



Court critical of resource recovery regime and EPA enforcement

EPA v Grafil

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Prepared for the Members of the Waste Contractors & Recyclers Association of NSW

On 5 November 2021 the NSW Land and Environment Court finally sentenced Grafil Pty Ltd and Bruce McKenzie in one of the longest running prosecutions ever pursued by the EPA (*Environment Protection Authority v Grafil Pty Ltd (Grafil)*; *Environment Protection Authority v Mackenzie (Mr McKenzie) (No 4)* [2021] NSWLEC 123).

The Court was scathing about the EPA's handling of the matter and the significant legal and financial risks that the state's resource recovery exemption regime places on consumers of recovered materials. Notably, the Court concluded there was nothing that the defendant could have done to prevent asbestos coming onto the site. Further, no actual harm to the environment had been proven as the mere presence of asbestos in the material did not constitute harm.

Ultimately, Grafil was convicted of an offence under s144(2) of the *Protection of the Environment Operations Act (POEO)* but no conviction or penalty was imposed against Mr McKenzie. Grafil was ordered to cap the contaminated material.

What was the case about?

Grafil and its director, Mr Robert McKenzie, were sentenced for operating a waste facility without lawful authority in around 2012.

Grafil was a consumer of recovered fines and Excavated Natural Material (**ENM**) that it received for free for the purpose of building an access road. Grafil had stockpiled the material on its own site in preparation for the construction of the road.

The material was supplied to Grafil under the relevant EPA resource recovery orders, being the *Continuous Process Recovered Fines Exemption 2010* and the *Excavated Natural Material Exemption 2012*.

The volume of material that Grafil had stockpiled, while the EPA was conducting its surveillance activities, was in the range of 24,000 to 44,000 tonnes. Unknown to Grafil, the material contained traces of asbestos.

The EPA subsequently charged Grafil with an offence under s 144(2) of the POEO Act. That section creates an offence for the use of place as a waste facility without lawful authority (for examples, without a valid Environmental Protection Licence). Meanwhile, Mr McKenzie had been charged in his capacity as a director of Grafil, being a person “concerned in the management of the corporation” and therefore deemed liable for the offence of the company (under s 169(1) of the POEO Act).

The prosecution resulted in a long-running court battle between the EPA and Grafil. Ultimately the offences were found to be proven. However, along the way the Court of Appeal (COA) delivered a judgment with several important principles including:

- Once a waste, a material may remain a waste even where it is recycled, re-used or recovered (including under a resource recovery order)
- The onus is on generators and consumers to prove the application of resource recovery orders
- Any fragment of asbestos in a stockpile, no matter how large the stockpile or small the fragment, means that the entire stockpile must be treated as “asbestos waste”.
- Any non-compliance with a resource recovery order or exemption will mean that the order or exemption will not apply.
- Any application of material where there has been a failure to comply with a resource recovery order or exemption would constitute an offence of unlawful application to land separate from the failure to comply with the order or exemption.

What did the Court find on sentencing?

The Court found both Grafil and Mr McKenzie guilty of the offences. However, due to the circumstances of the case, the Court found that neither Grafil nor Mr McKenzie had no moral culpability for the offences (they had done nothing morally wrong). Grafil was convicted, but the charge against Mr McKenzie was dismissed with no conviction and no fine.

During sentencing, Justice Pain noted that “*The EPA cannot shy away from its own responsibility for its decision to sit on its hands and let the stockpiles grow while it watched in secret, doing nothing to stop it.*”

Grafil was ordered to cap the site to the cost of around \$250,000. Grafil was ordered to pay 25% of the EPA’s legal costs likely being over \$250,000 and 25% of investigation costs being \$46,772. This meant that the total minimum liability to Grafil was \$582,315. The court did not impose any additional penalty on Grafil.

The defendants’ own legal costs were in excess of \$1,650,000.

Why is this case important?

The Court made scathing comments including that the resource recovery order regime for recovered fines and ENM was “unsatisfactory and incoherent”. The Court found consumers of

recovered material could take no comfort that that they would not be subject to prosecution or clean up orders from the EPA in the event they unintentionally received material that was contaminated material. The case is a blow to the credibility of the resource recovery regime – and may undermine trust in the use of recovered materials, for both generators and consumers.

With respect to the clean-up orders, the Court also accepted that a level of asbestos contamination in the soil was acceptable. The Court applied the criteria for capping of asbestos waste was that found in the NEPM Guidelines and the *Guidelines for the Remediation and Management of Asbestos-Contaminated Sites in Western Australia* (DOH, WA). The EPA had argued firstly that the waste should have been removed entirely at an estimated cost of between \$15-20M. However, the EPA backed down on the last day of the hearing and the Court subsequently applied the NEPM and DOH Guidelines.

This is a clear indication from the Court that the EPA's zero tolerance approach to asbestos will not necessarily be upheld when the Court is dealing with asbestos contaminated material. This is also consistent with the SafeWork's 2014 *Guidelines Managing Asbestos in or on Soil*.

What next?

Immediately after the decision the EPA announced a review of the resource recovery order regime which will be completed in 2022. The review will be led by a former CEO of the Victorian EPA.

We recommend that all businesses confirm their compliance with any relevant resource recovery orders and exemptions as the implications of non-compliance are significant. In the event that a contamination incident is identified, we recommend you seek urgent legal advice.

For further advice on compliance, and what action you need to take to minimise the impact on your business, please contact Ross Fox, Principal, Fishburn Watson O'Brien on 0421 358 575.

Please note that this is general advice only. We recommend that members seek specific legal advice in relation to their particular situation. If you require further information or advice, please contact:

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