NELR casenotes

New South Wales Land and Environment Court

Environment Protection Authority v Queanbeyan City Council [2010] NSWLEC 237 (21 December 2010)

by Sarah Froh, Henry Davis York Lawyers

In this case the Queanbeyan City Council attempted unsuccessfully to block proceedings for polluting the Queanbeyan River, the east basin of Lake Burley Griffin in Canberra and the Molonglo River waterskiing area with almost 2 million litres of untreated sewage.

The Queanbeyan City Council (the Council) sought a permanent stay of a prosecution brought by the EPA for water pollution under s 120 of the *Protection of the Environment Operations Act* 1997 (the POEO Act). The Council claimed that the proceedings were an abuse of process as the EPA had not granted the Council an environment protection licence and, accordingly, the Council could not avail itself of the only statutory defence to the charge under s 122 of the POEO Act. Under s 122, the Council may have been able to defend the charge if it was able to establish that the pollution was regulated by an environment protection licence, and the conditions of that licence were not contravened.

The background

On 4 November 2007, at approximately 5:54 a.m. a pump failed at the Morisset Street pumping station in Queanbeyan. Although an alarm was activated, there was a warning SMS system but it failed and no text message was sent to the Council's on-call supervisor. Instead a member of the public alerted the Council than an overflow of sewerage had occurred and had spilled over the earth bund.

That night, at 6:36 p.m. the sewage pump system failed again at Morisset Street. Again no text message was sent and 12 hours later that the supervisor arrived at work and observed the pump was not working. By this stage almost 2 million litres of untreated sewage had entered the Queanbeyan River.

As a result, the east basin of Lake Burley Griffin and the Molonglo waterskiing area were closed to activities for the next week or so and the EPA commenced criminal proceedings against the Council for water pollution.

The outcome of the stay proceedings

Prior to the substantive hearing, the Council sought to permanently stay the proceedings on the basis that the proceedings were an abuse of process. In order to be granted a stay, the Court found that the Council would have been required to establish that it would have been granted an environment protection licence and that licence would have contained a condition in relation to water pollution and overflows from the Morisset Street pumping station.

In her judgment in this matter, Justice Pepper referred to the case of *Jago v District Court* (NSW) (1989) 168 CLR 23 per Mason CJ at 33, and concluded that in determining whether or not to grant a permanent stay, even if unfairness can be established, the Court is required to balance the interests of justice of the accused against those of the community in having breaches of the law prosecuted.

Justice Pepper held that the proceedings should not be stayed. She said that even if a licence had been granted, the unfairness about which the Council complained would not exist, because as both the evidence and the POEO Act demonstrates, no conditions attaching to any licence issued would have permitted the emission of such a large amount of untreated sewerage into the river.

The Council's history of sewage overflows, with their attendant risk of harm to the environment and to human safety, the public interest in permitting the prosecution to proceed outweighed any unfairness created by the absence of the environment protection licence.

The Council claimed that as a pumping station had been installed at the EPA's direction, a licence from the EPA was mandatory. Her Honour disagreed that the Morisset Street pumping station constituted a 'pumping station' for the purposes of the POEO Act, and it did not fall within a 'sewage treatment' facility which is listed in Schedule 1 and requires an EPA licence. She said the Morisset Street pumping station did not 'treat' the sewage or involve the 'discharge or likely discharge of waste' as per the sewage treatment definition.

On the contrary, a pumping station was designed to avoid the discharge of waste. Accordingly there was no obligation on the EPA to issue a licence. Furthermore, if the Council had applied for a licence, her Honour found that it would have been in the EPA's power to refuse the application whether or not that required the Council to terminate the operation of the pumping station. There was nothing to prevent the Council from applying for an environment protection licence in the anticipation that conditions would be attached permitting any accidental sewage overflows and if refused, to appeal the decision to the Court.

In the end, the refusal to issue an environment protection licence did not, as the Council submitted, equate to a representation by the EPA that pollution occasioned by the sewage overflow was permissible. The evidence demonstrated that the EPA would never have issued an environment protection licence in respect of an overflow structure that permitted effluent to be discharged.

Even if the environment protection licence had been issued by the EPA, the fact remains that the pollution was caused by a failure of which the Council had clear notice. The Council did not, given that knowledge, take precautionary measures to ensure against, or at the very least minimise, another discharge from the Morisset Street pumping station. Had the EPA issued a licence, the failure by the Council would not have enlivened a defence under s 122 of the POEO Act. The Court concluded that the public interest in the proceedings compelled the prosecution to proceed. Justice Pepper noted that water pollution is a serious matter and that the gravity of the offence is reflected by the strict liability attaching to those who, whether it be by deliberate design or accidental discharge, cause pollution to enter waterways.

Lessons

The main lesson from the case is that if a proposed activity is likely to result in water pollution, it should be the subject of a licence requiring a range of measures designed to prevent or control any possible discharge. If a discharge is impossible to completely prevent, then mitigation measures will need to be proposed. If despite the above measures a licence is refused by the EPA, an applicant has a right of appeal to the Court.

EPA v Chillana Pty Ltd [2010] NSWLEC 263

by Dr Nicholas Brunton, Henry Davis York Lawyers

This case highlights the importance of maintaining plant and equipment. The costs of not doing so can be enormous.

The defendant Chillana operated a small, family owned abattoir near Coonabarabran that employed 30 full time workers. The plant had been operating for 42 years, the last 15 of which was under the ownership and control of Chillana, licensed by the EPA.

The waste water from the operation was treated in a 'saveall facility' which screened out solids and pumped to a waste water pond treatment system. The pipe from the saveall to the ponds was made of asbestos cement and a 10 cm crack formed in the pipe. This lead to some 98 000 L of untreated effluent leaking from the pipe and flowing off site into a creek, called Salty Creek, for some six days.