Environmental Justice Australia

Fact sheet

The EPA v Hazelwood mine owners case

Information for the Latrobe Valley community about the charges brought by the Victorian Environment Protection Authority for pollution caused by the Hazelwood mine fire in 2014

In this fact sheet

The case

The Victorian Environment Protection Authority (EPA) has brought a total of 12 pollution-related charges against four owners of the Hazelwood mine at Morwell, Victoria.[1] This case is important to the Latrobe Valley from an environmental justice perspective. If the EPA is successful, it confirms that the pollution from the Hazelwood mine fire was unlawful; it sends a strong message to other mining and industrial facilities; and community members may then be able to claim compensation for damage caused.

1 http://www.epa.vic.gov.au/about-us/news-centre/news-and-updates/news/2016/march/15/charges-laid-following-epa-investigation-into-hazelwood-mine-fire.

The four companies being charged are: National Power Australia Investment Ltd, Hazelwood Pacific Pty Ltd, Australian Powers Partners B.V., and Hazelwood Churchill Pty Ltd (the Occupiers). These companies are majority owned by Engie (formerly GDF Suez).

Hearing dates have been set for August 2017. Although full details of the case will not be public until the hearing, the EPA has released its legal basis.

The charges

The EPA has charged the Occupiers with 12 offences (three each) for breaches of section 41 of the *Environmental Protection Act 1970* (Vic) ('the EP Act'). As these are criminal charges, the EPA must prove beyond reasonable doubt that the Occupiers polluted the atmosphere in contravention of section 41(1) of the EP Act. Section 41(1) says:

> A person shall not pollute the atmosphere so that the condition of the atmosphere is so changed as to make or be reasonably expected to make the atmosphere—
>
> *(a) noxious or poisonous or offensive to the senses of human beings;*
>
> *(b) harmful or potentially harmful to the health, welfare, safety or property of human beings; […] or*
>
> *(e) detrimental to any beneficial use made of the atmosphere.*

There are three elements that need to be established to make out a breach of section 41(1):

1. The condition of the atmosphere was changed;
2. A person caused or permitted that change in the atmosphere;
3. The change in the condition of the atmosphere had been, or could be expected to be, harmful, potentially harmful or detrimental to the environment or humans.[2]

This is a 'strict liability' offence, meaning that the courts are not concerned with whether the person intended the pollution offence to occur, just that it occurred. Therefore it does not matter whether the operators caused the pollution to happen intentionally, or negligently, or inadvertently (without negligence and without intention), they can still be guilty of an offence.[3]

The 2014 Hazelwood Mine Fire Inquiry ('2014 Inquiry') found that the risks of a fire breaking out in the mine were foreseeable and, had proper risk assessment been taken, preventable in its severity and impact.[4] Both the 2014 Inquiry and the 2015/2016 Hazelwood Mine Fire Inquiry ('2015/2016 Inquiry') detail the adverse health effects suffered by residents of the Latrobe Valley during the fire.[5] The 2015/2016 Inquiry found that air pollution arising from the mine fire likely contributed to an increase in deaths in the Latrobe Valley in 2014.[6]

Engie's response to the charges

In response to the charges, Engie (writing as GDF Suez) announced it would vigorously defend itself as it does not consider there is a proper basis for legal action against the company, and would not comment further as the matter is before the courts.[7]

2 *Environment Protection Act 1970* (Vic) s. 41(2).
3 *Window v Phosphate Co-Operative Company of Australia Ltd* (1983) 50 LGRA 10, 10.
4 Hazelwood Mine Fire Inquiry, *Hazelwood Mine Fire Inquiry Report 2014*, 29 August 2014, 20-21.
5 See: Hazelwood Mine Fire Inquiry, *Hazelwood Mine Fire Inquiry Report 2014*, 29 August 2014, pp 240-380;
6 Hazelwood Mine Fire Inquiry, *Hazelwood Mine Fire Inquiry Report 2015/2016*, Volume II, 'Investigations into 2009-2014 Deaths', 02 December 2015, p. 74.
7 http://www.gdfsuezau.com/media/newsitem/EPA-charges

Presumption against Occupier

According to the EP Act, if there is an emission of pollution from a premises on which commercial or industrial undertaking occurs, there is a legal presumption that the Occupier is deemed to have polluted the environment.[8] However, an Occupier is not liable if the Occupier can prove that the emission was unrelated to its commercial or industrial undertaking. The onus of proof is on the Occupiers to prove that the pollution was unrelated to its commercial or industrial undertaking.[9]

What are the penalties?

There are two forms of penalty: a total penalty and a daily penalty. The maximum penalty is up to 2400 penalty units ($373,104), for each breach.

What this means for the Latrobe Valley

This case is exceptional given the circumstances in which it arose. EPA prosecutions of industrial polluters are not common,[10] however these prosecutions are usually successful.[11] It is not possible to predict what the outcome of the case will be. Regardless of what the Court determines, this case will contribute to setting a precedent for how air pollution events from coalmines might be legally dealt with and how State and Territory EPAs will fare in similar prosecutions.

A successful prosecution of the Occupiers would be an environmental justice gain for the residents of the Latrobe Valley. It would find that the Occupiers illegally polluted the atmosphere and were responsible for the severe pollution impacts endured by people who were exposed the pollution from the fire for some 45 days. If the companies are fined, the fine will be paid back to the Victorian Consolidated Fund.[12] Although fines for pollution offences are paid into government revenue, in some circumstances the court can also make an order that a polluter fund a project for the restoration or enhancement of the environment. For more information see the EPA website.

Compensation for individuals affected

Under the *Sentencing Act 1991* (Vic) ('Sentencing Act') it may be possible for compensation to be granted to people who experienced injury and property loss as a result of the Hazelwood mine fire. The extent of pain, suffering or loss experienced should not be minor. Complaints about temporary discomfort without any significant alteration of lifestyle, routine or medical treatment are likely to be dismissed as frivolous. Evidence such as medical reports and repair bills will need to be provided. This is a civil application and requires you to prove, on the balance of probabilities, that you are entitled to compensation.

If the EPA are successful in their prosecution and the owners of the Hazelwood mine are found guilty of causing pollution in breach of the EP Act, another court date will be set for sentencing. The Sentencing Act says that if a company is convicted or found guilty of an offence the sentencing Court may order the offender to pay compensation of an amount the Court finds appropriate.[13] You must make your application for compensation within 12 months of a guilty verdict or conviction, however it is better to start this process before the Court hearing into the offence commences.[14]

EJA is unable to represent clients in these claims but you can contact us for a referral or contact a local lawyer.

We will provide further updates on our website as the case progresses – www.envirojustice.org.au

8 *Environment Protection Act 1970* (Vic) s. 62C.
9 *Environment Protection Act 1970* (Vic) s. 62C.
10 The 2015-2016 EPA Annual Report states that between 2013 – 2016 there was 28 EPA prosecutions. See: http://www.epa.vic.gov.au/~/media/Publications/1635.pdf.
11 The EPA considers success to be a prosecution with conviction, or a fine without conviction. Information on the success rate for EPA prosecutions can be located in Annual Reports. Each annual report has a table that signifies the outcome of prosecutions for that fiscal year. For fiscal years 2012-2013, 2013-2014, 2014-2015 and 2015-2016 the EPA states that it has been successful 100% in prosecutions is has commenced. See: http://www.epa.vic.gov.au/about-us/who-we-are/annual-reports-and-plans.
12 *Environment Protection Act 1970* (Vic) s. 69(1).
13 *Sentencing Act 1991* (Vic) s. 85B.
14 *Sentencing Act 19941* (Vic) s. 85C

About Environmental Justice Australia

Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. Funded by donations and independent of government and corporate funding, our legal team combines a passion for justice with technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

While we seek to give the community a powerful voice in court, we also recognise that court cases alone will not be enough. That's why we campaign to improve our legal system. We defend existing, hard-won environmental protections from attack. At the same time, we pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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