

NELR casenotes

being stored in an open yard on the site. Many containers were found to be rotting and collapsing. Although no actual harm to the environment was caused by Plastech's operations, the Court found that containers of hazardous and dangerous materials were stored in such a way that a significant pollution incident could have occurred.

The Court also found that there was no logical reason offered by Ms Buchanan as to why the conditions of the licence were not complied with and found that the Plastech business was conducted negligently, with inadequately trained staff on-site.

Although the Court found that Ms Buchanan was unlikely to re-offend, the Court fined her \$40,000 for the offence and ordered a daily penalty of \$500 per day for the continuation of the offence from the date the clean up notice was issued until the company was evicted from the site (being 78 days and totally \$39,000). Ms Buchanan was also ordered to pay the clean up costs for the site which totalled \$465,000, in addition to the EPA's costs of the proceedings being \$88,000.

Implications

Liability of directors and managers

This case serves as a reminder that the EPA will in certain cases prosecute a director or manager concerned with the management of a corporation that commits an offence against the *Protection of the Environment Operations Act 1997*. This year alone there have been four cases in the Land and Environment Court in which the EPA sought to convict either the director or manager of a corporation that committed an offence.

Bankruptcy and a defendant's impecuniosity

The Court, when it considered the appropriate penalty, expressly considered Ms Buchanan's ability to pay a fine. Ms Buchanan was a declared bankrupt, and at the time of the hearing she was also 64 years old with no assets, no job and at the end of her working life. In her decision, Pain J, re-affirmed the principle that a penalty imposed by the Court for an offence under the *Protection of the Environment Operations Act 1997* is a debt that survives bankruptcy. Notwithstanding the defendant's limited means to pay any fine, the Court held that there was a need to set a penalty beyond a nominal fine to act as a general deterrent, but that fine was to be balanced against the seriousness of the offence.

Accordingly, although Ms Buchanan will continue to be liable to pay the penalty if/when she is discharged from bankruptcy, the penalty awarded against her was reduced to take into account her limited financial means.

Amendments to fines under the Protection of the Environment Operations Act 1997

In 2006, amendments to the *Protection of the Environment Operations Act 1997* more than doubled the maximum penalty that could be ordered against an individual and quadrupled the penalty against a corporation. Cases which have been commenced under those new amendments started to appear before the Court in the middle of last year. The amendments have not resulted in a corresponding doubling or quadrupling of the fines ordered, but there is a trend towards higher penalties.

Although the fine that was awarded to Ms Buchanan was within the normal range for an offence of this nature, Ms Buchanan's total penalty (when including clean up costs, fines and legal costs) is well over \$500,000, making it at the very top end of the scale for penalties awarded against individuals.

Environment Protection Authority v Delta Electricity [2009] NSWLEC 11

By Ed Lee - Senior Associate Henry Davis York

There is a general presumption that the rule of law should apply equally to both the public and private sector. However, when it comes to litigation between government agencies there is a question of whether the costs involved are in the public interest. This tension is reflected in guidelines from the Premier Memorandum M1997-

26 Litigation involving Government Authorities. These guidelines apply to civil and criminal proceedings between government authorities but not State-owned corporations although the Memorandum suggests that prosecutors apply the principles nonetheless to SOCs.

In addition, the EPA has a general discretion when deciding whether to commence criminal proceedings, the application of which is described in its *Prosecution Guidelines*.

Delta Electricity

Delta Electricity is a statutory State-owned corporation and holds an environment protection licence for the Wallerawang power station. The Licence permits Delta to deposit various types of ash on the premises at the Kerosene Vale Flyash Repository. The Licence contains a general condition which requires that the “... premises must be maintained in a condition which minimises or prevents the emission of dust from the premises.”

The Wallerawang Power Station has a total capacity of 1,000 megawatts. Each month 50,000 tonnes of flyash is produced. Given the volume of flyash produced, specialised expertise is required to manage the stockpile.

The offence

Delta pleaded guilty to a charge that it breached its licence by allowing dust from the flyash stockpile to escape from the premises. At the time of the incident, Thiess Services was contracted to manage the flyash stockpile. Thiess was responsible for all aspects of flyash management including dust control, environmental controls, and bunds and retaining walls. Thiess changed operating procedures and decided that moistening the flyash stockpile, by water cart, would be a suitable technique. The person operating the water cart was sacked about three months before the incident. The mobile plant operator then became responsible for the pushing, rolling and cutting the flyash as well as operating the water cart.

On the day of the incident high winds were forecast. The mobile plant operator’s visibility was obscured due to the amount of flyash in the air. The mobile plant operator was given strict instruction not to contact Delta. Left with no alternative, he telephoned the Department of Environment and Climate Change’s environment line to report the dust problems. Residents in each of the nearby towns of Lidsdale to the west, Blackmans Flat to the north and Wallewerang to the south-west complained to the EPA about the dust problem on the day of the offence.

The Court’s findings

Justice Pain found that Delta was actively engaged in the management of Theiss’s services, which included two Delta employees on site to supervise the flyash stockpile. Her Honour also found that there were practical measures which could have been taken, but were not, to prevent and control the emissions of dust. Delta accepted responsibility for compliance with the Licence conditions.

In terms of seriousness of the offence, Justice Pain found that Delta’s culpability was low. While there was a visual impact caused by the offence, and a likelihood of harm as the dust settled on surrounding land, there was no evidence of actual environmental harm from the flyash. Importantly, her Honour found that the process and procedures that were being carried out on the flyash stockpile at the time of the hearing were adequate to prevent this event occurring again. Indeed, the Court held that Delta did not carefully manage the contract. Her Honour convicted Delta, fined the company \$45,000 and ordered the company to pay the prosecutor’s costs of \$35,000.

Implications

Notwithstanding the relatively low level and short term nature of the harm involved, and the fact that the evidence showed the offence is unlikely to re-occur, the EPA still prosecuted the defendant.

This shows that the motive of the prosecutor was one of general deterrence rather than the specific deterrence of Delta. Strict compliance with licence conditions is vitally important to manage the legal risks in carrying out schedule activities under the Act.