Prosecution Bulletin no. 5/2014

Summary

- The Litigation Unit has recently been successful in defending two appeals against prosecutions which occurred in 2013.
- The original prosecutions occurred in the Cairns Magistrates Court on 12–14 August 2013 and the Ipswich Magistrates Court on 7-8 February 2013 respectively.
- In both prosecutions the defendants were found guilty of all charges and fined.
- Both defendants brought appeals against the convictions of guilt and sought to have the original decisions overturned.

Facts

Case 1

The defendant company owned a large property near Atherton in North Queensland. The Department of Environment and Heritage Protection (the department) received reports of dead birds on the property and executed a warrant on 24 June 2011. During the warrant more than 50 bird carcasses were found as well as corn kernels in small piles on the property. The corn kernels were tested and found to contain high levels of the pesticide fenamiphos.

The defendant company was subsequently charged with one offence against s. 88(2) of the *Nature Conservation Act 1992* for the unauthorised taking of a protected animal, namely 10 or more brolgas.

The matter was heard on 12-14 August 2013 before the Cairns Magistrates Court. The Court found that:

a. the death of the birds was the result of poisoning by the chemical fenamiphos;
b. the birds were located on the defendant company's property;
c. there was no break in the chain of custody;
d. the number of samples taken were reasonable in light of the condition of the birds;
e. the testing of the birds was conservative, precise and vigorous;
f. the defendant company had control over the property to exclude others;
g. an agent or employee of the defendant company put the contaminated corn on the property;
h. the fact that no chemicals were located on the property was of no evidentiary significance;
i. it is not clear what the intention was, whether there was intent to kill birds or some other animal;
j. that 52 brolgas died as a result of consuming the contaminated corn.

The defendant company was subsequently fined $10,000 and ordered to pay $3,250 in legal costs, plus $5,000 for the conservation value of the wildlife.

Case 2

The defendant was the sole director, secretary and shareholder of a co-defendant company. The company operated a sand quarry under a development approval.

The defendant was subsequently charged with 11 offences against s. 493 of the *Environmental Protection Act 1994* for failing to ensure that the company complied with the Act on 11 occasions when it wilfully contravened a development condition of a development approval, which prohibited the release of contaminants (sediment) from the site into waters; wilfully contravened an Environmental Protection Order, which required it to improve onsite water management issues by reinstating and stabilising extraction pit walls at various locations on site; and failed to comply with an authorised person's direction in an emergency, which required it to reinstate extraction pit walls at various locations.

The matter was heard on 7–8 February 2013 before the Ipswich Magistrates Court. The Court found that:

a. the defendant did not undertake any works to fix the issues at the site;
b. his decision not to undertake works was motivated by his refusal to spend any money on rectifying the site;
c. no remorse was demonstrated by his failure to take action, and his refusal to cooperate with the department or appear in court.

The defendant was subsequently fined $75,000, and ordered to pay $1,531.73 for investigative costs. A conviction was recorded.

Outcome

Case 1

The appeal against Case 1 was heard in the Cairns District Court on 23 January 2014. Judge Everson upheld the original conviction and found that the Magistrate had not erred in making the original decision.

The defendant argued that the department's case against it was entirely circumstantial, and that the department had not proved the defendant's guilt beyond reasonable doubt.

The Court, in dismissing the appeal, found that *"in all of the circumstances there was an abundance of evidence to justify the conviction of the appellant beyond reasonable doubt of taking 10 or more brolgas without authorisation".*

Case 2

The appeal against Case 2 was heard in the Southport District Court on 20 February 2014. Judge Wall upheld the original conviction and fine, and found that there were no grounds for the appeal.

The defendant argued that there were seven grounds of appeal, including that the co-defendant company was insolvent at the time of the offences, or alternatively that he had previously sold the company to another person, and that therefore he was not responsible for the company's actions.

The Court, in dismissing the appeal, found that none of the various grounds of the appeal were made out by the defendant. The Court upheld the original decision and fine of $75,000.

The successful prosecution of the two matters in the first instance, and the subsequent dismissal of both appeals confirms the department's best practice evidence based approach in deciding to proceed to prosecution, and willingness to defend those prosecutions in the higher courts.

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