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Environmental, Government and Town Planning Law

ENVIRONMENTAL OFFENCES CASE LAW SUMMARIES

This newsletter provides a summary of the more significant cases decided by the Land and Environment Court in 2009. The EPA has prosecuted over 15 different individuals and companies over the past year. In many of those cases the defendants pleaded guilty to the offences they were charged with and were penalised at a sentencing hearing. The penalties ranged from \$18,000 to \$80,000; one defendant was also required to do 450 hours of community service and another defendant was ordered to pay clean up costs in the range of \$464,000. All defendants were also ordered to pay prosecutors costs, ranging from \$18,000 to \$87,000.

Environment Protection Authority v Causmag Ore Company Proprietary Limited (2009) NSWLEC 164

Judge: Justice Pain
Defendant: Company
Offence: Air pollution - Sec 64 (1) of POEOA – breach of an environmental licence

Location: Young
Plea: Guilty
Penalty: Fined \$20,000 and ordered to fund an environmental project to the value of \$45,000 and pay prosecutors costs of \$26,500 costs. Also ordered to publish a notice in the local newspaper outlining the offence and penalty.

Key Issue: Breach of Licence

Interesting facts:

This prosecution was brought against Causmag for failing to maintain a bag house that was used to control dust emissions from a rotary kiln at its plant in Young. The enforcement action was brought in response to an incident in April 2008, in which white dust was emitted onto properties located adjacent to the plant.

The company’s maintenance manager had inspected the bag house several weeks before the incident and had found that some

of the fabric filter bags were in poor condition. He then sent an electronic mail message to the plant manager recommending that all of the filter bags be replaced. However, the company did not stop operation of the kiln in order to allow the replacement of the bags to go forward.

After EPA inspectors attended Causmag’s plant to investigate the dust emissions, the company shut down the rotary kiln so that new filter bags could be installed in the bag house. The EPA seized the old bags that had been removed and found that many of them had holes, and that several others were caked so severely that they were incapable of effectively removing dust particles from the exhaust gases discharged from the rotary kiln. In addition, the EPA obtained records from Causmag which indicated that the filter bags had been used beyond their expected useful life and had not been inspected for several years. The company also failed to respond to monitoring information which suggested that the filter bags were not functioning effectively.

The EPA conducted a Record of Interview of Causmag’s production manager following the incident, during which he stated that the company had continued to operate the rotary kiln in order to fill customer orders. Based on these statements, the Court concluded that the company had committed the offence in order to achieve financial gain. The Court thus found that the offence was “reasonably serious” even though the amount of dust that had been deposited onto the surrounding properties was not



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substantial. Daily fines were imposed for each day that the company had continued to operate without taking steps to ensure that the bag house was operating properly.

Several important points can be taken from the result in this case:

- 1) Routine inspection and maintenance programs must be carried out to ensure that pollution control equipment is functioning effectively. Production processes should not continue unless the control equipment is fully operational.
- 2) Investigations should be carried out, and appropriate remedial action should be taken, whenever automatic monitoring equipment indicates that pollution control equipment is not operating within normal parameters.
- 3) Reports from employees concerning problems with pollution control equipment need to be followed up promptly.
- 4) Care must be taken in selecting a representative to answer investigative questions from the EPA at a Record of Interview. It is vital that the representative who is chosen have full knowledge of plant operations and of the circumstances leading to a pollution incident. The representative should be prepared in advance about how to respond during the Record of Interview, so that she/he does not make statements concerning matters outside her/his knowledge and does not inadvertently make damaging admissions.

Environment Protection Authority v Boral Australian Gypsum Limited (2009) NSWLEC 26

Judge: Justice Pain
Defendant: Company
Offence: Water pollution - Sec 120 of POEOA
Location: Parramatta
Plea: Guilty
Penalty: Fined \$58,500 and ordered to pay costs of \$23,000 costs

Key Issue: Accidental pollution which initially went unnoticed

Interesting facts:

This prosecution was taken by the EPA following a chemical spill from a plant where Boral was engaged in the manufacture of plasterboard. The chemical, known as “Gardisperse”, was used to reduce the amount of water needed for the production processes, and was automatically transferred from a large storage tank to a smaller “batching” tank when an electronic probe indicated that the level in the batching tank was low. The transfer of chemical from the storage tank to the batching tank was shut down when the probe detected that the batching tank had been filled to a particular level.

In August 2007, the probe in the batching tank malfunctioned. Consequently, the entire contents of the storage tank were pumped to the batching tank, which then overflowed. Because the bunding around the batching tank did not have sufficient capacity to contain all of the liquid that had been transferred from the storage tank, several thousand litres of chemical overflowed the bund, escaped into stormwater drains, thence into an unnamed waterway, and ultimately into the Parramatta River.

The batching tank was not equipped with an alarm to detect an overflow of the chemical. As a result, the spill was not detected by Boral’s employees for several hours after it occurred. Once the spill was noticed, the company arranged for pools of the chemical that had not yet reached the river to be collected by a tanker truck. The company also undertook measures designed to prevent a recurrence of the spill, including replacement of the defective probe and enlargement of the capacity of the bunding around the batching tank.

Although there was no evidence of actual environmental harm, the Court found that



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there was a potential for harm because the chemical was spilled was not readily biodegradable and was of low to moderate toxicity in the aquatic environment. Overall, the Court determined that this incident was one that fell on the “low to medium” range of the scale in terms of seriousness.

The following lessons can be drawn from this case:

- 1) In order to minimise the chances of a prosecution, it is advisable to provide adequately sized containment systems to prevent the escape of polluting substances into the environment.
- 2) Equipment that is used to automatically transfer process materials should be fitted with alarm systems so that plant personnel will become aware of a malfunction as soon as it occurs and thus be able to take remedial action before a pollution incident occurs.

Environment Protection Authority v Delta Electricity (2009) NSWLEC 11

Judge: Justice Pain
Defendant: Company
Offence: Air pollution - Sec 64 (1) of POEOA – breach of an environmental licence
Location: Wallerawang, near Lithgow
Plea: Guilty
Penalty: Fined \$45,000 and ordered to pay costs of \$35,000 costs
Key Issue: Contracting out duties under an Environmental Licence

Delta was convicted of breaching a license condition which required it to prevent the emission of dust from a fly ash disposal site. Delta had engaged a contractor to operate the site. The contract required the contractor to ensure that all requirements of the environment protection license were met. However, the contractor failed to cap the fly ash that it deposited on the site and did not operate a sufficient number of

sprinklers to keep the ash wetted. As a result, an incident occurred during which dust was emitted into the air from the disposal site.

This case illustrates that:

- 1) The holder of an environment protection license will be held accountable for breaches of the license, even in circumstances where it contracts out all responsibility for carrying out the activities authorised by the license. Consequently, the license holder must carefully supervise the operations of all contractors and must ensure that the requirements of the license are complied with at all times.

Environment Protection Authority v Albury City Council (2009) NSWLEC 169

Judge: Justice Pepper
Defendant: Council
Offence: Water pollution - Sec 120 of POEOA
Location: Murray River
Plea: Guilty
Penalty: Fined \$45,500 and ordered to pay costs of \$18,044 costs
Key Issue: Accidental pollution – Council should have taken additional measures to prevent harm

The council was fined for a water pollution incident that occurred while it was carrying out maintenance work on its sewer system. The maintenance project involved diverting sewage flows from one of the “wells” in the system. In order to accomplish this, two mobile pumps were set up to capture any sewage that entered a manhole: one as the primary pump, and the second as a back up, intended to operate if the primary pump failed or if its capacity was exceeded. The council had used this “two pump” system on previous occasions when it was maintaining the sewer system without any problems. Furthermore, the council had equipped the pumps with an automatic telemetry system



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which provided an alarm if the sewage levels were nearing the top of the manhole and threatening to overflow and also had also arranged for the suction hoses of the pumps to be checked and cleaned daily by council employees, to prevent malfunctioning of the pumps and possible sewage discharges.

In spite of these precautions, on 28 May 2008 the suction hoses became blocked by rags, both pumps failed, and between 84,000 and 127,000 litres of raw sewage overflowed from the manhole. Even though the council promptly implemented remedial actions (including arranging for a tanker truck to pump sewage from an open stormwater drain that it had entered, placing sandbags in the drain to try to prevent sewage from flowing further downstream and using water trucks to wash the drain), untreated sewage flowed through the open drain and into the Murray River. Sampling revealed that the sewage discharges had caused bacterial contamination of the River.

Although the Court found that the sewage spill was accidental, it took the view that there were additional measures that the Council should have taken to guard against the possibility that the pumps would simultaneously fail and that sewage would consequently be discharged into the River. Therefore, despite the fact that the council had not committed any previous environmental offences and thus had an “unblemished” character, the Court determined that it was appropriate to impose a penalty.

The outcome in this case illustrates that:

1) Even where backup systems and preventive measures are used, and a pollution incident results from multiple unanticipated equipment failures, a prosecution may still be brought by the EPA. Therefore, it is essential to plan carefully for the possible breakdown of plant, and to ensure that adequate containment is in place to stop the escape of polluting equipment to the environment.

Environment Protection Authority v Forgacs Engineering Pty Limited (2009) NSWLEC 64

Judge:	Justice Pain
Defendant:	Company
Offence:	Air pollution - Sec 64 (1) of POEOA – breach of an environmental licence
Location:	Carrington, near Newcastle
Plea:	Guilty
Penalty:	Ordered to fund an environmental project to the value of \$45,000 and pay prosecutors costs of \$20,883
Key Issue:	Training of employees in the importance of complying with an environmental licence

This case related to Forgacs’ ship repair operations in Newcastle Harbour. In December 2007 – January 2008, the company was engaged in blasting marine paint from the hull of a large commercial vessel. The paint on the ship contained a chemical compound, “tributyltin” or “TBT”, which was used to prevent marine organisms from building up. This compound is highly toxic to marine organisms.

Forgacs’ ship repair facility is located adjacent to a marina operated by the Newcastle Cruising Yacht Club. On 30 December 2007, the dock manager observed that a black-brown coloured grit had been deposited on most of the boats in the marina. He also observed that there were gaps in the shade cloth material that Forgacs has placed around the ship that was undergoing blasting of its paint, and that fine particles of dust were being released into the air. Investigations by the EPA on subsequent days revealed that further blasting activities had resulted in the release of additional dust particles, which was deposited into the Harbour and also onto boats in the marina.

Forgacs was prosecuted for breaching a license condition which prohibited the



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emission of dust from its facility. The company claimed that the offence had occurred because employees had failed to report that gaps had developed in the shade cloth that was designed to prevent the escape of particulates. The company also suggested that the emissions had occurred because it had been supplied with a blasting medium that was small in size, and that as a result particles had escaped through the holes in the shade cloth.

The EPA sought an order pursuant to section 250 of the POEO to require Forgacs to contribute to an environmental project. Consequently, the Court directed the company to pay Newcastle City Council \$45,000 to be used to construct a boardwalk to provide access to mangrove trees. The company was not required to pay any further monetary fine.

The result in this case instructs that:

- 1) Employees should be trained to immediately report defects in environmental control systems, so that remedial action can be taken before a pollution incident occurs.
- 2) The Land and Environment Court has frequently allowed defendants to perform environmental restoration projects in lieu of penalties. Therefore, it is advisable to consider proposing such projects as part of a defence strategy when charges are brought.

Environment Protection Authority v Smart Skip (NSW) Pty Ltd (2009) NSWLEC 204

Judge: Justice Pain
Defendant: Company
Offence: Sec 144 (1) of POEOA – use of land as a waste facility without authority
Location: Silverwater
Plea: Guilty
Penalty: Ordered to fund an environmental project to the value of \$50,000 and pay prosecutors costs of \$20,000. Also ordered to

publish a notice in the “Inside Waste” magazine outlining the offence and penalty.

Key Issue: Using land as a waste facility without a licence

Smart Skip was convicted for operating a waste facility without lawful authority, in breach of section 144(1) of the POEO. The company was engaged in operating a skip bin business near Silverwater. Skip bins containing demolition waste, including concrete, metal, bricks, plastic and soil were transported to the company’s premises, where the material was sorted. The sorted material was then sent to recyclers or to landfill.

Schedule 1 of the POEO requires that an environment protection license be obtained for any waste facilities that store, separate and process more than 30,000 tonnes of waste a year. Shortly after the facility was acquired from a prior operator, Smart Skip’s director was advised by the EPA to make enquiry concerning whether the amount of material that was processed at the site was over the licensing threshold. However, the company did not immediately seek to obtain a license. When the EPA obtained operating records from the company and from the recycling facilities that received waste from the site, they revealed that the company had exceeded the licensing threshold. Although there was not evidence that the operation of the site without a license had caused any environmental harm, the prosecution nonetheless ensued.

This case highlights:

- 1) The importance of carrying out due diligence investigations before purchasing a business that is potentially subject to the POEO, in order to ensure that any development approvals and environment protection licenses that are necessary for continued operation are identified and obtained.



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2) It is critical both that business operators be aware of the circumstances that will trigger licensing requirements under Schedule 1 of the POEO, and that proper record-keeping systems be put in place to alert management if there is a risk that operating restrictions may be exceeded.

Environment Protection Authority v Ross (2009) NSWLEC 36

Judge: Justice Pain
Defendant: Individual
Offence: Water pollution - Sec 120 of POEOA
Location: Dungay
Plea: Guilty
Penalty: Ordered to fund an environmental project to the value of \$18,000 and pay prosecutors costs of \$35,000.

The defendant was prosecuted under section 120 of the Protection of the Environment Operations Act for polluting water with a liquid insecticide known as “Bifenthrin”. The defendant had been engaged by a film company to eradicate mosquitoes on a property in Dungay. While standing on rocks in the bed of Dungay Creek, he used the insecticide to spray foliage along the bank. Some mist from the spray drifted into the creek. Rain that fell on the property on the evening after the insecticide was applied (7 October 2007), and again on the following night (8 October); the rainfall on these nights also apparently carried some quantity of insecticide into the creek.

The morning after the defendant performed the spraying, hundreds of dead crayfish were found in Dungay Creek; hundreds more dead crayfish were discovered on 9 October, after the second night of rain.

The approved labelling for Bifenthrin stated that the insecticide should not be allowed to contaminate waterways, and that the active ingredient was “very toxic” to aquatic organisms. Evidence was also given by the

EPA’s toxicologist that the insecticide was lethal to aquatic life at low concentrations. Because insecticide was found in sediments in the creek bed at levels that were dangerous to aquatic life, the EPA issued a notice requiring the defendant to clean up the contamination.

Although the defendant claimed that a substantial fine would subject him to financial hardship, Justice Pain refused his application to dismiss the charge without penalty under section 10 of the *Crimes (Sentencing Procedure) Act*. Her Honour found that section 10 should not be applied because: 1) the offence was not “trivial” in light of the serious environmental harm that occurred; 2) the harm was reasonably foreseeable, in view of the highly toxic nature of the insecticide; and 3) there were practical measures that could have been taken by the defendant to avoid the harm – in particular, the defendant could have checked the weather forecasts to ensure that it would not rain until after the insecticide had dried and could not be washed into the creek.

These guidelines can be taken from the case:

- 1) It is essential that any person who uses an insecticide or other hazardous substance exercise caution to avoid allowing the material to escape into the environment. Even an accidental spill can result in the imposition of severe penalties.
- 2) The Land and Environment Court is unlikely to dismiss a pollution prosecution under section 10 of the *Crimes (Sentencing Procedure) Act* even if a penalty will cause financial hardship to the defendant. Section 10 will be available only in exceptional circumstances – most likely only when the circumstances giving rise to the incident are completely outside the defendant’s control.



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