

Government Reports and privilege Wallis Lake oyster contamination

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Background

In January and early February 1997, NSW Health began detecting higher than usual notifications for viral Hepatitis A in New South Wales. In the face of rising notifications, investigations were undertaken by NSW Health.

A pattern began to emerge. Oysters cultivated in Wallis Lake were suspected as the source of the outbreak. On 14 February 1997 the Department of Health issued a warning that Wallis Lake oysters were suspected in an epidemic of viral Hepatitis A. Oyster farmers voluntarily recalled their products from sale.

The Lake was closed for harvest for the remainder of the oyster harvest season. Subsequent NSW Health studies would reveal that more than 440 persons Australia wide contracted HAV as a result of consuming oysters cultivated in and harvested from Wallis Lake in the Christmas/New Year period 1996/97.

The Inter-Agency Taskforce

In the wake of the contamination episode, the NSW Government established an Inter-Agency Taskforce to investigate the episode and provide Government with an explanation of what had occurred, as well as recommendations for future action. The Government indicated that the findings of the Taskforce would provide the basis for a comprehensive whole of government response.

On 13 March 1997 Mr Grant Ryan commenced a representative proceeding on behalf of all persons who suffered personal injury, loss and damage as a result of the consumption of contaminated Wallis Lake Oysters. By October 1997, the State of New South Wales had become a respondent to those proceedings.

As time passed, the NSW

Government did not release the findings of the Inter-Agency Taskforce. Documents produced on subpoena by Departments participating in the Taskforce included draft contributions to the Taskforce report as well as minutes and agendas of meetings.

Before trial, the Applicant sought production by the state of the Taskforce report to the Government ("The Final Report"). The Applicant contended that the Final Report was likely to contain important material relevant to the cause of action in negligence that was being maintained by the Applicant against the State and the local Council. In many respects the Taskforce was in a unique forensic position, gaining unrivalled access to relevant material at a time when the trail of evidence was at its freshest.

Privilege claims

The State of New South Wales indicated that the document was a Cabinet minute and consequently claimed public interest privilege.

The matter was first considered by the Trial Judge, His Honour Justice Wilcox. Affidavit material provided by the Crown indicated that the Final Report comprised four parts. Firstly there was a Cabinet Minute prepared by the Minister for Health. This was an attachment to the minute "A" and three Appendices 1 -3. The evidence revealed that the matter had first gone to Cabinet in April 1998 when it had been adjourned to a date to be fixed.

His Honour, following well established principle enunciated in *Sankey v Whitlam*, refused access to the Cabinet Minute, Attachment A and Appendix 1, on the basis that these were clearly documents which had been prepared for and formed part of the Cabinet decision making process and were properly privileged.

Appendix 2 was a report written by the Department of Health, "in accordance with the usual practice of the Department of Health in responding to food-borne disease outbreaks in NSW". Appendix 2 was the final NSW Health Epidemiological report. His Honour granted access to Appendix 2.

Appendix 3 became the subject of controversy. It was a discussion of existing oyster industry safeguards. It was observed by His Honour during the course of argument and later during judgement, that it contained observations critical of the State Government. Before Justice Wilcox, the Crown claimed privilege over the entire document. His Honour refused the Crown's application and ordered production of the document.

As the time for production approached, the Crown sought a stay of His Honour's order. A full bench was convened. On the day following his Honour's determination, the Crown argued before a full bench comprising Justices Burchett, Hill and Madgwick that parts of the Appendix 3 should not be produced.

It became apparent during argument that the Crown had not submitted to Justice Wilcox the alternative of expunging parts of the Appendix. On the basis that the trial of the matter was imminent and in order to have the matter fully ventilated at first instance, the Justices remitted the matter to Justice Wilcox. His Honour was invited to consider whether those parts (now identified as offensive by the Crown) should be expunged and the document otherwise produced.

Justice Wilcox declined to follow that path and the matter returned to the Full Court.

The Full Court ultimately decided to vary Justice Wilcox's initial order granting access to the whole of Appendix 3. The

State was not required to produce those passages that it wished to expunge. In the course of judgment, the Full Court made the following observations: -

- Emphasis must be given to each phrase within a document over which privilege is sought. The significance of each passage in the context of the prosecution of the claim should be considered, not simply the tenor of the document as a whole. The Full Court considered the evidence before Wilcox J to indicate that the disputed passages were of limited forensic significance in the case.
- In a case where the Court has to weigh competing public interests, it is required, in doing so, to give weight to the assertion of a government representative that there is a public interest that would be jeopardised by producing the document. The full court accepted that the disputed passages contained recommendations which justified the claim for privilege and which may have been the basis for a cabinet discussion.
- An error in principle was made by the primary judge in failing to weigh the significance of the material in question in the context of advancing justice in the litigation as compared with the public interest in withholding cabinet documents.

The Full Court held that His Honour's exercise of discretion was miscarried. Those passages of the Appendix 3 were not produced. The Applicant never gained access to the full text of the Final Report.

Postscript: On Friday 8 March 1999, Justice Wilcox delivered judgment in which he found for Mr Ryan against the Great Lakes Shire Council, Graham Barclay Oysters and the State of New South Wales. Justice Wilcox held each respondent equally culpable in negligence. Mr Ryan was awarded \$30,000 in damages. ■

Poisoned oysters legal win

By **AMANDA PHELAN**
and **PHILIP CORNFORD**

NSW taxpayers may face a \$7.5 million bill after four people who ate poisoned Wallis Lake oysters won a major damages payout yesterday.

The Federal Court awarded \$30,000 to Mr Grant Ryan, a Quakers Hill plumber, saying the State Government, Great Lakes Council and Australia's biggest oyster grower, Graham Barclay Oysters Pty Ltd, were negligent.

Mr Ryan, whose claim represented 185 similar cases, contracted hepatitis A during an epidemic of the disease in 1977. At least 400 people suffered from the deadly virus after eating the contaminated oysters and one man died.

Mr Ryan, a father of four, was delighted with his victory, his lawyers said yesterday.

Speaking outside court, Mr Andrew Grech, from Slater and Gordon, called for the settlement of outstanding claims, saying he had 250 clients who had suffered as a result of the oyster disaster.

These claims represented about \$7.5 million, he said.

Mr Grech said the decision of Justice Murray Wilcox should act as a stern warning to the

government, councils and oyster farmers to comply with strict rules on the hygiene of food.

Justice Wilcox said his award of \$30,000 to Mr Ryan should help to "assist agreement" with outstanding claims.

"It was common ground that the hepatitis A epidemic was caused by the victims consuming oysters contaminated by the hepatitis A virus, and that this stemmed from widespread human faecal pollution of the waters of the lake," he said.

Wallis Lake was poorly managed, and breached a number of National Health and Medical Research Council guidelines, he said. Oysters act like filters, and "clean water is essential for the industry to exist and prosper".

Justice Wilcox accused the local council of ignoring many complaints over septic tank waste polluting waters that flowed into the lake. Health Department inspectors had identified 67 septic tanks which discharged directly into waterways or represented "high" and "medium" risks of pollution but had taken no action.

The Oyster Farmers Association of NSW Ltd challenged the State Government to release immediately a "secret" report on the Wallis Lake incident.