

## CASE NOTE

### Pollution Control -- Validity Of Licensing Conditions

*Genkem Pty Ltd v Environment Protection Authority*

Unreported, Court of Criminal Appeal (NSW), Gleeson CJ, Powell JA and Dunford J, 21 October 1994

#### Facts:

Genkem Pty Ltd (Genkem) operated a chemical plant at Tomago in respect of which it was required to hold, inter alia, licences under the *Clean Air Act 1961* (CAA), *Clean Waters Act 1970* (CWA). Between 18 and 29 May 1990 inspections of Genkem's premises by authorised officers disclosed water discharging from a drain on the western side of Genkem's lead plant building. A large body of water, said to be a swamp, to the west of Genkem's lead plant was found to have a significant lead content. Genkem was thus charged with an offence under s 16 of the CWA in that it allowed waste liquid to flow to the boundary of its premises from where it was likely to flow into the swamp.

Furthermore on 23 May 1990 an authorised officer of the Environment Protection Authority inspected a storage area at Genkem's premises and observed a large drum lying on its side and from which chromate or dichromate liquid was leaking. This gave rise to a charge that Genkem contravened a condition of its licence, namely L6 which was as follows:

"L6 Matter and substances on the premises shall be processed, handled, moved and stored in a proper and efficient manner."

#### The Decision:

In relation to the charge against the CWA Genkem argued that the body of water to the west of its premises was not a "swamp" as recited in the charge and that in any event the waste liquid was not likely to flow into the swamp. Bignold J had concluded that the water was not a "swamp" since it did not exhibit features of continuity, permanence and unity. He did however conclude that it was "unconfined surface water" within the definition of "waters" in s 4(1) of the CWA.

Gleeson CJ was of opinion that the water was a "swamp" by reference to its dictionary meaning, namely "a tract of low lying ground in which water collects; a marsh or a bog". Moreover, he was of the view that the water was "unconfined surface water" by which he understood this to mean "surface water whose area is not limited by any significant natural or artificial barrier": see at p 7. As to whether the waste liquid was "likely" to flow into the swamp, Gleeson CJ held that there was evidence that a significant quantity of water had already flowed into the swamp and that there was every reason for Bignold J to conclude that further pollution was likely to occur.

Genkem also argued that licence condition L6 was invalid because (1) the condition was beyond power and (2) it was too general in its terms.

Gleeson CJ held that the condition was not beyond power. He referred to the preamble to the conditions which stated: "For the purpose of preventing, controlling or mitigating the pollution of the environment, this licence is granted subject to the following conditions..". Gleeson CJ then stated:

"When regard is had to the legislative power pursuant to which condition L6 was imposed, and to the preamble to the licence conditions..., as well as to the immediate context of the condition, it becomes reasonably apparent that the reference to 'matter and substances' is a reference to matter and substances capable of polluting the environment. I would reject the submission, advanced on behalf of [Genkem], that there would be a contravention of condition L6 if [Genkem] failed to store office stationary and paper clips in an efficient manner.... Conduct which has no possible environmental consequences, but was related solely to the profitability of [Genkem's] business, would be outside the purview of the condition.": p 13.

On the issue of the generality of the condition Gleeson CJ concluded that it was not uncertain or too general when regard was had to power to impose conditions granted to the EPA under s 17D of the PCA:

"I am unable to accept the view that, on its true construction, the only conditions which may be imposed pursuant to s 17D of the [PCA] are conditions which direct the holder of the licence, with specificity, to do, or refrain from doing, particular acts. I do not find it difficult to envisage circumstances in which both the [EPA], and the holder of a licence, may regard it as positively preferable for a condition to be expressed in general, rather than specific, terms.... I see no reason to read down the generality of the language of s 17D in such a way as to limit the power to impose conditions...": p 18.

Powell JA similarly concluded:

"...while a condition imposed pursuant to the provisions of s 17D of the [PCA] must be one directed toward achieving the object of preventing, or at least minimising, pollution or the risk of pollution, no further implication as to the nature and extent of the power to impose conditions is called for... in a situation which (sic) the relevant statutes themselves penalise the failure to operate equipment in a proper and efficient manner, it is not necessary to require of a condition any greater certainty.": p 7.

### Comment:

This decision is important in clarifying the position of the generality of licence conditions imposed under s 17D of the PCA. It removes doubts which have from time to time been expressed that conditions similar to condition L6 in the present case would be invalid by reason of uncertainty.

It is also pertinent to consider, in this context, the merit of two further comments made by Gleeson CJ. Firstly, at p 14, he expressed the view that should the Court determine that condition L6 be within power as conferred by s 17D of the PCA, that was the end of the issue for the Court, although it would not be for the EPA, since the "policy" underlying the exercise of the power in s 17D would be purely a matter for it. Thus, while a condition such as condition L6 would be prone to cause uncertainty, nonetheless it would not encroach upon or interfere with the commercial judgment of licence holders as to how best they might manage their operations for the prevention of pollution. Thus, licence holders are placed in the position of determining for themselves the best available technology economically available (BATEA) which will satisfy the condition imposed, a significant autonomy in this area of pollution control. Secondly, at p 19, Gleeson CJ referred to the appeal rights granted licensees in respect of licence conditions under s 17D(6) and 17M of the PCA would enable licensees who are in doubt as to the requirements to satisfy the condition to seek greater specificity by means of such an appeal. It may also be that a licensee could seek general advice as to how to fulfil any such general condition from the EPA pursuant to its general functions as listed in s 7(2)(f) of the *Protection of the Environment Administration Act 1991*.

**Lachlan Roots BEc LLB (Hons)**