Land and Environment Court of New South Wales

Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd [2010] NSWLEC 144 (9 August 2010)

Last Updated: 12 August 2010

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd [2010] NSWLEC 144

PARTIES: PROSECUTORGordon Plath of the Department of Environment and Climate ChangeDEFENDANTSAnthony FishOrogen Pty Limited

FILE NUMBER(S): 50002 of 2009; 50004 of 2009

CATCHWORDS: PROSECUTION :- plea of guilty to offence of causing damage to habitat of threatened species arising from provision of mistaken advice by consultant - advice resulted in clearing of koala habitat - whether aggravating factors such as negligent advice - whether level of control over clearing more remote when assessing culpability - mitigating factors taken into account - environmental service order made under new

provisions in NPW Act

LEGISLATION CITED: Crimes (Sentencing Procedure) Act 1999 s3ACriminal Procedure Act 1986 s257B, s257GFines Act 1996 s6National Parks and Wildlife Act 1974 s118D, s191(1A)(b),s205(1)(a), s205(1)(c)National Parks and Wildlife Amendment Act 2010Native Vegetation Act 2003 Port Stephens Local Environment Plan 2000Threatened Species Conservation Act 1995

CASES CITED: Andrews v DPP [1937] UKHL 1; [1937] AC 576Axer Pty Ltd v Environment Protection Authority (1993) 113 LGERA 357Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority (1993) 32 NSWLR 683Carmody v Brancourts Nominees Pty Ltd (No 2) [2003] NSWLEC 84 Cittadini v The Queen [2009] NSWCCA 302Department of Environment and Climate Change v Olmwood Pty Ltd [2010] NSWLEC 15Director General Department of the Environment Climate Change and Water v Ian Colley Earthmoving Pty Ltd [2010] NSWLEC 102Director-General of the Department of Environment and Climate Change v Hudson [2009] NSWLEC 4; (2009) 165 LGERA 256Director-General of the Department of Environment and Climate Change v Rae [2009] NSWLEC 137; (2009) 168 LGERA 121Director-General Department of Environment and Climate Change v Walker Corporation Pty Ltd (No 2) [2010] NSWLEC 73Director-General of the Department of Land and Water Conservation v Wilkinson [2002] NSWLEC 171Director General of the Department of the Environment and Climate Change v Wilton [2008] NSWLEC 297Director of Public Prosecutions v D'Arcy [2009] NSWLC 1 Environment Agency v Empress Car Co (Abertilley) Ltd [1998] UKHL 5; [1999] 2 AC 22Environment Protection Authority v Barnes [2006] NSWCCA 246Environment Protection Authority v Werris Creek Coal Pty Ltd;Environment Protection Authority v Holley [2009] NSWLEC 124Garrett v Freeman (No 5); Garrett v Port Macquarie Hastings Council; Carter v Port Macquarie Hastings Council [2009] NSWLEC 1; (2009) 164 LGERA 287Gittany Constructions Pty Ltd v Sutherland Shire Council [2006] NSWLEC 242; (2006) 145 LGERA 189Gosford City Council v Australian Panel Products Pty Ltd [2009] NSWLEC 77Hoare v R [1989] HCA 33; (1989) 167 CLR 348Hawkesbury City Council v Johnson; Hawkesbury City Council v Johnson Property Group Pty Ltd (No 2) [2009] NSWLEC 6Lowe v The

Queen [1984] HCA 46; (1984) 154 CLR 606Newcastle Wallsend Coal Company Ltd v McMartin [2006] NSWIRComm 339; (2006) 159 IR 121NSW Sugar Milling Co-operative Ltd v Environmental Protection Authority (1992) 59 A Crim R 6Minister for the Environment and Heritage v Greentree (No 3) [2004] FCA 1317; (2004) 136 LGERA 89Pittwater Council v Scahill [2009] NSWLEC 12; (2009) 165 LGERA 289Plath v Rawson [2009] NSWLEC 178; (2009) 170 LGERA 253R v Bateman [1925] All ER Rep 45; (1925) 19 Cr App R 8R v Borkowski [2009] NSWCCA 102R v Gallagher (1991) 23 NSWLR 220R v De Simoni [1981] HCA 31; (1981) 147 CLR 383R v Einfeld [2009] NSWSC 119R v Rahme (1989) 43 A Crim R 81R v Rushby [1977] 1 NSWLR 594R v Taktak (1988) 14 NSWLR 226The Queen v SZ [2007] NSWCCA 19Tiger Nominees Pty Ltd v State Pollution Control Commission (1992) 25 NSWLR 715Veen v The Queen [No. 2] [1988] HCA 14; (1988) 164 CLR 465

CORAM: Pain J

DATES OF HEARING: 26 July 201027 July 201028 July 2010

JUDGMENT DATE: 9 August 2010

LEGAL REPRESENTATIVES

PROSECUTORMr E MustonSOLICITORDepartment of the Environment, Climate Change and WaterDEFENDANTSMr D Buchanan SC with Mr A PicklesSOLICITORMcCabe Terrill Lawyers

JUDGMENT:

THE LAND AND

ENVIRONMENT COURT

OF NEW SOUTH WALES

Pain J

9 August 2010

50002 of 2009 Gordon Plath of the Department of Environment and Climate Change v Fish

50004 of 2009 Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd

JUDGMENT

1. **Her Honour**: The Defendants, Anthony Fish and Orogen Pty Ltd (Orogen), are each charged with an offence against s 118D(1) of the *National Parks and Wildlife Act* 1974 (the NPW Act) in that, from about 19 March 2007 to about 30 March 2007 on land at Taylors Beach in New South Wales (the property), each by act or omission caused damage to the habitat, not being critical habitat, of a threatened species knowing that the land concerned was habitat of that kind. Mr Fish has been charged in his capacity as a director of Orogen Pty Ltd by reason of s 175B(1) of the NPW Act.
2. The property is approximately 10ha in size. Eight hectares are zoned 4(a) Industrial and 2ha is land zoned 1(a) Rural under the Port Stephens Local Environment Plan 2000 (the LEP). The threatened species is *Phascolarctos cinereus* (koala), and the damage was the felling or mulching of vegetation forming the habitat of the koala.
3. Part 8A of the NPW Act (Threatened species, populations and ecological communities, and their habitats, and critical habitat) contains s 118D which relevantly provides:

(1) A person must not damage any habitat of a threatened species, an endangered population or an endangered ecological community if the person knows that the habitat concerned is habitat of that kind.

Penalty: 1,000 penalty units or imprisonment for 1 year or both.

...

*(6) In this section, **damage** includes cause or permit damage.*

1. Each Defendant has pleaded guilty and has therefore admitted the essential elements of the offences. The offence is one of strict liability so that mens rea is not an element of the offence.
2. Additionally to any penalty imposed in sentencing for the offences, at the commencement of the hearing the Prosecutor foreshadowed the possibility of seeking an environmental service order under s 205(1)(c) of the NPW Act. The Prosecutor is also seeking:

(a) a publication order pursuant to s 205(1)(a) of the NPW Act; and

(b) an order pursuant to s 257B of the *Criminal Procedure Act* 1986 (the CP Act) that Orogen and Mr Fish pay the Prosecutor's costs of the proceedings, calculated in accordance with s 257G of the CP Act.

1. These proceedings for offences under the NPW Act are brought in the Court in its summary jurisdiction by the Prosecutor as an officer of the Department of Environment, Climate Change and Water (DECCW) as authorised by the Director General: s 191(1A)(b) NPW Act.

Statement of Agreed Facts

1. The parties have usefully tendered a Statement of Agreed Facts (SOAF) as follows (note attachments referred to are not attached):

...

The Property 4. The offences were committed on a property at 60 Port Stephens Drive, Taylors Beach NSW known then as Lot 473 in Deposited Plan 728126 (the Property). The property is now Lot 100 in Deposited Plan 1121428. The Property is located East of Port Stephens Drive and South of Sky Close. 5. At the time of the offences the property was owned by Eureka 1 Project 17 Pty Ltd (Eureka), part of Eureka Funds Management Group. 6. ... 7. The zoning is important because both the NPW Act and Native Vegetation Act 2003 apply to the land zoned 1(a) Rural. The Native Vegetation Act does not apply to the land zoned 4(a) Industrial. On the land zoned 1(a) Rural certain defences and exemptions available for clearing under the Native Vegetation Act 2003 apply as defences to offences under s118D the NPW Act for the clearing (s118G(1) of the NPW Act). 8. The exemptions for clearing native vegetation on land zoned 1(a) Rural include:

1. the clearing of “regrowth” as defined under s19 of the Native Vegetation Act. This section exempts the clearing of regrowth that is not “protected regrowth” (protected regrowth is not relevant to this prosecution). Section 9 defines regrowth as:

a. any native vegetation that has regrown since 1 January 1990, and
b. not any native vegetation that has regrown following unlawful clearing of remnant native vegetation or following clearing of remnant native vegetation caused by bushfire, flood, drought or other natural cause,

2. the clearing of native vegetation for the purpose of routine agricultural management activities such as maintaining a 6 metre buffer from boundary fencelines (s118G(6) of the NPW Act and cl20(2)(a) of the Native Vegetation Regulation 2005).9. ... 10. In order to lawfully clear threatened species habitat, it would have been necessary to obtain one of the following that authorised the clearing:

1. a licence or certificate under the NPW Act or Threatened Species Conservation Act 1995;
2. a property vegetation plan under the Native Vegetation Act;
3. a joint management agreement under the Threatened Species Conservation Act 1995;
4. a conservation agreement under the NPW Act; or
5. a project approval, approval or development consent under Parts 3A, 4 and 5 of the Environmental Planning and Assesment Act 1979.

Background11. In mid 2006 a subsidiary of the developer Buildev Group (Buildev) engaged Tony Fish to provide expert planning and environmental advice in relation to the proposed 21 lot industrial subdivision of the property. Throughout the process of obtaining development consent for the subdivision Buildev relied on Orogen and Anthony Fish for their professional guidance on planning and ecology matters. This included advice on the approvals that were required for the project to proceed. Development consent was ultimately granted by Port Stephens Council.12. Shortly after Tony Fish was engaged, he split from Geolyse Pty Ltd and created a separate environmental planning, assessment and management consultancy called Orogen Pty Ltd. The Buildev project was transferred to this company. Mr Fish was responsible for the project. This transfer occurred around 1 July 2006.13. At the time

of the present offence, around March 2007, Buildev had entered into a joint venture with a member of the Eureka Funds Management Group (Eureka). Eureka was responsible for providing funding for the development. The joint venture commenced around January 2007. Prior to that the Buildev Group had provided funding for the development.

Identification of koala habitat 14. Orogen and Mr Fish were aware that the property contained koala habitat and movement corridors.15. From around June 2006 Geolyse conducted environmental assessments which identified both the 1(a) and 4(a) zoned land as containing koala habitat. The work of Geolyse and Mr Fish identified that the proposed subdivision would impact on an area of 0.4 ha of "preferred koala habitat" and 3ha of "link over habitat" (habitat buffer) as defined in the Port Stephens Koala Plan of Management. The following data has been superimposed over a satellite image of the property taken after the clearing:

1. Mapping from the Koala Plan of Management (Attachment 1).
2. A Plan of Preferred Koala Feed Trees situated outside of Preferred Koala Habitat based on data obtained by Orogen (Attachment 2).

16. The surveys and other work carried out by Geolyse identified that the development of large portions of the property was "highly constrained" by the koala habitat present. A copy of Geolyse's map of the constraint is Attachment 3. As a result of the survey work, Orogen prepared a Koala habitat offset option study which recommended alterations to the proposed development application to ensure retention of movement corridors and the highest percentage of koala feed trees within the site. 17. Prior to the offences Mr Fish was aware that it was necessary to develop a strategy for dealing with the impact on Koala habitat. 18. ... 19. ... 20. ... 21. ...

Preparations for removal of vegetation from the property22. ...23. ...

24. No inquiries were made by Orogen as to whether a licence was required under the Threatened Species Conservation Act 1995 for the removal of the vegetation constituting koala habitat.

25. On 17 January 2007, prior to the offence and following several complaints made by residents to Council regarding the clearing and impact on habitat, Council sought from Buildev further confirmation that the clearing was lawful. Buildev in turn sought further specific advice from

Orogen as to what vegetation it was permissible to remove without development consent. Mr Fish advised that no consent was required to clear vegetation on the 4(a) land. This advice was either incorrect or only limited to the issue of development consent (as no consent or permission was required under the Council's LEP).

26. Mr Fish was aware that there was a significant risk to Buildev of investigation and prosecution if it could not give "hard evidence" that the vegetation on the land zoned 1(a) was "regrowth" under the Native Vegetation Act. 27. ...

Inquiries as to "regrowth" on land zoned 1(a) 28. Orogen and Mr Fish made inquiries as to whether the vegetation on the 1(a) land was "regrowth" and could lawfully be removed under the Native Vegetation Act 2003. Mr Fish was aware that age not height is the critical factor with respect to determining what is "regrowth". The inquiries included:

1. attempting to obtain aerial photographs of the property;
2. deleted; and
3. obtaining the expert advice from an arborist, Tony Lydon of TLC Tree Solutions.

29. Mr Fish was unable to obtain aerial photographs prior to 1991. He advised Buildev that it must be assumed that the native vegetation was not regrowth and could not be cleared without consent.30. Around November 2006 Mr Fish sought permission to engage Tony Lydon of TLC Tree Solutions to provide expert advice on the extent to which the vegetation on the property was "regrowth". Buildev approved the engagement of Mr Lydon. Mr Lydon provided advice that while some areas of the site contained "regrowth", the site also contained older trees "that must be preserved until such time as authority to remove them has been received." 31. In late November 2006 Mr Fish sought clarification from Mr Lydon with respect to the conclusions in his report. Mr Lydon was unable to provide more detailed advice, such as a survey of the individual trees on the property, without undertaking a further site visit. 32. In December 2006 Orogen advised Buildev that:

1. the conclusion of the Lydon report was clear, the vegetation on the land zoned 1(a) was primarily "non-protected regrowth";
2. Orogen would prepare a vegetation management plan for use by the

clearing contractor in the Stage 1 clearing;

3. Isaac Mammot, an ecologist employed by Orogen, would mark the trees that were regrowth within the 1(a) zone.

33. On 21 December 2006 Isaac Mammott and Eden Wyatt, employees of Orogen, commenced the tagging of "non-protected regrowth" trees. Mr Fish had asked Mr Mammott to use Mr Lydon's report to determine which trees should be tagged. Mr Lydon's report was not designed to be used for this purpose and provided no clear guidance. Mammott has acknowledged that his method was subjective and not scientific.

33A Anthony Fish requested an Orogen ecologist, Isaac Mammott, to conduct the tree tagging. Mr Mammott did not have expertise in this area. It was the first time Mr Mammott had been asked to judge the age of trees (to determine what vegetation was regrowth).34. Diameter at breast height (DBH) is an indicator of the size or height of the tree. While it can also indicate age of the tree, small trees of some species may be older than large trees of another. Therefore use of DBH is not a conclusive indicator of age. The cohorts used by Mr Mammott were:

1. trees with a DBH of 0-40cm,
2. trees with a DBH of 40-90cm, and
3. trees with a DBH of 90cm+.

35. Mr Mammott decided to tag only those trees above of DBH 90cm+. Mr Mammott advised Mr Fish it would have taken him at least a week to tag all the trees in the middle 40-90cm cohort. He subsequently contacted Mr Lydon for clarification. Mr Lydon advised that the middle cohort should be protected as it was likely not regrowth and so could not be lawfully cleared without consent. The effect of Mr Lydon's advice is that it would be necessary for Orogen to tag regrowth trees within the middle cohort. This was not done by Orogen.36. On 22 December 2006 Mr Fish was made aware of Mr Lydon's advice and he requested that Mr Lydon re-draft his report to identify the 3 cohorts created by Mr Mammott and to make clear that only the cohort of 90cm+ DBH trees were not regrowth.37. On 24 December 2006 Mr Lydon refused. He responded that all cohorts would contain vegetation that was protected given that the growth rate of each species is different. Mr Lydon stated that "Isaac may have identified such trees as part of a cohort, and they may be regrowth, but in general it is unlikely that these trees are less than 16 years old, and

therefore regrowth that can be removed under the exemption provided in the Act".38. On 3 January 2007 Mr Fish advised Mr Lydon that Stage 2 of the clearing was to commence on 6 January. Mr Fish requested Mr Lydon urgently visit the site again prior to the start of clearing in order to identify "protected regrowth" based on his advice. Later that day Mr Lydon responded advising:

1. that he was unable to attend the site until 9 January;
2. that that moving quickly to clear trees before consent is obtained for their removal would be difficult and increase the project costs;
3. that it would be preferable if he reviewed the instructions and methodology given to the contractor to reduce the risk of unintended damage; and
4. that many of the non-regrowth trees were scattered through the site.

39. ...

Applicability of "regrowth" exemption on 1(a) land40. The '"regrowth" exemption does not apply where it is done for a work, building or structure before the grant of any statutory approval or other authority required for the work, building or structure (s118G(3)(b) of the NPW Act). 41. ...

Pre-clearing slashing42. This outline of pre-clearing slashing is provided as background. It is not the subject of a charge.43. In July 2006 Buildev approved Bolkm Pty Ltd, its construction partner, to engage Murray Wicks of LTRAX Pty Ltd to 'clean up' vegetation in the 1(a) zone in accordance with the Vegetation Management Plan prepared by Buildev and dated 8 June 2006. 44. On around 28 July 2006 Murray Wicks commenced work. Mr Wicks slashed the understorey of an area of the 4(a) land and selectively removed smaller trees in an area of the 1(a) land. The trees were pushed over and then mulched. The area in which the trees were removed is shown within the red dots on the map at Attachment 4.45. A photo of the vegetation on the property on 19 July 2006, at or around the time of commencement of pre-clearing slashing, is Attachment 5. The photo is taken from the opposite side of Port Stephens Drive looking into Sky Close. The property is to the right of Sky Close.46. A photo of the property on 7 August, after the pre-clearing slashing was completed, is Attachment 6. The photo is also taken from the opposite side of Port Stephens Drive looking into Sky Close. The property is to the right of Sky Close.

Clearing – from 6 January to about 20 January 200747. This clearing event is not the subject of a charge and is provided by way of background. 48. Orogen developed conditions for the clearing prior to commencing. These conditions were later set out in a letter to Buildev prior to the second stage of clearing (at some time towards the end of the first clearing). These included that the contractor would ensure that any koala vacated the tree prior to being felled. Orogen's letter did not state that Buildev was prohibited from removing koala habitat. 49. Brett Campbell of Orogen attended an on-site briefing prior to the first stage of clearing. Brett Campbell was instructed by Buildev to attend to provide instructions in respect of any koalas that may be found on site. Mr Campbell also provided advice in respect of vegetation that could lawfully be removed under the Native Vegetation Act 2003. Buildev specifically engaged Orogen for this purpose (reflected in letters of engagement and invoices from Orogen to Buildev). 50. In the stage of clearing, between 6 January 2007 and about 20 January 2007, Murray Wicks of LTRAX Pty Ltd and his son, Owen Wicks, selectively cleared vegetation from the 1(a) zone using a "wombat" machine based on the advice of Brett Campbell. Mr Wicks did not clear vegetation from the 4(a) zone. The vegetation cleared was habitat of koalas. 51. ... 52. Photos of the property taken from a helicopter on 11 January 2010 are Attachment 7.53. Photos of the property taken on 14 January 2007 by a local resident from Sky Close are at Attachment 8. 54. Photos of the property taken on 15 January 2007 by a local resident from the corner of Sky Close and Port Stephens Drive are Attachment 9. These photos show selective clearing in the 1(a) zone. Some photos show Mr Wicks operating his "wombat" machine.55. ...

Stage 2 clearing - background56. This stage of clearing is the subject of the present proceedings.57. Buildev requested Bolkm, its construction manager, engage Oz Mulching Pty Ltd to conduct the clearing. 58. Buildev engaged Orogen and Bolkm to supervise the work of Oz Mulching. The contract provided that Bolkm would ensure a site survey was undertaken by an Orogen ecologist prior to commencing work to ensure compliance with relevant environmental legislation and to check for threatened species prior to clearing.59. ...60. A diagram of the parties involved and the instructions given in respect of the clearing is Attachment 10.61. On 9 March 2007, there was a site meeting at the Property attended by Dennis Jensen of Oz Mulching, Brett Campbell of Orogen, John Crates

of Bolkm, and Brett Kittel of PCB Surveyors. Dennis Jensen was provided with a copy of Orogen's Site Improvement Plan. A copy of the plan is Attachment 11. The handwriting on the map was placed there by Jon Mead of Bolkm Pty Ltd. However, the marks as to 'stockpiles' were placed there during the investigation and were not on the document given to Mr Jensen.62. ...63. ... 64. As John Crates, Brett Campbell and Dennis Jensen walked along the northern boundary of the Selective Clearing Area, Dennis Jensen observed pegs in the ground, which appeared to mark the boundary of the 4(a) and 1(a) zones. Pegs also appeared to mark a straight line running from the northern end of the Selective Clearing Area west across to Port Stephens Drive. Dennis Jensen observed pegs marking the six metre wide areas around the boundary of the Property. John Crates said with reference to the 6m wide areas words to the effect of "These areas are to be cleared for fence lines." 65. Brett Campbell said: "There might be koalas in the area, so keep an eye out for them." Brett Campbell did not give Dennis Jensen any other specific instructions about koalas. Dennis Jensen did not see any koalas at any time he was present on the Property.66. On 13 March 2007 Oz Mulching signed a contract with Bolkm. The contract provided that Orogen would provide advice on legislative requirements for the clearing and check for threatened species prior to commencement.

Clearing – 19 to 30 March 200767. Oz Mulching commenced clearing on 19 March 2007 and finished on around 30 March 2007. Dennis Jensen and employees of Oz Mulching Pty Ltd cleared vegetation from both the 1(a) zone and the 4(a) zone using mechanical equipment. They used two Komatsu PC220-6 excavators to do the clearing and a Redback grinder (Stinger) to do the mulching. 68. ...69. The vegetation included koala habitat and preferred koala feed trees such as Swamp Mahogony (Eucalyptus robusta) trees. 70. No employees of Orogen visited the site or provided any other supervision during the clearing. John Crates of Bolkm, the construction manager, inspected the works as they were in progress and once they were done. 71. On 20 March 2007 a local resident took a number of photographs of the clearing in progress. The photographs show an Oz Mulching's excavator working on the 1(a) and 4(a) zones.72. On 22 March 2007 a local resident took a number of photographs. Those photographs show the majority of vegetation felled on the site in the 1(a) and 4(a) zones and the excavator at work. 73. On 27 March 2007 a local

resident took 8 photographs of the clearing in progress. 74. On 2 and 3 April 2007 a local resident took several photographs of the clearing as it was completed and mulching was taking place. The photos show all vegetation down except in the selective clearing area. 75. On 3 April 2007 a Port Stephens Council officer took a number of photographs of the property. Those photos show all the vegetation removed. 76. The vegetation was cleared from the areas of the property other than that shown as "retained vegetation" at Attachment 17.

76A Buildev stated that at all times it acted on the expert advice of Orogen. Buildev subsequently lodged a development application with Port Stephens Council for the industrial subdivision of the property.

Environmental harm77. Andrew Smith, expert ecologist engaged by DECC, found that the cleared area included 3.7 hectares of high quality koala habitat which constituted a significant koala habitat corridor link between an adjacent nature reserve and mapped koala habitat. 78. The extent of koala habitat across the site is shown on Attachment 18. The habitat includes:

a. preferred koala habitat;
b. supplementary koala habitat;
i. habitat buffer over supplementary koala habitat; and
a. habitat corridor link over supplementary koala habitat.

79. The site had sufficient habitat (3.7 ha.) to support either one or two resident breeding female koalas based on reported koala densities of 0.2 - 0.57 animals/hectare.

Impacts of damage to habitat80. The prosecutor relies on the expert report of Andrew Smith. In summary, the clearing of the site has had two major impacts on the local koala population:

a. cumulative loss of about 3.7 hectares of high quality koala habitat, sufficient to support up to a pair of adult koalas;
b. Narrowing of a significant koala habitat corridor link between Tilligerry Nature Reserve to the north west and mapped koala habitat to the south east of the site shown on Attachment 19.

81. Road kill appears to be a significant threat to the local koala population. Koala habitat on the subject site provides an important corridor

link between habitat and koala populations in the Tilligerry Nature Reserve to the north west of the site, and koala habitat to the south east of the site. Clearing of the site has significantly narrowed this habitat link.

1. A number of documents were attached to the SOAF. Those specifically referred to were:

(a) Aerial photographic images, SPOT 5 satellite images, and koala habitat mapping of the subject land;

(b) A plan of preferred koala feed trees on the property and adjoining access road (issued 17 October 2006); and

(c) Orogen's Site Improvement Plan (SIP) of the Taylors Beach industrial subdivision prepared by Orogen, including a legend and protocol which identify property boundaries, permissible boundary clearing areas, mature tree retention and regrowth clearing instructions in the 1(a) zone, and koala welfare instructions.

1. The parties also agreed on a chronology of events as drafted by the Defendants' solicitor which is useful to reproduce here:

Date	**Event**
March 2006	Buildev engaged Geolyse as planning consultant for 60 Port Stephens Drive Taylors Beach.
May 2006	Review of Planning & Environmental Constraints prepared.
15 May 2006	Fish reports to Anderson by email re meeting with Council.
June 2006	Anderson enquires as to ability to clear under NVA.
8 June 2006	Anderson proposes clearing in a marked up plan of site.
9 June 2006	Fish advises Anderson of need to determine tree ages, mark tre and document process
13 June 2006	Fish advises in relation to proposal to carry out under scrubbin of vegetation.
14 June 2006	Fish advises in relation to vegetation clearing and cautions against without certainty it is lawful.
22 June 2006	Fish further advises Anderson of provisions of NVA and LEP applicable to clearing.
June 2006	Geolyse prepares draft flora and fauna assessment and SEE.

1 July 2006	Orogen Pty Limited formed.
6 July 2006	Fish provides ecological constraints map to Buildev.
18 July 2006 – 7 August 2006	LTRAX carries out under scrubbing on site.
5, 6 October 2006	Orogen conducted habitat survey for preferred Koala habitat.
October 2006	Koala Initiatives Plan prepared.
26 October 2006	Koala Initiatives Plan sent to Buildev.
1 November 2006	Buildev (Anderson) enquire again regarding clearing of land a Fish re-sends advice of 22 June 2006.
November 2006	Tony Lydon, arborist, retained to advise on age of trees.
9 November 2006?	Tony Lydon and Brett Campbell attend the site.
22 November 2006	Tony Lydon advises some clearing permissible.
5 December 2006	Tony Lydon draft report.
7 December 2006	Tony Lydon final report.
8 December 2006	Fish sends Lydon report to Anderson and advises.
20 December 2006	Quote for survey and tagging of non regrowth trees accepted b Buildev.
20 December 2006	Mamott instructed to undertake tagging of trees in accordance with Lydon report.
22 December 2006	Mamott advises Fish of decision to tag only older cohort of tre
22 December 2006	Anderson advises Fish of date set for clearing by LTRAX.
22 December 2006	Plan prepared of remnant trees (Site Improvement Plan Versio 1.)
22 December 2006	Email exchange between Lydon and Fish regarding ageing of trees.
22 December 2006	Site Improvement Plan (Version 2) prepared and sent to Anderson.
24 December 2006	Tony Lydon sends email clarifying age cohorts to Fish.

3 January 2007	Fish sees Lydon email and seeks further clarification.
4 January 2007	Telephone discussions between Lydon and Fish re age cohorts
5 January 2007	Fish sends instructions to Campbell.
6 – 20 January 2007	LTRAX clears parts of 1(a) land of regrowth.
8 January 2007	Anderson advises Fish of intention to seek re-zoning of 1(a) la
9 January 2007	Armstrong of Buildev writes to Council regarding clearing of trees.
10 January 2007	Fish sends revised Site Improvement Plan (Version 3) to Anderson with covering letter.
17 January 2007	Anderson seeks confirmation from Fish regarding ability to cle on 4(a) land or along boundaries of 1(a) land.
24 January 2007	Fish speaks to Williams (Buildev) regarding plans for development of 1(a) land.
25 January 2007	Fish advises Anderson and Williams in relation to clearing alo fence lines.
Late January/early February 2007	Buildev considers further clearing of regrowth vegetation on 1 land.
7 February 2007	Fish email to Anderson with revised Site Improvement Plan (Version 4)
7 February 2007	Fish email to Anderson re subdivision proposal and rewriting c ecological reports.
8 February 2007	Campbell meets Murray Wicks (LTRAX) on site.
12 February 2007	Campbell sends revised layout plan to Anderson ("Layout and Tree Plan" Version A).
12 February 2007	Campbell prepares Site Improvement Plan (Version 5)
13 February 2007	Anderson sends annotated Site Improvement Plan (Version 2(a to Williams and Sharpe.
13 February 2007	Murray Wicks provides quotation for further work by Oz Mulching.
21 February 2007	Mead (Bolkm) asked Oz Mulching for quotation for clearing.
23 February 2007	Oz Mulching provides quotation to Bolkm.
26 February	Buildev ask Bolkm to engage and supervise Oz Mulching for

2007	further clearing.
26 February 2007	Orogen sends fee proposal to Buildev for monitoring of clearin works.
28 February 2007	Anderson asks Williams to liaise with Orogen regarding scope works.
2 March 2007	Project Control meeting (Buildev, Eureka and Bolkm) resolves for Anderson to liaise with Orogen regarding attendance on sit
6 March 2007	Fish emails Anderson regarding no contact from contractor.
7 March 2007	Bolkm accepts Oz Mulching quotation.
7 March 2007	Mead (Bolkm) sends Site Improvement Plan (Version 5) to Oz Mulching.
March 2007	Site Improvement Plan (Version 5(a)) annotated by Mead and sent to Jensen
9 March 2007	Campbell attends site meeting with Jensen (Oz Mulching) and Crates (Bolkm).
13 March 2007	Jensen meets with Armstrong and Mead to sign contract
19 March 2007	Campbell emails Crates, Mead and Anderson confirming site visit discussions on 9 March 2007.
March 2007	Jensen Annotated version of Site Improvement Plan (Version 5(b))
19 March 2007	Mead forwards Campbell email to Jensen.
20 March 2007	Oz Mulching commences clearing of vegetation on site.
30 March 2007	Oz Mulching ceased work on the site.
April 2007	Fish speaks to Anderson re proposed re-zoning application.
April 2007	Buildev lodge DA and re-zoning application
July 2007	Council refuse DA
28 November 2007	Revised Statement of Environmental Effects prepared by Orog
25 June 2008	Revised Flora and Fauna Assessment prepared by Orogen
21 April 2009	Council grants development consent to industrial subdivision

1. The chronology refers to events also contained in the SOAF and additional information based on evidence in affidavits filed by the parties. Although the SOAF and the evidence of the Prosecutor and the Defendants referred to events from mid-2006 the Defendants' counsel submitted that only events immediately relevant to the charge period of 19 to 30 March 2006 should be considered as

required by the application of the principle in *R v De Simoni* [1981] HCA 31; (1981) 147 CLR 383. That principle provides that the surrounding circumstances of the offences must only be considered in a proper manner and in accordance with the offences to which the Defendants have pleaded guilty.

2. For the charge period identified in the summonses, the Court considers events occurring from 17 January 2007 onwards have the greatest relevance. That is the date when Mr Anderson of the Buildev Group (Buildev) sought confirmation from Mr Fish regarding the ability to clear on 4(a) land or along boundaries of 1(a) land. Much of the Prosecutor's submissions focussed on events earlier than that date commencing with the employment of Orogen by Bolkm Pty Ltd (Bolkm) from mid 2006. While much of that information provides background of the circumstances of the offence, as emphasised by the Defendants' counsel much of that is unrelated to the events occurring in the charge period such as the earlier pre-clearing slashing and the clearing of trees on the 4(a) land in January 2007. As I agree with these submissions of the Defendants it is not necessary to set out the detail of the evidence of these matters identified in the affidavit evidence of Mr Fish in particular much beyond what is already identified in the SOAF.

3. As identified in the SOAF the land cleared fell into two differently zoned areas under the LEP and different statutes applied to the 1(a) land in particular. The interaction of the NPW Act with the *Native Vegetation Act* 2003 (the NV Act) are summarised in the parties' SOAF par 7, 8 above as these Acts apply to the land zoned 1(a). Additionally, the *Threatened Species Conservation Act* 1995 (the TSC Act), through Pt 8A of the NPW Act, prohibits the damage of threatened species habitat and contains provisions to protect endangered populations and threatened ecological communities.

Evidence

Prosecutor's evidence

1. The Prosecutor relied on an expert report dated 20 November 2008 prepared by Dr Andrew Smith, ecologist, annexed to his affidavit affirmed 25 November 2008. Dr Smith states that he was engaged by DECC to prepare an opinion and report on the following matters:

1. *Whether the vegetation cleared on the part of the property zoned 1(a) is native vegetation within the meaning of the NV Act and Native Vegetation Regulation 2005;*
2. *Whether any part of the vegetation cleared on the part of the property zoned 1(a) was older than 1 January 1990, and if so, to what extent;*
3. *Whether any part of the vegetation cleared on the land formed habitat for threatened species, including the koala, and if so to what extent;*
4. *The significance of the native vegetation cleared on the part of the property zoned 1(a) Rural, and the effect of the clearing on the environment;*
5. *The significance any habitat of any threatened species damaged on the property, and the effect of the damage; and*
6. *What measures would be appropriate, if any, to allow the vegetation on the site to recover.*

2. Dr Smith inspected the site on 11 June 2008. He examined historical aerial photographs of the property for the years 1983, 1993 and 2003, as well as a map of the extent of recent clearing on the property superimposed on a 2007 spot satellite image supplied by DECC. Additionally, Dr Smith accessed non-regrowth tree tagging data sheets and Swamp Mahogany (koala food tree) survey data sheets provided by Orogen. He also accessed the results of koala spot assessment data sheets (from two locations on the property in May 2006), a 2006 vegetation survey field data sheet, and Geolyse documents prepared (variously between May 2006 to April 2007) for Buildev and Eureka 1 Project on a proposed industrial subdivision of the property. Further documents accessed by Dr Smith were an arborist's report (prepared by T Lydon for Orogen, November 2006) and DECC vegetation field survey recording data (dated 26 October 2006). Dr Smith states that he relied on his knowledge of the flora and fauna and ecological processes in the region, in addition to the documents mentioned, to provide his expert opinion.
3. The documents exhibited to an affidavit of Tony Lydon, arborist, affirmed 10 December 2008 were tendered as the Prosecutor relied on various email communications between Mr Lydon and Mr Fish, the latest dated 3 January 2007, regarding site visits and issues pertaining to vegetation regrowth assessment. As identified in the

SOAF and the annexures to his affidavit, Mr Lydon provided advice to Orogen in November 2006 concerning the extent of regrowth on the property on the 1(a) land prior to the clearing of that area in January 2007.

4. The Prosecutor tendered a further bundle of documents (exhibit D). The bundle contained extracts from the exhibits to an affidavit of Stephen David Lewer, Regional Biodiversity Conservation Officer employed by the Prosecutor, affirmed 9 December 2008. The bundle included a copy of a Notice to Provide Information (dated 19 September 2007) issued to Orogen, copies of Orogen's flora and fauna habitat mapping field data sheets, and various emails between Mr Fish and Mr Anderson (Buildev).

5. A bundle being the exhibit to an affidavit of John James Palmer, Resource Information Officer employed by the Prosecutor, affirmed 31 October 2008, was tendered as exhibit E. Mr Palmer's exhibit includes his expert report of aerial photographic interpretation assessment, including SPOT 5 images which incorporate the property for four dates (3 January 2004, 6 February 2005, 14 April 2006, and 17 November 2007).

6. Mr Jensen, director of Oz Mulching, carried out the clearing with other employees in March 2007 at the request of Bolkm. He swore an affidavit (10 December 2008) identifying how he got instructions to do the clearing on site on 9 March 2007. His affidavit refers to conversations with Mr Campbell of Orogen and Mr Crates of Bolkm concerning where the clearing was to occur on 1(a) land. He did not specify in the affidavit which of the two people gave the instructions. In oral evidence he stated that Mr Crates had told him where to clear on the 1(a) land and told him where the boundary of the 1(a) land and the 4(a) land was. When Mr Jensen drew the line on the SIP in the SOAF Attachment 11 during oral evidence, the boundary Mr Crates indicated identified the boundary incorrectly so that the northern section of the 1(a) land was identified as 4(a) land. That is the area where 12 trees and some scrub was cleared in March 2007 (which the Prosecutor accepts is the amount cleared in the northern area of the 1(a) land, no clearing occurring in the southern section of the 1(a) land). It was also his oral evidence that Mr Crates instructed him to clear some trees in this area, not Mr Campbell of Orogen.

7. A coloured aerial image, marked up to indicate various areas of the

property affected by koala habitat/corridor constraints was tendered as exhibit F.

Defendants' evidence

1. The Defendants relied on an extensive affidavit of Mr Fish sworn 19 May 2010 which describes his professional employment history and current role as a director of Orogen. A large part of the document relating to Orogen's involvement with the Taylors Beach property is relevant as background information only, and includes a brief history of:

the relationship between Orogen, Buildev and Geolyse;

Mr Fish's visit to the property;

a review of planning and environmental constraints by Orogen in May 2006;

consideration of the NV Act in June 2006;

Orogen's draft statement of environmental effects, flaura and fauna assessment and s 5A assessment;

a proposal for underscrubbing;

an assessment of koala habitat as an ecological constraint in July-October 2006;

Orogen's koala initiatives plan;

Buildev's inquiries about clearing before development consent in October-November 2006;

contracting and advice relating to Tony Lydon, arborist, in November-December 2006;

tagging of non-regrowth trees and communications with Mr Lydon in December 2006 - January 2007;

vegetation clearing by Murray Wicks in January 2007; and

boundary clearing and plans for finalising ecological reports in January 2007.

1. In his affidavit Mr Fish describes the correspondence, consultations and planning which occurred in February 2007 in preparation for the vegetation clearing to be undertaken by Oz Mulching in March 2007. He identified the searches he made of departmental fact sheets provided on the NV Act obtained from the DECCW website. These were attached to his affidavit. No reference is made to the offence under the NPW Act of clearing of threatened species habitat. (The NPW Act is referred to in the context of an offence to destroy aboriginal heritage).
2. He also refers in par 64 - 66 to advice from Mr Campbell, ecologist employed by Orogen, that there was no koala habitat on the 4(a) land.
3. He acknowledges that as a result of the offences sections of koala habitat at the Taylors Beach property have been unlawfully destroyed. Responsibility for the offences is accepted on the basis that:

(a) through an oversight, Orogen and Mr Fish failed to advise Buildev that the NPW Act prevented damage to threatened species habitat before development consent was granted, and

(b) in Orogen's fee proposal dated 26 February 2007, Orogen accepted responsibility for ensuring "legislative compliance" in respect of the clearing works proposed.

1. Mr Fish states that Orogen received about $5,503 (net of GST) by way of income referable to the commission of the offences. This amount includes the hourly rated value of about $2,000 referable to Mr Fish's personal contribution. Mr Fish also states that Orogen has implemented changes to improve their practices, including thorough and critical legislation and policy review, advising clients to seek legal advice in relation to clearing activities, greater consultation with clients to better understand development objectives and opportunities to outline appropriate mitigation and offset measures that may be required for development approval. Orogen is also in the

process of appointing an external management expert to further review Orogen's systems. It was clarified in oral evidence that this had not occurred as Orogen discovered the consultant's review would add nothing to the review that Orogen had already undertaken.

2. Mr Fish states that prior to the offences Orogen had a high reputation for providing professional environmental planning and assessment services in the mid-north coast area of NSW. A summary of Orogen's Tinonee project, demonstrates extensive legislative and regulatory assessment and compliance, and included mitigation and management measures to reduce the impact of future development on threatened species and to provide protection and habitat enhancement measures. This project was the subject of a quality commendation from a non-government, DECCW-licensed koala care group (Koalas In Care Inc.) and directed to the Department of Planning.
3. The affidavit provides brief details of Mr Fish's financial circumstances, including income and commitments. This information suggested Mr Fish had modest savings and a limited ability to pay a fine.
4. Exhibits to Mr Fish's affidavit comprised two volumes of documents which were tendered as exhibit 1. Development application documentation (including planning constraints, flora and fauna assessment reports, draft s 5A assessment documents and a draft statement of environmental effects) as well as flora and fauna field data records, arborist's report, site improvement plans and aerial photographs are contained in this exhibit. There are also copies of extensive email communications between Mr Fish and other stakeholders regarding the property and development/site preparation activities.
5. During oral evidence Mr Fish confirmed that Orogen had commissioned independent reviews of Orogen's service provision policy and procedure in May 2006 and a further review of the Taylors Beach Project in July 2010 as a means of improving the performance of Orogen in any future projects. He identified and explained his understanding and knowledge of koala habitat maps and the Port Stephens Council Comprehensive Koala Plan of Management (the CKPoM).
6. Mr Fish outlined the proposed Orogen Targetted Koala Habitat

Utilisation Assessment Project and project tasks, timelines and costs. The cost of preparing the proposal was $17,400. He stated that the reason for proposing the project was to off-set any fine that might be imposed on Orogen for the offences. Additional reasons for proposing the project were to assist in koala mapping activities in the region, to make a tangible corporate contribution to the community, and to rehabilitate Orogen's reputation by repairing their relationship with other agencies and stakeholders.

7. Mr Fish stated that on behalf of Orogen he consents to a publication order in the Sydney Morning Herald (approximate cost $5,000) and additionally in the Ecological Consultants Association newsletter (at no cost). He also described his reasons for proposing a presentation regarding this prosecution at the Ecological Consultants Association annual conference later in 2010 as a means of sharing information and improving industry compliance standards. He stated that his proposal to the conference organisers was made before the Prosecutor made any suggestion about a publication order. On behalf of Orogen, Mr Fish stated that he was mortified by the commission of the offences, and described the conduct as unprofessional and embarrassing. He stated that he was very sorry for the commission of the offences.
8. Mr Fish stated that he had no direct personal experience in fieldwork assessment of ecological factors. His personal involvement in ecological assessment activities is limited to desk-top data reviews and project management activities. He stated that as at 2006 he was aware of s 5A assessment processes and requirements for environmental impact assessments, and was aware that the koala is a "listed species" under the legislation. He stated that in general terms he understands the purpose of the TSC Act to be the protection of threatened species. He accepted that the identification of koalas on the property would be a potential constraint on any development or rezoning application when questioned during cross-examination.
9. Mr Fish stated that Orogen (and previously Geolyse) was retained by Buildev to advise on statutory development application requirements and to prepare documentation for development and rezoning applications. He described Orogen's history of fieldwork activities and data archiving, particularly for flora and fauna mapping. Mr Fish explained his understanding of koala habitat off-sets and CKPoM

habitat conservation strategies relating to development and rezoning in the Port Stephens area, and stated that no koala habitat off-set had been completed or negotiated with Port Stephens Council (the Council) for the property but was pending.

10. Mr Fish also explained his understanding of the legality of regrowth clearing in the 1(a) zone of the property. He stated that identification and tree tagging of remnant trees in that zone was arranged by Orogen (and carried out by Isaac Mamott) in late December 2006.
11. Mr Fish stated that the cost schedule associated with the proposed Targetted Koala Habitat Utilisation Assessment Project was calculated on Orogen's commercial consultancy fees. The costs of the project take into account Orogen's infrastructure costs. The costs of the project must include the value of any commercial opportunities lost. Mr Fish stated that the commercial costing of the project was reasonable and realistic.
12. The Defendants' counsel tendered a bundle of photographs (exhibit 2), a table listing, and a copies of, the various site improvement plans prepared by Orogen referred to in the evidence (exhibit 3), and summarised details of the Taylors Beach tree tagging activity (exhibit 4)(the tree tagging activity also appears in the SOAF par 32-35). Further exhibits included the Port Stephens CKPoM (exhibit 5), two koala habitat planning maps (exhibit 6), a review of service provision clearing advice dated 6 May 2009 (exhibit 7), a review of the Taylors Beach Project dated July 2010 (exhibit 8), and a targeted koala habitat utilization assessment (exhibit 9).
13. A bundle of correspondence and profile documents relating to Orogen's intended presentation at the Ecological Consultants Association of NSW 2010 Annual Conference was tendered as exhibit 10. A bundle of character references for Mr Fish and Orogen were also tendered (exhibit 11).
14. Extracts from an affidavit of Sabine Thode, former solicitor for the Defendants, sworn 10 December 2009 was tendered as exhibit 12. The extracts identify the dates and substance of correspondence between Ms Thode and the Prosecutor for the period March 24 2009 to 1 December 2009 relating to the particularisation of the charges against the Defendants.

Relevant sentencing considerations

1. The purposes of sentencing are identified in s 3A of the *Crimes (Sentencing Procedure) Act* 1999 (the CSP Act) and include to ensure the offender is adequately punished (s 3A(a)), to deter the offender and other persons from committing similar offences (s 3A(b)), to make the offender accountable for its actions (s 3A(e)) and to denounce its conduct (s 3A(f)).
2. An appropriate sentence is to be determined after consideration of the objective and subjective matters relating to the offence bearing in mind 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).

National Parks and Wildlife Act 1974

1. Section 2A of the NPW Act outlines the objects of the Act. The relevant sections are s 2A(1)(a)(i) and 2A(1)(a)(ii) which provide:

(1) The objects of this Act are as follows:

(a) the conservation of nature, including, but not limited to, the

conservation of:

(i) habitat, ecosystems and ecosystem processes, and

(ii) biological diversity at the community, species and genetic levels, and

...

1. By cl 118 Sch 1, the *National Parks and Wildlife Amendment Act 2010* inserted a new Pt 15 into the NPW Act, headed "Criminal and Other Proceedings". This amendment commenced on 2 July 2010 (proclamation gazetted on 2 July 2010). By cl 121 Sch 1, the 2010

amending Act inserted a new Pt 8 into Sch 3 of the principal Act which contains transitional provisions.

2. The new Pt 15 includes in Div 2 a new s 194 which requires the Court to give consideration to a number of specific factors. While the transitional provisions do not specify either s 194 or Div 2 of the new Pt 15, s 194 has effect according to its terms and is, all parties agreed, required to be applied.

3. Section 194 provides:

(1) In imposing a penalty for an offence under this Act or the regulations, the court is to take into consideration the following (so far as they are relevant):

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

(b) the significance of the reserved land, Aboriginal object or place, threatened species or endangered species, population or ecological community (if any) that was harmed, or likely to be harmed, by the commission of the offence,

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

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

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

(f) in relation to an offence concerning an Aboriginal object or place or an Aboriginal area—the views of Aboriginal persons who have an association with the object, place or area concerned,

(g) whether, in committing the offence, the person was complying with an order or direction from an employer or supervising employee,

(h) whether the offence was committed for commercial gain.

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

1. Subsection (f) has not application in these matters.

Threatened Species Conservation Act 1995

1. Having regard to the relationship between s 118D of the NPW Act and the TSC Act, it is relevant also to consider the purposes of that Act as described in s 3 :

The objects of this Act are as follows:

(a) to conserve biological diversity and promote ecologically sustainable development, and

(b) to prevent the extinction and promote the recovery of threatened species, populations and ecological communities, and

...

(d) to eliminate or manage certain processes that threaten the survival or evolutionary development of threatened species, populations and ecological communities, and

(e) to ensure that the impact of any action affecting threatened species, populations and ecological communities is properly assessed, and

(f) to encourage the conservation of threatened species, populations and ecological communities by the adoption of measures involving co-operative management.

Extent of harm caused: s 194(1)(a)NPW Act

1. The SOAF identifies the harm to koala habitat resulting from the clearing of 3.7ha as identified by Dr Smith's report.

Prosecutor's submissions on environmental harm

1. The harm caused to the environment by the clearing of vegetation on the property is addressed at par 77 – 81 of the SOAF, and the Prosecutor quantifies the destruction of koala habitat on the property

as causing a high degree of environmental harm on the 4(a) land. The land zoned 4(a) had not been cleared previously in the earlier clearing events referred to in the SOAF. Accordingly, a number of mature trees were removed which were koala habitat. The Prosecutor accepts that the harm resulting from the clearing of 12 mature trees on the northern section of the 1(a) land is minor.

Defendants' submissions on environmental harm

1. The Defendants submit the area of 3.7ha considered by Dr Smith is much greater than the area cleared as a result of these offences as it includes areas and damage resulting from earlier clearing events not the subject of these charges. It is also necessary to distinguish between the 1(a) and 4(a) zoned land. The koala habitat removed in March 2007 for which the Defendants are charged comprised:

(a) the north-western section of the Swamp Sclerophyll Woodland on the 4(a) zoned land which was in the zone of Preferred Koala Habitat identified by Mr Smith; and

(b) subject to two qualifications, a segment of the 147 koala feed trees on the 4(a) land, identified in Orogen's survey in October 2006 of feed trees outside Preferred Koala Habitat (as identified by Orogen), located north and east of the retained area and on the road reserve to the south of the site.

1. The first qualification referred to in (b) above is that a quantity of those trees were not on the subject property but on the road reserve to its south. The second qualification is that only 74 of the surveyed feed trees actually on the 4(a) land were large enough to support a koala. This is consistent with the poor and disturbed quality of the habitat on the Coastal Dune Woodland segment of the vegetation on the property.
2. In total, the vegetation removed, whilst in large measure comprising koala habitat, cannot be equated with the 3.7ha of koala habitat which existed on the land before it was acquired by Buildev. Once it is accepted that much of the habitat was lawfully removed before the events for which the Defendants are charged, the harm caused will not be seen as sufficiently substantial to comprise an aggravating factor. Taking the evidence as a whole it would seem that no more than approximately 74 mature trees – trees that could support a koala

– were removed in March 2007 on the 4(a) land.

3. Further, the corridor function would, in any event, continue to be fulfilled in part by the area of vegetation on the 1(a) land that was retained to the south of the 4(a) land and the road reserve below it. The Defendants submit that the destruction of koala habitat on the 1(a) land can no longer be said to have caused a high degree of environmental harm.

Finding on environmental harm

1. There was no evidence before the Court of any physical harm to any koalas as a result of the clearing activity. While that would be a relevant aggravating factor if proven, the focus of this charge is the environmental harm resulting from the destruction of koala habitat. The necessity to protect that habitat arises because the koala is designated a threatened species under the TSC Act. Loss of habitat for koalas is a key threatening process listed under that Act. The loss of habitat to any extent arguably gives rise to some level of environmental harm. The level of harm will be informed by the extent and location of any clearing. The Defendants knew of the existence of koala habitat from the general survey contained in the CKPoM and the on-ground surveys, reflected in Tab 18 of the SOAF. This shows a large area of the 4(a) land was mapped as having preferred koala habitat and habitat buffer over supplementary habitat. A substantial number of feed trees were also identified in the assessment of 4(a) land, shown on SOAF tab 3.
2. The Prosecutor submits that there was substantial clearing of habitat trees on the 4(a) land and that land was not cleared earlier in January 2007, unlike the land zoned 1(a) which was selectively cleared in January 2007. The extent of koala habitat across the site was identified by Mr Smith and is referred to in the SOAF attachment 18 categorised as preferred koala habitat, supplementary koala habitat and habitat buffer over supplementary koala habitat. The Defendants' submissions attempt to minimise the impact of the number of trees cleared on the 4(a) land. The number cleared remains significant in this location, as reflected in its inclusion by the Council in the CKPoM. I consider the extent of harm caused to be of low to medium significance given the number of trees which are identified koala habitat cleared on the 4(a) land.

Significance of the threatened species, population or ecological community that was harmed: s 194(1)(b) NPW Act

1. Neither party made explicit submissions regarding the significance of the koala or its habitat in New South Wales. The objects of the TSC Act make clear the reason for the need for the protection of such habitat.

Practical measures to prevent, control, abate or mitigate harm: s 194(1)(c) NPW Act

1. Subsection 194(1)(c) can be considered in relation to events at the time of the offences and subsequently. The clearing of the 4(a) land could possibly have been avoided if the correct advice about the need to obtain relevant consents or approvals from the Defendants had been obtained. It would have been necessary for those who actually decided that clearing was to be undertaken by employees of Buildev and Bolkm to accept that advice and apply for the necessary permission. In other words, the taking of practical measures to avoid the clearing was not completely within the control of these Defendants given their role as providers of advice. Nor can it be assumed that any relevant permission would have been forthcoming in allowing all or some clearing of koala habitat to occur.
2. The Defendants submitted, and the Prosecutor did not dispute, that active revegetation is occurring due to the efforts of the current owner of the property. That means that practical measures to mitigate the harm caused by the offence are currently being undertaken (Defendants' submissions par 169).

Foreseeability of harm: s 194(1)(d) NPW Act

1. The Prosecutor argued that having regard to the nature and extent of the vegetation cleared, a reasonable person would foresee the risk of harm caused or likely to be caused to koala habitat by the commission of the offence. The extent of foreseeability of harm is a relevant objective circumstance of the offence: *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 700. Both Mr Fish and Orogen were aware of the presence and quality of koala habitat on the property from as early as May 2006, that is accepted in the SOAF par 17.
2. The Defendants submitted that there was never any intention, or

contemplation, that there would be the removal of vegetation comprising of koala habitat on the zone 1(a) portion of the property. Further, in contemplation of the pre-existing poor and disturbed quality of koala habitat on the Coastal Dune Woodland segment of the vegetation in the 4(a) zone on the property (written submissions par 158), the Defendants could not reasonably foresee harm arising from clearing in this area.

Finding on foreseeability of harm

1. The Defendants' submissions in relation to the 1(a) land are accepted as they are supported by the evidence of Mr Jensen as to who gave instructions to him to clear where and also by the content of the SIPs prepared by the Defendants in relation to this area. In relation to the 4(a) land there is no suggestion in Dr Smith's evidence that the koala habitat was so degraded that it was not of value as the habitat of threatened species. Given that the bulk of the clearing in March 2007 occurred in this area I consider that the harm caused was foreseeable.

Control over causes: s 194(1)(e) NPW Act

1. The Prosecutor submitted that the contracted role of Orogen and Mr Fish as the principal consultant, was to ensure legislative compliance in respect of proposed clearing works and therefore the Defendants had a high level of control over the causes that gave rise to the offences (written submissions par 42 – 43).

Defendants' submissions

1. The Defendants made submissions on the meaning of "caused". It is important to the sentencing exercise to appreciate the extent of the element of causation which, by their pleas of guilty, the Defendants have admitted. The offence created by s 118D(1) of the NPW Act is an offence of strict liability, and such offending conduct is criminalised irrespective of the offender's intention or notions of fault. On the authority of decisions such as *Environment Agency v Empress Car Co (Abertilley) Ltd* [1998] UKHL 5; [1999] 2 AC 22 at 30-32, the duty imposed by the NPW Act not to cause damage to threatened species habitat knowing it to be such habitat does not exclude liability in cases in which the immediate cause of the damage was the deliberate act of a responsible third party.
2. The offence of causing damage to habitat in s 118D(1) of the NPW

Act does not require the exercise of particular control over the third party whose actions result in the habitat-damaging event to the extent that would be necessary to establish vicarious liability for the actions of an independent contractor. Where the damage by a third party occurs as a natural consequence of a defendant's conduct that defendant is taken to have caused the damage (*Department of Environment and Climate Change v Olmwood Pty Ltd* [2010] NSWLEC 15 at [351]–[355]; *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Ltd (No 2)* [2010] NSWLEC 73 at [274](f)).

3. The Defendants submitted that except to the extent that they omitted to understand and advise that the NPW Act prohibited the removal of threatened species habitat, they did not have control of the conduct, including decision-making, of Buildev, Bolkm or Oz Mulching (written submissions par 175).

Finding on control over causes

1. The Defendants submissions do identify usefully the unusual application of s 194(1)(d) to the circumstances of this offence given the role of the Defendants as advisers to the person who decides to undertake the clearing, here the developer Buildev as arranged through its manager Bolkm, with the clearing undertaken by another party. The causal connection between the actions of the Defendants and the actual clearing undertaken is not direct in that the actions of at least two third parties directly caused the clearing to occur. While the Defendants are liable for causing damage to threatened species habitat as accepted by their guilty pleas this factor weighs less heavily against the Defendants in these circumstances.

Whether offence committed in compliance with directions: s 194(1)(g)

1. Neither offence was committed when either Defendant was complying with an order or direction from an employer or supervising employee.

Whether offence committed for financial gain: s 194(1)(h)

1. As identified in *Director-General of the Department of Environment and Climate Change v Rae* [2009] NSWLEC 137; (2009) 168 LGERA 121 at [11]- [13], the carrying out of an offence for profit or to save incurring an expense or to avoid the cost of obtaining and

implementing a statutory permission increases the seriousness of the crime. The Prosecutor accepts that any financial remuneration actually referable to the giving of advice is likely to be minimal (written submissions par 41). In this regard the parties are agreed (Defendants' submissions par 180).

2. In the circumstances of the offences where the Defendants are acting in a consultative capacity I accept that the offences were not committed for financial gain in the sense identified in *Rae*.
3. Based on the s 194 factors which I must consider and have referred to above I consider the objective seriousness of the Defendants' actions is at the lower end of the possible range.

Other objective circumstances

1. Other relevant factors for determining the objective gravity of environmental offences include the maximum penalty, the objective harmfulness of the defendant's actions, the reasons for the commission of the offence and the state of mind of the offender when the offence was committed: *Gittany Constructions Pty Ltd v Sutherland Shire Council* [2006] NSWLEC 242; (2006) 145 LGERA 189 at [110]. The statutory scheme in which the offence provision appears must also be considered, and this is identified above in relation to the NPW Act and the TSC Act given their interaction in relation to the protection of threatened species habitat.

State of mind of the offender/reasons for committing the offence

1. The offence under s 118D of the NPW Act is a strict liability offence and mens rea is not an element of the offence. However, the state of mind of an offender at the time of the offence can increase the seriousness of the offence. A strict liability offence that is committed intentionally, negligently or recklessly will be objectively more serious than one not so committed: *Gittany Constructions* at [123]; *Garrett v Freeman (No 5); Garrett v Port Macquarie Hastings Council; Carter v Port Macquarie Hastings Council* [2009] NSWLEC 1; (2009) 164 LGERA 287 at [68], [356]; *Director-General of the Department of Environment and Climate Change v Hudson* [2009] NSWLEC 4; (2009) 165 LGERA 256 at [75]; *Pittwater Council v Scahill* [2009] NSWLEC 12; (2009) 165 LGERA 289 at [69].

Aggravating factors - whether advice given negligently/to overcome impediment to development

1. Section 21A of the CSP Act identifies aggravating factors which are relevant to sentencing considerations. The Prosecutor submitted that there were aggravating factors because of the circumstances of the offence and the Defendants' state of mind, namely that:

(a) the advice which led to the destruction of koala habitat on the property was provided by Orogen and Mr Fish so as to enable Buildev to overcome a perceived impediment to the subsequent development of the property;

(b) the level of negligence involved in giving the advice which led to the destruction of koala habitat on the property. In turn, this may require consideration of the extent to which any of the land zoned 1(a) rural on the property might lawfully have been cleared pursuant to the provisions of the NV Act and the reasonableness of the advice given by Orogen and Mr Fish in relation to the clearing of the land zoned 4(a) industrial on the property.

1. Dealing firstly with (a) removal of an impediment to development, the Prosecutor relied on three circumstances which it submitted suggested aggravating factors. Firstly, the advice and services which the Defendants were contracted to provide was the preparation of documents and advising on the development process. The Defendants knew that Buildev wanted to maximise development to also comply with legislative requirements. It was the Defendants' role to identify constraints and provide solutions to those constraints within the law. The identification of koala habitat was a constraint on the development of the site as identified in the CKPoM (SOAF par 15, 16). Field work was undertaken on 23 May 2006 which identified the presence of koala habitat across the 1(a) and 4(a) land. A map identifying the constraints on development was prepared by an Orogen employee (exhibit F) which identified a substantial area was constrained. It was not until 28 July 2006 that consideration was given to off-set proposals but Mr Fish had been discussing clearing of the site for a month since 6 June 2006 and had given advice on 13 June 2006 that 4(a) land and regrowth on 1(a) land could be cleared. When the constraints map was sent to Buildev in May 2006 Mr Fish

stated in the cover email that there were solutions to what appeared to be a very constrained site in view of the large areas of koala habitat identified. The Prosecutor submitted that I should infer that the solutions were the ability to clear land including koala habitat and remove constraints on development.

2. Secondly, in dealing with the advice of the arborist, Mr Lydon, leading to the final clearing event I can take into account the state of mind of Mr Fish when he was given advice well before the March 2007 clearing event that much of the vegetation was regrowth (SOAF par 30, 32 and numerous email exchanges between Mr Fish and Mr Lydon referred to in the evidence).
3. Thirdly, after the clearing event the subject of these offences Mr Fish gave advice in April 2007 about altering the existing reports prepared to support the DA and rezoning application to be submitted to the Council to remove references to the existence of koala habitat. Such an inference can be drawn from the terms of the emails sent by Mr Fish relating to the work required to redo the reports.
4. These circumstances mount up to an unavoidable inference that the Defendants' advice was aimed at removing constraints on development resulting from the presence of koala habitat through achieving the clearing of it.
5. As identified in par 10 above, the Defendants have submitted and I have accepted that under the *De Simoni* principle the Defendants should be charged on the basis of the events falling largely within the offence period which is 19-30 March 2009. All the matters raised by the Prosecutor as giving rise to an irresistible inference that advice was given in order to remove an impediment to development fall outside that period, being several months earlier in 2006 or after the offence period in April. I do not consider that these are matters that I can take properly into account in this sentencing matter.
6. In addition, the Defendants' counsel provided lengthy reasons why these matters should not give rise to any adverse finding (par 109-119 written submissions and in notes handed up at the hearing) that the purpose of the advice was to remove an impediment to development on the property. These were briefly that the Prosecutor bears the onus of proving matters adverse to the Defendants beyond reasonable doubt. As there is no direct evidence of the Defendants' state of mind the case is necessarily circumstantial and is linked to

finding that that was Buildev's purpose in undertaking the clearing on the site. No inference of Buildev's intentions (about which there is no direct evidence) can be attributed to the Defendants. Buildev is not a party to the proceedings having not been charged and no such adverse finding in relation to its intentions ought be made in its absence. The emails relied on concern advice from Mr Lydon and relate to clearing which took place in January 2007. Further the Defendants proposed from the outset habitat enhancement, rehabilitation and offset measures culminating with the Koala Initiatives Plan prepared for Buildev which was sent in October 2006. It was intended to be used as part of the rezoning and development application to the Council. The decision to remove the habitat was not the Defendants', it was Buildev's, (SOAF 57). By the time of the offence, Mr Fish had been persuaded by his ecologist Mr Campbell that the vegetation on the 4(a) zoned land was not koala habitat (see above par 22).

7. I agree with the Defendants' submission that the Prosecutor has not discharged its onus of proof that the Defendants gave certain advice in order to remove an impediment to development, an alternative finding given my view expressed immediately above in par 75 concerning the application of the *De Simoni* principle.

Whether advice negligent

1. The Prosecutor submitted that an aggravating factor was that the Defendants acted negligently in providing the mistaken advice. Firstly, neither Defendant could have sensibly concluded that the koala habitat could be legally removed without approval in light of s 118G(3)(b) of the NPW Act. The clearing was for the purpose of a work, building or structure being the subdivision and proposed development of industrial lots and buildings. The Prosecutor accepted in the course of the hearing the Defendants' submission that given the accepted failure of overlooking s 118D(1) of the NPW Act as part of the circumstances of the offence the Defendants could not be more culpable because they overlooked another provision of the same statute they have already admitted they overlooked. I do not need to further consider this argument.
2. Secondly, the Prosecutor submitted the native vegetation was not regrowth as defined in the NV Act on the 1(a) land as held in *Walker*

Corporation and in light of Mr Palmer's evidence interpreting the SPOT 5 images (par 17 above) and the advice given was negligent in failing to correctly deal with this issue.

3. The Defendants submitted that the relevant principles (accepted by the Prosecutor) as to whether they were negligent in relation to their advice was that, in the criminal context, negligence means more than a breach of a duty of care. To amount to criminal negligence, the degree of carelessness must be such as to show such a disregard for the objects of the statute as to amount to a crime against the state (*R v Bateman* [1925] All ER Rep 45; (1925) 19 Cr App R 8; see also *Andrews v DPP* [1937] UKHL 1; [1937] AC 576 per Lord Atkin at 583; applied in *Cittadini v The Queen* [2009] NSWCCA 302 at [38]-[40]). For there to be negligence, there must have been an indifference to an obvious risk (*R v Taktak* (1988) 14 NSWLR 226 at 247, applied in *Cittadini*).
4. The test for criminal negligence is objective. The risk of harm must have been foreseeable to the reasonable person in the position of the Defendants (*NSW Sugar Milling Co-operative Ltd v Environmental Protection Authority* (1992) 59 A Crim R 6 per Hunt CJ at CL at 7). In this case, of course, the allegation of foresight of harm is not of foresight of damage to threatened species habitat. The Defendants were aware damage was being caused to habitat. That awareness is an element of the offence addressed in the Defendants' pleas of guilty. Rather the allegation must be that a reasonable person in the position of the Defendants would have foreseen that the damage was unlawful as being an offence against the NPW Act.
5. The Defendants' counsel submitted that the Defendants' role was in advising that the clearing could not be conducted on the property and contracting to ensure legislative compliance. The Defendants did not decide to clear that property, rather that was Buildev. Nor did the Defendants undertake the clearing work, that was carried out by a contractor paid by Buildev. It is accepted that the Defendants' failure in providing mistaken advice resulted in the clearing on the 4(a) land because they failed to advise that under the NPW Act clearing could not be conducted without a licence under the TSC Act. The provision of that advice was not negligent in the criminal sense.
6. The NV Act did not apply in the 4(a) zone. The circumstances in relation to the 1(a) land are different where the NV Act did apply.

The evidence of Mr Jensen is that 12 mature trees and scrub were cleared in this area in March 2007, which evidence the Prosecutor accepted during the hearing. There is no evidence that non protected regrowth trees were cleared in March 2007. Further, it is now accepted by the Prosecutor in light of Mr Jensen's oral evidence that no instructions were given to him by Mr Campbell of Orogen to clear trees on the 1(a) land.

7. To the extent that non-regrowth trees were cleared, the Defendants did everything that an advisor in its position could reasonably do to preserve these. It did not advise their removal. Rather they were removed because of the directions of Bolkm, not the Defendants. The Prosecutor accepts that there was no express instruction from the Defendants to remove mature vegetation on the 1(a) land.

8. In light of the evidence of Mr Jensen and its acceptance by the Prosecutor it is unnecessary that I consider lengthy submissions made concerning whether the Defendants' understanding of and instructions in relation to regrowth on the 1(a) land was correct or not. The issue of whether the advice concerning regrowth was incorrect or not does not need to be resolved for the purposes of this sentencing matter. On the basis of these arguments alone I do not consider the Prosecutor has proved beyond reasonable doubt that the advice given was negligent in the criminal sense.

9. The Defendants made numerous further submissions on why they had not been criminally negligent. As these also traverse events falling outside the offence period the extent to which these should be considered is debateable, but accepting that every opportunity should be afforded to a defendant to place matters relevant to sentence before the Court I will refer to these briefly. Firstly, the evidence of Orogen and Mr Fish was that they thought that the Council's decision on their client's development application would be governed by the extent to which the application complied with the requirements of the CKPoM. The Defendants understood that there were legal constraints arising from the status of much of the vegetation on the land as koala habitat. The legal constraints which they identified were sourced in the LEP and the CKPoM. Accordingly, the submission that they thought the vegetation could be legally removed without approval is contradicted by the evidence.

10. The Defendants had no warning of relevant unlawfulness despite

consulting DECCW fact sheets which alerted them to the prohibition on vegetation and habitat clearing under the NPW Act. The CKPoM made no reference to the prohibition on clearing of koala habitat and the Council made no reference to such prohibition when it wrote to the developer (unlike the facts in *Garrett v Freeman (No 5)*). The information obtained from DECCW also made no mention of the prohibition under the NPW Act with Mr Fish attesting that he personally consulted the facts sheets published by DECCW on the clearing of native vegetation. If the prosecuting department does not itself draw the attention of the public to such a connection between the NV Act and other legislation it is not fair for the Court to conclude that either Defendant could reasonably have concluded that this habitat could not be legally removed without approval. The information provided in the fact sheets does not refer to s 118D at all. The reference to the NPW Act does not refer to this section. The information on clearing of native vegetation, threatened species and the NPW Act fails to identify the relevant link. Further the legislation for the protection of vegetation comprising threatened species habitat is not logical. The prohibition on causing damage to threatened species habitat is not located in the TSC Act but in the NPW Act which deals with national parks and wildlife.

11. For the further reasons given by the Defendants and in light of the appropriate test which must be applied, I am confirmed in my opinion that the Defendants were not criminally negligent in the advice that they provided. Consequently this is not an aggravating factor to be considered on sentencing.

Other parties not prosecuted

1. The Defendants also submitted that a relevant matter to consider in relation to culpability is that other parties who potentially also committed an offence were not prosecuted. Another party commissioned the work which caused the clearing of koala habitat. Another party carried out the clearing work and was directed to clear mature trees on the northern section of the 1(a) zoned land. In *Newcastle Wallsend Coal Company Ltd v McMartin* [2006] NSWIRComm 339; (2006) 159 IR 121 at [625] the Full Bench of the Industrial Court (Walton, Marks & Boland JJ) said:

625 In Nesmat Pty Ltd v WorkCover (NSW) (1998) 87 IR 312, a Full

Bench of the Court considered that the absence of prosecution against the other parties upon whom a defendant had reasonably relied meant that the sentence imposed upon the defendant may give rise to a justifiable sense of injustice. We adopt the analysis of Nesmat and Wong v Melinda Group Pty Ltd (1998) 82 IR 118 in WorkCover Authority v McDonalds at 437 which was affirmed by the President in Walco (No 2) who stated at [33]:

The significance of the failure to prosecute, or to continue the prosecution of the other potential defendants, is not that fact but rather the fact that any assessment of the role of the present defendants must be considered in the light of the consideration that the criminality for the breach of occupational health and safety was one which did not fall solely on the shoulders of these defendants. That fact, of itself, involves consideration of matters which may mitigate the conclusion as to the objective seriousness of the offences committed and thus the penalty which should be imposed in relation to them.

A similar approach was taken in *Director General, Department of the Environment, Climate Change and Water v Ian Colley Earthmoving Pty Ltd* [2010] NSWLEC 102 at [39].

1. I agree with the Defendants that this is a relevant consideration given the circumstances of this case for the reasons stated in *McMartin*. I also agree with the Prosecutor that the evidence in this matter discloses a greater degree of control over the circumstances giving rise to the offence than was the case in *Colley*.

Findings on culpability

1. These are the first prosecutions in NSW of advisers acting in the capacity of the Defendants that the parties or the Court is aware of. Those circumstances mean that the consideration of culpability raises different considerations. Given my application of the *De Simoni* principle, such that events immediately before and during the offence period are most relevant to the assessment of culpability, the culpability of both Defendants is the same, as accepted by their counsel. In assessing culpability, it is relevant to identify that these Defendants did not remove the vegetation, nor was it their decision to remove the vegetation. They are liable for the consequences of

giving incorrect advice to the extent that caused damage to occur to threatened species habitat in the circumstances of these offences. There are no aggravating factors to consider in relation to culpability.

2. In relation to the removal of 12 trees on the northern section of the 1(a) land that resulted from the mistaken directions from Bolkm (as described in Mr Jensen's affidavit of 10 December 2008 and in light of his oral evidence) so that the Defendants' culpability in relation to that land is very low. In relation to the 4(a) land, the Prosecutor has not established beyond reasonable doubt that the Defendants' culpability rises any higher than having made a serious error in overlooking the prohibition in the NPW Act on causing damage to threatened species habitat for the 4(a) land. The Defendants' overall culpability is low.

Further sentencing considerations

1. Regard must be had to the culpability of the Defendants and the individual circumstance which led to the commission of the offence including the reason the offence was committed, *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 per Badgery-Parker at 366. While the offence was committed by an omission in advice, the culpability is the same for each of the Defendants in the current circumstances, and I assess that culpability as low. In reaching that conclusion I also take into account the relevant factors I must consider under s 194(1) of the NPW Act.

Maximum penalty

1. The maximum penalty is 1,000 penalty units ($110,000) or imprisonment for one year or both: s 118D(1) NPW Act. The Prosecutor is not seeking imprisonment as a penalty for Mr Fish.
2. 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: see *Camilleri's Stock Feeds Pty Ltd* at [698] and [701] respectively that:

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.

1. The Prosecutor submits that the maximum penalty reflects the seriousness with which Parliament views offences of this nature. While I accept that submission I observe that the maximum financial penalty for this offence is markedly lower than for environmental offences under other legislation where maximum penalties of around $1 million for corporations are not uncommon. Penalties for persons are markedly more substantial under the POEO and EP&A Act. The penalties for offences against the NV Act are also significantly greater than the penalties currently available under the NPW Act.

General/specific deterrence

1. Section 3A(b) of the CSP Act states that one of the purposes for a court in imposing a sentence is to prevent crime by deterring offenders. Sentences imposed in relation to environmental offences must embrace powerful considerations of general deterrence: see *Axer* per Badgery-Parker J at 367. In *Axer*, Mahoney J stated at 359:

The quantum of the fines which the legislation allows to be imposed has no doubt been fixed not merely to indicate the seriousness with which such pollution is regarded but also to deter those engaged in such activities and to procure that they will take the precautions necessary to ensure that it does not occur.

1. The sentence must ensure that the offender is held accountable for its actions and is adequately punished. The sentence must deter the offender from committing similar offences in the future. Further, the sentence of the Court needs to operate as a powerful factor in preventing the commission of similar offences by persons who might be tempted to do so by the prospect that, if they are caught, only light punishment will be imposed: *R v Rushby* [1977] 1 NSWLR 594 at 597. Similar observations are made in the context of the NV Act in *Director General of the Department of the Environment and Climate Change v Wilton* [2008] NSWLEC 297 at [77] and in *Rae* at [8]-[9].
2. As already noted these are the first prosecutions of consultants because of offences arising in the course of their business of providing advice as part of the development process. The offences underscore the importance of consultants, both the corporate entity

and individual directors, advising those engaged in the property development process to ensure they undertake work only within their area of competence. I surmise that these prosecutions will provide an important signal to those engaged in similar activities of the need to ensure that correct advice is given.

3. Specific deterrence was referred to in *Veen v The Queen [No. 2]* [1988] HCA 14; (1988) 164 CLR 465 at 477 as being relevant to a defendant who displays:

uncharacteristic aberration *or whether the offender has manifested in his commission of the instant offence a* ***continuing attitude of disobedience of the law***.

1. There is no need to consider specific deterrence for either Defendant in light of the steps taken to avoid a recurrence of any similar offence and the measure being voluntarily implemented by them to draw attention to these offences for those engaged in the same industry; see below in relation to these Defendants being unlikely to reoffend (par 115-117).

Mitigating factors

1. A number of mitigating factors should be taken into account to reduce any penalty, as provided for in s 21A(3) of the CSP Act.

Guilty plea - s 21A(3)(k), s 22 CSP Act

1. The Defendants each pleaded guilty on 26 February 2010. This was not the first return date for the summonses. A plea of guilty entitles the Defendants to a discount in penalty under s 22 of the CSP Act in the range of 10-25 per cent: *R v Thomson; R v Houlton* (2000) 49 NSWLR 383; *R v Sharma* [2002] NSWCCA 142; (2002) 54 NSWLR 300. The Prosecutor accepts that there have been guilty pleas prior to the matter being set down for hearing. There should be a discount on this basis. In recent decisions of this Court there has been a reduction of the discount for penalty where a guilty plea has not been entered at the first available opportunity: see Lloyd J in *Environment Protection Authority v Werris Creek Coal Pty Ltd; Environment Protection Authority v Holley* [2009] NSWLEC 124 at [79]- [80]; see also Biscoe J in *Gosford City Council v Australian Panel Products Pty Ltd* [2009] NSWLEC 77 at [100] referring to *R v Borkowski*

[2009] NSWCCA 102).

2. The Defendants' counsel submitted that the procedural chronology of these prosecutions demonstrate that an adequate particularisation of the offences was the critical factor in any delay in making guilty pleas (written submissions par 204 – 213). The Defendants rely on extracts from the affidavit of Ms Thode sworn 10 December 2009 to support a submission that a lack of adequate particularisation sufficient to enable the Defendants to sensibly plead to the charges resulted in the delay in a plea being entered. I note that particulars, as requested by the Defendants, were provided on 3 February 2010 (see exhibit 13) and that guilty pleas were entered on the next listed mention date of 26 February 2010.
3. As a result of delays in entering pleas, the discount to be afforded for the utilitarian value of the pleas of guilty is normally reduced from the maximum of 25 per cent stated in the guideline judgment of the Court of Criminal Appeal in *R v Thomson* at [160]. I have taken into account the Defendants' submissions that the delay in entering guilty pleas was a consequence of untimely particularisation of the offences by the Prosecutor, and further that guilty pleas were entered before a hearing date was fixed. Each Defendant is entitled to a discount of about 20 per cent.

Contrition and remorse – s 21A(3)(i) CSP Act

1. Section 21A(3)(i) states:

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

...

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

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

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

1. As held by Preston J in *Plath v Rawson* [2009] NSWLEC 178; (2009) 170 LGERA 253 at [158]:

The existence of genuine contrition or remorse is also relevant to the weight that needs to be given in sentencing to individual deterrence and the prospects of rehabilitation of the offender: R v Thomson *at [116]. Contrition by an offender can be associated with insight by the offender into the reasons for, or factors contributing to, the offending conduct. If an offender has insight into the offending conduct, there is a reduced risk of reoffending and a reduced need for a sentence to be imposed for the purpose of individual deterrence:* R v Wisbey *[2001] NSWCCA 434 at [31].*

1. Mr Fish has expressed remorse through his affidavit sworn 19 May 2010 (at par 224-225) on behalf of himself and Orogen. He also expressed remorse during oral evidence. I accept his expressions of remorse.

Assistance to law enforcement authorities – s 21A(3)(m), s 23 CSP Act

1. There has been full cooperation with the Prosecutor in relation to the offence, once reported, and in relation to the preparation for this hearing as evidenced by the SOAF. Once the mandatory considerations set out in s 23(2) of the CSP Act are taken into account, it is clear that this is not a significant level of assistance. In any event, except where the assistance is future assistance, it is not necessary to quantify any discount for assistance to the authorities separately from the discount for an early plea (*R v Gallagher* (1991) 23 NSWLR 220; *The Queen v SZ* [2007] NSWCCA 19).

Prior conviction (s 21A(3)(e) CSP Act)

1. Neither of the Defendants has any prior convictions for environmental offences to the Prosecutor's knowledge: SOAF par 83.

Good character s 21A(3)(f)

1. Six references from local industry executives and senior managers from government agencies (including Midcoast Water, Bridgestar Pty Ltd, Gardner Planning Pty Ltd, Clarence Consultants Pty Ltd and Port Stephens Council) attesting favourably to the professional

characteristics and work practices of both Mr Fish and Orogen were tendered. Each of the references is made in knowledge of the guilty pleas made by the Defendants in these proceedings.

2. As noted in *Plath v Rawson* at [148], it is often the case that environmental offenders have no prior convictions and are otherwise of good character suggesting this subjective factor has less weight in sentencing. I am, however, satisfied that the Defendants are of good repute and otherwise demonstrate a high regard for legislative and ecological responsibilities.

Extra-curial punishment

1. Extra-curial punishment refers to any serious loss or detriment an offender has suffered or will suffer as a result of committing an offence, quite apart from any punishment imposed by a sentencing judge, *R v Einfeld* [2009] NSWSC 119 at [154]. What weight is to be given to any extra curial punishment is a factor for the Court to consider on the particular facts and circumstances of the matter before it, *Director of Public Prosecutions v D'Arcy* [2009] NSWLC 1 at [26]. The Defendants submit that due to the adverse impact on their professional reputation and their professional embarrassment resulting from this offence they have been subjected to extra-curial punishment. I accept that these Defendants have suffered extra-curial punishment in light of the nature of their offence and the professional occupation and standing.

Unlikely to reoffend s 21A(3)(g)

1. In light of Mr Fish's affidavit and oral evidence of the steps taken in the business to ensure no recurrence of similar circumstances (see par 24 and 28 above), and the reviews of Orogen's service provision (see exhibits 7 and 8 demonstrating the reviews of Orogen's clearing advice, supervision protocol, and a review of the Taylors Beach project), I accept that the Defendants have insight regarding the circumstances of the offences and their offending.
2. I also note that Mr Fish, on behalf of Orogen, has approached the organisers of the Ecological Consultants Association of NSW annual conference with the view to making a presentation regarding the circumstances of the current prosecution and Orogen's work-practice improvements and remediation efforts (see exhibit 10). I understand

and accept the intention of Mr Fish to alert other ecological consultants to the continuing vigilance required in legislative compliance.

3. I consider these Defendants are unlikely to reoffend in light of these circumstances.

Evenhandedness

1. The principle of evenhandedness requires that the Court consider if there is any sentencing pattern for like offences in order to determine a consistent approach to penalty. This principle must always be applied subject to the particular circumstances of the case before the Court: *Axer* at 365.
2. The Defendants' counsel submitted that there have been few decisions of the Court on sentences for offences against s 118D(1) which can be used for the purpose of ensuring evenhandedness. The Prosecutor agreed.
3. In *Carmody v Brancourts Nominees Pty Ltd (No 2)* [2003] NSWLEC 84 and *Director-General of the Department of Land and Water Conservation v Wilkinson* [2002] NSWLEC 171 the defendants in each of the cases had been forewarned to cease their clearing activities which were causing damage to the habitats of threatened species. Each defendant was subsequently charged with offences under the previous s 118D(1) of the NPW Act which was similarly worded and attracted the same penalty as the current legislation.
4. In *Brancourts Nominees* the damage was consistent with clearing understorey vegetation (most of which was lantana and bitou bush) involving at least 1.2ha of core koala habitat within a total area of vegetation cleared of 2.5ha, however much of the habitat damage had been mitigated by rapid vegetation regrowth. The land was subject to an undetermined rezoning application. Many preferred koala habitat trees (Swamp Mahogony *Eucalyptus robusta*) had been marked and remained unaffected by the vegetation clearing activity. A remediation plan to remediate the impact of clearing was also agreed between the parties since the institution of proceedings. After initially pleading not guilty, the defendant entered a plea of guilty which attracted a 15 per cent discount in sentence. The works described in the remediation plan became part of the formal orders of the Court and the defendant was also fined $5,000.

5. In *Wilkinson* the defendants (a corporation and its sole director) pleaded guilty to six offences of knowingly cause damage to the habitat of threatened species clearing approximately 34ha of cattle grazing land which caused serious long-term damage to the habitats of three threatened species: the Brush-tailed Phascogale, the Squirrel Glider and the Little Bent-wing Bat. The impact on the three threatened species was held to be both significant and serious, with long term consequences. The defendants pleaded guilty at the earliest opportunity. The totality principle was applied in regards the multiple summonses. Mr Wilkinson was fined $22,000 for the first summons. The sentences for the five remaining summonses each attracted a fine of $1,750.
6. In *Garrett v Freeman* Mr Freeman and Port Macquarie Hastings Council were co-defendants in proceedings for offences against s 118D(1) of the NPW Act, with Mr Freeman being charged pursuant to s 175B(1) of the NPW Act in his capacity as an individual responsible for the management of a company. Mr Freeman was sentenced after pleading not guilty to two charges related to the damage to habitat of two threatened species (the Eastern Chestnut Mouse *Pseudomys gracilicaudatus* and the Grass Owl *Tyto capensis*). The council was sentenced after pleading guilty to three charges relating to the damage to habitat of the same two threatened species as well as a third threatened species (the Wallum Froglet). There was no evidence of any actual harm to any of the threatened species. The offences arose as result of the Council undertaking the construction of road works and caused damage to the habitats to a significant extent. Remediation activities had been initiated by the council almost three years after the offences.
7. At [189] Lloyd J held that the appropriate penalty for each offence was $38,000, however as each offence arose from the same course of conduct the principle of totality was applied. Mr Freeman was sentenced to fines of $38,000 and $19,000 respectively for the two charges. Lloyd J recognised the ongoing financial commitment of the council to a local ecological restoration and conservation management plan (at [304]) and held this was relevant when considering the level of fine to be imposed on the council. The council was fined $26,000, $13,000 and $6,500 respectively for the three charges. The differences in the fines were attributable to the

harm caused to the habitat of the respective species. The Court ordered that each of the fines be paid into the National Parks and Wildlife Fund.

Section 6 Fines Act 1996

1. Under s 6 of the *Fines Act* 1996, in the exercise of its discretion to fix the amount of any fine, the Court is required to consider such information regarding the means of the accused as is reasonably and practicably available for the Court's consideration and such other matters as are relevant, in the opinion of the Court, to the fixing of that amount.
2. Capacity to pay a large fine is a factor which the Court is required to consider under s 6. In *R v Rahme* (1989) 43 A Crim R 81 at 86 Finlay J with whom Studdert J agreed, said:

The imposition of a large fine does involve a number of considerations. It is trite to say that a court generally should not impose a fine which the offender does not have the means to pay, even though these days failure to pay a fine does not lead to imprisonment but to a civil execution effect payment...It is clear I think that what is required where the court is contemplating the imposition of a financial penalty is a decision on whether or not the appellant has the means.

Mr Fish's counsel submits that the Court should take into account that Mr Fish's ability to pay a fine is limited.

Avoiding double punishment

1. The Defendants' counsel submitted that because Mr Fish is a 16 per cent shareholder of Orogen, the sentences to be imposed should be reviewed and adjusted to avoid double punishment: see *Minister for the Environment and Heritage v Greentree (No 3)* [2004] FCA 1317; (2004) 136 LGERA 89 as held by Sackville J at [77]-[78].
2. I have applied such an observation before in *Hawkesbury City Council v Johnson; Hawkesbury City Council v Johnson Property Group Pty Ltd (No 2)* [2009] NSWLEC 6 at [123], and agree there is authority to support the Defendants' submission: *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715 per Gleeson CJ at 722 (Campbell J and Mahoney JA agreeing); *Director-General of National Parks and Wildlife v Wilkinson* [2002]

NSWLEC 171 held by Lloyd J at [79].

Parity between Defendants

1. Both Defendants are charged with the same offences arising from the same circumstances. Their culpability is the same. Inconsistency in sentencing could give rise to a justifiable sense of grievance so that parity of punishment as between the Defendants is important, see *Lowe v The Queen* [1984] HCA 46; (1984) 154 CLR 606 Mason J at 610. In the current circumstances one of the Defendants is a corporation. There is no differentiation under the relevant penalty provided in the NPW Act for these offences between an individual and a corporation, however I am minded to draw a distinction in the penalty for each Defendant based on differing subjective characteristics discussed above.
2. A person liable to pay a fine imposed by the Court may make an application to the Registrar for further time to pay: s 10 of the Fines Act.

Additional orders

Environmental service order

1. By cl 118 Schedule 1, the *National Parks and Wildlife Amendment Act* 2010 inserted a new Pt 15 into the Act, headed "Criminal and other proceedings. Part 15 includes a new Div 3 headed "Court orders in connection with offences". In new Div 3 of Pt 15 is s 205 which is headed "Additional orders" and relevantly provides:

(1) Orders

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

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

(b) order the offender to take specified action to notify specified persons or classes of persons of the offence (including the circumstances of the offence) and its consequences and of any orders made against the person (including, for example, the publication in an annual report or any other notice to shareholders of a company or the notification of persons

aggrieved or affected by the offender's conduct),

(c) order the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit,

...

(2) ***Machinery***

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

1. The 2010 amending Act inserted a new Pt 8 into Sch 3 of the principal Act which contains transitional provisions. One of those provisions is cl 68 which provides :

A court order under Division 3 of Part 15 may be made in relation to the commission of an offence that occurred before the commencement of that Division, but only where the court concerned finds the offence proved after that commencement.

1. Section 198 in Div 3 of Pt 15 relevantly provides:

(1) Application to proved offences

This Division applies where a court finds an offence under this Act or the regulations proved.

(2) Meaning of proved offences

Without limiting the generality of subsection (1), a court finds an offence proved if:

(a) the court convicts the offender of the offence, ...

(3) Definitions

In this Division:

the court means the court that finds the offence proved.

the offender means the person who is found to have committed the offence.

1. Accordingly, the powers conferred by s 205 of the NPW Act are available in this case. The additional orders sought by the Prosecutor are in addition to any penalties I impose in relation to the offences: s 199(2) of the NPW Act.
2. The Defendants have proposed to the Prosecutor an extensive koala habitat mapping project to be undertaken in the Port Stephens area (see exhibit 9: Port Stephens Environmental Project Targeted Koala Habitat Utilisation Assessment and Mapping July 2010). The project has been developed with the consultation of the Council and DECCW, and identifies a 16 month project period including:

Targeted assessment of koala utilisation of potential koala habitat in four Koala Management Units (KMU's) of the Port Stephens Local Government Area (Salamander Bay, Salt Ash, Williamtown and Tomago);

Assessment of koala utilisation of potential habitat;

Field verification of the vegetation communities in the KMU's;

Mapping of the vegetation communities; and

Production of a koala habitat planning map.

1. As outlined in the Defendants' submissions at par 246-247, the work contributed by Mr Fish to each geographic part of the project is described as "project management". The total value of the work contributed by Mr Fish to the totality of the geographic parts is $26,400. The total value of the work contributed to the whole project, minus Mr Fish's contribution, is $136,080. An important feature of the proposed project is that Orogen and Mr Fish will conduct the whole of the project. The dollar value difference between the value of the whole project (whether including Mr Fish's contribution or not) and the value of the penalty to be imposed upon Orogen will be a voluntary contribution by Orogen to the

management of koala habitat in the Port Stephens local government area. The Prosecutor disputes that this is the true cost to Orogen as it includes a component of profit cost and does not take into account company tax payable of an amount less than 30 per cent.

2. As outlined in Mr Fish's oral evidence above at par 34, and as pressed by the Defendants' counsel, a commercial costing of the proposed project reasonably takes into account the business infrastructure costs of Orogen as would be required for any consultancy project of this nature. The value of commercial opportunities lost as a result of engaging Orogen resources in the proposed project should also be considered.
3. I consider it is appropriate to make an environmental service order for this project under s 205(1)(c) of the NPW Act. A copy of the project proposal is marked exhibit G.
4. The cost of the proposed koala mapping project is substantial whether the Orogen costing is accepted in full or discounted as the Prosecutor submitted it should be. I consider I can take that amount into account in determining the level of penalty I should impose.
5. The Prosecutor also seeks an order under s 205(1)(a) that the Defendants take specified action to publicise the offences (including the circumstances of the offence) and the environmental and other consequences and any other orders made against them. A draft of a suitable publication order has been provided by the Prosecutor. The Defendants consent to the making of an order and had additionally undertaken on their own initiative to have the publication order included in an issue of the Ecological Consultants Association newsletter (see oral evidence of Mr Fish at par 30 above).
6. I agree that a publication order is appropriate in the circumstances of these offences, and approve of the form as provided by the Prosecutor. The publication order appears as appendix 1 to this judgment. The schedule for publication is contained in the sentencing orders below.

Prosecutor's costs

1. The Prosecutor's legal costs would generally be awarded to the Prosecutor as provided for under s 257G of the CP Act. The Prosecutor's counsel estimated that the costs of the proceedings are $105,000 which the Defendants have agreed to pay on an equal

basis. That amount of legal costs is significant and can be taken into account in setting a penalty as it is likely to affect the ability of the individual Defendant, Mr Fish, to pay a penalty, *Environment Protection Authority v Barnes* [2006] NSWCCA 246.

Orders

1. The Court orders that:

1. The Defendants be convicted of the offences charged.

2. Orogen Pty Ltd:

a. pay a fine in the amount of $ 10,000; and

b. pursuant to s. 205(1)(c) of the *National Parks and Wildlife Act* 1974, that Orogen Pty Ltd conduct the following parts of the Koala habitat mapping project described in the document *Port Stephens Environmental Project – Targeted Koala Habitat Utilisation Assessment and Mapping* (28 July 2010)(exhibit G):

Salamander Bay Koala Mapping Unit – Parts A, B, C & D

Salt Ash Koala Mapping Unit – Parts A, B, C & D

Williamtown Koala Mapping Unit – Parts A, B, C & D

Tomago Koala Mapping Unit – Parts A, B, C & D.

1. That Anthony Fish:

a. pay a fine in the amount of $5,000; and

b. pursuant to s. 205(1)(c) of the *National Parks and Wildlife Act* 1974, that Anthony Fish conduct with Orogen Pty Ltd the following parts of the Koala Habitat mapping project described in the document *Port Stephens Environmental Project – Targeted Koala Habitat Utilisation Assessment and Mapping* (28 July 2010)(exhibit G):

Salamander Bay Koala Mapping Unit – Parts A, B, C & D

Salt Ash Koala Mapping Unit – Parts A, B, C & D

Williamtown Koala Mapping Unit – Parts A, B, C & D

Tomago Koala Mapping Unit – Parts A, B, C & D.

1. In respect of orders 2 and 3 -

a. within 14 days of the date of completing the work the subject of orders 2 and 3, provide evidence to the prosecutor that Orders 2(b) and Order 3(b) have been complied with;

b. the parties have liberty to apply on 3 days notice.

2. Pursuant to s. 205(1)(a) of the *National Parks and Wildlife Act* 1974, that the Defendants take the following action to publicise the offence:

a. Within 14 days of the date of these orders, publish the contents of the notice annexed to this Short Minute and marked 'A', in the Local Government section Sydney Morning Herald at a minimum height of 9.6cm by width of 18cm, from and including the heading below the words 'Annexure A', such heading to be in bold print;

b. Within 6 months of the date of these orders, publish the contents of Annexure A , at the minimum size of a quarter of a page and minus the words "and paid for", in the first 12 pages of the Newsletter of the Ecological Consultants Association of NSW Inc;

c. Within 21 days of the date of these orders, provide evidence to the Prosecutor that Order 5(a) has been complied with;

d. Within 7 months of the date of these orders provide evidence to the Prosecutor that Order 5(b) has been complied with; and

e. All references in tender documents in support of tenders and promotional material by the defendants to the carrying out of the project referred to in Orders 2 and 3 above, shall be accompanied by the following words:

'The performance by Orogen Pty Ltd of part of this project is part of a penalty imposed by the Land and Environment Court following conviction for the offence of causing damage to the habitat of the Koala, knowing it was habitat of that kind.'

1. Pursuant to ss 257B and 257G(a) *Criminal Procedure Act* 1986, that the Defendants pay the Prosecutor's costs of the proceedings in the amount of $105,000 as agreed.

The Court notes the following Undertaking by Orogen Pty Limited in respect of Order 2:

(i) to provide reports and mapping to Port Stephens Council and the Department of Environment, Climate Change and Water within 4 weeks of completing the survey of each KMU; and

(ii) to participate in quarterly review meetings with the Department of Environment, Climate Change and Water, the first being conducted no later than 120 days of the date of these orders.

ANNEXURE A

Environmental consultant convicted of causing damage to koala habitat at Taylors Beach, Port Stephens

Orogen Pty Ltd and its director Anthony Fish have been convicted in the Land and Environment Court of causing damage to habitat of threatened species, namely the Koala, knowing that the land concerned was habitat of that kind. Orogen and Mr Fish provided a developer with advice on what vegetation could be lawfully cleared on the property but failed to advise that damaging the habitat of the Koala was unlawful under the National Parks and Wildlife Act. Both Orogen and Mr Fish were aware that the property contained habitat of the Koala and Koala movement corridors. Vegetation containing Koala habitat was subsequently cleared. The offences occurred at a proposed development site at 60 Port Stephens Drive, Taylors Beach, at the intersection with Sky Close.

Orogen and Mr Fish both pleaded guilty. Orogen and Mr Fish were fined a total of $15,000. The company was also ordered to pay the prosecutor's costs and investigation expenses.

This advertisement was placed by order of the Land and Environment Court and paid for by Orogen Pty Ltd and Mr Fish.