Australian court throws out hazardous waste case

A lack of evidence sealed the fate of a recent hazardous waste case in Australia, as **Derek Luxford** reports

Prosecutions of environmental offenders under the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal are rare. An Australian court recently threw out a prosecution against an Australian exporter of scrap lithium ion batteries from Australia to Belgium on the basis that the prosecution had failed to lead any evidence that the batteries constituted "hazardous waste" within the meaning of that term under the Australian Hazardous Waste (Regulation of Exports and Imports) Act 1989 (HWA) which incorporates the Convention and the related OECD decision into Australian domestic law.

The judgment was a decision of a magistrate in the Local Court of New South Wales in Sydney. It was the first prosecution under the HWA in Australia. It is sometimes said that it is very difficult for a corporate defendant facing an environmental regulatory prosecution to succeed in a criminal prosecution. This judgment demonstrates this is not necessarily so and reiterates a basic principle of criminal law namely that the prosecution must prove its case beyond reasonable doubt. Although the judgment was very much based on the unusual facts of the case and the specific provisions of the HWA and its subordinate regulations, the fact that the Convention and the decision form part of the matrix of the judgment makes the case of wider importance than it might otherwise seem.

The legal framework

As its title indicates, the purpose of the Convention is to control the international movement of hazardous wastes with a view to prevent harm to people and to the environment. Section 3 of the HWA puts it in these terms: "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." To export a hazardous waste from Australia the exporter needs to apply for a special permit pursuant to the HWA. There are voluminous lists of hazardous and non-hazardous wastes in the various annexes and appendices to the Convention and the decision with some overlap between them albeit there are a large number of substances which are specifically defined as hazardous waste including for instance the heavy metals cadmium and mercury. Also, there is a list of characteristics which, when found in sufficient quantity, may render the substance hazardous such as a tendency to explode. Importantly lithium ion and lithium ion batteries are not mentioned anywhere in any of this voluminous material as being hazardous waste. Significantly the HWA does not define hazardous waste as such, rather it leaves it to the Convention and the decision.

The factual background

The Australian exporter wanted to export quantities of scrap lithium ion batteries for ultimate recycling in Belgium. The batteries were individually packed into drums and placed inside shipping containers. Several shipments of containers were prepared pursuant to the contract between the exporter and the Belgian importer. The process of applying for an export permit is very complex with detailed information to be provided in various forms which are sent 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 (half a dozen in this case). Each of the authorities (called competent authorities) in each of those jurisdictions has to give its approval to the movement of the waste. This was duly done.

The Australian Department of the Environment, which administers the HWA in Australia, issued an export permit to the exporter in March 2016 containing particulars prescribing the manner in which the batteries were to be packed, the maximum weight of the total consignments, the route the shipments were to take and various other details nearly all of which had been set out by the exporter in its application. It is not as if the Department came up with its own particulars, rather it approved the particulars the subject of the application.

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Unfortunately, the second shipment comprising two containers caught fire during cargo trans-shipment activities while the vessel was in port in Colombo, Sri Lanka. Investigations subsequently carried out on behalf of the exporter pointed to the cause of the fire being inadequate cargo handling and stowage of the containers in the vessel. Importantly, the sea carrier knew that the cargo was scrap lithium ion batteries and as such they had to be carried on deck pursuant to the relevant classification (Class 9) under the IMDG Code. Unfortunately, the containers were carried below deck and it was in the process of being moved from below deck onto the quay and then back below deck in Colombo where the fire occurred. It seems likely that the containers were dropped during that process and that led to the fire notwithstanding the very detailed individual packaging safety precautions taken by the exporter in packing the batteries.

The prosecution

After the exporter had informed the Department of the incident, the Department carried out its own investigations to ascertain

whether there had been a breach of the export permit. It formed the view that there had been and commenced proceedings in July 2017 alleging negligent non-compliance with the export permit. A finding of breach would have resulted in hefty fines being levied against the exporter. The exporter pleaded not guilty to all charges. It is a prerequisite of the need to obtain an export permit under the HWA that the goods being exported are "hazardous waste". This was an essential element of the offence alleged under section 40 of the HWA.

The prosecution had a chequered history of various interlocutory applications, delays and appeals and it finally went to trial in March 2019. Apart from denying each of the alleged offences the exporter took the position that the lithium ion batteries were not hazardous waste within the meaning of that term in the HWA, the Convention and the decision. As a matter of law if there was no evidence that the batteries were hazardous waste as a matter of construction of the HWA, the Convention and the decision, the prosecution would fail on the basis that there was "no case" for the defence to answer.

At the conclusion of the prosecution's evidence the defence asked the magistrate to rule that there was no case to answer. The only evidence called by the prosecution to establish that the scrap lithium ion batteries were hazardous waste within the relevant legal regime were two administrative employees of the Department who had been involved in the permit application process but they had no personal expertise or training in relation to hazardous waste or industrial chemistry and no expert evidence was called. The exporter called evidence from a senior manager with training and experience in industrial chemistry that the batteries were not hazardous waste and rather fell within the categories of non-hazardous waste where an export permit is not required pursuant to the HWA, the Convention and the decision.

The judgment

After hearing the evidence of both parties on hazardous waste the magistrate had to decide whether there was any evidence that the scrap lithium ion batteries were hazardous waste. The magistrate formed the view that the prosecution, which had to prove that the batteries were hazardous waste on the criminal burden of proof of beyond reasonable doubt, had not provided any evidence that the batteries were hazardous waste and hence it failed to establish an essential element of the alleged offence namely that there was an export of "hazardous waste". Therefore, the prosecution failed.

In the light of his finding on the prima facie case the magistrate did not need to decide whether the underlying charges of breach of specific particulars of the export permit were valid. The exporter had pleaded not guilty to those offences. Had the magistrate found there was a prima facie case to answer then the hearing would have been resumed and the exporter would have adduced evidence to demonstrate that there had been no breach of the permit and the magistrate would have had to rule on those issues having by then heard all the evidence of both parties on all issues.

Importance of the judgment

The judgment contains succinct observations on the purpose and objective of the HWA and the Convention and detailed examination of the definitions and meaning of "hazardous waste" as set out in the HWA, Convention and decision. It was particularly crucial to the decision that the magistrate held that the evidence of the Department's employees to the effect that the batteries were hazardous waste was purely an opinion based on assumptions by the Department and that it was not evidence that the batteries were hazardous waste. The magistrate said "... in these proceedings mere assumptions are insufficient; there must also be evidence capable of convincing the Court prima facie of the correctness of that submission. No evidence of that kind was received from "the various witnesses called by the DOE." 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. That was the code relied on by the Department and specified by the Department in the export permit.

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The judgment of the local court does not mean that for all times and all purposes lithium ion batteries are not hazardous waste. However it is a clear finding that as a matter of law if the prosecution wants to establish that a particular substance is hazardous waste for the purposes of insisting that an export permit be sought and for then seeking to prove a breach of that permit for the purposes of the HWA, then the prosecution must lead evidence that the substances are indeed hazardous waste. The fact that the prosecution called no evidence, as found by the magistrate, was conclusive that there was no case to answer and hence the prosecution failed altogether. The judgment is authority for the proposition that, to assert that a particular substance is hazardous waste within the relevant legal regime, the authorities must do more than make assumptions to that effect, they must make adequate inquiry as to why the substance is hazardous waste under the relevant legal regime. In other words, the authorities and the prosecution must do their homework if they insist on an exporter applying for a permit and then prosecuting the exporter for alleged breach of it. The homework involves making proper and diligent inquiry and then providing proper admissible evidence of hazardous waste. *MRI*

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