



Land and Environment Court New South Wales

Medium Neutral Citation: *Harrison v Baring (No 2)* [2012] NSWLEC 145

Hearing Dates: 25 June 2012

Decision Date: 27/06/2012

Jurisdiction: Class 5

Before: Pain J

Decision: The Defendant is convicted of the ten offences charged in matters numbered 50856 - 50865 of 2011.
See additional orders at [95] of judgment.

Catchwords: PROSECUTION - sentencing - ex parte hearing in absence of defendant or his representative - objective factors relevant to sentencing including the unauthorised taking of water from a regulated river during severe water shortage on four occasions - breach of public trust with failure to comply with water access licence and water works approval - few mitigating factors - operation of totality principle where ten offences

Legislation Cited: Corporations Act 2001 (Cth) s 475, s 1314
Crimes (Sentencing Procedure) Act 1999 s 3A, s 21A
Criminal Procedure Act 1986 s 250(a), s 257B
Fines Act 1996 s 4, s 6, s 10, s 122
Rivers and Foreshores Improvement Act 1948 (repealed)
Supreme Court Rules 1970 Pt 75 r 11A
Water Act 1912
Water Management Act 2000 s 3, s 49, s 60 (repealed), s 341(1)(a) (repealed), s 343(1)(a1) (repealed), s 363(1), s 363B(b)(ii), s 348(b), s 364A

Cases Cited: *Axer Pty Limited v Environment Protection Authority* (1983) 113 LGERA 357
Bentley v BGP Properties Pty Limited [2006] NSWLEC 34; (2006) 145 LGERA 234
Cabonne Shire Council v Environment Protection Authority [2001] NSWCCA 280; (2001) 115 LGERA 304
Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority (1993) 32 NSWLR 683
Chief Executive, Office of Environment and Heritage v *Kyluk Pty Limited (No 3)* [2012] NSWLEC 56
Director-General, Department of Environment and Climate Change v Walker Corporation Pty Ltd (No 4) [2011] NSWLEC 119
Environment Protection Authority v Incitec Limited [2003] NSWLEC 381; (2003) 131 LGERA 176
Environment Protection Authority v Port Kembla Copper Pty Ltd [2001] NSWLEC 174; (2001) 115 LGERA 391
Garrett v Williams [2006] NSWLEC 785; (2006) 160 LGERA 115
Harrison v Baring [2012] NSWLEC 117
Hoare v R [1989] HCA 33; (1989) 167 CLR 348
Markarian v R [2005] HCA 25; (2005) 228 CLR 357
Muldock v R [2011] HCA 39; (2011) 244 CLR 120
R v Donaldson (1968) 87 WN (Pt 1) (NSW) 501; [1968] 1 NSW 642
Wills v Ianelli [2008] NSWLEC 300

Category: Sentence

Parties: Russell James Harrison (Prosecutor)
Dean Patrick Baring (Defendant)

Representation: Crown Solicitor's Office (Prosecutor)

Ms L Sanderson (Prosecutor)
No appearance (Defendant)

File Number(s): 50856, 50857, 50858, 50859, 50860, 50861, 50862, 50863, 50864, 50865 of 2011

- 1 In *Harrison v Baring* [2012] NSWLEC 117 (*Harrison (No 1)*) I found Mr Baring, the Defendant, guilty of ten offences under s 341(1)(a) and s 343(1)(a1) of the *Water Management Act* 2000 (WM Act). The offences arose from taking water on four separate occasions from the Lachlan Regulated River Water Source (Lachlan River) in 2008, relating to the irrigation of a wheat and a canola crop. Four of the offences were of taking water from a water source otherwise than in accordance with the regulated river (general security) water access licence, contrary to s 341(1)(a) of the WM Act. Six offences were of using a water supply work, being a pump, to take water from a water source otherwise than in accordance with a water supply work approval that authorised the use of the work, contrary to s 343(1)(a1)(i). As the Defendant did not appear or enter a plea it was necessary for Mr Harrison, the Prosecutor on behalf of the NSW Office of Water, to prove the offences. I found that the Defendant, the sole director of Baring Park Pty Limited (BPPL), knowingly authorised or permitted the acts or omissions that constituted the ten offences. The Defendant was taken to have committed those offences by reason of s 363(1) of the WM Act. It is now necessary to sentence the Defendant for the offences committed.
- 2 The Defendant did not appear at the sentence hearing. The Prosecutor read the affidavit of Mr Percival, solicitor, dated 25 June 2012 which identified the steps taken to bring the sentence hearing to the Defendant's attention, as required by orders of the Court made on 12 June 2012. I consented to the Prosecutor's application to proceed in the absence of the Defendant as provided for under s 250(a) of the *Criminal Procedure Act* 1986 or alternatively Pt 75 r 11A of the Supreme Court Rules 1970. The Prosecutor seeks the imposition of a fine in respect of the offences charged, an order under s 122 of the *Fines Act* 1996 that the Defendant pay 50 per cent of any fine imposed to the Prosecutor and legal costs pursuant to s 257B of the Criminal Procedure Act in the amount of \$80,000.

Summary of charges

- 3 The ten charges which the Prosecutor has proved the Defendant committed are summarised in the schedule of charges set out at [7] in *Harrison (No 1)* as follows:

No.	Offence under the Water Management Act	Short description	Date of offence	Proceedings No.
1	Section 341(1)(a) take water from a water source otherwise than in accordance with an access licence (Condition 5(B), WAL 2302)	Water not ordered under access licence	mid-April 2008	50856/2011
2	Section 343(1)(a1)(i) use water supply work to take water otherwise than in accordance with a water supply work approval (Condition 7, Approval 70CA603217)	Water not ordered under works approval	mid-April 2008	50857/2011
3	Section 341(1)(a) take water from a water source otherwise than in accordance with an access licence (Condition 5(B), WAL 2302)	Water not ordered under access licence	mid-May 2008	50858/2011
4	Section 343(1)(a1)(i) use water supply work to take water otherwise than in accordance with a water supply work approval (Condition 7, Approval 70CA603217)	Water not ordered under works approval	mid-May 2008	50859/2011
5	Section 343(1)(a1)(i) use water supply work to take water otherwise than in accordance with a water supply work approval (Condition 5, Approval 70CA603217)	Failure to report meter not functioning	mid-May 2008	50860/2011
6	Section 341(1)(a) take water from a water source otherwise than in accordance with an access licence	Water not ordered under access	late July / early August 2008	50861/2011

	(Condition 5(B), WAL 2302)	licence		
7	Section 343(1)(a1)(i) use water supply work to take water otherwise than in accordance with a water supply work approval (Condition 7, Approval 70CA603217)	Water not ordered under works approval	late July / early August 2008	50862/2011
8	Section 341(1)(a) take water from a water source otherwise than in accordance with an access licence (Condition 5(B), WAL 2302)	Water not ordered under access licence	late August / early September 2008	50863/2011
9	Section 343(1)(a1)(i) use water supply work to take water otherwise than in accordance with a water supply work approval (Condition 7, Approval 70CA603217)	Water not ordered under works approval	late August / early September 2008	50864/2011
10	Section 343(1)(a1)(i) use water supply work to take water otherwise than in accordance with a water supply work approval (Condition 5, Approval 70CA603217)	Failure to report meter not functioning	late August / early September 2008	50865/2011

Water Management Act 2000

4 Section 3 of the WM Act states its objects as follows:

The objects of this Act are to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations and, in particular:

- (a) to apply the principles of ecologically sustainable development, and
- (b) to protect, enhance and restore water sources, their associated ecosystems, ecological processes and biological diversity and their water quality, and
- (c) to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water, including:
 - (i) benefits to the environment, and
 - (ii) benefits to urban communities, agriculture, fisheries, industry and recreation, and
 - (iii) benefits to culture and heritage, and
 - (iv) benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water,
- (d) to recognise the role of the community, as a partner with government, in resolving issues relating to the management of water sources,
- (e) to provide for the orderly, efficient and equitable sharing of water from water sources,
- (f) to integrate the management of water sources with the management of other aspects of the environment, including the land, its soil, its native vegetation and its native fauna,
- (g) to encourage the sharing of responsibility for the sustainable and efficient use of water between the Government and water users,
- (h) to encourage best practice in the management and use of water

5 At the time of the offences the relevant offence provisions provided:

341 Unlawful taking of water

(1) A person must not take water from a water source otherwise than:

- (a) in accordance with an access licence, and ...

343 Constructing or using water management work without a water management work approval

(1) A person must not:

...

- (a1) use a water supply work to take water:

- (i) otherwise than in accordance with a water supply work approval that authorises the use of that work, and ...

6 At the time the offences were committed in 2008 the maximum penalty for an individual for each offence was \$132,000 (being 1,200 penalty units) under the now repealed s 348(b) of the WM Act. With the introduction of Ch 7 by the *Water Management Amendment Act 2008* Sch 1, which commenced on 1 January 2009, the same offences now attract a

tier 2 penalty, being a maximum penalty of 2,250 penalty units.

7 Chapter 7 Pt 5 s 364A states:

364A Matters to be considered in imposing penalty

(1) In imposing a penalty on a person 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 impact of the offence on other persons' rights under this Act,
- (b) the market value of any water that has been lost, misused or unlawfully taken as a consequence of the commission of the offence,
- (c) the extent of the harm caused or likely to be caused to the environment (including, in particular, any water source or waterfront land) by the commission of the offence,
- (d) the practical measures that may be taken to prevent, control, abate or mitigate that harm,
- (e) the extent to which the person could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence,
- (f) the extent to which the person had control over the causes that gave rise to the offence,
- (g) whether the offence was committed during a severe water shortage (that is, in contravention of an order in force under section 49A or 324),
- (h) the person's intentions in committing the offence,
- (i) whether, in committing the offence, the person was complying with orders from an employer or supervising employee,
- (j) in the case of an offence of taking water in contravention of this Act, whether the water so taken had been released for environmental purposes and, if so, whether the person was aware of that fact,
- (k) any civil penalty that has been imposed on the person under section 60G in relation to the conduct from which the offence arises.

(2) The court may take into consideration other matters that it considers relevant.

8 The Prosecutor relies in particular on subsection (1)(a) - (i). The Court must also take into consideration such of the matters set out in s 364A of the WM Act as are relevant. Although s 364A commenced on 1 January 2009, after these offences were committed, it applies to these offences: *Water Management (General) Regulation 2011* Sch 9 cl 15.

9 Another provision of the WM Act then in force relevant to the statutory scheme for these offences was s 60 which provided:

...

(2) If satisfied that there is a severe water shortage, either generally or in relation to a particular water management area or water source or particular class of water management areas or water sources, the Minister may, by order published in the Gazette, suspend the operation of the rules of distribution referred to in subsection (1).

(3) While an order under subsection (2) is in force, the following rules of distribution apply to the making of an available water determination:

- (a) first priority is to be given to:
 - (i) the taking of water for domestic purposes by persons exercising basic landholder rights, and
 - (ii) the taking of water for domestic purposes or essential town services authorised by an access licence,
- (b) second priority is to be given to the needs of the environment,
- (c) third priority is to be given to:
 - (i) the taking of water for stock purposes by persons exercising basic landholder rights, and
 - (ii) in the case of regulated rivers, the taking of water for purposes (other than domestic purposes) authorised by a regulated river (high security) access licence, and
 - (iii) the taking of water for the purposes of supply of commercial and industrial activities authorised by a major utility access licence or local water utility access licence, subject to the water made available being in accordance with any drought management strategy established by the Minister for that purpose, and
 - (iv) the taking of water for the purposes of electricity generation authorised by a major utility access licence, and
 - (v) the taking of water for purposes authorised by a domestic and stock access licence or by persons exercising any other water rights in relation to stock, and
 - (vi) the taking of water for purposes authorised by a conveyance access licence in connection with the supply of water for any other purpose or need referred to in this paragraph,
- (d) fourth priority is to be given to the taking of water for purposes authorised by any other category or subcategory of access licence.

10 An order in force under the current s 49A is in the same terms (see s 364A(1)(g)). Holders of a general security licence such as that held by BPPL would be considered under s 60(3)(d), the fourth priority.

Crimes (Sentencing Procedure) Act 1999

11 Relevant provisions of the *Crimes (Sentencing Procedure) Act 1999* (the CSP Act) are as follows:

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 ...

21A Aggravating, mitigating and other factors in sentencing

(1) General

In determining the appropriate sentence for an offence, the court is to take into account the following matters:

- (a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,
- (b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,
- (c) any other objective or subjective factor that affects the relative seriousness of the offence.

The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.

(2) Aggravating factors

The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

- ...
- (o) the offence was committed for financial gain,
- ...

The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.

(3) Mitigating factors

The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

- ...
- (e) the offender does not have any record (or any significant record) of previous convictions,
- ...
- (g) the offender is unlikely to re-offend,
- ...
- (m) assistance by the offender to law enforcement authorities (as provided by section 23).

(4) The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so.

(5) The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.

- 12 The Prosecutor read all of the affidavits relied on for the offences during *Harrison (No 1)* as set out at [16] and summarised at [20] - [29]. In relation to this sentence hearing, the Prosecutor particularly relied on the affidavit of Ms Brook, community relations officer, NSW Office of Water, filed 21 February 2012; the affidavit of Mr Christmas, program coordinator, water management and implementation, NSW Office of Water, filed 21 February 2012; the affidavit of Mr Smith, compliance officer, NSW Office of Water, filed 20 September 2011; the affidavit of Mr Sefton, senior legal counsel, GrainCorp Operations Limited (GrainCorp), filed 21 February 2012; the affidavit of Mr Joyce, company secretary, Cargill Australia Limited (Cargill), filed 20 December 2011 and the affidavit of Mr Anderson, general manager, State Water Corporation of NSW, filed 21 February 2012. The Prosecutor also relied on the expert report of Mr Ivey, agricultural and management consultant, dated 22 February 2012 (exhibit C). Further, the Prosecutor filed in Court a schedule of costs which identifies his total costs at approximately \$114,000.
- 13 Ms Brook attests that on 28 June 2004 the then Minister for Natural Resources made an order under former s 60(2) of the WM Act changing the rules of distribution of water after being satisfied that there was a severe water shortage in the Lachlan River. On 1 July 2006 the then Department of Infrastructure, Planning and Natural Resources made an available water determination order under s 59 of the WM Act stating that no water was available for regulated river (general security) access licences. This was published in a regional magazine on 10 July 2006. A subsequent order dated 23 July 2007 made available 0.2 ML of water for those licences and was published in a regional magazine on 31 July 2007.
- 14 After being satisfied that it was necessary in the public interest to do so because of water shortage, the then Acting Director-General of the Department of Water and Energy made the following orders under the now repealed s 323 of the WM Act, directing that the taking of water under regulated river (general security) access licences from the Lachlan River be restricted as follows:
- (1) On 23 July 2007, to 10 per cent of the volume of water in the water allocation account as at 30 June 2007
 - (2) On 21 December 2007, to 20 per cent of the volume of water in the water allocation account as at 30 June 2007

- (3) On 3 January 2008, to 40 per cent of the volume of water in the water allocation account as at 1 July 2007
- (4) On 30 June 2008, to 14 per cent of the volume of water in the water allocation account as at 1 July 2008
- 15 These orders were published in regional magazines and broadcast over regional radio stations.
- 16 On 1 July 2007 the then Department of Water and Energy issued a media release regarding the commencement of water allocations for Lachlan Valley water users. On 27 July 2007 the then Minister for Climate Change, Environment and Water issued a media release regarding the Lachlan Valley's water storage levels. On 24 December 2007 the then Department of Water and Energy issued a media release regarding the availability of water in the Lachlan Valley. On 3 January 2008 the then Minister for Water Utilities issued a media release regarding water allocations and restrictions in Western NSW. Further media releases were issued on 1 July 2008 and 3 November 2008 regarding water allocations for Lachlan Valley.
- 17 A Lachlan Valley Newsletter issued for August 2007 by State Water Corporation indicated the water allocation for general security licences and dam levels and advised that extracting water without a working flow meter was a breach of licence conditions. The January and August 2008 issues update customers on water allocations, dam levels and the water resource situation. Copies of the above orders and other documents were exhibited to Ms Brook's affidavit.
- 18 Mr Ivey's expert opinion in relation to the volumes of water likely to have been taken for irrigation was as follows:
- (1) 56 - 188 ML in mid-April 2008 and 56 - 156 ML in late July/early August 2008 for the wheat crop
- (2) 96 - 192 ML in mid-May 2008 and 72 - 96 ML in late August/early September 2008 for the canola crop
- 19 Mr Christmas states that the Water Sharing Plan for the Lachlan Regulated River Water Source 2003 (WSP) which commenced on 1 July 2004 was suspended from that date to 16 December 2011 due to drought conditions. Consequently the then Department of Water and Energy could allocate water across the licence categories which were not in accordance with the WSP. Mr Christmas was responsible for recommending what water allocations the Department should make. Throughout the period during which the WSP was suspended there was no environmental water released from Wyangala Dam because it was so low and there was also little water available for allocation to general security licences between 2004 and 2009. Wyangala Dam was at approximately four per cent capacity in June 2007.
- 20 Mr Christmas states that water ordering is critical for the optimal release of water from a dam. Dam releases are balanced with downstream tributary inflows in order to meet water supply needs at various locations along the river. If someone takes water without ordering, there is an increase in losses in a river reach leading to a shortfall in meeting commitments to other licensees, towns and riparian landholders further downstream. Mr Christmas described the process of determining dam releases. The primary purpose of river operation under the drought contingency arrangements was to have a flow for the full river length for the whole year whilst delivering small amounts of allocated water. The majority of the flow was for maintaining river connectivity, meeting basic landholder rights and town water needs. This outcome was largely achieved but in 2008 and 2009 there were periods of no flow in the Lachlan River at Booligal, downstream of Condobolin, which may have resulted from or been exacerbated by unauthorised taking of water. In 2008, 80 per cent of the releases from Wyangala Dam were to maintain a flow for the full length of the river.
- 21 Mr Christmas opined that failure to report a faulty meter impacts on the management of an access licence holder's water account as it makes it difficult for the State Water Corporation to calculate the precise quantity of water used.
- 22 In his affidavit Mr Anderson states that to the best of his recollection, the Defendant did not sign any statement with State Water Corporation during or after the meeting of 29 October 2008 with himself and Mr Lennox, another officer of State Water Corporation, in Dubbo. Mr Anderson was aware that in 2008, after several years of poor allocation in the Lachlan River system, what water was available for purchase was relatively expensive, being traded at up to \$1,000 per megalitre.
- 23 Mr Smith's affidavit attaches a transcript of a taped record of interview with the Defendant in the company of another compliance officer on 31 March 2010. After cautioning the Defendant Mr Smith asked, referring to a statement by Mr Hamilton, whether it was accurate that he told Mr Lennox or Mr Hamilton he had watered the canola crop in August. The Defendant said he did not know and that it would be in the statement he gave at Dubbo. When asked whether what he told the officers in Dubbo was the truth, the Defendant replied if he and the two State Water Corporation officers put something down on paper and he signed it on that day, it would be accurate.
- 24 I note that in relation to the value of the canola and wheat crops the evidence relied on was that of Mr Joyce and Mr Sefton from Cargill and GrainCorp respectively, summarised in [27] - [28] of *Harrison (No 1)*.

Sentencing principles

- 25 The Court must sentence the Defendant in accordance with the CSP Act. In addition to any other relevant factors, the Court must specifically take into account the matters listed in s 21A of the CSP Act that are relevant and known to the Court. The Court must impose a sentence that is appropriate in all the circumstances, and having regard to the purposes of sentencing set out in s 3A of the CSP Act. The Prosecutor submits that the sentence should reflect the need to ensure that the Defendant is adequately punished for the offences (s 3A(a) of the CSP Act) and is made accountable for his actions (s 3A(e) of the CSP Act).
- 26 The High Court in *Muldock v R* [2011] HCA 39; (2011) 244 CLR 120 at [26] (unanimous) confirmed the finding of McHugh J in *Markarian v R* [2005] HCA 25; (2005) 228 CLR 357 at 378 [51] that "[T]he judge identifies *all* the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case (emphasis added)." This is known as the instinctive synthesis approach.
- 27 The sentence must reflect both the objective circumstances of the offence and the subjective circumstances of a defendant: *Markarian* at [73]. An appropriate sentence is to be determined mindful that:
- ... a basic principle of sentencing law is that a sentence...imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances (see *Veen v. The Queen (No. 2)* [1988] HCA 14; (1988) 164 CLR 465, at pp 472, 485-486, 490-491, 496).
- per *Hoare v R* [1989] HCA 33; (1989) 167 CLR 348 at 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ).
- 28 The Court may take facts into account in a way that is adverse to a defendant's interest if they have been proved beyond reasonable doubt. It may take facts into account in a way that is favourable to a defendant if they have been proved on the balance of probabilities: *R v Olbrich* [1999] HCA 54; (1999) 199 CLR 270 at [27].
- 29 The Court must consider the objective gravity of the offence when determining sentence. As stated by Pepper J in *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Ltd (No 4)* [2011] NSWLEC 119 at [25]:
- This is determined by consideration of the upper most limit of a sentence that is justified as appropriate or proportionate to the gravity of the crime in light of its objective circumstances (*Veen v R (No 2)* at 472, 485-486, 490-491 and 496; *Hoare v R* [1989] HCA 33; (1989) 167 CLR 348 at 354), and the lower limit of the offence by allowing for consideration of the subjective factors of the matter to produce a proportionate range that reflects the objective gravity of the offence (*Pittwater Council v Scahill* [2009] NSWLEC 12; (2009) 165 LGERA 289 at [50] and *Plath v Rawson* [2009] NSWLEC 178; (2009) 170 LGERA 253 at [46]).
- 30 The statutory scheme giving rise to the offences should be considered in light of the objects of the WM Act which are set out above in par 4 and include the protection, enhancement and restoration of water sources, their associated ecosystems, ecological processes and biological diversity and their water quality, the recognition of the significant social and economic benefits to the State that result from the sustainable and efficient use of water, including benefits to the environment, and to urban communities, agriculture, fisheries, industry and recreation, and recognition of the role of the community, as a partner with government, in resolving issues relating to the management of water sources, and to provide for the orderly, efficient and equitable sharing of water from water sources. The Prosecutor has made substantial submissions set out below on the particular aspects of the statutory scheme giving rise to the offences. That scheme is directed to the achievement of these broader objectives.

Objective circumstances

- 31 Facts additional to the facts constituting the offences committed are relevant to sentencing. The additional facts relied on by the Prosecutor concerning the volume of water taken, the existence of severe water shortages at the time of the offences, the restrictions on general security licences and the widespread publication of water restrictions at par 32 - 42 below are made good by the evidence relied on and are accepted in this sentence determination.

Prosecutor's additional facts

Volume of water taken

- 32 The volume of water taken was at least as follows, par 4.5.1, 4.5.2 and 4.5.3 of the expert report of Mr Ivey.
- (a) For the first wheat watering (offences 1 and 2): 56.0 ML;
 - (b) For the first canola watering (offences 3, 4 and 5): 96.0 ML;
 - (c) For the second wheat watering (offences 6 and 7): 56.0 ML;
 - (d) For the second canola watering (offences 8, 9 and 10): 72.0 ML; and
 - (e) In total for the four occasions of taking watering (offences 1-10): 280 ML.

Severe water shortage

- 33 There existed a severe water shortage in the Lachlan River from 28 June 2004 and it continued throughout the period

in which the offences were committed: affidavit of Ms Brook par 10, 23 and 50 and exhibit AB1 tabs 1, 14 and 41.

- 34 The WSP was suspended on 1 July 2004, immediately after its commencement, because the water resources available were so severely limited that the provisions of the WSP could not be implemented. The Lachlan River had moved into drought conditions from January 2003 and remained effectively in drought conditions until February 2010. The WSP continued to be suspended until 16 September 2011: affidavit of Mr Christmas par 6, 7 and 9.
- 35 The capacity of Wyangala Dam was at about ten per cent by July 2003, and was below 10 per cent in June 2004 and June 2005. It increased to 34 per cent in December 2005, but fell to only about 4 per cent by June 2007: affidavit of Mr Christmas par 7 - 8.
- 36 The severity of the drought can also be seen from the following facts:
- (a) During 2007/08 and 2008/09, the town water supply, which under s 60(3) of the WM Act was, together with domestic water, the highest priority for water allocation during a severe water shortage, was allocated only 70 per cent of its needs, par 32, 33, 39 and 54 of the affidavit of Ms Brook and tabs 23, 24, 30 and 45 of exhibit AB1.
 - (b) During 2007/2008 and 2008/2009, high security access licences were only granted 0.3 ML per unit share, which was only 30 per cent of the allocation intended for high security access licences under the WSP: affidavit of Ms Brook par 24, 31, 32, 33, 39 and 54 and exhibit AB1 tabs 15, 22, 23, 24, 30 and 45 .
 - (c) No environmental water was released from Wyangala Dam during the period the WSP was suspended, being from 1 July 2004 to 16 September 2011, par 18 of the affidavit of Mr Christmas.
- 37 During the current water year (2011/2012), as the Lachlan River is no longer in drought, releases are being made from Wyangala Dam in excess of 2,000 ML per day. During 2008, however, daily releases were generally about 400 ML per day, reducing to less than 200 ML per day during July, August and September 2008, par 23 and 25 of the affidavit of Mr Christmas.
- 38 During 2008, the flow of the Lachlan River measured downstream from Baring Park at Condobolin was generally only about 100 ML per day, with a range of between about 80 ML and 120 ML, par 27 of the affidavit of Mr Christmas. This was the only water available to meet the needs of persons taking water for domestic purposes pursuant to their basic landholder rights, essential town services, the environment, persons taking water for stock purposes pursuant to their basic landholder rights, and other access licence holders downstream of Condobolin.

General security licences

- 39 No water was allocated to general security licences for the years 2006/2007, 2007/2008 and 2008/2009, par 21, 23, 46 and 56 of the affidavit of Ms Brook and tabs 12, 14, 37 and 47 of exhibit AB1.
- 40 Temporary water restrictions were placed on general security licences in 2007/2008 and 2008/2009 such that only the following carryover water in the water allocation accounts could be used; par 27, 34, 39 and 46 of the affidavit of Ms Brook and tabs 18, 25, 30 and 37 of exhibit AB1.
- (a) 10 per cent of carryover as at 30 June 2007 from 23 July 2007;
 - (b) 20 per cent of carryover as at 30 June 2007 from 21 December 2007;
 - (c) 40 per cent of carryover as at 1 July 2007 from 3 January 2008; and
 - (d) 14 per cent of carryover as at 1 July 2008 from 30 June 2008.

Water restrictions were well-publicised

- 41 During 2007/2008 and 2008/2009, licence holders were informed of the water restrictions and conditions generally in the Lachlan River by the Lachlan Valley Newsletter, which was sent to licence holders with their water account statements in August 2007, January 2008 and August 2008: affidavit of Ms Brook par 31, 39 and 52 of and exhibit AB1 tabs 22, 30 and 43 of.
- 42 During 2007/2008 and 2008/2009, water restrictions were also publicised in the Lachlan Valley area by way of advertisements, media releases and radio broadcasts: affidavit of Ms Brook par 22, 23, 25, 28, 29, 30, 36, 37, 38, 40, 43, 44, 48, 49, 50, 51 and 55 and exhibit AB1 tabs 13, 14, 16, 19, 20, 21, 27, 28, 29, 31, 34, 35, 39, 40, 41, 42 and 46.

Objective seriousness of the offence

Prosecutor's submissions

- 43 The Prosecutor submits that the offences in the present case are, objectively, moderately to very serious. The Prosecutor submits that the following factors are relevant and should be taken into account in determining the appropriate sentence.

Consequences of the offences (s 21A(1)(c) CSP Act/s 364A(2) WM Act)

- 44 The systems of ordering water and measuring water taken are important as they allow the NSW Office of Water to monitor and control the taking of water, manage the flow of the river, lessen negative impacts on the environment, and ensure the lawful and equitable sharing of water.
- 45 The consequences of the offences that involved taking water without placing a water supply order and without a water supply order being approved and accepted in breach of the water access licence and the water supply works approval (offences 1 - 4 and 6 - 9) were as follows.
- (a) The State (whether through the Prosecutor or through State Water) was precluded from managing the release of water from the dam in an optimal manner to meet water supply needs, affidavit of Mr Christmas par 20 and 24.
 - (b) The State was precluded from managing the release of water from the dam in an optimal manner to retain as much water as possible in the dam for future years: affidavit of Mr Christmas par 23.
 - (c) The State was denied the opportunity to determine whether or not the water the subject of the order was available in the relevant water allocation account.
 - (d) The State was precluded from effectively monitoring the taking of water to ensure that the taking of water was lawful.
 - (e) The amount of water available to, and for use by, downstream water users was reduced, par 22 of the affidavit of Mr Christmas.
 - (f) The drought conditions in 2008 exacerbated the impact of taking water without ordering because the daily releases of water from Wyangala Dam were much less in volume and about 80 per cent of the release was intended to maintain a flow for the full length of the river, par 23, 25, and 28 of the affidavit of Mr Christmas.
 - (g) During 2008, there were periods in which there was no flow in the Lachlan River at Booligal (which is downstream of Condobolin), which may have resulted from or been exacerbated by the unauthorised taking of water upstream, par 29 of the affidavit of Mr Christmas.
- 46 The consequences of the offences that involved taking water using a water supply work on which the meter did not work, without informing the Prosecutor and without notifying the Prosecutor of the necessary details of the water taken (offences 5 and 10) were as follows.
- (a) The volume of water being taken via the water supply work was not being measured.
 - (b) The State was precluded from effectively monitoring the water taken to ensure that it was lawfully taken: affidavit of Mr Christmas par 32 and 34.
 - (c) The State was precluded from maintaining an accurate water allocation account for the relevant access licence: affidavit of Mr Christmas par 32 and 34.
 - (d) The State was precluded from assessing whether or not the water taken was available from the water allocation credited to the licence because the amount of water taken was not accurately measured and an accurate water allocation account could not be maintained: affidavit of Mr Christmas par 34.
 - (e) The State was denied the opportunity of calculating aggregate water usage accurately: affidavit of Mr Christmas par 32.

Impact on other persons, environmental harm and severe water shortage (s 364A(1)(a), (c), (g))

- 47 Three of the matters to be considered under s 364A of the WM Act are particularly relevant in considering the relative seriousness of these offences. Section 364A(1)(a) requires consideration of the impact of the offence on other persons' rights under the WM Act, s 364A(1)(c) requires consideration of the extent of the harm caused or likely to be caused to the environment (including, in particular, any water source or waterfront land) by the commission of the offence and s 364A(1)(g) requires consideration of whether the offence was committed during a severe water shortage.
- 48 The Prosecutor does not submit that there is direct evidence of other persons' rights under the WM Act actually being negatively affected or of actual harm caused to the environment by the commission of the offences. Any unlawful taking of water, however, will have a negative impact on other persons' rights under the WM Act or on the environment, or both. An unlawful taking of water reduces the amount of water that is available for other licence holders and to maintain the flow of the river.
- 49 The taking of at least 280 ML over the four occasions of taking water resulted in the water available for other licence holders and to maintain the flow of the river being reduced by at least that amount. This certainly had the potential, and was very likely, to affect the rights of other licence holders and to harm the environment. I accept that this inference arises beyond reasonable doubt in these circumstances.
- 50 Further, the offences were committed during a severe water shortage declared under s 60(2) of the WM Act (now s 49A), par 10 of the affidavit of Ms Brook and tab 1 of exhibit AB1. The extent of the impact on other persons and the harm likely to be caused to the environment is likely to have been significantly greater because the offences were committed during a severe water shortage.
- 51 The systems of ordering water and measuring water taken provide reassurance to other water users that the available water is being shared lawfully and equitably and they help to maintain the confidence of licence holders as to the fairness of the system for sharing water in NSW. It is particularly important to maintain the confidence of licence holders as to the fairness of the system in times of severe water shortage when all licence holders face significant restrictions on their ability to take water.

Public trust

- 52 As submitted by the Prosecutor, significant trust and reliance is placed upon licence holders by the State to ensure that they abide by the licences and approvals granted under the WM Act. Environment protection licences which allow pollution subject to specified conditions have long been recognised as involving an important public trust: *Environment Protection Authority v Port Kembla Copper Pty Ltd* [2001] NSWLEC 174; (2001) 115 LGERA 391 at [23] - [25]; and *Environment Protection Authority v Incitec Limited* [2003] NSWLEC 381; (2003) 131 LGERA 176.
- 53 Holders of licences and approvals under the WM Act should also be regarded as being placed in a special category over and above other persons because they are allowed to take and use a limited (and at times very scarce) resource, water, in accordance with the conditions of the licences and approvals. That is, they are trusted to construct water supply works that can take significant volumes of water, and they are trusted to use those water supply works to take water, but only as permitted under their licences and approvals. Breaches of licence conditions and approvals should therefore be regarded as involving breaches of public trust.
- 54 The Prosecutor's submissions on the matters relevant to sentencing set out above from par 44 to 53 such as the consequences of the offences, the impacts on other persons and environmental harm considered under s 364A(1)(a) and (c) are generally accepted. That the offence was committed during a severe water shortage is also relevant under s 364A(1)(b) as referred to above by the Prosecutor. The Prosecutor's submission that the offences give rise to a breach of public trust is accepted as an appropriate consideration in the statutory framework for the protection of scarce water resources.

Defendant's role (s 364A(1)(f) WM Act)

- 55 The Prosecutor also submitted that in determining the relative seriousness of the offence, the Court would also have regard to the role played by a defendant in the commission of the offences. Although the Defendant's commission of the offences is here established through his role as a director of BPPL, the Defendant had complete control over the causes that gave rise to the offences, which is a relevant consideration under s 364A(1)(f) of the WM Act. In particular, the extent of the Defendant's role in the commission of the offences can be seen from the following:
- (a) He was the sole director of BPPL
 - (b) He managed Baring Park
 - (c) He made decisions about and directed each taking of water
 - (d) He personally worked on taking water on three of the four occasions, including by operating the relevant pumps
 - (e) He was responsible for ordering water
 - (f) He made relevant admissions that he had not ordered water
 - (g) He made relevant admissions that the meter did not work
- 56 I note that these facts were established on the evidence referred to in *Harrison (No 1)* at [12], [16], [18], [20], [21] and [26].
- 57 The Prosecutor also submitted that the Defendant was found liable as a director pursuant to s 363 of the WM Act. Particularly given his admissions, the Prosecutor submitted that it should be inferred that the Defendant was aware of the regulatory requirements set out in the WM Act and the conditions attaching to BPPL's access licence and water supply works approval. That may be considered as part of the element of the offences for which the Defendant was found guilty and may not therefore be considered again as an additional factor in sentencing.
- 58 Caution is required in considering relevant facts in sentencing. The Defendant's conviction under s 363 of the WM Act required that as a director he knowingly authorised or permitted the acts constituting the offences. It is a principle of sentencing that an element of the offence cannot be considered as an additional fact on sentence. I considered relevant authorities in *Chief Executive, Office of Environment and Heritage v Kyluk Pty Limited (No 3)* [2012] NSWLEC 56 at [115] - [116] in the context of the CSP Act and s 194 of the NPW Act. I held that a sentencing court should not have regard to, in that case, an aggravating factor in s 21A(2) if it is an element or an inherent characteristic of an offence.
- 59 The relationship if any between a conviction for an offence as a director based on s 363 of the WM Act which requires consideration of knowledge of a defendant director and sentencing under s 364A(1)(f) is unclear. Section 364A(1)(f) is couched in terms of the extent to which the person had control over the causes that gave rise to the offence. Leaving aside any knowledge of the regulatory framework as not relevant to "causes" the Defendant had complete control over the causes that gave rise to the offences being the taking of water from the Lachlan River on four occasions and twice failing to report a meter as not functioning as a result of the facts established in *Harrison (No 1)* referred to in par 55 (a) - (e) above.

Reasonable foreseeability of harm (s 364A(1)(e))

- 60 Given the publicity referred to above, the Prosecutor submitted it should also be inferred that the Defendant was aware

of:

- (a) The severe water shortage conditions applying to the Lachlan River at the time of the offences;
- (b) The very limited water that was available in the Lachlan River; and
- (c) The restrictions applying to the taking of water under general security access licences.

61 The Prosecutor also submitted that it should be inferred that the Defendant foresaw the harm likely to be caused to the environment by the commission of the offences (which is a relevant consideration under s 364A(1)(e)), but proceeded to commit the offences regardless of that harm.

62 The Prosecutor is applying a subjective test to s 364A(1)(e) whereas it specifies an objective test that a defendant could reasonably have foreseen the harm caused. It is not necessary to establish the inference that the Defendant was aware of the relevant water restrictions and shortage or infer that he proceeded to commit the offences regardless of any actual or likely harm to the environment. In the absence of any evidence from the Defendant it is difficult to so conclude. I consider that viewed objectively the circumstances established by the Prosecutor given the large volume of water taken overall and the severe water shortage at the time of the offences establish that the Defendant could have reasonably foreseen the harm likely to be caused to the environment as a result of the offences.

Defendant could have prevented the offences (s 364A(1)(d))

63 I accept the Prosecutor's submissions that the offences, and any resulting harm, could have been prevented by the Defendant, a relevant consideration under s 364A(1)(d) of the WM Act. In particular, the Defendant could have:

- (a) Not taken the water;
- (b) Sought to place orders for the water and not taken the water unless those orders were accepted and approved;
- (c) Reported the faulty water meter; and
- (d) Recorded and reported the details of any water taken when the water meter was not working.

Whether aggravating factor under s 21A(2)(o) CSP Act/offences committed for financial gain s 364A(1)(h) of the WM Act/market value of water s 364A(1)(b) of the WM Act

64 The Prosecutor submitted that where an offence was committed for financial gain, it is an aggravating factor to be taken into account in determining the appropriate sentence (s 21A(2)(o) of the CSP Act). In *Garrett v Williams* [2006] NSWLEC 785; (2006) 160 LGERA 115 at 143, Preston J stated:

The carrying out of an offence to make a profit, or to save incurring an expense or to avoid the cost of obtaining and implementing a statutory permission such as a development consent or environment protection licence increases the seriousness of the crime. Offenders should not profit from crime. (references omitted)

65 The Prosecutor submitted that BPPL was conducting a business, including growing irrigated crops for sale. The wheat crop grown with the water taken in the commission of offences 1, 2, 6 and 7 was sold for a total of \$59,695.13 (including GST), par 11 of the affidavit of Mr Sefton. The canola crop grown with the water taken in the commission of offences 3 to 5 and 8 to 10 was sold for a total of \$77,809.02 (including GST), par 3 and Annexure A to the affidavit of Mr Joyce. The Prosecutor submitted, therefore, that the taking of water on each occasion in breach of the water access licence and water supply works approval was carried out for financial gain. Further, a defendant's intentions in committing the offences are a relevant consideration under s 364A(1)(h) of the WM Act. Here, it can be inferred that the Defendant's intentions in committing the offences were to take water for financial gain.

66 It is not appropriate to consider as an aggravating factor under s 21A(2)(o) the commission of the offence for financial gain if that is already a matter considered under s 364A(1)(h) as the intention of the Defendant in committing the offences. To do so is impermissible double counting in sentencing as discussed in *Kyluk* at [115] - [116]. I take into account that the offences were committed for financial gain under s 364A of the WM Act in that I can infer that the Defendant's intention was to take water to grow a wheat and a canola crop which were sold to GrainCorp and Cargill.

67 The market value of any water unlawfully taken as a consequence of the commission of the offences is a relevant consideration under s 364A(1)(b) of the WM Act. As noted above, the offences involved the unlawful taking of at least 280 ML of water according to Mr Ivey's evidence. There is evidence that available water in the Lachlan River was being traded at up to \$1,000 per ML around October 2008, par 23 of the affidavit of Mr Andersen. Based on the Defendant having taken between 280 and 632 ML, par 4.5.3 of the expert report of Mr Ivey, the market value of the water unlawfully taken might have been as high as \$280,000 to \$632,000. The market price of the water at \$1,000 per ML was a substantial cost foregone. Indeed at that rate the cost was prohibitive with the cost of the water being substantially greater than any profit from the crops.

Conclusion on objective circumstances

68 The Court assesses the objective seriousness of these offences, that is, where these offences sit in the range of seriousness for offences under s 341(1)(a) and s 343(1)(a1)(i) of the WM Act. That assessment is informed by the statutory scheme for the protection of water resources under the WM Act including its objects and the consequences

of the offences identified by the Prosecutor. The distribution of a vital public resource underpins the scheme for water licensing and access hence the conclusion of a breach of public trust in the circumstances of the offences. The deliberate actions of the Defendant in causing the taking of water on four occasions, the volume of water taken without authorisation and without measurement in the absence of an operational water meter and the severe water shortage giving rise to foreseeability of harm to the environment and other users' rights along the Lachlan River at the time of the offences, and the financial motivation for the taking of water, all suggest that the objective circumstances are in the moderate to serious range.

Subjective factors (s 21A(3) CSP Act)

69 Mitigating factors which must be taken into account where relevant are identified under s 21A(3) of the CSP Act.

No record or no significant record

70 The only previous convictions of the Defendant of which the Prosecutor is aware are convictions for a breach of the *Corporations Act 2001* (Cth). A fine of \$400 was imposed in late 2010 for breach of s 475 of the *Corporations Act* (report as to company's affairs to be submitted to liquidator), and two fines of \$1,500 each were imposed under s 1314 of the *Corporations Act* (continuing offences) in the period January to June 2011. In these circumstances, the Prosecutor does not submit that the Defendant has a significant record of previous convictions and I accept that the absence of such a record should be taken into account as a mitigating factor, under s 21A(3)(g).

Defendant is unlikely to re-offend

71 If the Defendant is unlikely to re-offend, it is a mitigating factor to be taken into account in determining the appropriate sentence (s 21A(3)(g) of the CSP Act). BPPL has been deregistered. Although the Defendant is still recorded as holding two water access licences on the Prosecutor's Licensing Administration System, so far as the Prosecutor is aware, the Defendant is no longer involved in irrigation or farming. In circumstances where the Defendant does not have the means or opportunity to re-offend, I agree with the Prosecutor that the Defendant is unlikely to commit further offences of the same or similar nature to the offences charged.

No remorse, no plea of guilty, minimal assistance to law enforcement authorities

72 As the Prosecutor submitted none of the following mitigating factors are present for this Defendant:

- (a) The remorse shown by the Defendant for the offence (s 21A(3)(i))
- (b) A plea of guilty by the Defendant (s 21A(3)(k) and s 22)

73 Assistance by the Defendant to law enforcement authorities (s 21A(3)(m) and s 23) can be relevant. There were initial admissions made of one watering event by the Defendant which the Prosecutor was otherwise unaware of referred to in *Harrison No 1* but assistance to law enforcement authorities was otherwise non-existent.

74 There are few mitigating factors to consider in relation to the Defendant.

Other sentencing principles

Maximum penalties and increases to maximum penalties

75 In setting a penalty the Court should have regard to the maximum penalty applicable, as this is an expression of the seriousness Parliament attributes to the offence. In *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 (Kirby P, Campbell and James JJ concurring) at 698 and 701:

The task of a 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...

... the more serious the lasting environmental harm involved the more serious the offence and, ordinarily, the higher the penalty.

76 Offences must be assessed as to their level of criminality so that the relative seriousness is determined in relation to the worst case for which the maximum penalty is provided, see *Cabonne Shire Council v Environment Protection Authority* [2001] NSWCCA 280; (2001) 115 LGERA 304 at 312.

77 The Prosecutor also submitted that Parliament had determined that these offences should attract a significant maximum penalty of \$132,000 in the case of individual offenders. The maximum penalty serves as a yardstick and a basis for a comparison between the case before the Court and the worst case. The Court should have regard to the maximum penalty and determine the degree by which a defendant's conduct offends against the legislative object in this case, of regulating the taking, and ensuring the equitable sharing, of water in NSW.

78 The Prosecutor submits that the Court may, and should, also have regard to the significant increase in the maximum penalty for equivalent offences enacted with effect from 1 January 2009: *R v Donaldson* (1968) 87 WN (Pt 1) (NSW) 501; [1968] 1 NSWLR 642 and *Markarian* at [30]. The offences under s 341(1)(a) would now be offences under s 60B

(Contravention of terms and conditions of access licence) and the offences under s 343(1)(a1)(i) would now be offences under s 91G (contravention of terms and conditions of approvals). In each case, the offence is subject to a tier 2 penalty, which corresponds to a maximum penalty for an individual of 2,250 penalty units (\$247,500) under s 363B(b)(ii) of the WM Act. The significant increase in maximum penalties indicates that Parliament regarded the previous penalties as inadequate.

- 79 In his Agreement in Principle speech in relation to the Water Management Amendment Bill 2008, the Minister referred to the extent of the drought in NSW at the time (23 September 2008). In turning to the increased fines or penalties, he said:

With New South Wales suffering from the worst drought on record, it is critical that water is used by those lawfully entitled, and extracted according to licence conditions. Water theft directly reduces the water available to users and the environment. To put it simply: water theft is not a victimless crime. That is why I propose to introduce new maximum penalties for offences under the Act. This will send a strong message that stealing water is now regarded as a serious crime against property and a serious crime against the environment. Stock theft has traditionally been regarded in the bush as a low act, and these new penalties send the message that taking water illegally should be regarded in the same way.

... The new maximum penalties are a genuine attempt by the Government to crack down on water thieves and ensure that those members of the community who are using water lawfully are not unfairly disadvantaged. In short, the new maximum penalties send a strong message to offenders and the courts that illegal behaviour under the Act, including water theft, will not be tolerated in these difficult times.

- 80 The usual principle in sentencing is that the law in force at the time of the offences should apply. While the imposition of greater penalties later by Parliament can be a relevant factor it cannot alter the fundamental regime in force at the relevant time. The Prosecutor did not submit that any increase in penalty imposed should mirror the later increase in any event.

Specific and general deterrence

- 81 Under s 3A(b) of the CSP Act, specific and general deterrence are purposes for which a court may impose a sentence on an offender, giving statutory recognition to the common law sentencing principles of deterring the particular offender and others who might consider breaking the law. The Prosecutor does not submit that specific deterrence of the Defendant should be given significant weight in these proceedings. BPPL has been de-registered. As noted above, so far as the Prosecutor is aware, the Defendant is no longer involved in irrigation or farming.

- 82 General deterrence has long been recognised by this Court and the Court of Criminal Appeal as being a major consideration in the imposition of penalties for environmental offences: *Axer Pty Limited v Environment Protection Authority* (1983) 113 LGERA 357 at 359; *Camilleri's Stock Feeds* at 701.

- 83 In *Bentley v BGP Properties Pty Limited* [2006] NSWLEC 34; (2006) 145 LGERA 234 at [139] - [140], Preston J said:

It is the duty of the Court to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those who might otherwise be tempted by the prospect that only light punishment will be imposed: *R v Rushby* [1977] 1 NSWLR 594 at 597-98.

This factor is particularly relevant to environmental offences. Persons will not be deterred from committing environmental offences by nominal fines: *Environmental Protection Authority v Capdale Pty Limited* (1993) 78 LGERA 349 at 354; *Director-General, National Parks and Wildlife v Wilkinson* [2002] NSWLEC 171 (27 September 2002) at paras 85 and 93 per Lloyd J.

- 84 In recognition of the importance of general deterrence and the denouncement of the conduct of the Defendant (s 3A(f) of the CSP Act), the Prosecutor submits that the penalties imposed here:

must reflect the objective gravity of what was done, and the breach of public trust it represents, and send a message to the wider community that drought, desperation, financial imperative, and difficulty of detection and enforcement cannot excuse disobedience of the law: *Wills v Ianelli* [2008] NSWLEC 300 at [16].

- 85 The Prosecutor submits that the sentence of the Court must:

- (a) Be sufficiently substantial that the fine does not appear to be a mere licence fee for illegal activity and must create a significant disincentive to the harm envisioned by the WM Act;
- (b) Emphasise the importance of complying with licensing systems, including the ordering and metering requirements which are essential in enabling the NSW Office of Water to maintain accurate water allocation accounts and to monitor the lawful and equitable sharing of water;
- (c) Reflect the fact that the offences were carried out for financial gain; and
- (d) Particularly reflect the increased seriousness of the offences because they were committed during a period of severe water shortage.

- 86 The commission of offences such as these in a period of severe water shortage presents the greatest risk of harm to the environment and negative impact on other water users. During severe water shortages, most or all licence holders are likely to experience significant reductions in their expected water allocations and most or all irrigators and farmers are likely to come under significant financial pressure because of the lack of water. In these circumstances, the Prosecutor submits that general deterrence is a particularly important consideration in sentencing for these offences (which submission I adopt).

Even-handedness

87 The principle of even-handedness requires that the Court consider if there is any sentencing pattern for like offences in order to determine a consistent approach to penalty, if there is one. No other prosecutions have been taken in this Court under these provisions in the WM Act so that there are no directly comparable penalties to consider. A table of prosecutions of ten matters under the WM Act, the *Water Act 1912* and the *Rivers and Foreshores Improvement Act 1948* (repealed) in the Local Court was provided by the Prosecutor. None are comparable in that they concern different offence provisions and the maximum penalties are lower in that Court. One prosecution in this Court under the Rivers and Foreshores Improvement Act, *Wills v Ianelli* [2008] NSWLEC 300, concerned excavations on protected land without a permit. The defendant, the controlling mind of a landowning company which was also charged, pleaded guilty. The maximum penalty for the offence was then \$66,000. The Court considered that the offence was at the upper end of the lower range of culpability, imposed a fine of \$12,000 after a 20 per cent discount for the utilitarian value of the guilty plea and awarded the prosecutor's costs. These cases provided very limited assistance to the Court in determining the appropriate penalties in this case.

Totality principle of sentencing

88 The "principle of totality" is relevant to ensure that the sum of any fines imposed is not disproportionate to the total criminality of the defendant: *Camilleri's Stock Feeds* at 703 - 704. The Prosecutor submits that the offences committed in relation to each occasion of taking water can be seen as connected and as involving common elements and accepts that the totality principle ought apply in some manner. That is, the offences can be seen to form four "groups" of offences as follows:

- (a) Offences 1 and 2, in relation to the April watering of the wheat crop;
- (b) Offences 3 to 5, in relation to the May pre-watering of the canola crop;
- (c) Offences 6 and 7, in relation to the July or August watering of the wheat crop; and
- (d) Offences 8 to 10, in relation to the August or September watering of the canola crop.

89 The Prosecutor submits that the four "groups" of offences should not be seen as connected with each other because they were not closely connected in time and they involve separate and deliberate acts of criminality.

No information about means to pay

90 The Prosecutor has no knowledge of the financial means of the Defendant and there is otherwise no direct or specific information before the Court as to the means of the Defendant which could be considered under s 6 of the Fines Act. Mr Lennox, officer of State Water Corporation, attests (in par 44 of his affidavit) to a conversation with the Defendant where he said that the bank would not give him any more money, his wife and he were separated and he is indebted to the bank. The Defendant also stated that his neighbour put the crop in for him and he only watered it so they could strip it and get the money back. In the absence of the Defendant or a representative and any other information about the Defendant, I do not consider I have any relevant information before me which enables me to consider the Defendant's means to pay a fine. Section 10 of the Fines Act provides for an application to be made to the Registrar of the Court for time to pay if a defendant lacks financial capacity to pay a fine.

Moiety

91 The Prosecutor seeks a moiety in the fine payable by the Defendant by an order under s 122 of the Fines Act that half of the fine payable by the Defendant be paid to the Prosecutor, as delegate of the NSW Office of Water. It is appropriate to make such an order. I note that s 10 of the Fines Act applies to the whole of the fines imposed regardless of the making of an order under s 122.

Costs

92 The Prosecutor seeks costs pursuant to s 257B of the Criminal Procedure Act. Although costs incurred by the Prosecutor are in excess of \$114,000 (including GST), the costs order sought is in the amount of \$80,000. The costs schedule handed up by the Prosecutor confirms the amount of costs incurred by the Prosecutor and should be awarded to the Prosecutor. I note that legal costs are included in the definition of fine under s 4 of the Fines Act and can therefore be the subject of an application under s 10 of the Fines Act.

Appropriate penalty

93 The maximum penalty if applied for all ten offences would be \$1,320,000. The totality principle should be applied across all the offences. The Prosecutor submitted that the ten charges should be considered in four separate groups as identified in par 88 above. These are organised on the basis of the time period that water was taken on four occasions. The volume of water taken on each occasion varied with the greatest amounts of water taken for the second crop watering for both crops. I will adopt the Prosecutor's approach of four groupings of the offences but will also consider the offences collectively across the four groups. The same activity of taking water on four occasions took place over a relatively confined period of five to six months and was directed to the same activity of growing a crop albeit of two different varieties. I also consider the failure to report a meter not functioning is an important offence

given the statutory scheme. Further, within each group of offences one act of taking water results in more than one charge and this needs to be recognised in the application of the totality principle.

94 The following penalties should be imposed:

In matter no 11/50856 (first offence)	\$90,000
In matter no 11/50857 (second offence)	\$20,000
In matter no 11/50858 (third offence)	\$50,000
In matter no 11/50859 (fourth offence)	\$15,000
In matter no 11/50860 (fifth offence) meter	\$20,000
In matter no 11/50861 (sixth offence)	\$40,000
In matter no 11/50862 (seventh offence)	\$10,000
In matter no 11/50863 (eighth offence)	\$30,000
In matter no 11/50864 (ninth offence)	\$ 5,000
In matter no 11/50865 (tenth offence) meter	\$10,000

Orders

95 The Court makes the following orders:

1. The Defendant is convicted of the ten offences charged in matters numbered 11/50856 - 11/50865.
2. The Defendant is fined the following sums:
 - (a) \$90,000 for matter no 11/50856
 - (b) \$20,000 for matter no 11/50857
 - (c) \$50,000 for matter no 11/50858
 - (d) \$15,000 for matter no 11/50859
 - (e) \$20,000 for matter no 11/50860
 - (f) \$40,000 for matter no 11/50861
 - (g) \$10,000 for matter no 11/50862
 - (h) \$30,000 for matter no 11/50863
 - (i) \$5,000 for matter no 11/50864
 - (j) \$10,000 for matter no 11/50865
3. Pursuant to s 122 of the *Fines Act* 1996 the Defendant must pay 50 per cent of the fines to the Prosecutor, as delegate of the NSW Office of Water.
4. All fines are to be paid to the Registrar of the Court within 28 days of today's date.
5. The Registrar is directed to pay half the fines to the Prosecutor.
6. The Defendant must pay the Prosecutor's legal costs of the proceedings in the amount of \$80,000.
7. The exhibits may be returned.

Amendments

16 Jul 2012 cross references corrected

Paragraphs: 30 and 93

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