case note

Victorian Environment Protection Agency Update May - July 2001

Prosecutions under the Environment Protection Act 1970 and Pollution of Waters by Oils and Noxious Substances Act 1986

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Murray Goulbourn Co-operative Co. Ltd

Offence: *s41(1)(e) of the Environment Protection Act 1970 [EP Act] – air pollution detrimental to any beneficial use.*

Maximum Penalty: *$20,000*

On 14 May 2001 at Sale Magistrates' Court, Murray Goulburn Co-operative Co. Limited was convicted and fined $5,000 and ordered to pay EPA's costs of $3,284 after pleading guilty to a charge of air pollution. The charge related to a discharge of milk powder from the defendant's dairy factory at Maffra on 5 March 2000. Following the event, Murray Goulburn carried out clean up operations, including washing milk powder off 56 cars. The company later installed output sensors to provide an early warning of any such discharge.

The Court was told, in the defendant's plea in mitigation, that the defendant had recently provided $20,000 for a project aimed at reducing damage to streams by run-off from dairy farms. The court took this into account but applied the minimum penalty of $5000 in accordance with section 67AB of the Act on account of a prior conviction in 1998.

Terminals Pty Ltd

Offence: *s41(1)(a) of the EPAct – offensive to the senses of human beings.*

Maximum Penalty: *$240,000*[1]

At the Melbourne Magistrates' Court on 7 June 2001, Terminals Pty Ltd was convicted on one count of air pollution under section 41(1)(a). The Court made the following orders:

- The charge is adjourned for 12 months on the defendant undertaking to comply with a special condition that it contribute $5,000 to a local community project designed to enhance the local amenity. The project is to be nominated by the affected workers and the expenditure to be demonstrated to the satisfaction of the EPA.
- Further order under section 67AC of the *Environment Protection Act 1970* that the defendant is to arrange and undertake an Ambient Air Monitoring program at community locations as approved by the EPA. The purpose of the monitoring is to determine the background impact of Terminals Pty Ltd and other facilities on the ambient conditions to those people who live and work in the region of Coode Island and to provide a benchmark for future comparisons. In particular the monitoring should seek to examine the welfare of the public, in terms of the air environment at three areas: South East Yarraville; East Yarraville; and South West Kensington.

The results for each area must be compared by the EPA to the other areas within the monitoring program as well as to the monitoring carried out by the EPA from October to December 2000 in and around Coode Island and Whitehall Street, Footscray.

The prosecution related to offensive odours emanating from the Terminals' premises at Coode Island on 28 December 2000. Thirteen workers at the nearby P&O Ports premises complained of feeling ill. Symptoms included dry throat, dry tongue and eye irritation.

This order under section 67AC is the first use of the new 'alternative sentencing' provisions that came into effect on 9 July 2000 after being introduced by the *Environment Protection (Penalties and Enforcement) Act 2000.*

TT-Line Company Pty Ltd

Offence: *s8 of the Pollution of Waters by Oil and Noxious Substances Act 1986 – discharge of oil from a ship into State waters.*

Maximum Penalty: *$1,000,000*[2]

In Melbourne Magistrates' Court on 25 June 2001, TT-Line Company Pty Ltd pleaded guilty to a charge under section 8(1). The Court imposed a fine of $5,000 (without conviction) on the company together with an order that it pay the Authority's costs of $6,705. A further order was made that $4,395 clean up costs be paid to the Marine Board of Victoria who arranged for the clean up at the time.

The charge related to the discharge of approximately 1000 litres of diesel fuel that occurred while the fuel was being transferred from a road tanker at Station Pier to the 'Devil Cat' catamaran ferry on 8 January 2000.

In pleading guilty the company detailed changes to procedures and the fitting of equipment to prevent a recurrence. In sentencing, the Court noted that it was satisfied that the spill volume of 1000 litres was high and that the company had implemented all of the recommendations arising from a detailed investigation conducted by its shipping agents.

Edwin Murray Wheeler, Jo Anne-Marie Clarke, Gordon Murray Wheeler, Suburban Demolitions and Excavations Pty Ltd and Andrew Mitsakis

Offence: *s27A(2)(a) of the EPAct – dumping or abandoning or permitting the dumping or abandoning of industrial waste*

Maximum Penalty: *$40,000*

At Ringwood Magistrates' Court on 19 June 2001, Edwin Wheeler, Jo Anne-Marie Clarke and Gordon Wheeler each pleaded guilty to a charge of permitting the dumping of industrial waste. Suburban Demolitions and Excavations Pty Ltd (Suburban) and Andrew Mitsakis (as a Director of Suburban and thereby liable pursuant to s66B(1) of the EP Act) also pleaded guilty to charges of dumping industrial waste. All charges were laid pursuant to section 27A(2)(a) of Act.

The sentences for each of the defendants are as follows:

- Edwin Murray Wheeler: $20,000 with conviction ($845 costs)
- Jo Anne Marie Clarke: $7,500 with conviction ($845 costs)
- Gordon Murray Wheeler: Adjourned for 12 months on an undertaking to pay $300 to the court fund ($1,045 costs)
- Suburban Demolitions and Excavations Pty Ltd: $10,000 with conviction ($2133 costs)
- Andrew Mitsakis: $5,000 with conviction (no order as to costs).

Additionally, the Magistrate made orders that required each defendant (except Gordon Wheeler) to:

- not dump (Suburban and Mitsakis) or permit to be dumped (Edwin Wheeler and Clarke) any additional industrial waste;
- remove all existing industrial waste from the site in accordance with the Environment Protection Act 1970 and the Environment Protection (Prescribed Waste) Regulations 1998;
- keep records of the nature, volume and destination of all industrial waste removed from the site;
- provide to the Authority a report, prepared by an Environmental Auditor that:
- confirms items (a) and (b);
- summarises the reports required by item (c);
- assesses the impact of the dumping; and
- suggests steps for remediation of the site;
- provide to the Authority a report itemising all costs and expenses incurred by each of the four defendants in complying with items (b), (c) and (d).

The prosecution followed the discovery by the EPA of an illegal landfill at Yarra Glen on land owned by Edwin and Gordon Wheeler.

Edwin Wheeler lives on the property with Jo Clarke, his de facto wife. Mr Wheeler approached Andrew Mitsakis in October 1999 and offered the property's partially filled gravel quarry as a dumping site for demolition and excavation material. Suburban then used the property to dump waste at the site over a period of several months.

In sentencing, the Magistrate remarked that the illegal dumping was a very serious matter and emphasised the need for the community to be protected against this type of activity. She said that the overall weight of convictions and fines was levied in regard to the deterrent value and the possibility of re-offending by all parties, while Gordon Wheeler's sentence reflected his minimal involvement in the offending behaviour.

Edwin Wheeler and Jo Anne-Marie Clarke have appealed against the severity of the sentence to the County Court.

Mauri Yeast Australia Pty Ltd

Offence: *s27A(1)(c) of the EP Act– cause or permit an environmental hazard.*

Maximum Penalty: *$20,000*

On Wednesday 18 July 2001, at Melbourne Magistrates' Court, Mauri Yeast Australia Pty Ltd pleaded guilty to one charge of causing an environmental hazard contrary to section 27A(1)(c). The court imposed a fine of $5,000.00 without conviction and required the defendant to pay the EPA's costs of $3,710.85.

The charge related to the spill of approximately 1000 litres of 98% concentrated sulphuric acid at the defendant's South Yarra premises. The spill occurred when the tine of a forklift damaged the acid container's valve during unloading operations.

In its defence, the defendant noted that it had already paid significantly for the incident including:

- $51,150 to the emergency services;
- $20,000 in compensation to a neighbouring business whose employees were evacuated for the afternoon;
- $7,550 in waste removal and disposal costs; and

- an unspecified amount in constructing bunding and undertaking civil works at the premises to reduce the potential for a recurrence of the incident.

In sentencing, the court took account of the nature of the incident, the fact that any environmental impact was only potential, the early plea of guilty and that the defendant had been on the site for 70 years without any prior offences.

Arnold Aitken and David Harris

Offence: *s39(1)(e) of the EP Act– water pollution detrimental to any beneficial use.*

Maximum Penalty: *$20,000*

On 14 June 2001, Arnold Aitken and David Harris both pleaded guilty to a charge of water pollution under section 39(1)(e) in the Magistrates' Court at Korumburra. The Court adjourned the matter on a 12 month undertaking by the defendants to be of good behaviour, without conviction. Each defendant was also ordered to pay half of the Authority's costs in the sum of $5,117.88.

The case concerned the discharge of between one and two megalitres of dairy waste pond effluent. Mr Aitken operates a dairy farm and had engaged a contractor, Mr Harris, to empty out the first of two diary waste treatment ponds. Harris emptied the contents of the pond onto a steeply sloping paddock. The effluent and sludge flowed down the paddock and into an intermittent creek. That creek then carried the material a kilometre or so to a reservoir used for drinking water. Analysis of the stream, reservoir and pond effluent indicated that the material contained potentially pathogenic bacteria, high nutrient levels and Cryptosporidia. Expert statements referred to the high risk of algal bloom as a result of elevated nutrients.

PAINT WASTE

A number of defendants were charged in relation to the alleged illegal transportation of paint waste in September 1999 and the subsequent provision of false information to the Authority. The following matters have been completed. Charges against three related defendants arising from their involvement in the matters are currently before the courts.

FBT Operations (Vic) Pty Ltd

Offence: *s59D(a) of the EP Act– intentionally provide incorrect or misleading information to the Authority.*

Maximum Penalty: *$40,000*

At Sunshine Magistrates' Court on 29 May 2001, FBT Operations Pty Ltd pleaded guilty to four charges of intentionally providing incorrect or misleading information to the Authority. The information was provided in Waste Transport Certificates, and indicated that the subject waste had been received at an appropriately licensed facility. The Court was told the material in fact went directly to a second hand paint merchant. The Court imposed a fine of $7,500 per offence, with conviction (a total of $30,000), together with an order to pay the Authority's costs in the sum of $5,245.

Australian Coating Technologies Pty Ltd

Offence: *s27(1A) of the EP Act – be an occupier of a schedule four premises used to reprocess, treat, store or dispose of prescribed industrial waste without a licence.*

Maximum Penalty: *$20,000*

On 24 May 2001 the Magistrates' Court at Sunshine found Australian Coating Technology Pty Ltd guilty of one charge of storing prescribed industrial waste at a Schedule 4 premises without being licensed to do so, contrary to section 27(1A). This defendant was the second hand paint merchant to which the loads of paint waste were transported.

The defendant had pleaded not guilty to the charge on the basis that:

- the paint waste was not prescribed industrial waste, as it was able to be used and was being used as product by the defendant;
- the defendant's premises were not a schedule 4 premises as there were no 'facilities' for storing prescribed industrial waste, and thus the premises did not meet the definition in the Environment Protection (Scheduled Premises) Regulations 1996; and
- The offence was one of strict and not absolute liability, and therefore the defence of honest and reasonable mistake was open.

The Magistrate found against the defendant on each point. She decided:

- the paint was surplus to the producer and thus fell within the definition of "waste", and clearly it was industrial in nature, and fell within the definition in the Environment Protection (Prescribed Waste) Regulations 1998;
- the fact that the defendant was storing up to 200,000 litres of paint was sufficient evidence that facilities for storing waste existed at the premises; and
- the offence is one of absolute liability.

In fixing the penalty, the Magistrate noted that the defendant was a relatively minor player in the whole affair, and may have been misled as to where the paint waste was coming from. Her Worship did point out that the defendant must accept responsibility for accepting the waste, given that one of the defendant's employees signed Waste Transport Certificates in relation to two of the loads.

1 New penalty provisions came into effect on 9 July 2000 pursuant to the *Environment Protection (Penalities and Enforcement) Act 2000* New penalities for indictable offences are subject to a limit of $100,000 for a single offence when heard summarily in the Magistrates' Court

2 Section 24C(1)(c) of the *Pollution of Waters by Oil and Noxious Substances Act 1986* limits the fine the Magistrates' Court can impose on a corporation in relation to a single offence to $50,000