Regulatory & Environment Insights

NSW GOVERNMENT | Crown Solicitor's Office

A finding of guilt only: Section 10(1)(a) dismissals for environmental offences

KEY POINT

- While uncommon, an order dismissing a charge after an offender is found guilty of an environmental offence may be available, particularly where the offending is "trivial", or the defendant mounts a strong subjective case. Regulators need to be ready on sentence to meet submissions for such orders.

APPLICABLE PROVISIONS

Under s. 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999*, a court that finds a person guilty of an offence may, without proceeding to conviction, make an order directing that the relevant charge be dismissed. Section 10(3) lists four factors that the court must consider:

- the character, antecedents, age, health and mental condition of an offender
- the trivial nature of the offence
- any extenuating circumstances in which the offence was committed
- any other matter the court thinks proper to consider.

RELEVANT CASE LAW

In *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 7)* [2021] NSWLEC 26 ("*Leda (No 7)*"), Pepper J dismissed the defendant's s. 10(1)(a) application.

Her Honour found that, while Leda committed the offences mistakenly, it had the capacity to ensure that the offences and resulting environmental harm did not occur (at [640]). The orders were not appropriate having regard to the objective seriousness of the offences, the need for specific deterrence and denunciation, and the absence of remorse: [641]-[644].

Pepper J observed that an order under s. 10(1) is "usually rare" in the case of environmental offences: [630]. Where these are strict liability offences, such orders are considered appropriate in only limited circumstances: [631]-[632].

Other case law indicates that this is to emphasise general deterrence and "to give effect to" the relevant regulatory regime (eg. *Blue Mountains City Council v Carlon* [2008] NSWLEC 296 at [70]-[71]).

In the environmental context, if an offence is a technical, unintended or minor breach of the legislation, it may be considered trivial (e.g. *Penrith City Council v Re-Gen Industries Pty Ltd* (2000) 107 GERA 331 at [30]-[31]).

Section 10(1)(a) orders generally, although not always, apply to offences of a trivial nature (*Leda (No 7)* at [629]). Where the offence is not considered trivial, the subjective circumstances of the offender may still be relevant to whether a s. 10(1)(a) order is made.

For instance, in *Secretary, Department of Planning and Environment v T W Perram & Partners Pty Limited* (2017) LGERA 169, the defendant pleaded guilty to a strict liability offence under the *EPA Act*. The defendant received, but failed to disclose, donations from persons with a financial interest in an application to modify an approval for a major project. Justice Pain dismissed the charge under s. 10(1)(a), finding that:

- significant subjective factors were demonstrated, including an early guilty plea, provision of co-operation, pre-trial disclosures, no prior convictions, and genuine contrition and remorse: [45]-[48];
- the principal of the defendant was "elderly and transitioning to retirement after many decades", and was "a candid witness who took care in his professional activities": [50]-[51]; and
- the offence, although not trivial, "arose from a mistake and no more": [51].

IMPLICATIONS

While uncommon, s. 10(1)(a) orders are available for environmental offences, especially where the defendant can show the offending is "trivial" or can mount a strong subjective case.

Regulators should be ready to respond to defence submissions seeking such orders. This may be by preparing evidence on how the offence causes harm to the regulatory regime and submissions in favour of general deterrence.

The CSO's Regulatory & Environment practice group specialises in advising and representing agencies in relation to regulatory compliance and prosecutions, statutory interpretation advice in the environment and natural resources context, as well as criminal law, evidence and procedure.

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