NEW SOUTH WALES SUPREME COURT

CITATION:
Dr Denise Robinson v Eureka Operations Pty Ltd [2009] NSWSC 784

JURISDICTION:

FILE NUMBER(S):
10221/08-10222/08
10224/08
10229/08
10233/08-10234/08
10239/08
10242/08
10244/08
10446/08-10248/08
10250/08-10252/08
10256/08-10257/08
10259/08-10261/08
10265/08-10267/08
10262/08
10217/08
10228/08

HEARING DATE(S):
24/11/08, 19/12/08, 18/02/09, 19/06/09

JUDGMENT DATE:
13 August 2009

PARTIES:
Dr Denise Robinson
Eureka Operations Pty Ltd trading as Coles Express and 23 other matters

JUDGMENT OF:
James J

LOWER COURT JURISDICTION:
Not Applicable

LOWER COURT FILE NUMBER(S):
Not Applicable

LOWER COURT JUDICIAL OFFICER:
Not Applicable

COUNSEL:
B Hodgkinson SC / I Bourke - Prosecutor
I Temby AO QC / D Mitchell - Defendants

SOLICITORS:
NSW Department of Health
Sparke Helmore Lawyers

CATCHWORDS:
CRIMINAL LAW — Supreme Court summary jurisdiction — sentencing — Public Health Act s 61B — displaying of tobacco advertisement

LEGISLATION CITED:
Crimes (Sentencing Procedure) Act
Criminal Procedure Act
Fines Act
Public Health Act

CASES CITED:
Camelleri's Stockfeeds Pty Ltd v Environment Planning Authority (1993) 32 NSWLR 683
Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd (2003) 196 ALR 350
Environment Protection Authority v Barnes [2006] NSWCCA 246
Environment Protection Authority v Waste Recycling and Processing Corporation [2006] NSWLEC 419
EPA v Buchanan (No 2) [2009] 165 LGERA 383
EPA v Ross [2009] NSWLEC 36
Pearce v The Queen (1998) 194 CLR 610
R v Crombie [1999] NSWCCA 297
R v Doan (2000) 50 NSWLR 115
R v Weldon (2002) 136 A Crim R 55
Timothy Brokenshire (South Eastern Sydney Area Health Service) v Philip Morris Limited & Wavesnet.net.Pty Ltd (8 November 2002)

TEXTS CITED:

DECISION:
1. For each of the 3 offences in which liability was contested I impose a fine of $5000.
2. For each of the 23 offences in which liability was not contested I impose a fine of $4000.
3. As applied for by the prosecutor and not opposed by Eureka, I make an order under s 122 of the Fines Act that one half of the fines be paid to the prosecutor.
4. I make an order that Eureka pay the prosecutor's costs of the proceedings agreed at $50,000.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

JAMES J

THURSDAY 13 AUGUST 2009

10221/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS DURAL**
10222/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS MERRYLANDS**
10224/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS GRIFFITH**
10229/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS BATHURST WEST**
10233/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS WATERLOO**
10234/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS BASS HILL**
10239/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS PORT MACQUARIE**
10242/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS**
10244/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS LIDCOMBE**
10246/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS CLARENDON**
10247/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS COFFS HARBOUR**
10248/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS GOROKAN**
10250/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS WOOLGOOLGA**
10251/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS ORANGE**
10252/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS WOY WOY**
10256/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS KINGSFORD**
10257/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS EASTERN CREEK**
10259/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS ERINA**
10260/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS ERINA**
10261/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS OURIMBAH**
10265/08	**DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS WAUCHOPE**

10266/08 **DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS BERKSHIRE PARK**

10267/08 **DR DENISE ROBINSON v EUREKA OPERATIONS PTY LTD t/as COLES EXPRESS ALBURY**

JUDGMENT

1 **HIS HONOUR**: In these proceedings I delivered a judgment on 19 December 2008 ("the principal judgment") in which, exercising the summary jurisdiction of the Supreme Court under Pt 5 of Ch 4 of the *Criminal Procedure Act*, I found the defendant Eureka Operations Pty Ltd ("the defendant" or "Eureka") which trades under the name of Coles Express, guilty of three offences under s 61B of the *Public Health Act* ("the Act").

2 On 19 December 2008 proceedings for determining what penalty should be imposed for the offences were stood over to 18 February 2009.

3 On 18 February 2009 counsel for Eureka informed the Court that Eureka would plead guilty in 23 other prosecutions brought against Eureka by the same prosecutor for contraventions of s 61B of the Act. All 26 matters were then stood over to 19 June 2009, when a hearing for determining what penalty should be imposed in the 26 matters took place.

4 In par 8 of the principal judgment I stated the basic facts alleged by the prosecutor and not disputed by the defendant in the three matters I was then dealing with, as follows:-

> "An environmental health officer had attended a shop conducted by the defendant; the officer had approached the counter of the shop; the officer had asked the person serving behind the counter ("the sales person") for a (that is a single) packet of a particular brand of cigarettes; the sales person had then told the officer that the officer could have a second packet of the cigarettes at a reduced price; and the officer had bought and received two packets of the cigarettes, paying the reduced price."

5 At the penalty hearing counsel for Eureka accepted that these facts were also the basic facts in the 23 other matters. Accordingly, the same conduct, with changes only in the times, places and the individuals involved, occurred on 26 occasions between 13 July 2007 and 23 July 2007.

6 In the principal judgment I held that by the conduct of its sales person in telling the environmental health officer that the officer could have a second packet of cigarettes at a reduced price Eureka had "displayed" a "tobacco advertisement" within the meaning of those terms as defined in the Act.

7 Section 61B(1) of the Act provides:-

> "A person who in New South Wales for any direct or indirect benefit displays a tobacco advertisement in, or so that it can be seen or heard from, a public place or a place prescribed by the regulations is guilty of an offence."

8 In s 53 of the Act "tobacco advertisement" is defined as follows:-

> "Writing, or any still or moving picture, sign, symbol or other visual image or message or audible message, or a combination of two or more of them, that gives publicity to, or otherwise promotes or is intended to promote:-
>
> (a) the purchase or use of a tobacco product, or
> (b) the trademark or brand name, or part of a trademark or brand name, of a tobacco product."

9 In s 53 of the Act "display" is defined as follows:-

> "Display, in relation to a tobacco advertisement, includes cause or permit to be displayed."

10 In the principal judgment I held that by saying that the Environmental Health Officer could obtain a second packet of cigarettes at a reduced price the sales person had displayed an audible message that was intended to promote the purchase of a tobacco product.

11 Under s 61N of the Act a person who is guilty of an offence under s 61B(1) is liable, in the case of the body corporate, to a penalty of not more than 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence. It was common ground at the penalty hearing that, although Eureka was to be penalised for 26 offences, each of the offences was to be regarded as a first offence, Eureka not having previously been convicted of any offence under s 61B or any other section of the Act. A penalty unit is $110 (*Crimes (Sentencing Procedure) Act* s 17).

12 It was also common ground at the penalty hearing that Pt 3 of the *Crimes (Sentencing Procedure) Act* applied to the imposition of penalties for the 26 offences (*Crimes (Sentencing Procedure) Act* s 4(3)).

Evidence in the proceedings on sentence

13 Additional evidence for the prosecutor in the penalty proceedings consisted of statements by environmental health officers in the 23 matters which had not been the subject of the liability hearing and three Coles Express memos distributed by Eureka to its employees.

14 A memo which was in force at the time of the offences read in part as follows:-

> "In all NSW and ACT stores we will trial a Tobacco Multibuys offer (to be made to customers verbally). This offer will be made in the P8 Promo period P8 – 6th June to 24th July on all Winfield 25's and also B&H 25's variants.
>
> ACTION

1. Accept the download on the 4th July to add the B&H 25's PDP in addition to Winfield 25's PDP download you have already received to enable the Tobacco multibuys offer to run at your store.

> PDP 24013 – All Winfield 25's varieties – 2 for $20.95
> PDP 24068 – all B&H 25's varieties – 2 for $21.95

> Please handwrite the PDP's on the PLU/PDP sheet for team members to reference.

2. Advise your team members of the Tobacco Multibuys offer.

3. Please ensure team members only communicate the Multibuys offer verbally. When customers ask to purchase a single pack of Winfield 25's or Benson & Hedges 25's, team members should ask them – "Did you know you can purchase 2 Winfield 25's packs for $20.95" or "Did you know you can purchase B&H 25's packs for $21.95".

4. We suggest that stores increase the stock holding of all respective Winfield 25's and B&H 25's variants listed below in the multibuys offer by 20% to cater for the anticipated sales volume increase.

5. This communication is to be filed in the store comms folder for Team Member sign off and not displayed in view of the customer."

15 A further memo for the period 5 September to 17 October 2007 was in similar terms, except that it was to apply only to certain Winfield cigarettes and not Benson & Hedges cigarettes.

16 A document from the defendant for distribution amongst its employees which was headed "monthly merchandise focus October/November" included the following:-

> "**Tobacco Multibuys**
>
> Ensure all Team Members are aware of state specific tobacco offers and up sell to customers purchasing smokes.
>
> ……..
>
> Drinks POG implementation
>
> With the warmer weather now upon us our drinks will be our second highest selling category after tobacco."

17 In the penalty proceedings Eureka relied on an affidavit by Mr Peter Struck, the General Manager Merchandise and Offer Development of Eureka. Mr Struck was not required for cross-examination on his affidavit and I accept his evidence.

18 Paragraphs 3 and 4 of Mr Struck's affidavit were in the following terms:-

> "3. Eureka's sole business is the operation of service stations under the trading name 'Coles Express'. Eureka presently operates 620 Coles Express service stations throughout Australia. Those service stations sell Shell fuels at the pump, a selection of Shell car and motorcycle care products, and a variety of food, refreshment and household items, including cigarettes. Most Coles Express outlets are open 24 hours a day, seven days a week.
>
> 4. Eureka is a wholly-owned subsidiary of Coles Supermarkets Australia Pty Ltd (**Coles Supermarkets**), which is in turn a wholly-owned subsidiary of Coles Group Limited (**Coles Group**). In line with that relationship, Eureka's directors and General Manager report directly to Coles Supermarkets' Managing Director and board."

19 In par 8 of his affidavit Mr Struck said that Eureka had first become aware that the New South Wales Department of Health considered Eureka's conduct to be in breach of the *Public Health Act*, when Eureka was served on 22 January 2008 with the summonses commencing the 26 prosecutions. Immediately after being served Eureka issued an urgent action advice to all its service stations in New South Wales and the Australian Capital Territory requiring staff to suspend verbally offering multiple packets of cigarettes at the bulk price.

20 On 23 January 2008 Eureka issued a further action advice to all its service stations, which included the following:-

> "We have received further advice from our lawyers that we can still offer the "2 for" Tobacco Multibuys offer to customers in NSW/ACT however staff must not verbally up sell the Tobacco Multibuys. Staff are only allowed to respond to any customer queries regarding the Tobacco Multibuys including the price of the offer."

21 Eureka has no previous conviction for any offence in any jurisdiction, despite having operated service stations since 2003.

22 In a number of paragraphs of his affidavit Mr Struck set out steps taken by Eureka to ensure compliance with legislative requirements, including training employees in the rules governing the sale of tobacco products.

23 Under the heading "corporate citizenship" Mr Struck described the substantial monetary and in-kind contributions made by Coles Supermarkets to the community each year, including charitable donations.

24 In par 21 of his affidavit Mr Struck said:-

> "Eureka accepts responsibility for these offences and accordingly entered pleas of guilty in relation to 23 of them. In relation to the 3 to which it decided to plead not guilty, Eureka did its best to cooperate with the prosecution to minimise the number of issues, to eliminate factual disputes (save for some short cross-examination on the issue of whether or not consent to prosecute was validly given) and to shorten the length of the proceedings as much as possible."

25 In par 22 of his affidavit Mr Struck said:-

> "Eureka sincerely regrets that it has acted in breach of the Public Health Act and is committed to ensuring that it does not breach tobacco (or any other) laws in the future."

Submissions of the parties

26 The principal submissions made by counsel for the parties can be summarised, very broadly, as follows.

For the prosecutor

27 It was important to take into account the legislative purpose of s 61B of the Act, that is the protection and promotion of public health. Counsel referred to the second reading speech made by the Minister for Health in which the Minister had said inter alia that studies had established a link between advertising and the rate of tobacco consumption.

28 The conduct constituting the offences had been planned and had been engaged in for financial gain.

29 Counsel referred to a passage in the judgment of Preston CJ of the Land and Environment Court in *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419 at [229], where his Honour said (omitting citation of authority) with respect to the environmental offences before him:-

> "Courts have repeatedly stated when sentencing for environmental crime that the sentence of the court needs to be of such magnitude as to change the economic calculus… it should not be cheaper to offend than to prevent the commission of the offence…the amount of the fine needs to be such as will make it worthwhile that the cost of precautions be undertaken…the amount of the fine must be substantial enough so as not to appear as a mere licence fee for illegal activity."

30 It was submitted that these principles, even though some modification would be required, could be applied in the present context.

31 There was a need for the fines to give effect to the sentencing purposes of general and specific deterrence.

32 Eureka would be entitled to some discount for its pleas of guilty in 23 matters but the amount of the discount should be at the lower end of the range.

For Eureka

33 The offences were not objectively serious. An offer to sell a second packet of cigarettes at a reduced price was made only to a person who had already approached a sales person at a service station wanting to buy one packet of cigarettes. It was unlikely that such a person would not already be a smoker of cigarettes. There was nothing to suggest that the offer had been made to minors.

34 All that a sales person was prohibited from doing was telling the customer about an offer to sell a second packet of cigarettes at a reduced price. Without contravening s 61B, the sales person could in fact have sold a second packet of cigarettes at a reduced price, if he did so without telling the customer of an offer to do so.

35 Each offer had been made to a single person as distinct from, for example, an advertisement broadcast through a media outlet to tens or hundreds of thousands of people.

36 Before engaging in the conduct Eureka had obtained legal advice that an offer to be made to customers verbally did not contravene the Act.

37 Planning should not be regarded as an aggravating factor, because at least some planning was inherent in any offence under s 61B.

38 Nor was a motive for financial gain an aggravating factor. Actual or intended gain is an element of or inherent in the definition of "tobacco advertisement" in s 53 of the Act and is an element of the offence created by s 61B ("for any direct or indirect benefit").

39 There was no need for specific deterrence. Eureka had ceased engaging in the conduct constituting the offences, as soon as it received notice that the Department of Health considered its conduct to be in breach of the Act and it was improbable that Eureka would commit any further offence.

40 Eureka had a number of favourable subjective circumstances. It had assisted the conduct of the proceedings against it by making admissions, by limiting the issues and by then pleading guilty to 23 of the charges. Through Mr Struck it had expressed its regret for having committed the offences. Eureka had no previous criminal convictions and had demonstrated that it is a good corporate citizen.

41 I should take into account that the proceedings could have been brought in the Local Court and not in the Supreme Court.

Submissions on other matters

42 I was informed by counsel that the parties had agreed that I should make an order that Eureka pay the prosecutor's costs of the proceedings and that the amount of those costs had been agreed at $50,000. Counsel for the prosecutor submitted that the making of the costs order and the amount of the costs were irrelevant to a determination of what fines should be imposed for the offences. Counsel for Eureka submitted that the costs order and the amount of the costs were relevant to the determination of what fines should be imposed.

43 In the present case I have to impose penalties for 26 offences which were of the same kind and which were committed within a period of less than two weeks. In these circumstances both counsel made submissions about the sentencing principle of totality and how I should give effect to that principle. It was accepted by both counsel that, as stated by Kirby P, with the concurrence of the other members of the Court, in *Camelleri's Stockfeeds Pty Ltd v Environment Planning Authority* (1993) 32 NSWLR 683 at 704, "the principle of totality is applicable where the penalty imposed is by way of fine". However, counsel for the prosecutor pointed to the further statement by Kirby P that "it may be that the principle of totality may not have the same force in the case of the imposition of fines, as opposed to the imposition of imprisonment where it has a special operation…".

44 I was referred by counsel for the prosecutor to the well known passage in the joint judgment of McHugh, Hayne and Callinan JJ in *Pearce v The Queen* (1998) 194 CLR 610 at 624 [45] where their Honours said:-

> "A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality."

45 This statement of principle is obviously incapable of being fully applied in cases where the only penalty a sentencing judge can impose is a fine.

46 However, it was submitted that I should apply the principles in *Pearce*, so far as they could be applied, by fixing an appropriate penalty for each offence (which, having regard to the similarity of all of the offences and subject to any discount for a plea of guilty where there had been a plea of guilty, should be the same penalty) and then give effect to the principle of totality by the only means available where the only penalty that can be imposed is a fine, by reducing the amount of the fine. The objective would be to produce a total penalty which would be proportional to the total criminality.

47 Counsel for Eureka submitted that I could give effect to the principle of totality by imposing a fine of a not insubstantial amount for one of the offences (perhaps the first in time of the three offences to which Eureka had, in effect, not pleaded guilty) and then fines of fairly nominal amounts for all the rest of the offences.

48 I was informed by counsel at the penalty hearing that there has been no previous case in the Supreme Court relating to the imposition of a penalty for a contravention of s 61B of the Act.

49 I was referred to one previous case in the Local Court *Timothy Brokenshire (South Eastern Sydney Area Health Service) v Philip Morris Limited & Wavesnet.net.Pty Ltd* (8 November 2002). In that case both defendants pleaded guilty. The defendant Philip Morris Pty Ltd was fined $9000 and the defendant Wavesnet.net.Pty Ltd was fined $7500 on each of two matters. However, the facts in *Brokenshire* were very different from the facts of the present case, involving a promotional event attended by 400-500 persons clearly advertising Philip Morris alpine brand cigarettes.

50 In the absence of any previous authority in this Court on s 61B of the Act and any previous authority in any other court apart from the decision in *Brokenshire*, I was referred by counsel, for general principles of sentencing for statutory offences, to cases in the Land and Environment Court for environmental offences and in the Industrial Relations Commission for offences under Occupational Health and Safety legislation.

Decision

51 In determining what penalty I should impose for each of the 26 offences I consider that I should, so far as is possible, apply the principles of sentencing stated in *Pearce*. In accordance with those principles I should first fix an appropriate penalty for each offence. That penalty, apart from any discount for a plea of guilty, should be the same amount, because all of the offences involved the same kind of conduct and the defendant's subjective circumstances were the same.

52 I should then give effect to the principle of totality, in the only way which is available where the only penalty which can be imposed is a fine, by reducing the amount of the penalty for each offence. The objective should be to ensure that the aggregate penalty should fairly and justly reflect the total criminality of Eureka's conduct: see *R v Weldon* (2002) 136 A Crim R 55 per Ipp JA at 62 [46].

53 It is necessary to assess the level of objective seriousness of each of the offences.

54 I take into account the submissions made by counsel for the prosecutor about the legislative purposes underlying s 61B, as stated in the second reading speech by the Minister for Health. Section 61A of the Act provides that the objects of Div 4 of Pt 6 in which s 61B is contained include the promotion of good health and the prevention of illness.

55 While I accept that some degree of planning may be inherent in any offence under s 61B, I consider that the degree of planning in the present case, as shown by the tobacco multibuys offer memo from Coles Express to its employees, exceeded what would be inherent in any offence under s 61B.

56 I accept that an element of an offence under s 61B is that the offender display the advertisement for a direct or indirect benefit to the offender and that a message will not amount to a "tobacco advertisement" within the part of the definition of that expression in s 53 of the Act which was relied on by the prosecutor, unless it is intended to promote the purchase of a tobacco product. I also accept that the benefit which could be made from each "displaying" of an "advertisement" would be very small. Nevertheless, the tobacco multibuys offer memo, including the suggestion that stores increase by 20 per cent their holdings of stocks of cigarettes to which the offer applied, shows that Eureka foresaw a substantial financial benefit to itself from pursuing a course of conduct of making offers of the kind made in the commission of each offence. I consider that the general principle stated by Preston CJ in par [229] of his Honour's judgment in *EPA v Waste Recycling* have some application in the present case.

57 On the other hand, I accept the submission made by counsel for Eureka that on each occasion what I found to be an "advertisement" was displayed to one person only and that that person had approached Eureka's employee seeing to buy a packet of cigarettes and that it can be inferred that that person was an adult and was already a smoker of cigarettes. Eureka had obtained legal advice that what it proposed to do was legally permitted.

58 I take into account the maximum penalty for an offence under s 61B. However, the objective seriousness of each of the present offences is clearly much less than would be the objective seriousness of an offence in the worse class of cases, an example of which might be an explicit advertisement of tobacco products published or broadcast in the media to a large audience, including children and non-smokers.

59 The conclusion I have reached as to the objective seriousness of each offence is that its objective seriousness fell well below the middle of the range of objective seriousness for offences under s 61B.

60 I take into account Eureka's favourable subjective circumstances. It pleaded guilty to 23 of the charges and in the case of each of the charges where liability was not admitted, it assisted the conduct of the proceedings by making some admissions and by limiting the issues.

61 I accept that Eureka has expressed genuine regret for its actions, that it takes its obligations seriously, that it has no previous criminal convictions, that it has been a corporate citizen of good character and that it is unlikely to offend again.

62 While specific deterrence may not be necessary, there remains a need for the penalties I impose to give effect to general deterrence.

63 It was submitted by counsel for Eureka that I should take into account in favour of Eureka that the proceedings by the prosecutor could have brought in the Local Court, where a lower maximum penalty would have applied (s 61M(2) $11,000). It was not suggested that the penalty I could impose would be limited to the

maximum penalty which could have been imposed in the Local Court. Counsel referred to *R v Crombie* [1999] NSWCCA 297; *Environment Protection Authority v Barnes* [2006] NSWCCA 246; *R v Doan* (2000) 50 NSWLR 115.

64 I accept that the fact that the proceedings could have brought in the Local Court where there would have been a lower maximum penalty is relevant but I do not consider that I should give this factor much weight in the present case. In my opinion, the proceedings were properly brought in the Supreme Court. The proceedings raised a novel question of construction of the provisions of the Act and it is highly probable that, if the proceedings had been brought in the Local Court, an appeal would have been brought to this Court.

65 As previously noted, counsel for the prosecutor submitted that the making of the agreed costs order against Eureka that it pay the prosecutor's costs amounting to $50,000 was irrelevant to the determination of what fines should be imposed for the offences, whereas counsel for Eureka submitted that the costs order was relevant to determining what fines should be imposed.

66 Counsel for Eureka referred particularly to *Environmental Protection Authority v Barnes.* As the name of the case indicates, this was a prosecution of an individual (Mr Barnes) for offences under environmental legislation. Mr Barnes pleaded guilty and was sentenced by her Honour Justice Pain of the Land and Environment Court. The Environment Protection Authority appealed to the Court of Criminal Appeal against her Honour's sentencing orders.

67 The leading judgment in the Court of Criminal Appeal was delivered by Kirby J, with whom the other members of the Court agreed.

68 In a discrete part of his judgment Kirby J considered a ground of appeal that the sentencing judge in determining the amounts of the fines she would impose had erred in her consideration of Mr Barnes' means to pay the fines. It was not submitted by the Authority that Mr Barnes' means to pay fines were irrelevant. What was submitted by the Authority was that the sentencing judge had disregarded an asset of Mr Barnes and his wife and had not given sufficient weight to countervailing sentencing considerations. In his judgment Kirby J referred to s 6 of the *Fines Act*, which provides in part:-

> "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 practically available to the court for consideration…"

69 Kirby J held that the sentencing judge had not made any error of principle and rejected this ground of appeal. It was relevant to the sentencing of Mr Barnes that he "had limited means to pay a substantial fine (and costs)".

70 Later in his judgment, in considering a ground of appeal that the penalties were manifestly inadequate, Kirby J said at [88]:-

> "Returning to the penalty imposed upon Mr Barnes. As a matter of first impression, the fines imposed appeared unduly lenient, suggesting error. However, the fines were part only of the penalty. Mr Barnes was obliged to pay substantial costs. Her Honour made it clear that, but for that fact, the fines she would have imposed would have been much higher."

71 It is clear that Kirby J considered that the sentencing judge had not erred in taking into account Mr Barnes' obligation to pay substantial costs.

72 I was referred by counsel for Eureka to other, subsequent, decisions of Pain J of the Land and Environment Court: *EPA v Buchanan (No 2)* [2009] 165 LGERA 383 especially at [121] and *EPA v Ross* [2009]

NSWLEC 36 especially at [104]. Both *Buchanan* and *Ross* were cases of individual offenders who gave evidence of having limited financial means.

73 I was also referred by counsel for Eureka to *Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd* (2003) 196 ALR 350, in which members of the full court of the Federal Court held that in determining the penalty which should be imposed on a union for contempt of an order of the court, it was appropriate to take into account the significant burden likely to have been imposed on the union by an indemnity cost order made by the primary judge.

74 It is clear that in exercising a discretion to fix the amount of a fine a court is required by s 6 of the *Fines Act* to consider such information regarding the means of the offender as is available to the Court. In the present case, of course, there was no information before the court suggesting any lack of means to pay a fine. Indeed, Mr Struck's affidavit emphasised the size of Eureka's operations. Its turnover for the 2008 financial year was said by Mr Struck to be approximately $6billion.

75 In a case such as the present where there is no doubt about the means of the offender to pay whatever fine might be imposed, the fact that an offender has been ordered or will be ordered to pay another party's legal costs should not be given much weight.

76 I have concluded that an appropriate penalty for each offence, considered by itself, would be $7000. I consider that I should then reduce that figure to $5000 in order to give effect to the sentencing principle of totality. I should reduce the amount of the penalty by $1000 to $4000, in the case of the 23 offences in respect of which a plea of guilty was entered. The total amount of the fines will be $107,000.

77 I make the following orders:-

For each of the 3 offences in which liability was contested I impose a fine of $5000.

For each of the 23 offences in which liability was not contested I impose a fine of $4000.

As applied for by the prosecutor and not opposed by Eureka, I make an order under s 122 of the *Fines Act* that one half of the fines be paid to the prosecutor.

I make an order that Eureka pay the prosecutor's costs of the proceedings agreed at $50,000.

****

LAST UPDATED:
13 August 2009