chemical composition of each water body. Each water body was deprived of oxygen as a result of the entry of untreated abattoir effluent.
5. However, the prosecutor and the defendant disagree as to the extent to which the spill and escape of untreated abattoir effluent were responsible for causing the depletion of oxygen in each water body.
6. The toxicity of each water body was increased by the addition of ammonia concentrated in the untreated abattoir effluent. As a combination, the lowered oxygen and increased ammonia resulted in

the death of aquatic species in the creek and tributary.

7. EPA and Council officers inspecting the creek and tributary, and downstream landholders, readily observed the death of larger aquatic species, including eel-tailed catfish and eels. However, the extent of deprivation of oxygen in each water body and the toxicity caused by ammonia almost certainly killed smaller, less visible invertebrates and vertebrates commonly found in the water columns of such water bodies, including zooplankton, crustaceans, freshwater shrimp and yabbies.
8. The escape resulted in the injection of nutrients into each water body. In turn, sediment in the bed and banks of the creek and tributary has absorbed significant concentrations of those nutrients.
9. In annexure 9 to the agreed statement of facts are photographs depicting such dead and/or dying aquatic species and black, anoxic conditions in each water body.

THE ANZECC GUIDELINES

1. The Australia and New Zealand Guidelines for Fresh and Marine Water Quality (**ANZECC guidelines**) are a scientifically recognised set of tools that provide an authoritative guide for setting water quality objectives required to sustain current, or likely future, environmental values for natural and semi-natural water resources in Australia and New Zealand.
2. The ANZECC guidelines provide recommended trigger values for a range of physical and chemical stressors as well as toxicants. These trigger values indicate levels for particular stressors or toxicants outside of which investigations or management actions should be taken to avoid a deterioration in water quality.

DISSOLVED OXYGEN

1. The concentration of dissolved oxygen in water is an indication of how much oxygen is available in water for aquatic organisms, and therefore an indicator of water quality in a water body. Low dissolved oxygen concentrations are capable of killing fish and other aquatic organisms, depending upon the species, as they are unable to absorb enough oxygen through their gills. A low dissolved oxygen concentration is therefore an indication of quality. Most native fish require at least 2 milligrams per litre.

2. The ANZECC guidelines trigger values for dissolved oxygen are expressed in terms of the extent to which, as a percentage, water is saturated with oxygen. The ANZECC guidelines lower trigger value for moderately disturbed lowland rivers and streams is 85 per cent.

AMMONIA

1. Ammonia is toxic to fish and other aquatic organisms in high concentrations. Ammonia is present in high concentrations in untreated abattoir effluent, but is much reduced in treated abattoir effluent.
2. The ANZECC guidelines default trigger value for ammonia as a toxicant is 0.9 mg-N/L.

DISSOLVED OXYGEN AND AMMONIA CONCENTRATIONS IN THE CREEK

1. On 12 October 2007 the water at sampling site 2 was one per cent saturated with oxygen (or 0.1 milligrams per litre).
2. On 12 October 2007 the ammonia concentration at sampling site 2 was between 3.2 and 3.5 mg-N/L.

AMMONIA CONCENTRATIONS IN THE TRIBUTARY

1. On 12 October 2007, the ammonia concentration at sampling site 5 was 19 mg-N/L, being a multiple of 21.1 times the ANZECC guidelines default trigger value.

POTENTIAL FOR LONG TERM ACTUAL HARM TO AQUATIC ECOSYSTEMS

1. The prosecutor and defendant disagree as to whether the spill and escape of untreated abattoir effluent into each of the tributary and the creek caused potential long term harm to the aquatic ecosystem in each water body.

EXTENT OF POTENTIAL HARM TO HEALTH OF HUMAN BEINGS

1. At all times between the material dates, the spill and resulting escape of untreated abattoir effluent into each of the creek and tributary caused potential harm to the health of human beings.
2. The spill and escape caused each of the creek and tributary to contain significant concentrations of faecal matter downstream of the spill. In

turn, animal faecal pollution posed risk of waterborne infection to any humans who may have consumed or become immersed in the water in each water body.

3. Pathogenic organisms contained in animal faecal matter include bacteria, viruses and protozoa. The diseases that they cause vary from mild gastroenteritis to severe and sometimes fatal diarrhoea, dysentery, and hepatitis.
4. *Enterococci* is an indicator organism used to detect faecal pollution in water.
5. Water sampling analysis conducted by the EPA shows *enterococci* concentrations at sampling sites 1, 28 and 5A as being 7,900, 1,200 and 13,000 numbers per 100 millilitres, respectively. The locations of sampling sites 1, 2B and 5A are each depicted in annexure 8 to the agreed statement of facts. Sampling site 1 is a location in the creek broadly adjacent to the plant.
6. The Australian National Health and Medical Research Council "Guidelines for Managing Risks in Recreational Water" recognise *enterococci* concentrations above 501 numbers per 100 millilitres as posing significant risks of high levels of illness transmission under certain exposure conditions, being 10 minutes bathing involving three immersions.
7. Downstream of the plant, the creek flows a distance of four kilometres before entering Alipou Creek. In turn, Alipou Creek flows three kilometres before entering the Clarence River. Over such seven kilometres, the land surrounding the creek and Alipou Creek is predominantly flat, coastal floodplain. The land use is typically agricultural and includes tea tree plantations.
8. In the first 1.5 kilometres downstream of the plant, the creek flows over gentle gradient through a series of pools of varying width and depth, under a bridge forming part of Armidale Road, and past four residential allotments, being properties owned by the Shepherd, Murray, Williams and Sciberras families.
9. Each of those residential allotments front the creek. The first residential allotment, that of the Sciberras family, is located only one kilometre downstream of the plant.
10. None of the residents of the four residential allotments use the water in the creek as a drinking water or potable water supply. However, each family on the four residential allotments keep cattle which

occasionally drink the water from the creek.

11. The risk of potential harm to human health was reasonably low, and decreased with distance downstream of the licensed premises as the untreated abattoir effluent became more diluted.

PRE-EXISTING CONDITION OF THE WATERS

1. The creek and tributary, as rural waterways, were in a pre-existing degraded condition and, consequently, were significantly more prone to deoxygenisation than pristine waters.
2. There is a question as to the extent of the pre-existing degradation. Much of the hearing was taken up with evidence and contentions as to this matter.
3. The waters were of sufficient health to accommodate fish, eels and turtles.
4. Mr Moreno Julli, a scientific expert called by the prosecution, concluded from Mr Ensbey's October 2007 water samples upstream of the pollution discharge points, that while the values for dissolved oxygen in the waters were below what he would expert for pristine conditions, they were what he would expect in agricultural areas such as this particular area. He agreed in cross-examination that the waters were not very healthy and were prone to becoming deoxygenated. Much of his cross-examination related to a theory of algal crash which he rejected as not being possible. I accept his evidence.
5. Ms Robyn Smith, an EPA operations officer and former water quality officer, inspected the creek and tributary on 17 October 2007, when some parts had been pumped, with Mr Ensbey and Mr Considine. She rated the pre-existing state of the creek as 4 on a scale of 0 to 10 (where 0 is anoxic and 10 pristine). Mr Lancaster, a scientific expert called by the defendant, rated the pre-existing state of the creek and the tributary as 2 to 3 on a scale of 1 to 10 (where 1 is anoxic and 10 pristine). The spectrum of their estimates is fairly narrow. It is sufficient to express the pre-existing degradation of the waters as roughly 3–4 on a range of 0 to 10 (where 0 is anoxic and 10 pristine) and as what would be expected in an agricultural area such as this.
6. The unchallenged evidence of Dr Amanda Reichelt-Brushett, a scientist, called by the defendant, was that there were high nutrient

loads which could give rise to algae blooms and result in eutrophication, where the oxygen in the water is consumed by bacteria. That evidence is consistent with that of the scientists, Mr Lancaster and Mr Haine. This evidence may be accepted as far as it goes as indicative of the pre-existing condition of the creek. However, I do not accept that algae was in fact present or had any role to play in the pollution incident.

THE VOLUME OF EFFLUENT AND WHEN EFFLUENT ENTERED THE CREEK AND TRIBUTARY

1. There is an issue as to the volume of effluent and whether it reached the creek and tributary before or with the assistance of the rain that fell on the afternoon of Monday 8 October 2007. Mr Allen, who discovered the leak on the Monday at 8.30am, but did not give evidence, told EPA investigators that he observed liquid from the area of the leak as follows: "It was wet...3 metres by 3 metres, if not 4 metres...It was just a lot of water, just like a bog...It was sort of running. It was running toward the creek, like trickling". This does not establish that the effluent reached the creek prior to the Monday afternoon storm. Mr Allen told Mr Considine at that time that the "runoff was near the creek". He did not say he actually saw it enter the creek. Constable Powell's record of her interview of Mr Allen records that "unknown persons have opened up the valve on the main effluent line at the L01. This action has led to the effluent flowing into the nearby creek and land, causing untold pollution". That does not indicate whether or not it was before the rain.
2. I conclude that before the storm on the Monday, liquid effluent was trickling towards and near the creek, and that during and as a result of the rain a substantial amount of liquid effluent escaped into the creek and tributary. The evidence does not enable me to be more precise nor to conclude that solids entered the creek and tributary. The absence of Mr Allen and Mr Considine from the witness box means that no further light has been cast on the question. Of course, if the incident had been promptly notified to the regulatory authorities, the escape could have been measured and, if the notification had been sufficiently prompt, even contained.

OTHER CONTRIBUTING SOURCES?

1. At the hearing, the defendant submitted that the evidence indicated five other possible additional sources of pollution triggering the anoxic state of the water and that the prosecutor had the onus of rebutting their presence: (a) a stock saleyard to the south of the abattoir across the road; (b) a sewage pump station below the confluence of the creek and tributary and to the north of the abattoir on the western side of a bridge over the creek; (c) an unspecified dam to the south; (d) the defendant's treatment ponds to the south; and (e) unspecified drains. In the defendant's closing address, only the stock saleyard appeared to be pressed as an additional source of pollution triggering the anoxic event.
2. I do not accept the submission. Mr Moreno Julli, a scientific expert called by the prosecutor, whose evidence I accept, considered and rejected each of the suggested sources. Mr Ramsey was not told by Mr Allen in their conversation on Monday 8 October 2007 that there was anything coming from those locations. The only witnesses to give evidence in favour of the alternative possible sources were Mr Ramsey, who was not present at the time of the incident, and a scientist, Mr Lancaster. Mr Lancaster appeared to concede that once it was assumed the effluent had entered the creek and tributary it would have been the cause of the pollution incident, leaving any other factors as contributing to the background level of degradation of the system.
3. The defendant submits that pollutants could have entered the creek from the stock saleyard during the rain event on Monday 8 October 2007. I do not accept the submission. There is an open stormwater drain from the stock saleyard which goes under the road and into two of the defendant's paddocks before entering the creek. Mr Ensbey walked through those paddocks when investigating the incident on Thursday 11 October 2007 looking for signs of runoff from Armidale Road in the paddocks. He saw no signs of runoff from the direction of Armidale Road in either paddock. There was no sign of saturated soil, flowing water, soggy soil or effluent flowing in the general direction of the creek. That was in contrast to the rye paddock, where the valve and cracked pipe were located, that he observed the next day when it was full of wet, boggy soil. Further, material from the stockyard could only have entered the creek, yet the anoxic event was the same in both the creek and tributary. Ms Smith, who was

there the following week, saw no evidence, and rejected any suggestion, that the saleyard was a source. Finally, rainfall records indicate that the rain event was limited to just over 10 mm, but the evidence of the saleyard effluent treatment system indicates that this is insufficient to cause runoff to the creek (let alone the tributary).

4. As for the sewage pump station, its telemetry system, which monitors normal and abnormal operation, did not record any relevant alarm event nor was any overflow from it observed in the weeks preceding the pollution incident. Ms Smith did not observe any evidence of escape from that station when she inspected it on 17 October 2007. The extent of the pollution in the creek and tributary upstream of the pump station indicates that the pump station was not a contributing factor.
5. As for an unspecified dam to the south, there is no supporting evidence apart from vague, relatively insignificant evidence from Mr Sciberras, the downstream landowner, that a dam had been constructed some miles away years earlier and from Mr Ramsey that there was a dam going in somewhere south or south-west of Grafton.
6. To Mr Ramsey's knowledge, there was no leak from the defendant's treatment ponds, no such leak was reported to him, and if there had been a leak he would have expected it to be reported to him.
7. There was no evidence of unspecified drains contributing to the pollution.
8. Mr Ramsey gave evidence in cross-examination that (a) on the Monday Mr Allen did not say anything to him about any of the above locations being a source of pollution of the creek except that on the Monday afternoon Mr Allen told him there was a pollution problem in the creek and indicated that it was being caused by the sewer pump station, and (b) Mr Ramsey's recollection was that they reported that pollution problem to the council. If that was Mr Ramsey's recollection, it was wrong because such an incident was not reported. If his evidence is otherwise true, it indicates that Mr Allen and he, at least, knew that the creek was polluted as early as the Monday afternoon (presumably after the rain) even if Mr Allen was attributing it to another source. I have rejected the suggestion that the sewer pump station had anything to do with the pollution of the waters. So if the pollution problem was apparent in the creek near the sewer pump station on the Monday, it must have been apparent

upstream as well. Mr Allen had only to look. On Mr Sciberras' evidence it was obvious downstream on his property on the Tuesday or Wednesday; and it was obvious upstream and downstream during Mr Ensbey's inspection on the Thursday.

DELAY IN NOTIFYING REGULATORY AUTHORITY

1. Mr Ensbey gave evidence, which I accept, that had he been notified of the spill on Monday 8 October 2007 instead of Friday 12 October 2007 he would have (a) inspected the pollution incident immediately; (b) investigated the extent of the spill and the escape; and (c) directed the defendant's principal, officers and agents to contain the spill and escape to avoid potential for further runoff of effluent into the creek and tributary. If notified at about 8.30am on the Monday, such bunding could have been commenced that morning and possibly have been completed by 3pm that day. He would have taken into account the potential for rain and thunderstorm when giving such directions.

RECORD OF PRIOR CONVICTIONS

1. In 2003, this Court convicted and fined the defendant $33,750 for polluting the creek: *Environment Protection Authority v Ramsey Food Processing Pty Ltd* [2003] NSWLEC 82, 125 LGERA 369. That offence occurred in 2001 and involved the fracturing of an effluent pipeline and consequent discharge of untreated abattoir effluent into the creek.

WATER POLLUTION INCIDENT JANUARY 2006

1. In January 2006 a pollution incident occurred at the licensed premises involving the rupture of the main effluent pipeline on the western bank of the creek, which led to the escape of an unknown quantity of untreated abattoir effluent into the creek. The incident led to the EPA varying the defendant's environmental protection licence by requiring the defendant to implement a pollution reduction program involving diversion of the main pipeline under the creek and installation by the defendant of inspection points and the valve.

FACTUAL DISPUTES

1. According to the defendant's closing submissions, the factual disputes prior to the sentencing hearing were as follows:

(a) the extent of degradation of the creek and tributary prior to the pollution incident. I have concluded that they were roughly 3-4 on a scale of 0 to 10 (0 being anoxic and 10 pristine), and were what would be expected in agricultural areas such as this: see [132] above;

(b) the volume of effluent that escaped from the cracked pipe to the creek and tributary and whether it was of such a magnitude that it escaped without the assistance of the rain that fell on the afternoon of Monday 8 October 2007. I have concluded that a substantial volume escaped to the creek and tributary with the assistance of that rain: see [134] – [135] above.

(c) the responsibility of the defendant for the death of the aquatic life. The prosecutor submits that the anoxic state of the waters was solely the defendant's responsibility whereas the defendant contends that there were also other sources. I have concluded that there were no other sources and that the death of the aquatic life was solely the defendant's responsibility: see [136] – [143] above.

(d) whether the opening of the valve was due to a type of system failure. I have concluded that an unknown third party opened the valve but that it was imprudent for the defendant to have left the T-bar permanently in the valve, unsecured and unguarded. I would add that it was an unsatisfactory system where no-one working at the abattoir that day apparently knew how to turn off a valve which even an unauthorised third party (according to the defendant's own case) could turn on. Instead, there was a delay of some hours before an external contractor arrived and performed the task.

(e) whether Mr Allen and Mr Considine were aware of the effluent escape to the creek and tributary and deceived Mr Ensbey on Thursday 11 October 2007. The defendant, through Mr Considine, did not notify the EPA of the spill until the Friday. The defendant has not explained the reason for this delay. Mr Allen and Mr Considine did not give evidence. The defendant's plant is located right next to the creek. The defendant's case placed emphasis on the proposition, which I have accepted, that the rain on the afternoon of Monday 8 October 2007 carried liquid effluent to the creek and tributary. Mr Allen was responsible for daily maintenance inspections and personally conducted the inspection on the Monday. On the Monday he reported to Mr Considine that effluent was trickling to and

near the creek. On the Tuesday or Wednesday Mr Sciberras, the downstream landowner, observed that the creek on his property was black and odorous and that there were dead fish. On the Thursday Mr Ensbey made similar observations upstream and downstream of the plant. Mr Allen and Mr Considine had only to look to see the same thing. So too with Mr Ramsey on the Thursday when he attended the abattoir. Mr Allen and Mr Considine should have been on high alert because they knew early on the Monday morning that the effluent had flowed towards and near the creek and knew of the rain that afternoon. The defendant had been convicted of polluting the waters of the creek only a few years earlier when they both were in the defendant's service. There had been other pollution incidents. Mr Allen was responsible for daily maintenance checks and reported to Mr Considine. I conclude that by the Tuesday Mr Allen, at least, knew that the creek was black and odorous. Certainly they both knew by the Thursday when they inspected the creek with Mr Ensbey. Once they knew, it would have been blindingly obvious that the pollution incident on the Monday was a likely cause. It follows that they misled or deceived Mr Ensbey by not disclosing this to him until the Friday despite earlier direct opportunities to do so, and by the statement to him on the Thursday that the pool in the rye paddock was merely rainwater;

(f) the extent of the long term harm. I have concluded that there was no long term harm except for the death of a quantity of aquatic life before remediation: see [98] – [106] above;

(g) the time at which Mr Wilson closed the valve. This is relevant to the volume of effluent that escaped through the cracked pipe. The defendant's chronology provided to the EPA on 25 October 2007 indicated that the valve was turned off by a contractor at 3.30pm at about the same time that a heavy storm arrived. The evidence of an employee of the contractor who turned off the valve, and of another employee who spoke to him by telephone while he was at the abattoir, suggests that the valve was turned off closer to noon that afternoon just as a storm was coming in. Meteorological records indicate that the storm occurred at about 3 to 3.30pm on Monday 8 October 2007. I consider that the objective evidence of the meteorological records and Mr Considine's chronology soon after the pollution incident are more reliable indicators of time than the

recollection of the contractor's employees long after the event. Accepting their evidence that the storm was coming in but had not actually arrived when they finished the job, I conclude that the valve was turned off closer to 3 pm than to noon. The evidence does not permit me to be more precise.

SENTENCING PRINCIPLES

1. The purposes of sentencing are set out in s 3A of the *Crimes (Sentencing Procedure) Act* 1999:

"**3A Purposes of sentencing**

The purposes for which a court may impose a sentence on an offender are as follows:

(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,

(c) to protect the community from the offender,

(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".

1. In determining the appropriate sentence, s 21A requires the Court to consider specified aggravating and mitigating factors that are relevant and known to the Court as well as any other objective or subjective factor that affects the seriousness of the offence. Most of the listed aggravating factors are irrelevant to environmental offences. In the present case, relevant listed aggravating factors include that the offender has a record of a previous conviction, the damage caused was substantial and the offence was committed without regard for public safety: s 21A(2)(d), (g) and (i). Relevant

mitigating factors set out in s 21A(3) include:

"(i) the remorse shown by the offender for the offence, but only if:

(i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and

(ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both)".

1. In passing sentence on an offender who has pleaded guilty, a court must take into account the fact that the offender has pleaded guilty and the timing of the plea or the offender's indication of an intention to plead guilty, and accordingly may impose a lower sentence than it would otherwise have imposed: s 22.
2. Similarly, the Court may impose a lesser penalty than otherwise, having regard to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence: s 23.
3. In addition, in order to determine the relative seriousness of an offence against the *POEO Act*, s 241 of that Act requires the Court to take into consideration specified matters and permits the Court to take into consideration any other matters the Court considers relevant: *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 699-700 per Kirby P. Section 241 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".

1. In determining the objective seriousness of the offence, the Court may take into account the objects of the legislation that have been breached: *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34, 145 LGERA 234 at [168] - [172]; *Environment Protection Authority v Ghossayn* [2009] NSWLEC 181 at [81]. The objects of the *POEO Act* include the following, which have been compromised in this case;

"(a) to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development,

...

(d) to reduce risks to human health and prevent the degradation of the environment by the use of mechanisms that promote the following:

(i) pollution prevention..."

1. The sentence must fit the crime as well as the criminal. That is, it must reflect the objective circumstances of the offence and the personal or subjective circumstances of the defendant: *Veen v R* [1979] HCA 7; (1979) 143 CLR 458.
2. In *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683, the Court of Criminal Appeal set

out the following general sentencing principles for prosecutions in this Court:

(a) the maximum penalty available for an offence reflects the "public expression" by Parliament of the seriousness of the offence. The task of the Court is to assess the relative seriousness of the offender's particular offence in relation to a worst case for which the maximum penalty is provided: at 698;

(b) a maximum penalty is to be imposed where the case falls within the worst category of cases for which the penalty is prescribed, but this does not mean that a lesser penalty must be imposed if it is possible to envisage a worse case: at 698;

(c) the court must keep in mind not only the facts which establish the seriousness of the offence, but also those which tend to mitigate that seriousness or exculpate the offender, and where a relevant fact is the subject of conflicting evidence of like probability, the court should resolve the conflict in favour of the offender: at 698;

(d) the offender can only be sentenced for the offence for which it has been convicted, although the Court must take into consideration the surrounding circumstances of the offence provided they are not inconsistent with the plea or verdict: at 699;

(e) when imposing a penalty, the Court should have regard to the principle of "even-handedness" so that the penalty is not outside the pattern of sentencing relevant to the particular type of offence: at 701-703;

(f) when sentencing for two or more offences the court should have regard to the principle of “totality" by which the judge should evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, should determine what, if any, downward adjustment is necessary in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences: at 703-704.

1. The utilitarian value of a plea of guilty should generally be assessed in the range of 10-25 per cent on sentence. The primary

consideration in determining where in the range a particular case falls is the timing of the plea: *R v Thomson* [2000] NSWCCA 309, 49 NSWLR 383 at [160].

OBJECTIVE SERIOUSNESS

Maximum Penalty

1. The maximum penalty for an offence reflects Parliament's expression of the seriousness of the offence. In *Markarian v The Queen* [2005] HCA 25, 228 CLR 357 at [31] the High Court held:

"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."

1. In the present case the offences are serious. The maximum penalty for each of the three offences, in the case of a corporation, is $1 million and a further penalty of $120,000 for each day that the offence continues: ss 123, 152(a). Each offence continued from Monday 8 October to Friday 12 October 2007. Accordingly, the maximum penalty for each offence is $1,480,000.

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

1. If the harm is substantial, this objective circumstance is an aggravating factor: s 21A(2)(g) *Crimes (Sentencing Procedure) Act 1999*. The more serious the lasting environmental harm, the more serious the offence and, ordinarily, the higher the penalty: *Camilleri* at 701, *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419, 148 LGERA 299 at [148].
2. The pre-existing degraded state of the waters is relevant to the extent of the environmental harm but is not a mitigating factor: *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419, 148 LGERA 299, at [149] – [150]. In that case Preston CJ, in assessing the extent of environmental harm as substantial, took into account that the pre-

existing aquatic environment of a creek was moderately disturbed by reason of its location on an urban fringe: at [157]. In the present case, the pre-existing state of the creek and tributary was degraded. I have held that the degradation was what would be expected in agricultural areas such as this, and was roughly 3-4 on a scale of 0 to 10 where 0 is anoxic and 10 pristine.

3. The offences seriously harmed the environment in the short term: see [98] – [106] above. Other than the death of aquatic life in the days following the pollution incident, there was no long term environmental harm. There was potential for harm to the public human health but that risk was relatively low: see [117] – [122] and [127] above.
4. The results of water sampling by EPA officers in October 2007, combined with the evidence of the prosecutor's scientific experts, Mr Julli and Mr Haine, indicate the nature of the harm caused and likely to be caused. The results indicate that aquatic material present in the discharge caused depletion of dissolved oxygen, which led to the asphyxiation of fish, eels and minnows and the death of macrophytes (plants living in the water). The water became largely anaerobic with no capacity to support aquatic organisms for about a kilometre. At the date of the offence the creek comprised a series of interconnected pools, flowing slowly. The harm by the time the regulatory authority was advised of the spill on the Friday had extended to the Sciberras property downstream. The harm to the creek and tributary from the entry points to that point was such that all life therein was affected if not dead. Remedial measures by the defendant were instituted but only after official intervention and at the suggestion of EPA officers.
5. The defendant submits that there is no evidence as to the actual cause of death to the fish and aquatic life and no conclusive proof that the fish were not killed by the pre-existing levels of high ammonia. In my view, the agreed facts establish that the pollution incident killed the fish and aquatic life: see [103] – [106] above. In any case, I am satisfied beyond reasonable doubt on the evidence that the pollution incident killed them. Indeed, the very existence of anoxic conditions coupled with the presence of dead and dying fish and aquatic life immediately following the pollution incident, but not before, is strong evidence, of itself, that the pollution incident was the cause.

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

mitigate the harm

1. There is a tendency in the defendant's submissions to distance itself from the actions of Mr Allen and Mr Considine on the basis that the defendant's operations, including supervision and maintenance of the plant and treatment ponds, were structured by contracting out to their companies. I reject that approach. The defendant's responsibility is the same, in my view, whether it structured its operation in that way or whether it chose a conventional employment/employee structure.
2. I accept that (a) Mr Ramsey understood Mr Allen and Mr Considine to be competent in ensuring that the plant and treatment ponds would be operated efficiently and (b) that there was a daily maintenance checking procedure in place to check that the pipeline was not leaking, including the completion of a daily checklist. However, there were no measures for keeping the valve T-bar secure elsewhere, which would have prevented the valve being opened; for promptly reporting such an incident to the appropriate regulatory authority which would have led to prevention, control, abatement or mitigation of the harm; and for ensuring that there were always workers on site who knew how to turn off the valve, which would have avoided the escape of effluent during the hours awaiting the arrival of an external contractor to turn off a valve which even an unauthorised person was able to turn on.
3. Remedial measures to mitigate the pollution event were taken and were successful. They were prompted by the intervention of government officers.
4. The defendant has implemented the following in an endeavour to prevent a repetition of the pollution incident: removed the valve-key to a secured location; advised all managers that should any leak occur again they are to call the EPA at the first opportunity; and ensured that the routine daily pipe-line check is conducted.

The extent to which the defendant could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence

1. In the earlier pollution case in which the defendant was convicted, the Court noted that there had been a fracture in the pipeline 18 months earlier whereby effluent had escaped and polluted the creek,

that the effluent was highly contaminated and that it was reasonably foreseeable that a crack in the pipeline proximate to the creek would result in discharge into the creek and be likely to cause environmental harm: *Environment Protection Authority v Ramsey Food Processing Pty Ltd* [2003] NSWLEC 82, 125 LGERA 369 at [17], [30] – [31]. In 2006 there was a further pollution incident where effluent had escaped from a cracked pipe and polluted the creek: see [146] above.

2. The defendant submits that the turning of the T-bar in the valve by an unauthorised third party was not reasonably foreseeable and points out that the T-bar had been in place for some years without incident. I disagree that it was not foreseeable given that the valve was a prominent unsecured object in an open paddock which could easily be accessed. However, I accept that the foreseeability of that event was low compared with foreseeability now with the benefit of knowledge of this incident.
3. The more telling point against the defendant is the foreseeability of the actual or likely harm once the spill was discovered on the Monday and particularly when the rain event occurred.
4. The defendant is an experienced abattoir corporation with an extensive operation carrying the risk of pollution to the environment. The defendant had prior experience, and had been earlier convicted of pollution of the creek as a result of escape of effluent from a cracked pipe. In cross-examination Mr Ramsey professed to have no recall of that central aspect of the earlier conviction. As the chief executive officer, it should have been firmly impressed on his mind. This prior conviction and its circumstances were all the more reason why he, Mr Allen and Mr Considine should have foreseen the harm caused or likely to be caused to the environment.

The extent to which the defendant had control over the causes that gave rise to the offence

1. The opening of the valve by an unauthorised third party and the cracking of the pipe were causes that gave rise to the pollution offences. The defendant did not itself open the valve nor has any specific event been identified that caused the pipe to crack. However, the defendant permitted the T-bar handle to be in place, unlocked and unguarded, when it could have been readily removed and had no-one

on site who could turn off the valve. I assess the extent of the defendant's control over the causes as medium.

Defendant's state of mind

1. The pollution offences were not intended by the defendant. In the case of the failure to notify offence, the position is different in my view. As discussed earlier, the state of mind of Mr Allen and Mr Considine should be attributed to the defendant given that they were Mr Ramsey's full-time eyes and ears on the ground and Mr Ramsey himself usually only attended the abattoir once a week. I have concluded that after the rain on the Monday afternoon, Mr Allen, at least, knew that the waters were black and odorous and that the spill on the Monday was a likely cause, and that by the Thursday Mr Considine and Mr Ramsey also knew.

Deceptive Conduct

1. The prosecutor submits, and I accept, that an aggravating factor of the failure to notify offence is that Mr Ensbey was deceived by Mr Allen and Mr Considine when he investigated specific complaints: see [147(e)] above. The prosecutor also makes the following related submissions:

(a) on the Tuesday morning, when Mr Ensbey contacted Mr Considine over the smell complaint, which the latter said was due to the cooker in the abattoir, there was no mention of the open valve, a split pipe or raw abattoir effluent having been released. This was notwithstanding the rain event on the Monday afternoon on which the defendant places great emphasis as ultimately causing the discharge of effluent into the creek and tributary. I agree that this was an obvious opportunity missed to inform Mr Ensbey;

(b) Mr Considine and Mr Allen thought the effluent was trickling into the waterway prior to the rain event. I do not accept that this is established on the evidence. A letter of 25 October 2007 from the defendant (apparently signed by Mr Considine) to the Department of Environment and Climate Change enclosed a chronology. An entry for 8.30am on Monday 8 October 2007 recorded that Mr Allen telephoned Mr Considine and "told him of the problem, that the pipe had cracked and runoff was near the creek". In records of interview with Mr Allen in January and September 2008 Mr Allen said that on the Monday he checked the creek and that a little bit of

effluent, but not solids, was trickling “to the creek” or “towards the creek”. He did not say it was trickling into the creek. I am not satisfied on the evidence that Mr Allen or Mr Considine knew before the storm on the Monday that the effluent had reached the creek. But I am satisfied that they knew at that time that liquid effluent was trickling towards and was near to, the creek. That should have heightened their appreciation of the risk that the effluent posed to the waters, particularly in the event of rain.

Public Safety

1. The prosecutor submits that it is an aggravating factor that the offence of failure to notify the appropriate regulatory authority for four days was committed without regard for public safety. I accept the submission. The contaminated waters, as the defendant must have known, constituted a threat to public safety. The defendant did not show concern for the safety of those who might come into contact with the waters. Public officers had to attend a number of properties to warn of the contamination. There is no explanation as to why the spill was not reported until the Friday.

Conclusion as to objective seriousness

1. Overall, I regard the objective seriousness of the pollution offences as low to medium, and the objective seriousness of the offence of failure to notify the appropriate regulatory authority for four days as medium.

SUBJECTIVE CIRCUMSTANCES OF OFFENDER

Record of prior convictions

1. In 2003 the defendant was convicted and fined for an offence of polluting the creek: see [145] above.
2. It reflects poorly on Mr Ramsey that in cross-examination he claimed to have no recollection of a court case over effluent leaking into the creek. If he was taking the defendant’s environmental responsibilities seriously, he should have been completely familiar with the case.

Remorse

1. Remorse has been expressed in four ways: by the entry of a plea of guilty at the earliest possible time; Mr Ramsey in an affidavit has

expressed extreme regret that the effluent escaped from the pipe; the defendant assisted authorities with clean-up operations; and strategies have been introduced to reduce the potential for repetition of the incident with the valve key now being stored away from the valve and Mr Ramsey taking personal control of liaising with the EPA and compliance issues.

2. The prosecutor submits that there is no real remorse having regard, among other things, to the defendant's decision not to call as a witness Mr Allen, who was Mr Ramsey's eyes and ears on the ground, and to Mr Ramsey's oral evidence indicating that he still does not think the defendant's plant caused pollution of the waters. These matters, I think, dilute the weight that would otherwise be attached to the defendant's expression of remorse.

Plea of Guilty

1. The defendant's plea of guilty was entered at the earliest opportunity, on the first return day of the summons. The utilitarian value of the early plea was reduced because the defendant's case does not seem to have been run much differently than if there had been a plea of not guilty. The defendant was entitled to take this course but it reduced the utilitarian value of the early plea. The hearing occupied eleven days, an extraordinarily long time for a sentence hearing. I do not accept the prosecutor's submission that the utilitarian value of the plea of guilty was zero, but in my opinion it was less than usual in the case of an early plea. I propose to discount by 10 per cent for the early plea.
2. The defendant is also entitled to a discount for the utilitarian value of the agreed statement of facts. Its utilitarian value is less than otherwise would be the case because at the hearing the defendant applied to resile from it in certain respects, the application took about a day and a half to hear and was partly successful, but the defendant then reversed its position and accepted the agreed facts.

PARITY

1. Unusually, the Court has the benefit of a judgment where the defendant was fined $33,750 for the same offence of polluting the waters of the creek in 2001: *Environment Protection Authority v Ramsey Food Processing Pty Ltd* [2003] NSWLEC 82, 125 LGERA

369. Although the present pollution offences are less serious in that a cause of the pollution incident was the act of an unauthorised person, they are otherwise more serious in two respects:

(a) the incident in the earlier case, which was found to be in the low to mid range, affected some 150 metres of the creek: at [16]. The present case involves a much longer stretch of the creek system (about a kilometre), the pollution went well beyond the defendant's own property and it killed aquatic life;

(b) it was held in the earlier case that environmental harm was contained by the defendant's actions and that the defendant acted promptly in taking action. In the present case there was no such prompt action, aside from stopping the leak on the Monday.

1. Sentencing cases for pollution of waters prior to 1 May 2006 when the maximum penalty was increased from $250,000 to $1,000,000 include *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419, 148 LGERA 299 where at [239] sentences in earlier cases were noted. Sentencing cases for pollution of waters since the maximum penalty was increased include *Environment Protection Authority v Snowy Hydro Pty Ltd* [2008] NSWLEC 264, 162 LGERA 273 where at [216] – [218] sentences in earlier cases were reviewed; *Environment Protection Authority v Boral Australia Gypsum Ltd* [2009] NSWLEC 26; *Environment Protection Authority v Hanson Precast Pty Ltd* [2008] NSWLEC 285; and *Environment Protection Authority v Nalco Australia Pty Ltd* [2007] NSWLEC 831. These cases have been of limited assistance given the different circumstances of the pollution offences in this case.
2. The parties did not refer me to any comparable cases in relation to the failure to notify offence.

COSTS

1. I propose to order the defendant to pay the prosecutor's costs of the proceedings, which the prosecutor estimates will exceed $200,000. That is unsurprising given the extraordinary length of the sentencing hearing. The prosecutor has also incurred investigation costs in the sum of $13,477.82, which I propose to order the defendant to pay

pursuant to s 248 of the *POEO Act*.

2. The defendant submits that its liability for a large costs order should be taken into consideration with a commensurate reduction in the amount of the fine to be imposed. I do not accept the submission. Section 6 of the *Fines Act* 1996 provides:

"**6 Consideration of accused's means to pay**

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."

1. If the obligation to pay costs will impact on the ability of an offender to pay a fine, the amount of the fine may be reduced: *Environment Protection Authority v Barnes* [2006] NSWCCA 246 at [77], [78], [88]. The amount of a fine may also be reduced if it causes seriously disproportionate hardship to the defendant: *Ngo v Fairfield City Council* [2009] NSWCCA 241, 169 LGERA 56. In that case the Court of Criminal appeal held:

"[25] It is axiomatic that penalty should not only reflect the gravity of an offence, it must also reflect the circumstances of the offender. It was not disputed, as her Honour expressly mentioned in her remarks, that a fine or an order for costs would as a matter of practicality, force this applicant to sell his home. An enforced sale of his home would be a grossly excessive consequence of the strict liability of the applicant for an offence committed in subjectively innocent circumstances.

...

[28] In my view, fines should be imposed but they should be set at a level which should not result in the drastic consequence of a forced sale of the applicant's home. In making an assessment, the capacity of the applicant to have time to pay a fine and/or to make payments by instalments pursuant to an application under the Fines Act 1996 NSW is noted."

1. In the present case, there is no suggestion that the obligation to pay costs will affect the ability of the defendant to pay a fine nor that payment of a fine and costs would cause hardship to the defendant. There are no circumstances, in my view, which should lead to any reduction in the fine that would otherwise be imposed because of the obligation to pay costs.

THE APPROPRIATE FINES

1. It is necessary to take into account the totality principle when considering the penalty for the offence of polluting the creek and the offence of polluting the tributary. Those two pollution offences are intimately connected. They result from the same causes on the same occasion. The polluted length of the tributary was, however, much shorter than the polluted length of the creek. In my view, total fines of $50,000 for the two pollution offences properly reflect the total criminality of the defendant for those offences. Of that amount, I apportion $40,000 to the offence of polluting the creek and $10,000 to the offence of polluting the tributary.
2. I consider that the offence of failing to report the pollution incident to the appropriate regulatory authority for four days is more serious. As discussed, the aggravating circumstances include the circumstances that there has been no explanation for the four days delay and the investigator, Mr Ensbey, was deceived. I propose to fine the defendant $80,000 for that offence.

PUBLICATION ORDER

1. The prosecutor seeks a publication order, which I propose to make, pursuant to s 250(1)(a) of the *POEO Act*. Publicising sentences for environmental offences improves the effectiveness of sentences as a deterrent. The Court has made publication orders in numerous cases: *Environmental Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419, 148 LGERA 299 at [241] – [244]. Section 250 relevantly provides:

"**250 Additional orders**

(1) Orders

The court may do any one or more of the following:

(a) order the offender to take specified action to publicise the offence (including the circumstances of the offence) and its environmental and other consequences and any other orders made against the person,

...

(2) Machinery

The court may, in an order under this section, fix a period for compliance and impose any other requirements the court considers necessary or expedient for enforcement of the order..."

ORDERS

1. The court makes the following orders:

1. In each matter, the defendant is convicted of the offence as charged in the summons.
2. In respect of the offence of polluting the waters of the Musk Valley Creek, the defendant is fined $40,000.
3. In respect of the offence of polluting the waters of the Musk Valley Tributary, the defendant is fined $10,000.
4. In respect of the offence of failing to report the pollution incident to the appropriate regulatory authority, the defendant is fined $80,000.
5. In each matter, pursuant to s 250(1) of the *Protection of the Environment Operations Act* 1997, the defendant must:

(i) within 14 days of today, publish the contents of the annexure hereto in the first twelve pages of the early general news section of the Sydney Morning Herald at a minimum size of height 10cm by width 20cm, from and including the heading below the words "Annexure", such heading to be in bold print;

(ii) within fourteen days of today, publish the contents of the annexure hereto in the first five pages of the Grafton local paper, The Daily Examiner, at a minimum size of one-quarter of a page, from and including the heading below the words "Annexure", such heading to be in bold print;

(iii) within twenty-one days of today, provide evidence to the prosecutor that orders (i) to (ii) above have been complied with.

1. In each matter the defendant is to pay the prosecutor's costs.
2. The defendant is to pay the prosecutor's investigation expenses in the sum of $13,477.82 apportioned equally between the three matters.
3. Liberty to apply in relation to order 5.
4. In each matter, the exhibits may be returned.

ANNEXURE

Abattoir at South Grafton convicted of water pollution offences

On 24 February 2010 the Land and Environment Court of New South Wales found Ramsey Food Processing Pty Ltd, which owns the abattoir on Armidale Road South Grafton, guilty of 2 charges of water pollution and one charge of failing to notify the Environment Protection Authority of the pollution incident for 4 days. The EPA prosecuted the company for polluting about one kilometre of the Musk Valley Creek and a 300 metre section of a tributary to the creek with a large but unknown amount of untreated abattoir effluent in October 2007, and for failing to inform the EPA as the company was required to do under protection of the environment laws and under its Environment Protection Licence. The polluting effluent came from a split pipe in the abattoir's effluent management system.

The company pleaded guilty. The environmental harm was that within the affected parts of the creek and its tributary dead fish and eels were found. The affected parts of the creek and its tributary were, for a period of time, incapable of sustaining wildlife, and were potentially hazardous to human health.

The company was fined a total of $130,000 and ordered to place this notice by the Land and Environment Court. They were also ordered to pay the EPA's costs and investigation expenses.