Federal

Karpany and Anor v Dietman Case No A18/2012, High Court

by Victoria Shute[1]

This matter concerns an appeal to the High Court from a decision by the Full Court of the Supreme Court of South Australia delivered on 11 May 2012[2] that overturned the acquittals of two Aboriginal men charged with offences under the *Fisheries Management Act 2007* (SA). Issues raised in this matter include the continuation or extinguishment of the native title right to take fish, and whether s 72(2)(c) *Fisheries Management Act 2007* (SA) is inoperative due to inconsistency with s 221 of the *Native Title Act 1993* (Cth).

The men were charged jointly with being in possession or control of 24 undersized Greenlip abalone, contrary to s 72(2)(c) of the Act. The charges were laid in the Magistrates Court of South Australia, and the defendants argued that they were entitled to take undersized abalone as s 221 of the *Native Title Act 1993* (Cth) rendered s 72(2)(c) of the state Act inoperative by operation of s 109 of the Constitution of Australia.

The Magistrate, in acquitting the defendants, determined that s 115 of the Fisheries Management Act triggered the operation of s 221 of the *Native Title Act* and, therefore, the defendants were not guilty of an offence. Section 115 states:

> Subject to this section, the Minister may, by notice in the Gazette – (a) exempt a person or class of persons, subject to such conditions as the Minister thinks fit and specifies in the notice, from specified provisions of this Act

The Full Court of the Supreme Court disagreed with the decision of the Magistrate and determined that the intent of the Fisheries Management Act and its predecessors was to place all persons, including Aboriginal persons under the regime of the statute and as such, the native title to fish was extinguished and replaced by statutory rights.

This matter has due to progress to a hearing before the High Court in late 2012, however the proceedings were placed on hold following the filing of the appellant's response to the application by the Commonwealth Attorney-General to intervene in the proceedings. Whilst the proceedings are still 'live', it remains to be seen whether the appeal hearing will occur or not.

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2 *Dietman v Karpany & Anor* (2012) 112 SASR 514

New South Wales

Environment Protection Authority v Aargus Pty Ltd; Kariotoglou; Kelly [2013] NSWLEC 19

by Sarah Froh[3]

This case is significant in relation to misleading conduct, company liability, publication orders and consultants' duties.

Mr Bonadio, the owner of a rural/residential parcel of land in Oakville, acquired two stockpiles of topsoil for landscaping works – one from a site in Glendenning and one from a neighbouring property. Compliance officers from Hawkesbury City Council identified in one of the stockpiles:

> numerous contaminants including but not limited to concrete, plastics, metals, roof tiles, bricks, tiles, terracotta pipe and fibre cement sheeting suspected of containing asbestos.

Mr Bonadio engaged Aargus Pty Ltd (Aargus) to assess and report on the stockpiles. Mr Kariotoglou, a project manager at Aargus, inspected the Glendenning stockpile in early October 2010. He prepared an Asbestos Clearance Certificate which declared the stockpile to be 'visually acceptable' and a Soil Classification Report which stated that 'no visible fibro pieces were observed.' Both of these documents were reviewed and countersigned by Mr Kelly in his capacity as 'Environmental Manager'. Mr Kariotoglou had removed two pieces of fibre cement, which he suspected to contain asbestos, for disposal. An analysis he commissioned of two soil samples from the stockpile did not identify the presence of asbestos.

When the stockpile was examined by Council and re-examined by Mr Kariotoglou later in October 2010, it was apparent that it contained asbestos materials. An inspection performed by EPA officers in November 2010, similarly revealed the presence of amosite and chrysotile asbestos.

Mr Kariotoglou, Mr Kelly and Aargus were charged with two offences against s 144AA of the *Protection of the Environment Operations Act 1997* (NSW) (POEO Act) for supplying 'false or misleading information about waste'. Pleading guilty, Mr Kariotoglou was fined $9,000 and 30% of the prosecutor's costs; Mr Kelly was fined $6,000 and 20% of the Prosecutor's costs; and Aargus was fined $30,000 and 50% of the prosecutor's costs.

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Misleading conduct

This judgment clearly prescribes that when asbestos or unacceptable waste is discovered on a site, it must be declared and accurately reported. The superficial removal of questionable material or altering a subject site and then reporting on the altered site will amount to misleading conduct under s 144AA of the POEO Act. However, in this case, Justice Craig agreed with the defendants that

> the manner in which Mr Kariotoglou assessed the stockpiled material was sufficient to justify so much of the Certificate as asserted that no asbestos materials were currently present.

This was largely due to the fact that the defendant presented expert evidence supporting Mr Kariotoglou's methods which the prosecution had failed to address.

Company liability for employee actions

This judgment reinforces the liability that a company can incur from the actions of its employees. Justice Craig stated:

> While, in a practical sense, it may be thought that Mr Kariotoglou exercised primary control over the document and responsibility for its contents, that control and responsibility is shared not only by Mr Kelly in the proper exercise of his reviewing function, but also by Aargus in the formulation of its policies and procedures for staff carrying out inspections and providing reports and certificates of the kind in question.

His Honour went on to say that:

> I am of the opinion that the highest penalty should be imposed on Aargus … it was the employer of Mr Kariotoglou and Mr Kelly whose actions in completing the report and the certificate as they did, are not said to be outside the scope of functions that they were required to perform on behalf of their employer. Aargus had the capacity by imposition of appropriate protocols and controls to ensure that any report or certificate issued in its name complied with the requirements of the POEO Act.

Notably, Aargus' culpability was further increased due to a prior conviction in 2003 for a similar offence.

Publication orders

This case highlights the circumstances in which publication orders sought under s 250(1)(a) of the POEO Act will be appropriate and in what form. The EPA sought an order that Aargus be forced to publish a notice in the *Sydney Morning Herald* and on Aargus' website stating that they had been convicted of the offences to which it pleaded guilty, the amount of the fine imposed upon it and a summary of the facts giving rise to the offence.

However, Justice Craig determined that:

> …the objective gravity of the offence is towards the low end of the scale. If it were at a higher level then there may be some justification for the course which the prosecutor advocates.

Role of consultants

Whilst Mr Kariotoglou appeared to suggest that his primary duty was to the client, stating that he saw his role as 'helping out the owner'. However, it is clear from the outcome of this case that the primary obligation of a consultant is to comply with environmental legislation.

EPA v Terrace Earthmoving PTY LTD and Page [2012] NSWLEC 216

by Sarah Mansfield[4]

In this landmark Land and Environment Court decision, Judge Craig shed new light on the meaning of the term 'waste'. Essentially, Craig J determined that discarded building material was not 'waste' because the material was 'wanted' and was to be used for a specific purpose.

Facts

Terrace Earthmoving Pty Ltd (Terrace) was engaged to construct an access road within a rural property. Construction occurred during 2005–07. The fill material used for the road construction was obtained from various construction and demolition sites that Terrace was working on. Although the composition of this material was the subject of some debate, it was said to consist of crushed rock, broken bricks and concrete (fill material).

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