

A REMINDER ON CHEMICAL SPILLS

The Protection of the Environment Operations Act 1997 provides for a number of offences in the case of spills or escape of substances that harm or are likely to harm the environment. A person is guilty of an offence if he wilfully or negligently causes any substance to leak, spill or otherwise escape where such harm to the environment occurs or could occur, and if such person is not the owner of the substance, the owner of the substance is likewise guilty.

Further, if:

- (a) the person in possession of the substance at the time of the leak spill or other escape, or
- (b) the owner of any container from which the substance leaked spilled or escaped; or
- (c) the owner of the land on which the substance or any such container was located at the time of the leak spill or other escape, or
- (d) the occupier of the land on which the substance or any such container was located at the time of the leak spill or other escape

wilfully or negligently caused or contributed to the conditions that gave rise to the commission of the offence, that person owner or occupier is also guilty of an offence.

The case of *Environment Protection Authority v Warringah Golf Club* is a reminder to farmers of the responsibilities that attach to the use of chemicals. In that case, spraying equipment of the Golf Club had malfunctioned. It was repaired in the workshop which had a concrete floor; however chemical was spilled onto the concrete floor when being removed from the equipment. There was no bunding installed to contain any spill. The chemical spill was hosed

down with the chemical and water passing through a stormwater grate and pipe into Brookvale Creek. Shortly after the spill, dead fish were noticed in Brookvale Creek and then in Manly Lagoon. Approximately ten thousand fish were killed, as were birds and other wildlife.

The court found that the Club's employee either wilfully or negligently hosed the poisonous chemical off the concrete slab in circumstances where no adequate measures were taken to prevent discharge into the creek. The Court also found the Club negligent due to its failure to take reasonable care as occupier to guard against the foreseeable escape of polluting material – and this extended to the Club's failure to publish and adequately enforce written policy or guidelines for the handling of chemicals.

Farmers would be aware of their obligations concerning the handling of chemicals and should, if they have not already done so, implement and enforce a written policy concerning the handling of chemicals and ensure that the physical environment in which chemicals are handled is not such as would be likely to facilitate the discharge of polluted material in a way that harms or is likely to harm the environment.

WHAT'S HAPPENING WITH LAND VALUATIONS?

How is irrigation land being valued in areas where water sharing plans have commenced and water rights are no longer "attached" to the land. Logically, one might assume that rating will occur on the land value only, exclusive of the value of the now "detached" access licence being used on that land.

That, however, has not occurred. Because of the likely disruption to councils and landholders generally in having a council rating regime based solely on dry land values, a provision (Schedule 8.29[10]) has been included in the Water Management Act 2000 (the licensing provisions of which commenced on 1 July 2004) which amends the Valuation of Land Act to provide that the "old" provisions of the Valuation of Land Act (which included in the value of the land the value of the water right attached to the land) continue to apply as if the new access licence created on the

commencement of the licensing provisions of the Water Management Act were a water right (of the "old" type) attached to the land on which the water was being used.

This provision of the Water Management Act which amends the Valuation of Land Act will cease to apply on a date to be gazetted. If such gazettal occurs, the value of the access licence will no longer be taken into account for land valuation purposes.

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CATTLE AT LARGE

The July 2004 NSW Court of Appeal case of *Cargill Australia Limited v Parsons* dealt with an appeal from the decision of the judge at first instance who awarded Mrs Parsons damages of \$560,300.00 when she was injured after the car she was driving collided with a Santa Gertrudis steer.

The facts, briefly, were that when a mob of cattle containing the Santa Gertrudis steer was being moved by Cargill stockmen from saleyards to Cargill's abattoir, the steer jumped a fence, ran up a lane and jumped another fence into a paddock. The stockmen found the steer in the paddock approaching sunset and, rather than endeavouring to move it and upset it further, decided to leave it where it was, because in an adjoining paddock there were other Santa Gertrudis steers drinking at a trough. There was an open gate and a fence between the steer and the drinking cattle and the stockmen believed that, given the strongly gregarious nature of the Santa Gertrudis breed, it was likely that the steer would go through the gate and stand near the drinking cattle, jumping the fence to be with them if they moved off.

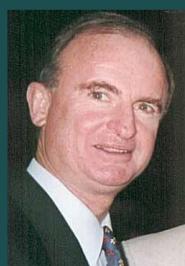
As it turned out, the steer did not act in the way the stockmen anticipated because, after they had left it, it had wandered away and jumped two more fences before it was struck on a roadway by Mrs Parson's car.

There have been a number of decided cases where graziers, whose livestock have escaped through damaged fencing or open gates, have been found guilty of negligence and have had damages awarded against them when the livestock have been struck by vehicles, causing damage to vehicles and/or injury to occupants. However, Cargill, in this case, appealed the decision on the

basis that there was no negligence on the part of its stockmen and that, accordingly, the damages verdict should be overturned.

Experts had been engaged by both Cargill and Mrs Weston and in the main they agreed in their evidence as to the way in which the steer should have been handled by the stockmen, save that the expert engaged by Mrs Weston said that the best husbandry practice would have been to take a small number of cattle into the paddock to meet up with the lone steer (this would help to calm the steer) and then collect the mob in the morning. The expert of Cargill submitted that there was only about one hour of daylight left and that further problems could be caused if any stock movement were unfinished at sunset. Accordingly, he said, the stockmen's actions were appropriate.

Whereas the Judge at first instance elected to accept the opinion of Mrs Weston's expert, the Court of Appeal concluded that even if the course of action proposed by that expert were followed (that is, the introduction of a small number of cattle into the field where the steer was) that would not necessarily have meant that the animal would not escape; escape was certainly possible in the time it would take to bring such small mob of cattle to the field, and may have occurred thereafter. The Court of Appeal, therefore, decided that the stockmen were not negligent in the way they dealt with the steer and overturned the award of damages.



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UNAUTHORISED CLEARING A COSTLY OFFENCE

In October, the Federal Court of Australia handed down judgement in a long standing set of proceedings concerning the clearing of native vegetation in an area classified in accordance with Australia's international treaty obligations as a protected wetland. In these proceedings, the Minister for the Environment and Heritage ("the Minister") sought orders requiring the payment of pecuniary penalties and other relief under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the EPBC Act").

In June 2004 the court had found that the Farmer and the company controlled by him ("the Company") had contravened section 16(1) of the EPBC Act by taking action that had a significant ecological impact on a component of the Ramsar Gwydir Wetlands part owned and controlled by the Farmer and the Company ("the Site"). The court found that in February 2003, the Farmer gave instructions to clear and plough an area of land on the Site in preparation for a seedbed; by July the area had been sown to wheat. The court also found that prior to the clearing in February 2003, the Site had lost some of the attributes of a pristine wetland by virtue of fire and the spread of exotic weed. However, at that time the Site retained the potential to recover quickly and still possessed important wetland attributes. Importantly, the court found that the actions of the Farmer and the Company effectively cleared the whole of the Site and had a significant impact on the ecological character of the area.

Given these findings, the later hearing centred on the issue of the appropriate penalties to be imposed on the Farmer and the Company for their contravening conduct.

Penalties

Section 481(3) of the EPBC Act provides a non-exhaustive list of matters that are to be taken into account by the Court is determining an appropriate penalty. The Court considered the following factors enumerated in section 481(3) in making its judgement:

- (i) The 'nature and extent of the contravention[s]'
The Farmer and, through him, the Company gave instructions for virtually the whole of the Site to be cleared and ploughed while knowing the Site was protected under the EPBC Act and that the clearing



and ploughing of the Site would give rise to a contravention of the EPBC Act. The contraventions of section 16(1) were deliberate and precisely the type of conduct that the legislation is intended to prohibit. The contravening conduct was not isolated and in fact took place over a period of time.

- (ii) The 'nature and extent of any loss or damage suffered as a result of the contravention[s]'
The Court took into account the fact that the Site was not a pristine wetland prior to the contravening conduct taking place in February 2003. Notwithstanding its degraded state, the actions of the Farmer and the Company caused significant ecological damage to the Site. Of significance was the designation of the site in the List of Wetlands of International Importance.
- (iii) The 'circumstances in which the contravention[s] took place'
While neither the Farmer nor the Company reaped a substantial financial benefit from the development of the Site the contravention was part of a commercial operation and as such the contravening conduct could not be divorced from its commercial motivation.

- (iv) 'Whether the person had previously been found by the Court in proceedings under this Act to have engaged in any similar conduct'

Neither the Farmer nor the Company had been found to have engaged in similar conduct and this factor weighed in their favour.

In relation to the imposition of an appropriate penalty, the Court further took into account a number of additional factors, including the importance of ensuring the penalties imposed acted as a deterrent to the respective parties in these proceedings and others who might contemplate taking action which could harm the ecological character of such a wetland; the lack of contrition shown by the Farmer or the Company; the substantial assets of the Farmer that demonstrated a capacity to pay any penalty imposed; and the fact that the Farmer was the sole director and shareholder of the Company and the desire to avoid the Farmer being double punished for the contravening conduct.

Having regard to the abovementioned factors and the maximum civil penalties that may be imposed for a contravention of section 16(1) (\$550,000 for an individual

and \$5,500,000 in the case of a body corporate), the Court imposed a penalty of \$150,000 on the Farmer and \$300,000 on the Company.

The decision is a clear message that farmers considering operations that may involve the clearing of native vegetation should first ensure that they are complying with the rules set down by the relevant statutory authorities and fully cooperate with the relevant Departments. In particular, they should be aware of the potential for such vegetation to form part of an area protected by virtue of Australia's international treaty obligations designed to preserve a range of designated flora and fauna. This case shows that merely because a particular area has suffered natural degradation will not preclude an action being taken against a farmer who causes further detriment to the ecological significance of a particular area.

In this case, Commonwealth legislation applied because the offence occurred in relation to wetlands protected under Australia's treaty obligations. For other lands in NSW not so protected, NSW native vegetation conservation legislation applies.

IRRIGATORS' ASSOCIATIONS – PROTECTING EXECUTIVE COMMITTEE MEMBERS AGAINST PERSONAL LIABILITY

Irrigators' associations are usually set up as either unincorporated associations or incorporated associations; in the latter case, in New South Wales, incorporated under the *Associations Incorporation Act 1984* (NSW). Their membership is usually made up of local landowners, with members' liability proportionate to their landholdings, and with an executive committee to manage the day-to-day affairs of the association and to deal with matters of policy, subject sometimes to oversight or veto powers by the members in general meeting. Though the members' ultimate personal liability is relatively clear, what is the liability position of those forming the executive committee? Kemp Strang has recently had occasion to consider this issue.

For incorporated associations, case law has decided that the position of executive committee members is akin to that of company directors. Being in a position where others rely on them, the law classifies them as "fiduciaries". As such, and like directors, they have a duty to act in good faith in the best interests of the association or their members as a whole, and to use reasonable skill and diligence for a person in like circumstances and in a like association.

In unincorporated associations, unless the evidence clearly indicates that personal liability of each member was intended, a similar position operates. An added layer of complexity can also operate if the some of the executive committee, or others, are appointed as trustees and/or agents to act for the association and/or own the association's property. These persons too will ordinarily be acting in a fiduciary capacity, with possible personal liabilities.

Personal liability may also arise for insolvent trading, and under certain occupational health and safety and environmental protection legislation.

Some of these personal liabilities can be protected against. For a start, executive committee members (and trustees/agents, where appointed, in an unincorporated association context) should ensure that an equivalent directors and officers insurance policy is in place. Public liability insurance can also ameliorate the impact of the occupational health and safety and environmental protection exposures. Executive committee members should also look to their association's rules or constitutions to ensure that they are fully and effectively indemnified to the maximum extent permitted by law. These measures however will not benefit the executive member who acts illegally or in bad faith.

If you would like us to review your rules or constitution in the light of recent developments, please contact us.

LEGAL BRIEFS

Visiting clients in Moree, the lawyer stayed at the local hotel and had bacon for breakfast, ham for lunch and pork for dinner. After dinner, he asked for a cup of tea and the waitress informed him: "We only have bore water", to which the lawyer replied: "By gee, you don't waste much of the pig."

Acknowledgement *The Sydney Morning Herald*