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RECENT ISSUES IN ENVIRONMENTAL AND DEVELOPMENT ENFORCEMENT

Presentation by Ryan Bennett and James Fan
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INTRODUCTION

This presentation will deal with recent issues in the conduct of prosecution and civil enforcement proceedings by statutory authorities in the sphere of environment and planning law. Particularly, this presentation will deal with some of the potential issues faced by private practitioners when defending such proceedings commenced by statutory authorities in the Land and Environment Court.

Proceedings in the Land and Environment Court of this nature largely fall into Class 4 (being civil proceedings to restrain a breach of environmental or planning legislation) or Class 5 (being prosecution proceedings for breaches of environmental or planning legislation).

INVESTIGATION COSTS

EPA v Ashmore (No 2) [2014] NSWLEC 142

Part 8.3 of the Protection of Environment Operations Act 1997 ("the POEO Act") allows the court when finding an offence proved, to make further orders such as:

1. requiring publication of the offence and the penalty imposed by the court – see s 250(1);
2. requiring the restoration or remediation of the environment – see s 245;
3. the payment of compensation to a person or public authority where loss or damage has occurred as a result of the offence as well as costs and expenses to control or mitigate harm – see s 246(1); and
4. the payment of costs and expenses reasonably incurred during the investigation of the offence.

In these proceedings before the Land and Environment Court, the defendant had earlier pleaded guilty to an offence under s 143 of transporting waste to a place that could not lawfully be used as a waste facility for that waste.

The prosecuting authority, the Environment Protection Authority, then sought to obtain an order from the Court, pursuant to s 248(1) of the POEO Act, that the

defendant pay its investigation costs said to be related to the stability of a dam wall, upstream of where the unauthorised materials were deposited. It was said that the dam wall's stability affected the ability of the EPA's officers to safely conduct an investigation of the downstream area where fill was deposited.

Justice Craig found that, without reference to authorities, the relevant test was that "*there must be a relevant nexus between the facts that pertain to the charges to which a plea of guilty has been entered and the claim for costs sought to be recovered*": see [10].

The Court found that, whilst it was appropriate for the prosecutor's investigators to inspect various aspects of the land, the entitlement to claim the costs of site investigations upstream required the Prosecutor to establish that those investigations were occasioned by the depositing of waste: see [12].

The Court here found that those investigation costs did not arise from waste being deposited on or in the vicinity of the dam wall. Accordingly, the Court did not make an order pursuant to s 248(1).

PUBLICATION ORDERS

Harris v Harrison [2014] NSWCCA 84

In the past, the Land and Environment Court has, in applying its powers to make publication orders, made vastly differing orders with respect to the wording of the publication and the scope and reach of the publication. Usually, the wording of the publication required specific reference to the identity of the defendant.

In the prosecution of a widely publicised pollution offence against Orica Australia, the Court required that the defendant publicise the offence in four prominent broadsheet newspapers, as well as a prominent industry and trade magazine: *Environment Protection Authority v Orica Australia Pty Ltd* [2014] NSWLEC 103.

In the prosecution of lesser known events or offenders, the Court regularly makes no such publication order, or may simply require publication within a smaller and localised publication, thereby reducing the cost burden of carrying out the publication. However, the scale of the breach and the offender's operations will dictate the scope and breadth of such requirements: see *Environment Protection Authority v Shoalhaven Starches Pty Ltd* [2006] NSWLEC 685 at [50].

Corporate offenders are more likely to be subjected to a broader publication order: see *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 419.

The Water Management Act 2000, similarly to the POEO Act, also provides for the making of an order against an offender to take action to publicise an offence and the consequences of that offence: see s 353G(1).

Here, the appellant was convicted with a sentence imposed by the Land and Environment Court that included a fine of $78,000.00 as well as additional orders including requirements for publication of the offence.

The Criminal Court of Appeal, reduced the penalty, but also varied the publication order and stated at [128] that:

> *The provision for publication orders has, in my opinion, a significant educative and deterrent function.* ***It is important that others who may be minded to commit offences against the WM Act be made aware of the possible consequences of such offences.*** *On behalf of the appellant it was argued that the publication order ought to be set aside, primarily because the offence was "trivial" or "technical". I do not accept these descriptions. However, the publication order in the terms specified by Pepper J cannot stand, in the light of what I have said above. In my opinion, it will be sufficient to order the appellant to publish, in one locally circulating newspaper, a notice drawing attention to the plea of guilty, the conviction, and the maximum fine available. It is not necessary to identify the appellant. The terms of the notice I propose are attached.*
> (emphasis added)

One should note that the failure to comply with a publication order in full constitutes contempt of court. In the matter of *Environment Protection Authority v Pannowitz* [2006] NSWLEC 219, the offender failed to comply with such an order in that he published a notice that was:

- on page 4 of a newspaper as opposed to page 3 as required
- 1/16th the size of the page as opposed ¼ as required; and most importantly
- included the words "*This matter has been referred by Steepleton to ICAC for further investigation*" where it was not required.

Whilst the facts and circumstances of how a publication order is carried out will be relevant to any allegation of contempt, the Court found that such acts committed deliberately interfered with the course of justice and scandalised the Court.

NOTICES TO ATTEND RECORDED INTERVIEWS

Zhang v Woodgate [2014] NSWLEC 143

Local government and other statutory authorities have wide powers to investigate potential breaches of the laws that they administer. In the *Environmental Planning and Assessment Act* 1979 (and similarly replicated in other legislation), there is the power to compel attendance at a specified date and time to answer questions or to provide other records and documents.

Section 118BA, which falls under Division 1A of Part 6 of the EPA Act (dealing with local enforcement powers), provides:

> *(1) A person authorised to enter premises under this Division (an authorised person) may require an accredited certifier, a person carrying out building work or subdivision work or any other person whom the authorised person suspects on reasonable grounds to have knowledge of matters in respect of which information is reasonably required to enable the council concerned to exercise its functions under this Act to answer questions in relation to those matters.*

> *(2) An authorised person may require a corporation to nominate a director or officer of the corporation who is authorised to represent the corporation for the purposes of answering questions under this section.*
> *(3) An authorised person may, by notice in writing, require a person referred to in subsection (1) to* ***attend at a specified place and time to answer questions*** *under this section if attendance at that place is reasonably required in order that the questions can be properly put and answered.*
> *(4) The place and time at which a person may be required to attend under subsection (3) is to be:*
>
> > *(a) a place and time nominated by the person, or*
> > *(b) if the place and time nominated is not reasonable in the circumstances or a place and time is not nominated by the person, a place and time nominated by the authorised person that is reasonable in the circumstances.*
>
> *(5) An authorised person may cause any questions and answers to questions given under this section to be recorded if the authorised person has informed the person who is to be questioned that the record is to be made.*
> *(6) A record may be made using sound recording apparatus or audio visual apparatus, or any other method determined by the authorised person.*
> *(7) A copy of any such record must be provided by the authorised person to the person who is questioned as soon as practicable after it is made.*
> *(8) A record may be made under this section despite the provisions of any other law.*
> (emphasis added)

This power to compel attendance was introduced in 2008, when Frank Sartor, then Minister for Planning, stated the following when introducing the bill:

> *Councils will be given greater powers to enforce development consents, with new investigation powers and mechanisms to recover costs of enforcement action. … Councils will be able to require certifiers and people carrying out development to answer questions to assist councils in exercising their functions under the Act. … However, this reform will assist councils in funding necessary enforcement action related to breaches of the development consent and holding developers accountable. Compliance cost notices will also allow consent authorities to recoup the costs of ensuring compliance with orders issued under the Act.* (Hansard, 3 June 2008)

This power is now widely used by Councils, particularly with an eye towards commencing enforcement or prosecution proceedings.

In *Zhang v Woodgate*, judicial review proceedings were commenced seeking an order declaring a Notice to a potential witness to be invalid and of no effect, as well as further orders restraining the exercise of power under s 118BA of the EPA Act. At the time of the notice being issued, Mr Zhang was being prosecuted in the Local Court by Lane Cove Council for breach of development consent conditions in that he carried out excavation beyond the permitted level.

The Judgment cited here dealt with interlocutory relief. However, the issue to be determined was whether s118BA empowered the Council to compel the potential witness, or any other person, to answer questions in relation to the subject matter of the criminal proceedings once the Local Court proceedings were commenced. The

Court found that there was a serious question to be tried, and the balance of convenience weighed in favour of making an interlocutory order.

An interlocutory injunction was issued and the Council here was restrained from exercising its powers under s 118BA for the purposes of prosecuting Mr Zhang. However, that injunction did not stop the Council from gathering evidence in other ways such as issuing subpoenas, or recording the answers of a potential witness in an interview where those answers were not compelled.

There are exceptions to the power to compel attendance and record answers. Section 118N, which provides that failure to comply with such a notice is an offence, the section also provides the limitations to the requirement to furnish information or answers.

Section 122U provides as follows:

> ***(2) Self-incrimination not an excuse***
> *A person is not excused from a requirement under this Division to furnish records or information or to answer a question on the ground that the record, information or answer might incriminate the person or make the person liable to a penalty.*
> ***(3) Information or answer not admissible if objection made***
> *However, any information furnished or answer given by a natural person in compliance with a requirement under this Division is not admissible in evidence against the person in criminal proceedings (except proceedings for an offence under this Division) if:*
> > *(a) the person objected at the time to doing so on the ground that it might incriminate the person, or*
> > *(b) the person was not warned on that occasion that the person may object to furnishing the information or giving the answer on the ground that it might incriminate the person.*
> ***(4) Records admissible***
> *Any record furnished by a person in compliance with a requirement under this Division is not inadmissible in evidence against the person in criminal proceedings on the ground that the record might incriminate the person.*

Noting the distinction between "records" and "information furnish or answer given", there is a deliberate limitation to prevent self-incrimination where the sole purpose is to obtain evidence to prosecute. Nevertheless, the information obtained by a statutory authority would greatly assist in the further investigation of any breaches.

The powers to compel attendance exercisable by local and state authorities are largely the same (cf ss 118BA and 122S). However, it is a strange situation in that the EPA Act proscribes a penalty of 20 units ($2,200.00) for failure to comply with a notice under s 118BA, whereas failure to comply with a notice issued by a state authority is $120,000.00 for an individual with further daily penalties applicable.

THE OWNER MUST BE JOINED IN CIVIL ENFORCEMENT

***Ross v Lane Cove Council* [2014] NSWCA 50**

Raymond Ross made alterations and additions to a Northwood property contrary to a development consent granted by the Council. The Council sought and obtained orders from the Land and Environment Court that Mr Ross demolish unauthorised additions and reinstate the property in accordance with the consent.

However, during the proceedings in the Land and Environment Court, it became apparent that Mr Ross was no longer the registered proprietor of the property. There were suggestions that the transfer to the subsequent owner was a sham to divert responsibility, but the Court did not agree.

The Land and Environment Court then proceeded to make final orders against Mr Ross.

The Court of Appeal held that the orders gave a mandatory obligation on Mr Ross to demolish, rebuild and reinstate the property. He was rightly the person to be ordered to do so as he had caused the unauthorised works. However, permission to access the land to carry out those works would be required.

Further, the new owner would be directly affected by the Court's orders, and they needed to be afforded the chance to make their views known in relation to the orders sought by the Council.

It is therefore essential that a property owner be joined to any civil enforcement proceedings where a statutory authority is seeking orders for remedial work or the like that requires access to land. If owners change, the proceedings need to reflect that.

The reasoning here does not affect reasoning in the oft cited decision of *Wilkie v Blacktown City Council* [2002] NSWCA 284; (2002) 121 LGERA 444, where it was held at [36], that the EPA Act allows the court to make orders against only "*persons who are in breach of or who have breached*" the Act. It was also held in *Wilkie a*t [60] that s 124 of the EPA Act did not contemplate common criminal activities such as "*aiding or abetting*" or "*involvement in the contravention*".

This type of issue may also arise in situations of rubbish dumpers, hoarders, or any other unauthorised building works.

5. WITHDRAWAL OF GUILTY PLEA

***Pittwater Council v Brown Brothers Waste Contractors (No 2)* [2013] NSWLEC 219**

The respondents to a charge of contempt, being Brown Brothers Waste Contractors Pty Ltd ("BBWC"), and its only directors, Wayne Brown and Gary Brown, sought the leave of the Court to withdraw pleas of guilty entered by way of a Notice of Motion.

In earlier and related contempt proceedings that took place in 2009, where only BBWC was being charged, a plea of guilty was entered to the effect that the respondents had breached 2007 consent orders. As a guilty plea was entered, the Court was not asked to construe the 2007 consent orders at that time, and BBWC was fined a total of $45,000.

The charges arise from a failure to comply with consent orders made between BBWC and the Council on 9 August 2007 ("the 2007 consent orders").

The reason for the withdrawal was that, having regard to the proper construction of the 2007 consent orders underpinning the contempt charge, the respondents were in fact allowed to undertake the very activity purportedly giving rise to the breach as the orders conflicted with their rights pursuant to the development consent.

In refusing leave to withdraw the guilty pleas, Pepper J gave a detailed decision on the effect of a guilty plea. However, in doing so, the Court also traversed matters that turned the tenor of hearing of the motion, into a mini hearing on contempt.

The Court considered the withdrawal of the plea, having regard to these principles:

1. A court has a discretion to permit a change of plea at any time prior to sentence;
2. Whether a plea is allowed to be withdrawn is entirely a matter for the discretion of the Court;
3. Courts have emphasised that such applications must be approached with caution given the public interest in the finality of litigation;
4. there is no exhaustive statement of the circumstances in which pleas of guilty may be set aside. Each application will turn on its own facts; and
5. A broad test is whether a miscarriage of justice will result.

Further, the Court noted that:

> [96]… *leave should be granted where the plea has been entered pursuant to some material mistake or where the integrity of the plea is otherwise questionable or would lead to a miscarriage of justice.*
>
> …
>
> [101] *Thus it is necessary for an applicant seeking to withdraw a plea of guilty to advert to circumstances that created a doubt about his or her guilt, as well as circumstances that raise a doubt about his or her own perception, at the time the plea was entered, of his or her guilt. Put another way, what is important is an elaboration of the circumstances that might justify a conclusion that a plea of guilty was not attributable to a genuine consciousness of guilt.*

Applying those principles, the Court summarised its reasons for refusing to grant leave at [125] as follows:

> *(a) first, the terms of the 2007 consent orders do not permit, upon their proper construction, the storage of non-putrescible waste on the property. It is a breach of the 2007 consent orders that has given rise to the contempt charge and it is the interpretation of the terms of the 2007 consent orders, not the 1995 consent, that is determinative;*
>
> *(b) second, to grant the leave sought would in all the circumstances impermissibly impinge upon the principle of the finality of litigation; and*
>
> *(c) third, as the evidence discloses, the respondents were aware of the possibility that the 1995 consent and thus the 2007 consent orders contained*

> *a potential ambiguity and with this knowledge they nevertheless pleaded guilty to the charges both in 2009 and, relevantly, in 2011.*

In concluding on the potential miscarriage of justice, her Honour found that it was not a case where the respondents "*did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence*".