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).

4 Lawyer, Henry Davis York

As a consequence of the transportation and use of the fill material, Terrace and its sole director, was charged with unlawfully transporting waste under s 143 of the POEO Act. The current maximum penalties imposed by s 143 are $1,000,000 in the case of a corporation and $250,000 in the case of an individual.

Relevant findings

The key question before Craig J was: Did the fill material constitute 'waste', as that term is defined in the POEO Act?

The definition of 'waste' relevantly includes:

> (b) any discarded, rejected, unwanted, surplus or abandoned substance

Craig J determined that the fill material was outside of the scope of (b) on the basis that it was 'wanted' for a specific purpose (being for the use in the construction of an access road) and therefore could not be said to be discarded, rejected, unwanted, surplus or abandoned.

As the fill material was not 'waste', Craig J concluded that the defendants could not be said to be guilty of unlawfully transporting 'waste'. On this basis, the defendants were found not guilty.

Implications

Instead of just looking at what the material is, consideration is to be given to the particular intentions of the end user. As a consequence, what is 'waste' in the hands of one, may not be in the hands of another. This makes the regulation of 'waste' under the POEO Act more complex, and potentially prosecutions for waste related offences generally, less clear cut.

In terms of s 143, if a material is being transported for a specified purpose, the transportation of that material will not constitute the transportation of 'waste'.

It should also be noted that the EPA chose to prosecute the contractor (and its director), rather than the head contractor, being the individuals who commissioned the works. This is consistent with a relatively recent change in approach for the EPA, which we understand has been adopted in order to create a greater deterrence effect amongst industry. Obviously this strategy back-fired for the EPA in this instance.

Toner Design Pty Ltd v Newcastle City Council [2012] NSWLEC 248 by Anneliese Korber[5]

This case deals with the interpretation of 'contaminated soil treatment works' under the *Environmental Planning and Assessment Regulation 2000* ('EP& A Regulation'), the scope of the exemption under the cl 37A exemption in Schedule 3 and the definition of 'treatment' of contaminated material in the Regulation.

Toner Design Pty Limited ('Toner') sought to develop a contaminated site in Birmingham Gardens, Newcastle, by remediating a portion of the site to facilitate a seniors living development and using another portion of the site for the containment of the contaminated soils excavated as part of the development. Toner submitted a development application ('DA') to Newcastle City Council ('Council') to this effect on 20 December 2010.

A Remedial Action Plan ('RAP') dated August 2010 indicated that the site, in its present state, posed no risk to the environment or neighbouring properties, and that its remediation was not an 'environmental imperative.'

The Statement of Environmental Effects ('SEE') prepared in June 2011 stated that the site did not require remediation for it to remain unoccupied; however, it would require remediation for any residential occupation of the site, such as a seniors living development.

In March 2012, Council refused the DA on several grounds, including contamination, flooding, unreasonable impacts and that it was contrary to the public interest.

Toner appealed and in October 2012, Council asserted for the first time that the proposed development was 'designated development' and, therefore, consent could not be granted until an environmental impact statement had been prepared and exhibited in accordance with the EP&A Act.

5 Senior Associate, Henry Davis York