

THE SIXTH AUSTRALIAN COTTON CONFERENCE

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**POLLUTION OFFENCES
- ARE YOU AT RISK?**

BY

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1. WHAT CONSTITUTES A POLLUTION OFFENCE

1.1 Most pollution law is contained in state legislation. For instance, in New South Wales:

- Clean Waters Act 1970 ("CWA");
- Clean Air Act 1961 ("CAA");
- Noise Control Act 1975 ("NCA"); and
- Environmental Offences and Penalties Act 1989 ("EOPA").

1.2 Different states will have different legislation. In Queensland there is the Clean Water Act (Qld) 1971-1990.

1.3 In NSW the above acts are largely administered by the State Pollution Control Commission (SPCC) now the Environmental Protection Authority (EPA). This is also the prosecuting agency for pollution offences.

1.4 Within the cotton industry, the following incidents may breach provisions of these acts resulting in a pollution offence being committed:

- Allowing irrigation water (eg cotton tailwater) to escape into a local creek or river, especially if the water contains any sprays or chemicals;
- Aerial spraying of crops which results in some overspray into a local creek or river;
- The pumping out of excess irrigation water into a local creek or river, especially if the water contains any sprays or chemicals.

2. NATURE OF A POLLUTION OFFENCE

2.1 Most major pollution offences are criminal offences, which result in criminal proceedings against the offender. They are not civil proceedings commenced by another citizen for compensation. They are criminal proceedings commenced by the State through an appropriate prosecuting authority or enforcement authority such as, in NSW, the Environmental Protection Authority.

- 2.2 Because most major pollution offences are criminal offences, the prosecution must establish in Court that the offence is proven beyond reasonable doubt not on the balance of probabilities (the civil onus).
- 2.3 Because of the higher onus of proof in criminal proceedings, the prosecutor will need to gather cogent and exact evidence of the guilt of the offender.
- 2.4 Most pollution offences are heard summarily before a judge and the penalties especially under EOPA are commensurate with criminal liability. For instance, EOPA creates three tiers of relative seriousness of pollution offences which may be broadly summarised as follows:
- Tier 1 - most serious or major pollution offences
Up to \$1m when committed by a corporation.
 - Tier 2 - most CWA, CAA, NCA offences
Up to \$5,000 by a corporation and \$60,000 by an individual.
 - Tier 3 - on-the-spot fines for relatively minor offences
\$200 - \$600.
- 2.5 The prosecuting authority may elect the nature and type of prosecution which will result in the relevant range of penalty.

3. WHAT TO DO WHEN A POLLUTION INCIDENT OCCURS

- 3.1 Take all available and reasonable steps to prevent the incident and/or limit its environment effect because this conduct has consequences for both liability and, if prosecuted, penalty.
- 3.2 No obligation to report incident.
- 3.3 Take appropriate steps to prevent any reoccurrence. If required, change irrigation system or system of work which resulted in incident.

4. WHAT TO DO WHEN VISITED BY AN INVESTIGATING OFFICER

- 4.1 After an incident is reported, an investigating officer may visit your property/premises to ascertain what occurred.
- 4.2 The purpose of this visit is twofold. First, to investigate any reported incident and secondly, to gather evidence for any proposed prosecution.

4.3 As with most criminal matters, your rights and obligations are as follows:

- You are innocent until proven guilty and the burden of proof lies with the prosecuting authority.
- You are not required to make a statement or say anything, and you cannot be compelled to make a statement or say anything to an investigating officer.
- You are entitled to remain silent. No adverse inference can be drawn for your refusal to answer questions of an investigating officer.
- Any answers you provide could determine whether or not the prosecuting authority proceeds against you, and, if it does, whether it succeeds or not.
- Any suggestion from an investigating officer that by making a statement you will “make things easier for yourself” should be ignored. It is for a court alone to determine liability.
- However remain calm. Unnecessarily confronting an investigating officer may have other detrimental consequences.

4.4 Independent of any co-operation from you, an investigating officer may have statutory avenues to obtain information:

- s.28 CWA permits the EPA to require an occupier of premises to furnish to it, within the time specified, information relating to any manufacturing, industrial or trade process, any pollution control equipment, waste treatment works or drainage systems or any wastes discharged or removed are likely to be discharged from the premises by written notice. Failure to comply with such a notice is an offence under EOPA.
- s.29 CWA authorises an investigating officer to enter premises, examine and inspect equipment, take samples of water or pollutants and take photographs where he reasonably suspects pollution has occurred.

5. RIGHTS AS THE OFFENDER

5.1 Ask for the certificate of appointment of the investigating officer.

- 5.2 You should not assist, or speak to, any investigating officer without legal advice.
- 5.3 Even if you do not make a formal statement, anything you say to an investigating officer may still be included in an affidavit of that officer which is used in criminal proceedings.
- 5.4 There is no such thing as an "off the record" conversation with an investigating officer who is gathering evidence to prosecute you.

6. RECORD OF INTERVIEW

- 6.1 Don't give them.
- 6.2 If you do, ensure:
- That you read it prior to signing it;
 - That you understand all of it;
 - That you do not disagree with any of it;
 - That you keep a copy of it for your records.

7. CONCLUSION

- 7.1 Pollution incidents are unfortunately inevitable.
- 7.2 Once they occur all reasonable and possible steps should be taken to prevent or limit the consequences.
- 7.3 Be cautious in providing information to investigating officers about the circumstances about a pollution incident.
- 7.4 To do so may simply provide an investigating officer with the necessary information to successfully prosecute criminal proceedings.

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