

TRANSCRIPT OF PROCEEDINGS

MAGISTRATES COURT

MCGRATH, Magistrate

MAG-00087418 of 2010(3)

ROBERT JAMES BLACK

Complainant

and

REGINALD EDWARD DRAPER

Defendant

ROCKHAMPTON

..DATE 05/11/2010

DECISION

I, STEPHANIE ATTARD, Director of the State Reporting Bureau and Courts Corporate Services, and the officer in charge of the State Reporting Bureau transcripts, do hereby certify that the abovementioned transcript, pages 1 to 20, is a transcript held in the official records of the State Reporting Bureau.

Dated this 13th day of DECEMBER 2010



Stephanie Attard
Director
State Reporting Bureau and Courts Corporate Services

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

BENCH: On the 10th of August 2010, Reginald Edward Draper pleaded guilty to a complaint framed as a breach of section 4.3.1(1) of the Integrated Planning Act 1997. The dates of the offending were dates unknown between the 30th of April 2009 and the 11th of July 2009.

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When the matter came before the Court on the 29th of September 2010, leave was granted for an amended complaint to be filed. No objection was taken by the defence. The only variation between the complaint in its amended form and the original is in paragraphs 4 and 5 of the particulars. It relates to amounts of land cleared.

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Mr Draper maintained his plea of guilty to the complaint in the amended form. The offence Mr Draper is to be sentenced for is that between the dates mentioned he carried out assessable development without an effective development permit. That involved the clearing of native vegetation and freehold land owned by him.

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It was cleared by Mr Draper and a co-offender, Donald Charles Edmiston. Mr Edmiston has previously been sentenced for his involvement in the offending. The total area of land unlawfully cleared of vegetation was 255 hectares, consisting of 226 hectares of endangered regional ecosystem, three hectares of, of concern regional ecosystem, and 26 hectares of least concern regional ecosystem, each of those ecosystems as defined in the Vegetation Management Act 1999.

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Those definitions, together with provisions of section 60B of the Vegetation Management Act make it quite clear that the clearing of the area of endangered regional ecosystem is by far the most serious aspect of the offending, not only because of the amount cleared, but also because the clearing of that type of ecosystem has a far more deleterious effect on the environment than the clearing of other ecosystems.

While such a general statement may be logical and accepted by all to be true, senior counsel for the complainant has placed before the Court material to demonstrate the applicability of that principle to the situation here. The material is in the form of a report from Mr Dillewaard, Exhibit 6, and Dr Smith, Exhibit 7.

Counsel for Mr Draper has submitted that I should give the reports little or no weight. I have read both closely. Both authors have declared that they have understood their duty to the Court and the consequential obligation when compiling their report. Each of the reports seems to me to have been compiled in accordance with their duty. I have not gleaned any hint of bias in favour of the complainant, or the Department of Environment and Resource Management, that is, those that commissioned the reports.

They are balanced, and if there are any shortcomings in them, they are readily acknowledged. For example, Dr Smith said that he did not survey the land himself, but his opinions and conclusions are based on information supplied to him and his

knowledge of the surrounding areas. Their respective qualifications are such that they can readily be accepted as experts on the issues on which they write. Their opinions are both cogent and relevant and I accept them as an accurate portrayal of the real and potential environmental impact that this tree clearing has had or will have on the vegetation and fauna in the area.

In his report, Mr Dillewaard said at page 6, "The clearing has had a significant adverse impact on regional ecosystems in the area and on flora values associated with the property at the bio regional, sub regional and local levels. Further, the unlawful clearing occurs in the Isaac/Comet Downs sub region, which is the eleventh most cleared of Queensland's 119 sub regions with 78 per cent of the sub region cleared. Further, the unlawful clearing adds to the issues of continued clearing in these areas, such as habitat fragmentation, habitat loss, weed invasion, soil loss, loss of nutrient cycling, increased greenhouse gases and a range of other effects."

Dr Smith's report deals in part with the affect on two particular animal groups, they are the bridled nailtail wallaby, which has been categorised as endangered, and the black-breasted button quail, which has been categorised as vulnerable. The categorisation of those species would of itself be of concern to the community. The adverse effect that this tree clearing would have on them would add to that concern.

Dr Smith writes, "A reduction of this vegetation type is likely to result in a loss of essential habitat required for maintaining population movement and viability of both species generally." From the material before me I am of the opinion that this is a very serious case of environmental degradation through tree clearing.

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Mr Draper was the owner of the land that had been illegally cleared. He contracted Mr Edmiston to do the clearing. What happened prior to this clearing is relevant in assessing Mr Draper's culpability. In 2004 Mr Draper made an application in a vegetation management ballot to clear 1,135 hectares. That application was refused in 2005. In 2007, Mr Draper was paid a significant sum of money to compensate him for the loss of potential pasture as a result of the implementation of the Vegetation Management Act.

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Both of those events, either alone or together, would have made Mr Draper aware of either the prohibition on clearing the land or his need for a permit to do so. The defence submission is that Mr Draper should be sentenced on the basis that his criminality stems from error. Any error can only relate to where Mr Draper thought he was entitled to clear. No error could have arisen because of any misunderstanding between Mr Draper and Mr Edmiston as to the area to be cleared.

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That is because Mr Draper gave Mr Edmiston a GPS with the coordinates set in the area to be cleared, provided

Mr Edmiston with a document, which in effect, was the same as that which he had based his application in a vegetation management ballot on and was refused. And showed Mr Edmiston the areas to be cleared and physically assisted him to mark them out.

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It was submitted that the error arose in part from Mr Draper's reliance on the information supplied by the Department and found in the maps, Exhibit 5. However, reliance on that information to create the error seems to be misconceived. At the bottom of each of the pages in the exhibit are disclaimers as to the accuracy of the contents. The information supplied by Mr Edmiston to investigators that on at least two occasions he sought and was given an assurance by Mr Draper that a valid permit had been obtained to clear the land, further undermines Mr Draper's claim of error.

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Exhibit 2 depicts the area cleared. It shows a parcel of land roughly rectangular in shape. The borders of which have been cleared, with the total area at one end of the block completely so. At the start of the investigation by the authorities, Mr Edmiston was intercepted in the process of carrying out the clearing. As a result, a stop work compliance notice was issued to Mr Draper to immediately cease the operation. From the way in which the land had been cleared to that point, it is proper to infer that it was Mr Draper's intention that all of the land be cleared. That is, all of the land bordered by that which had been cleared.

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I make it quite clear that Mr Draper is not being sentenced for any intent to clear more land, but on the basis of the areas of land mentioned in the particulars of the amended complaint. This information is, however, relevant to whether Mr Draper's culpability is grounded in error. I do not accept that Mr Draper's criminality arose from error but find that it was deliberate. His decision to have the land cleared was made against the background of previously having an application to do so rejected, and later being awarded compensation for not being able to clear the land.

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Inquiries by Mr Edmiston of the existence of a valid permit in the positive, albeit false advice by Mr Draper that one existed, meant that the need for one, and the wrongness of having the land cleared without one, would have been at the forefront of Mr Draper's thinking. Actions were therefore done in the full knowledge of the true situation and were really an act of defiance to the authorities.

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Mr Edmiston pleaded guilty to the complaint laid against him and was sentenced on the basis that although he sought an assurance from Mr Draper as to the existence of a permit, his culpability arose from his failure to make his own inquiry. He cooperated to a significant degree with the investigating authorities. He was interviewed by them, admitted his involvement and the level of it.

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Further, he gave a statement which set out the evidence he would be willing to give if he was called as a witness in any

proceedings against Mr Draper. He was sentenced under the regime created by section 13A of the Penalties and Sentences Act. Whilst it is not appropriate to disclose the fine imposed on him, the Court is aware of it.

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For his work he was paid \$73,000 by Mr Draper. The equipment he used is depicted in some of the photographs which form part of the Exhibit 3. The equipment is quite heavy and the running costs would have been substantial. It is not known if he had to carry his own costs. If he did, his personal reward would have been significantly less than he was paid.

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Mr Draper was to be the real beneficiary of the offending. It was his land and he had paid Mr Edmiston to clear it for him. In 2008 he leased the land to others so that it could be used to agist cattle. The lease provided for payment of a fee per beast per week, with a guaranteed weekly minimum payment. It is not known the purpose for which Mr Draper wanted the land cleared. Because of the timing of the clearing, relative to the commencement of the lease, it is reasonable in the circumstances to infer that the purpose was to allow for more cattle to be agisted, and hence generate more income. If that was not the case, the land was certainly to be put in a condition where it was capable of carrying more stock.

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It is appropriate to compare the factors which demonstrate the relative culpability of Mr Edmiston and Mr Draper.

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Mr Edmiston cooperated with the authorities in admitting his involvements with the investigating authorities prior to a

complaint being laid. Gave a statement implicating his
co-offender. Was paid a fixed sum for his effort. Pled
guilty at a timely point in the Court proceedings. Gave an
undertaking which form part of the sentencing process to
cooperate with authorities and give evidence against his
co-offender should it be necessary. Was sentenced on the
basis that he should have made his own inquiry as to the
existence of any permit. Did not have any criminal history.

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Mr Draper declined to be interviewed or otherwise cooperate
with the investigating authorities. Whilst he was not obliged
to be interviewed, and nothing adverse can be drawn from it,
he is not entitled to any mitigatory effect for not doing so.
He pleaded guilty at a timely point in the Court proceedings,
was to be the real beneficiary of the offending, knew of the
need for a permit to be obtained prior to the clearing being
started, and in the knowledge that one did not exist, took the
positive steps of arranging for, assisting and encouraging
Mr Edmiston to do the work, after falsely representing to him
that such a permit was in existence.

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In *Lowe v. The Queen* [1984] 154 Commonwealth Law Reports at
page 606, Gibbs C J, said at page 609, "It is obviously
desirable that persons who have been parties to the commission
of the same offence should, if other things are equal, receive
the same sentence, but other things are not always equal and
such matters as the age, background, previous criminal
history, and general character of the offender, and the part
which he or she played in the commission of the offence had to

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be taken into account."

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Considering the matters just alluded to and having regard to the principles set out in *Lowe*, I find that the culpability of Mr Draper was greater than that of Mr Edmiston, such that it would not be proper for Mr Draper to receive the same sentence as that which Mr Edmiston received.

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The sentencing of offenders convicted under Queensland law is governed by the Penalties and Sentences Act of 1992. The governing principles in the Act to provide that the purpose of sentencing is to punish the offender, provide rehabilitation, deterrence, denunciation, and/or to protect the community from the offender; see section 9(1).

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Some or all of these purposes may be aquired when sentencing and offender and may, depending on the circumstances, be relevant to varying degrees. The factors that a Court should have regard to are set out in other parts of section 9.

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The maximum penalty for the offence is a fine of \$166,500. The imposition of fines is governed by part 4 of the Act. Section 48 provides that in determining the amount of a fine the Court must, as far as practicable, take into account the financial circumstances of the offender and the nature of the burden that the payment of the fine will be on the offender.

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However, that section must be read in conjunction with the principle that the offender should be punished to an extent

and in a way that is just in all the circumstances; see section 9(1a). Section 48 has been recently judicially considered, see *Kumar v. Garvey* [2010] QDC 249, later referred to as *Kumar*. And *Engwarda v. O'Brien* [2010] QDC 357, later referred to as *Engwarda*. I've read closely both of those authorities and also the cases of *Prentice* and *Stevens* referred to in *Kumar*, and I am aware of the governing principle when imposing fines.

In *Kumar* his Honour cited with approval the *Queen v. Hoad* [1989] 42 Australian Criminal Reports 312, saying at paragraph 28, "As a matter of general sentencing principles the penalty imposed must be appropriate to the offender as well as appropriate to the offence."

Section 60B of the Vegetation and Management Act [1999] sets out a penalty guide for offences of this type. The application here of the formula set out in section 60B provides for a penalty of \$732,000. It is to be noted that an appropriate sentence for an offence cannot be determined solely by arismatic computations. To do so would offend the provisions of section 9 of the Penalties and Sentences Act, however, it must also be noted that in *Dore v. the State of Queensland* and another [2004] QDC 364, her Honour Judge Bradley affirmed the use as a guide set out in section 60B.

The guide confirms that the gravamen of the offence found in section 4.3.1(1) of the Integrated Planning Act is the amount of land cleared and the type of ecosystem damaged.

In exercising my discretion to determine an appropriate sentence, I am of the view that the principles of rehabilitation of the offender and protection of the Queensland community from the offender should be afforded minimal weight. That is because the clearing has now ceased and one would expect that the authorities would be quite vigilant in their monitoring of Mr Draper's land.

The aspect of personal deterrence deserves mention. While it is true that Mr Draper does not have any criminal history, and it may well be that this is the only occasion he will appear before a Court in relation to a criminal or a quasi-criminal offence, his defiant attitude, his determination to have the land cleared knowing that to do so without a permit would bring him into conflict with the law, and his willingness to deceive Mr Edmiston in order to secure his assistance, means that there is a need for any sentence imposed to carry some element of personal deterrence.

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Turning then to other principles of sentencing; that is general deterrence and denunciation. In my opinion, both of those principles should be to the forefront of consideration when determining an appropriate sentence. In R v. Inkson [1996] 88 ACR 334 Underwood J said, "On the issue of denunciation and retribution the community delegates to the Court the tasks of identifying assessing and weighing the outrage and revulsion that an informed and responsible public would have to criminal conduct. The Court's duty is to take that into account in the sentencing process. If the Court fails to responsibly discharge the duty that has been entrusted to it by the community, public confidence in the system of justice will be eroded."

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In R v. H 1993 66 ACR 505 the Court cited with approval the following passage from R v. Cuthbert [1967] 86 WN NSW Pt1 272, "The fear of severe punishment does and will prevent the commission of any offences that would have been committed if

it was thought that the offender would have escaped without punishment or only with light punishment. If a Court is weakly merciful and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such to operate as a powerful factor to prevent the commission of such offences."

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When dealing with this specific legislation Judge Bradley said in Dawe at paragraph 32, "The legislature has made it clear that significant penalties should be imposed on those who commit such offences and the issue of general and personal deterrence is of great importance."

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To assist in determining an appropriate sentence counsel have referred me to a number of matters previously dealt with in other Courts. That material is before the Court in the form of written submissions by Senior Counsel for the complainant. Copies of the cases referred to are also handed up. And two schedules tendered by counsel for Mr Draper, Exhibits 7A and 8.

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Having considered it all, I find that a matter of Gherk v. Henderson is the most assistance. The total area of land cleared in each case is about the same, however, the amount of endangered regional ecosystem cleared in Henderson was 53.7 hectares, whereas here it was 226 hectares.

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In Henderson about 20 per cent was endangered regional ecosystem, whereas in this case almost 90 per cent came from

that ecosystem. That of itself, in my view, means that
Mr Draper's offending is more serious than that in Henderson.
There are some other comparisons which must also be mentioned.
Mr Henderson acted on the incorrect assumption that he would
be granted a permit to clear. Prior to clearing, Mr Draper
had been refused approval to clear, through the Vegetation
Management ballot, and for some time after that, before the
clearing started, he was compensated for his loss of potential
pasture.

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His culpability is compounded, in my view, by the fact that he
asserted to me Edmiston on at least two occasions that a
permit was in existence when he clearly knew that there
wasn't. For these reasons I am of the opinion that
Mr Draper's offending is significantly more serious than that
of Mr Henderson. Finally, in drawing the comparison between
this case and that of Henderson, it should also be noted that
Mr Henderson was dealt with on a lesser maximum penalty than
that which Mr Draper is to be sentenced under.

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During the course of the sentencing process I received written
submissions from counsel as to the applicability or otherwise
of the principles laid down in Kumar and in Engwarda. During
the proceedings on the 29th of September 2010, counsel for
Mr Draper put before the Court a number of documents which
sought to portray Mr Draper's financial position.

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I have considered all of that material. Senior Counsel for
the complainant argues that the personal circumstances found

in both Kumar and in Engwarda are distinguishable from Mr Draper's such that the principle which brought about a significant reduction in sentence do not apply here.

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Counsel for Mr Draper argues that the personal circumstances of Mr Draper are aligned with those in Kumar and Engwarda, and for that reason do apply. Counsel for Mr Draper also argued that any sentence should be mitigated because of the real or potential impact a large fine would have on Mr Draper's estranged family, through his commitments to financially support them.

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In that regard, I am mindful of the comments of Thomas J, as his Honour then was, in the then Court of Criminal Appeal of Queensland in Chilly [1991] 53 ACR 1 at page 1, "Courts, of course, take account of such matters in a number of ways but are not overwhelmed by them. It is well recognised that very often a prison sentence will result in equal hardship to persons other than the offender. In the case of a male, his wife and children may be the ones who suffer because they lose a father and the person who provides financial support. In the case of a female it may mean the temporary loss of a mother. It is common that hardship or stress is shared by the family of an offender, but may be an inevitable consequence if the offender is to be adequately punished. An offender cannot shield himself under the hardship he or she creates for others, and the Courts must not shirk their duty by giving undue weight to personal or sentimental factors."

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It is to be noted that in both Kumar and Engwarda sentencing options other than a fine were available to the Courts at first instance. If it be that the offending in those cases was so serious as to warrant the imposition of a large fine, then perhaps having regard to the offender's capacity to pay, another form of sentence may have been more appropriate.

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That is not the case here, where the only sentencing option is to impose a fine. Because of that limitation it would seem that equal, if not greater force, should be given to the fine being appropriate to the offence, rather than to the offender.

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To rely solely on the capacity of the offender to pay a fine without having real regard to the seriousness of the offence and the offender's level of involvement in the commission of it would offend proper sentencing principles and fail to comply with the provisions of sections 9(1) and 9(2) of the Penalties and Sentences Act.

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That is not to say that the personal circumstances of the offender and the person's capacity to pay a fine should not be taken into account when determining an appropriate sentence. Of course, that must happen.

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The Exhibits 9 and 10 paint a bleak picture of Mr Draper's financial situation. No doubt it has, in part, been brought about by the impact of drought. Mr Draper is only working part time, for which he receives a meagre income. Counsel advises that the lease has now been determined and Mr Draper

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is no longer drawing any financial benefit from it. Counsel also advises that Mr Draper will not gain any benefit from the unlawful clearing because of orders placed on the area by the prosecuting authorities. In overview of the submissions in this regard as to Mr Draper's financial situation, it's so parlous that to impose a fine of the magnitude sought by the prosecution would result in a considerable financial burden, such that it's effect would be crushing.

Senior Counsel for the complainant points to the fact that Mr Draper owns a substantial asset, and to his potential to generate income. In that regard the Court is referred to Mr Draper presently only working 16 hours per week and there being no cattle on the property. I note Mr Draper's age. I have not been told of any medical or other condition which would impede his ability to work full time. Nor have I been told of the reason for the property not carrying any stock at present.

Whilst it is accepted Mr Draper's asset is not carrying any stock, it may still be recovering from the ravages of drought. In an application for compensation to the Queensland Rural Adjustment Authority it is written that the property, "Has the ability to return to consistent profitability long term, and is able to become independent of enterprise assistance funding, despite not operating at its full productive capacity."

Mr Draper's counsel has said that he will not derive any

benefit from the use of the land unlawfully cleared. Whilst that may be so, it is not, in my view, curtailed his enterprises ability to carry stock and so generate income. Although no material was put before the Court to its effect, the inference can be drawn from the fact that prior to the clearing other parts of the property were leased for the agistment of cattle.

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Having regard to all the material filed in the written submissions I find that Mr Draper's financial position is not, "Substantially worse than the average to be expected in the community.", and he does have capacity to pay a fine commensurate with the level of offending.

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Section 9(2) of the Penalties and Sentences Act provides that one of the factors that a Court must take into account is the maximum penalty prescribed for the offence. The common law prescribes that a maximum penalty should be reserved for those which can be regarded as coming into the worst category of offending for that type of offence. I do not think that this offence falls into that category. Indeed, one only has to look at the area Mr Draper intended to have cleared to find more grave example.

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In both Henderson and Petts the Magistrate accepted that the starting point for determining an appropriate sentence was the maximum penalty. That was because of the use of the formula provided for in section 60B of the Vegetation Management Act provided a penalty far in excess of the maximum penalty. The

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same exercise conducted in this case provides the same result.

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The other significant factor which must impact on any sentence is Mr Draper's plea of guilty. In the circumstances, I consider it to be timely. That is because of the change in particulars relied on by the complainant. Again, because the legislation provides only for the imposition of a fine, the only proper way to reflect the provisions of section 13 of the Penalties and Sentences Act is to reduce the amount of the fine from that which would otherwise be appropriate having regard to the seriousness of the offence, the level of Mr Draper's involvement and the factors personal to him.

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I therefore make the following orders. The defendant is convicted and fined \$110,000. I order that the payment of that sum be referred to the SPER agency for registration and enforcement.

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The final issue for consideration is the recording or otherwise of a conviction. Senior Counsel for the complainant does not urge that it be recorded. I have considered the provisions of section 12 of the Penalties and Sentences Act. It seems that Mr Drapers economic and social wellbeing may well be impacted on to such an extent that to order that the conviction be recorded would, in the circumstances, be unjust. I order that the conviction not be recorded.

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