

APRÈS SKI: TWO RULES FOR NSW ENVIRONMENTAL PROSECUTIONS AFTER THE CHARLOTTE PASS SNOW RESORT CASE

AUSTRALIA ENERGY, INFRASTRUCTURE AND RESOURCES AND REAL ESTATE ALERT

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Just days from the NSW ski season opening, the NSW Land and Environment Court (Court) has delivered its second decision in relation to the ongoing prosecution of Charlotte Pass Snow Resort Pty Ltd (Ski Resort) by the Environment Protection Authority (EPA).

This article explains two key rules applying to NSW environmental prosecutions after the Court's two Ski Resort decisions or, in the spirit of ski season, "après ski". Whilst procedural in nature, these rules are important as they can materially affect the outcome of environmental prosecutions.

THE SKI RESORT PROSECUTION

Like many remote businesses in NSW, the Ski Resort operates a sewage treatment plant which is regulated by the EPA under an environment protection licence granted under the Protection of the *Environment Operations Act* 1997 (POEO Act). The licence authorised water discharges to a creek from the sewage treatment plant subject to specified discharge limits.

In 2019, effluent was discharged from the sewage treatment plant to the creek at levels which exceeded the discharge limits. In response, the EPA ultimately commenced a prosecution against the Ski Resort by two separate summonses which alleged that Ski Resort had committed two offences against the POEO Act as follows:

1. An offence of polluting waters against s 120(1) of the POEO Act from about 9 July 2019 to 24 September 2019 (First Charge)
2. An offence of contravening a condition of its licence against s 64(1) of the POEO Act from about 9 July 2019 to 18 September 2019 (Second Charge).

It was agreed by the EPA and the Ski Resort that the discharges from the sewage treatment plant were not continuous from 9 July to 24 September but the EPA alleged that the contravention of the licence condition continued throughout.

The Ski Resort sought to have the summons dismissed on a technical legal point, namely that the summonses were bad for "duplicité".

Before the Court delivered judgment on the duplicity issue, the EPA asked the Court not to make final orders if it found against the EPA so that the Court could consider requesting a stated case appeal to the Court of Criminal Appeal pursuant to s 5AE of the *Criminal Appeal Act 1912* (NSW). Such appeals can only be made before final orders are issued.

The Court's decisions to date in the Ski Resort prosecution provide timely guidance on two key rules for environment prosecutions in NSW, being:

3. The rule against duplicity
4. The rule that a stated case appeal is only available for questions of law.

RULE 1: THE RULE AGAINST DUPLICITY

What is the rule?

The rule against duplicity is that in order to be valid, each single count in an indictment cannot charge a person with more than one offence. Duplicity can arise where a single count is drafted to include:

- More than one instance of an alleged offence (for example, multiple discharges of pollutants in separate incidents); or
- Two different offences (for example, an offence for failing to treat waste and an offence for failing to properly store waste).

What are the exceptions?

The two exceptions to the rule against duplicity are for:

5. **Continuing offences**, where the conduct constituting the offence was continuous over the charge period (and did not amount to separate offences)
6. **Single criminal enterprise**, where a series of offences are so closely related that the totality of the conduct amounts to the one activity.

Why is it important?

The rule against duplicity may sound like a technical legal point, but it is actually critical to environmental prosecutions in NSW because:

- The rule is important to ensure fairness to a defendant by ensuring that there is no uncertainty about the offences charged. A defendant cannot be expected to enter a plea to a charge which is uncertain or which in fact includes more than one complete offence to which the defendant may wish to enter different pleas
- The application of the rule to environmental offences (particularly pollution offences) is fraught due to the complex nature of environmental breaches which often occur over an extended time period and comprise of multiple acts
- Where an indictment is "bad for duplicity", it can result in the charges being amended or even thrown out completely

- Duplicity is a hotly contested issue in the Court and has been considered by 10 judgments in the past year alone.

Duplicity in the Ski Resort Prosecution

In the Ski Resort prosecution, the Court held that the First Charge was duplicitous because:

- The First Charge was particularised by reference to a number of separate discharges which the EPA alleged constituted a single water pollution offence; but
- Each discharge was different and discrete amounting to a separate alleged water pollution offence which could not be included in a single count.

While the issue was "finely balanced", the Court did not accept the EPA's argument that each discharge was, on the facts, sufficiently connected to constitute a "single criminal enterprise" so that it fell within the second exception to the rule against duplicity.

Accordingly, in this case, the Court gave the EPA the opportunity to amend the particulars of the First Charge.

However, the Court concluded that the Second Charge was not duplicitous because the alleged breach of the licence condition was continuous over the charge period.

RULE 2: STATED CASE APPEAL ONLY AVAILABLE FOR QUESTIONS OF LAW

What is the rule?

The Court has a discretion to submit a question of law to the Court of Criminal Appeal for determination at any time before it makes a final judgment in criminal matters under s 5AE of the *Criminal Appeal Act 1912* (NSW). The key issue here is that the stated case appeal is only available for "questions of law".

Why is it important?

The EPA has no right of appeal to the Court of Criminal Appeal:

7. Against an acquittal of a defendant by the Land and Environment Court in its summary jurisdiction. Such appeals can only be commenced by the Attorney-General or the Director of Public Prosecutions for proceedings where the Crown was a party (although this has never occurred before to our knowledge); or
8. Against an interlocutory judgment or order in prosecutorial proceedings in the Land and Environment Court except with leave of the Court of Criminal Appeal or certification from the trial judge.

To overcome these limitations, the EPA's practice to date has been to use the "stated case" process to, in effect, appeal decisions to the Court of Criminal Appeal prior to final judgement being issued.

Appeal in the Ski Resort Prosecution

In the Ski Resort case, the EPA initially asked the Court to submit a question to the Court of Criminal Appeal under the s 5AE stated case process. The proposed question was whether the relevant summons was "bad for duplicity because more than one offence had been charged in the one count" (Proposed Question).

However, the EPA subsequently realised that this request was, in ski lingo, "off-piste" and asked instead that the Court enter formal orders so that the EPA could appeal the interlocutory decision to the Court of Criminal Appeal (subject to obtaining leave of the Court of Criminal Appeal or certification from the trial judge).

Following the relatively new authority of *Orr v Cobar Management Pty Ltd* (2020) 103 NSWLR 36 (Cobar), the Court determined that the Proposed Question was not a "question of law" that can be submitted to the Court of Criminal Appeal through the stated case process in s 5AE as it involved mixed questions of fact and law. The Court held that:

- The purpose of the stated case procedure is not to provide an appeal after the judge has made a decision. Rather, the purpose is to provide the judge with assistance in coming to a decision
- The stated case procedure is only available for "pure" questions of law. Questions of mixed fact and law are not questions of law that can be subject to a stated case (for example, a question of whether or not a particular conclusion of a trial judge based on facts was correct).

This represents a significant departure from the Court's previous practice which was to submit questions to the Court of Criminal Appeal asking whether the Court had erred in making certain findings based on the facts and the law (see for example *Environment Protection Authority v Riverina Australia Pty Ltd* [2015] NSWCCA 165 and *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2018] NSWCCA 202).

For this specific case, the fact that the stated case procedure appeal was unavailable was of no consequence because the Court ultimately made an interlocutory judgment on duplicity of the First Charge and certified that this was a proper decision for determination on appeal, with the result that the EPA was still able to appeal to the Court of Criminal Appeal. So, we can expect further judicial consideration of the duplicity issue if the EPA decides to proceed with an appeal.

IMPLICATIONS

The Ski Resort decisions highlight:

9. The importance of carefully considering the potential for duplicity and other technical legal issues in environmental prosecutions; and
10. That the past regular practice of environment prosecutors in NSW (including the EPA and NRAR) relying on the stated case process as a kind of appeal avenue may have come to an end. As a result, Defendants who successfully defend environmental charges in the NSW Land and Environment Court can now ordinarily expect that decision to be final and not subject to any appeal by the prosecutor by way of the stated case process.

FURTHER INFORMATION AND ADVICE

The K&L Gates environmental team are very experienced in assisting with environmental regulatory investigations and enforcement action, including prosecutions. Please contact us if you would like advice or further information.

The full decisions of the Court are available here:

- [*Environment Protection Authority v Charlotte Pass Snow Resort Pty Ltd* \[2021\] NSWLEC 37](#)

- *Environment Protection Authority v Charlotte Pass Snow Resort Pty Ltd (No 2) [2021] NSWLEC 48*

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