

ASBESTOS PROSECUTION CASE STUDIES

Louisa Dicker – Senior Associate

AGENDA

- Nuisance 101
- Case Study 1 – Moira Shire Council –v- David James O’Connell
- Case Study 2 – Surf Coast Shire Council –v- Samaher Mondous
- Extra Tips and Tricks

NUISANCE 101

Principles under the Public Health and Wellbeing Act 2008 (“PHW Act”):

- + Sections 5-10 of the PHW Act
- + Includes precautionary principle, principle of primacy of prevention and principle of proportionality

Definition of Nuisance under the PHW Act:

- + Section 58 of the PHW Act
- + Includes premises, refuse, state, condition or activity, or other matter or thing
- + Includes nuisances that ‘are or liable to be’, dangerous to health or offensive

Duties under the PHW Act in respect to nuisances:

- + Duty to **remedy** as far as is reasonably possible (section 60)
- + Duty to **investigate** any notice of a nuisance (section 62(2))
- + Duty to **take action** or determine matter better settled privately (section 62(3))

CASE STUDY 1

MOIRA SHIRE COUNCIL –V– DAVID JAMES O’CONNELL

Background

- **April 2013** - Fire occurred and destroyed subject property
- **Mid 2014** – Complaints regarding burnt building debris being blown from subject property
- **May 2014** – Council arranges for testing of building debris, reveals in 2 of the 4 samples positive results for Chrysotile Asbestos and Amosite Asbestos
- **May 2014 to September 2014** – EPA involved in investigation
- **Early October 2014** – Improvement Notice served on land owner, required the land owner to have a licenced and accredited asbestos removalist remove asbestos materials and also to have a licenced and accredited soil hygienist confirm the absence of asbestos in a report to Council
- **Mid October 2014** – No action taken by land owner, inspection at subject property confirms breach of notice
- **November 2014** – Council issues injunction (under sections 196 and 197 of the PHW Act)
- **November 2014** – Council also issues charges (breaches of sections 61(1(b)) and 194(4) of the PHW Act)

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Injunction Outcome

- 12 December 2014 – Hearing of the Injunction at the Shepparton Magistrates’ Court
 - Respondent (land owner) ordered to comply with the Improvement Notice dated 3 October 2014 and carry out the required works by 12 December 2014, failing which Council could enter the subject property and do the works themselves
 - Ultimately works completed by Council contractor and clearance certificate obtained by 18 December 2015

Prosecution Outcome

- 27 January 2015 – Mention at the Shepparton Magistrates’ Court
 - Same Magistrate as the injunction hearing, wanted an update on the subject property
 - Accused (land owner) was self represented and entered plea of guilty to both charges (knowingly allowing nuisance and breach of improvement notice)
 - Offence period for the charges were extended up to date nuisance/breach continued (being 17 December 2015)
 - Fine without conviction in the sum of \$10,000 and costs in the sum of \$8,313 (including injunction and prosecution costs)

CASE STUDY 2 – SURF COAST SHIRE COUNCIL –V- SAMAHER MONDOUS

Background

- **Late November 2014** – Complaints regarding demolition works and suspected asbestos materials on subject property (future housing development area). Council advised Work Safe whom investigate also
- **Early December 2014** – Council arranges for testing of debris, reveals positive results for Chrysotile Asbestos and Amosite Asbestos
- **Early December 2014** – Improvement Notice served on land owner, required the land owner to have a licenced and accredited asbestos removalist remove asbestos materials and also to have a licenced and accredited soil hygienist provide a clearance certificate to Council
- **Between December 2014 and February 2015** – Council works with land owner whom repeatedly sought extensions to comply with the Improvement Notice

CASE STUDY 2 – SURF COAST SHIRE COUNCIL –V- SAMAHER MONDOUS

Background continued...

- **Mid February 2015** – Land owner has contractors mulch asbestos materials on the subject property in the middle of the night! Council advised Work Safe again, this time about land owner and contractor conduct
- **Next day (mid February 2015)** – Prohibition Notice served on land owner prohibiting further works on the subject property until the Improvement Notice had been complied with
- **Mid February 2015** – Council arranges for further testing of debris and mulch piles, reveals positive results for Chrysotile Asbestos and Amosite Asbestos
- **20 February 2015** – Council issues injunction (under sections 196 and 197 of the PHW Act)
- **23 February 2015** – Council receives reports of trucks on site attempting to remove debris and mulch piles from the subject property, in breach of the prohibition notice
- **March 2015** – Council also issues charges (breaches of sections 61(1(a)) and 194(4) of the PHW Act)

CASE STUDY 2 – SURF COAST SHIRE COUNCIL –V- SAMAHER MONDOUS

Injunction Outcome

- 27 February 2015 – Hearing of the Injunction at the Geelong Magistrates' Court
 - Respondent (land owner) provided clearance certificate at 8.30am that morning!
 - Injunction proven and dismissed and full costs granted to Council against the land owner (\$6,309)

Prosecution Outcome

- 9 October 2015 – Contest Mention at the Geelong Magistrates' Court
 - Same Magistrate as the injunction hearing
 - Ultimately Accused entered plea of guilty to both charges (causing a nuisance and breach of improvement notice and prohibition notice)
 - Fine with conviction in the sum of \$8,000 and costs in the sum of \$10,987 (in addition to the injunction costs)

Asbestos leads to fine

Man chided for risking public safety

ANTHEA CANNON

A MELBOURNE property developer risked public safety when he ignored Surf Coast Shire Council's requests to remove asbestos from his Torquay property, a Geelong Magistrate has ruled.

Magistrate Ron Saines said Samaher Mondous, 67, had allowed work to continue at the site for more than two months, "aggravating" the amosite asbestos, which is "one of the more hazardous forms of asbestos (as it is) more readily distributed into the atmosphere when disturbed".

He said Mondous was issued with a council improvement notice on December 8 last year and officers followed up with more notices and phone calls spelling out the requirements for clean up and disposal.

"There were at least two occasions when Mr Mondous by phone or email was obstructive and argumentative about requirements," Mr Saines said.

"He continued to engage

(anon-licensed asbestos company) to carrying out tree felling and mulching after the improvement notice which aggravated the problem of the spread of asbestos."

Mr Saines said Mondous finally complied and was issued a clearance certificate on February 27 after the council threatened to take further legal action.

"Things got worse before they got better ... it was a matter of public safety at risk," he said.

Mondous was yesterday ordered to pay almost \$11,000 in costs and was fined \$8000 with conviction after pleading guilty to causing a nuisance and failing to comply with a prohibition notice.

David Risstrom, for Mondous, asked for his client to be spared a conviction arguing it may affect his business dealings and his ability to travel overseas.

He tendered four character references for Mondous, who

he described as a churchgoer who accepted he'd done the wrong thing.

But Mr Saines said that while Mondous had an "unblemished record", there was no evidence of potential social or economic consequences as a result of the conviction.

"It was serious offending in respect of public safety," Mr Saines said.

Mondous had earlier been ordered by Geelong Magistrates' Court to pay \$6000 in costs for the matter, bringing the total bill to almost \$25,000 not including the cost of the asbestos removal.

EXTRA TIPS AND TRICKS

- Seriousness with which Court and public consider asbestos matters – media attention common also
- Recovery of costs under section 197(5)(b) is difficult for Council, against the person not the land
- Duties under the PHW Act are on Council – keep pressure on and progress resolution
- When given permission to enter subject property (e.g. by tenant/occupant/owner) – document this and remember to caution

QUESTIONS?

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