

Hazardous waste prosecution involving batteries thrown out

The Australian courts are no strangers to prosecutions for offences by parties in international shipping and trade, but sometimes criminal prosecutions in this sector fail, writes **Derek Luxford**

PROSECUTIONS OF ENVIRONMENTAL

offenders under the little known *Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal* are rare internationally. Until 2017 there had been none in Australia for alleged breaches of the Convention given force in Australia by the Hazardous Waste (Regulation of Exports and Imports) Act 1989.

In July 2019 the New South Wales Local Court at Parramatta dismissed the prosecution against an Australian exporter of scrap lithium ion batteries from Australia to Belgium on the basis the prosecution had failed to lead any evidence that the batteries constituted “hazardous waste”. The judgment is *The Commonwealth Director of Public Prosecutions v Sims E-Recycling Pty Ltd*, a judgment of Local Court Magistrate Keady. It was the first prosecution under the Act in Australia. The prosecution made clear that it was bringing the case to obtain a judicial ruling on the relevant offence provisions under the Act because there was no precedent.

THE LEGAL FRAMEWORK

The purpose of the Convention is to control the international movement of hazardous wastes with a view of preventing harm to people and to the environment. Section 3 of the Act reads: “*The object of this Act is to regulate the export, import and transit of hazardous waste to ensure that exported, imported or transited waste is managed in an environmentally sound manner so that human beings and the environment, both within and outside Australia, are protected from the harmful effects of the waste.*”

In order to export a hazardous waste from Australia the exporter needs to apply

for a special permit. Exporting hazardous waste without a permit is a breach of the Act (s.40). Significantly the Act does not define hazardous waste as such, rather it leaves it to the Convention. There are voluminous lists of hazardous and non-hazardous wastes in the various annexes and appendices to the Convention and the related OECD Decision with some overlap. There are many substances which are defined as hazardous waste including, for instance, the heavy metals cadmium and mercury. Also, there is a list of characteristics which may render the substance hazardous such as a tendency to explode. Importantly, we should note, lithium ion batteries are not mentioned anywhere in any of this voluminous material as being hazardous waste.

THE FACTUAL BACKGROUND

The Australian exporter contracted with a Belgian company to export by sea quantities of scrap lithium ion batteries for recycling in Belgium. The batteries were individually packed into drums and placed inside four shipping containers. Three shipments of these containers holding many thousands of scrap batteries were shipped from Sydney to Antwerp, Belgium, in mid-2016.

Applying for an export permit is complex with detailed information to be provided by the exporter to the administering authority of the Convention in the exporting and importing countries as well as to all the countries on the sea transit route (six in this case). Each of those authorities must approve the movement of the waste. This was duly done.

The Commonwealth Department of the Environment, as it was named at the time,



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which administers the Act in Australia issued an export permit to the exporter in March 2016 containing particulars prescribing the manner in which the scrap batteries were to be packed, the maximum weight of the total consignments, the route the shipments were to take and various other details which had been set out by the exporter. The Department approved the application, as it had done with a prior shipment of the exporter's scrap lithium ion batteries to the same company in Belgium. It is not as if the Department came up with its own particulars, rather it approved the particulars the subject of the application.

SCRAP BATTERIES ABLAZE

Unfortunately, in June 2016 the second shipment comprising two containers of the scrap batteries caught fire during cargo trans-shipment while the vessel was in port in Colombo, Sri Lanka during carriage of the containers to Belgium. Investigations pointed to the cause of the fire being inadequate cargo handling and stowage of the containers in the vessel. Scrap lithium ion batteries must be carried on deck pursuant to the IMDG Dangerous Goods Code. Unfortunately, the containers were carried below deck and it was during the process of being moved from below deck onto the quay and then back below deck in Colombo that the fire occurred. There was no harm to people nor the environment, which the Act and the Convention are designed to protect.

THE PROSECUTION

After the exporter informed the Department of the incident, the Department investigated. It decided there had been a breach and sent a brief to the CDPP which began proceedings against the exporter in July 2017 alleging negligent breach of the permit. A finding of breach could have resulted in hefty fines against the exporter.

The exporter pleaded not guilty and strenuously refuted the allegations. It is a prerequisite to obtaining an export permit under the Act that the goods being exported are "hazardous waste". This was an essential element of the offences alleged under section 40 (2) of the Act. Apart from denying each of the alleged offences the exporter took the position that the scrap lithium ion batteries were not hazardous waste within the meaning of that term in the Act, the Convention and the Decision. As a matter of law if there was no evidence

the batteries were hazardous waste as a matter of construction of the legal regime, the prosecution would fail on the basis there was "no case" for the defence to answer.

At the end of the prosecution's evidence the defence asked the magistrate to rule there was no case to answer. The only evidence to establish the scrap lithium ion batteries were hazardous waste were two administrative employees of the Department who had been involved in the permit application process and who had no personal expertise or training in relation to hazardous waste or industrial chemistry. No expert evidence was called.

Interestingly the prosecution called evidence from a senior manager of the exporter with training and experience in industrial chemistry and who had been closely involved in the export application process and in supervising the packing and preparation of the scrap batteries into the containers, who gave evidence the batteries were not hazardous waste and rather fell within the categories of non-hazardous

"hazardous waste". It was crucial to the judgment that the magistrate held the evidence of the Department's employees that the batteries were hazardous waste was purely an opinion based on assumptions and that it was not evidence that the batteries were hazardous waste, and that no such evidence was provided.

The magistrate commented that to the contrary, the exporter's employee called as a witness by the prosecution told the court that the batteries were not hazardous waste under Convention code A 1170, the very code specified by the Department in the permit.

The judgment of the Local Court does not mean lithium ion batteries are not hazardous waste. However, it is a clear finding that if the prosecution wants to establish that a particular substance is hazardous waste, then the prosecution must lead convincing evidence that the substance is hazardous waste. The fact the prosecution called no evidence, as found by the magistrate, was conclusive that there was no case to answer.

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waste where an export permit is not required. The exporter through that same employee had conveyed that view to the Department in its previous application for an export permit.

THE JUDGMENT

The magistrate concluded the prosecution, which had to prove that the batteries were hazardous waste on the criminal burden of proof of beyond reasonable doubt, had provided no evidence the batteries were hazardous waste and hence failed to establish an essential element of the alleged offence. Therefore, the prosecution failed. In the light of his finding on the prima facie case the magistrate did not need to hear evidence from the exporter. The exporter had pleaded not guilty to those charges.

IMPORTANCE OF THE JUDGMENT

The judgment contains succinct observations on the objectives of the Act and examination of the meaning of

The judgment establishes that in order to assert a particular substance is hazardous waste the regulator must do more than make assumptions, it must make adequate inquiry as to why the substance is hazardous waste. In other words, the regulators and the prosecution must do their homework by making diligent inquiry and providing sufficient admissible evidence of what is hazardous waste.

DISMISSED WITH COSTS

After having the prosecution dismissed the exporter applied for an order that it be paid its professional costs for its successful defence. Under section 214 of the NSW Criminal Procedures Act 1986 professional costs can only be awarded against the prosecution in limited circumstances.

Such costs are rarely awarded to successful defendants in criminal proceedings.

The magistrate held the criteria of section 214 had been made by the exporter and awarded significant legal professional costs. ■