

FELA Seminar Series 2011

**The Law in Relation to Offences under
the Environment Management Act 2005
& Sentencing Options**

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EMA Offences - Nature

- Obligations:
 - Environmental impact assessment approved report
 - Waste/pollution emission permit
- Breach/contravention
 - Prosecute within 3 years
 - Evidentiary aids
 - Protection for whistleblowers

Environment Management Act 2005

Environmental Impact Assessment requirement

43.-(1) A person who carries out any development activity or undertaking which is subject to the EIA process without an approved EIA report, commits an offence and is liable upon conviction to a fine not exceeding \$750,000 or to a term of imprisonment not exceeding 10 years or both.

(2) If a person is found to be undertaking a development activity under subsection (1), the Director may apply to the court for an order to stop work.

(3) A person who contravenes-

(a) any requirement under Part 4; or

(b) a condition for the approval of a development proposal or an approved EIA report,

commits an offence and is liable upon conviction to a fine not exceeding \$250,000 or to a term of imprisonment not exceeding 3 years or both.

Elements of the Offence s43(1)

[P must prove]:

1. Person charged carried out dev activity/undertaking
2. Development activity/undertaking requiring EIA carried out
3. Development activity/undertaking not subject of approved EIA report

development activity or undertaking means:
any activity or undertaking likely to alter the physical nature of the land in any way,
and includes the construction of buildings or works, the deposit of wastes or other material from outfalls, vessels or by other means, the removal of sand, coral, shells, natural vegetation, sea grass or other substances, dredging, filling, land reclamation, mining or drilling for minerals, but does not include fishing;

Offence: No Approved EIA

- How to identify whether the development activity/undertaking requires EIA
 - Falls under Schedule 2 Parts 1 or 2
 - Likely to cause significant environmental or resource management impact (**determination** of approving authority)

Significant environmental or resource management impact

Means an impact on the environment in the context of:
the setting, or
the intensity of effect on the environment, or both

Significant environmental impact

in relation to a development proposal, means an impact on the environment, either in the context of the setting of the proposed development or in the context of the intensity of the proposed development's effect on the environment, and includes, but is not limited to-

- (a)* the degree to which public health and safety are affected;
- (b)* the degree to which the unique characteristics of the geographic area are affected;
- (c)* the degree to which effects on the environment are likely to involve controversy;
- (d)* the degree to which unique or unknown risks are taken;
- (e)* the degree to which a precedent for future action is created;
- (f)* the potential for cumulative environmental impacts;
- (g)* the degree to which the natural functioning of the ecosystem is likely to be inhibited;
- (h)* the degree to which a cultural, traditional, natural, scientific or historic resource may be threatened;
- (i)* the potential threat to the existence of protected and endangered species or their critical habitat;
- (j)* the degree to which fish and wildlife resources of ecological, commercial, subsistence, and recreational importance are jeopardised; or
- (k)* the extent to which one aspect of use of a resource may conflict or contrary with another aspect of use of that resource;

Pollution Offence 1

45.-(1) A person who, without lawful authority or reasonable excuse (the offender shall prove lawful authority or reasonable excuse), causes or contributes to the discharge of a waste or pollutant from any vessel, aircraft or facility commits an offence and is liable on conviction-

- (a)* for a first offence, to a fine not exceeding \$250,000 and to a term of imprisonment not exceeding 3 years or both;
- (b)* for a second or subsequent offence, to a fine not exceeding \$750,000 and to a term of imprisonment not exceeding 10 years or both.

waste

litter, garbage, refuse, excavated and dredged spoil, and other discarded materials including any derelict motor vehicles or parts, waste materials from residential, commercial or industrial facility and from community activities (excluding religious offerings), solid or dissolved material in domestic sewage or other substances in water sources, such as silt, dissolved or suspended solids in industrial wastewater effluent, dissolved materials in irrigation return flows or other common water pollutants.

pollutant

- *dredged spoil, solid or liquid waste, industrial, municipal or agricultural waste, incinerator residue, sewage, sewage sludge, garbage, chemical waste, hazardous waste, biological material, radioactive materials, wrecked or discarded equipment, oil or any oil residue and exhaust gases or other similar matter.*

Pollution Offence 2



- (2) A person who, **knowingly or intentionally or with reckless disregard** to human health, safety or the environment, causes a pollution incident that results in harm to human health or safety, or severe damage to the environment commits an offence and is liable on conviction to a fine not exceeding \$1,000,000 or to life imprisonment or both.
- (3) Where a body corporate is convicted under this **section** the maximum penalty is 5 times the fine specified for that offence.

Pollution incident

- *the introduction, either directly or indirectly, of a waste or pollutant into the environment, which results in harm to living resources and marine life, hazards to human health, hindrance to marine activities including fishing and other legitimate uses of the sea, impairment of quality for use of water, air or soil, reduction of amenities or the creation of a nuisance.*

Elements of s 45(1) [P must prove:]

1. Waste/pollutant in environment
2. Waste/pollutant originated in discharged from a vessel, aircraft or facility as alleged
3. Person charged EITHER caused the discharge OR contributed to the discharge

If DEF proves lawful authority OR reasonable excuse for discharge,
prosecution fails

Elements of s 45(2) [P must prove]:

1. That a pollution incident occurred as alleged
2. That the person charged caused the incident :
 - EITHER knowingly or intentionally,
 - OR with reckless disregard to
 - human health OR
 - safety OR
 - the environment.
3. That the pollution incident resulted in:
 - EITHER harm to human health OR safety
 - Or severe damage to the environment

1. Knowledge of result
2. Intended result
3. Took risk with awareness of likely result

Result =
pollution
incident

Defences:

- Lawful excuse
- Took all reasonable measures to prevent
- Duress
- Sudden/extraordinary emergency
- Strict Liability
 - Mistake of fact
 - Intervening conduct/event

Corporate Offenders

- S45 offences – max penalty x 5
- Director, officer, employee, agent liable IF directed, authorised, acquiesced in, assented to or participated in offence
- Body vicariously liable for breaches by employee, agent (even if unidentified)
- Penalty obligation takes precedence in bankruptcy
- **NB: see Part 8 Crimes Decree 2009 – means by which fault may be established. Importance of due diligence.**

Sentencing

- Usual matters AND other relevant circumstances:
- the extent of the harm caused or likely to be caused to the environment;
- the practical measures which might have been taken to prevent, control, abate or mitigate the harm;
- the extent to which the defendant could reasonably have foreseen the harm caused or likely to be caused; and
- the extent to which the defendant had control over the causes which gave rise to the offence.

Orders in addition to penalty:

- prohibiting the person from the continuing or repeating the offence;
- ordering work to stop temporarily or permanently
- ordering the restoration of the area to its original condition
- carrying out of improvement or remediation work on the area
- directing the person to pay into the Fund costs and other expenses associated with any inspection, audit or investigation
- directing the person to pay into the Fund a refundable security for costs to ensure compliance with an order
- directing the seizure and forfeiture of any vessel, aircraft or thing used in the commission of an offence
- requiring the person to comply with any other condition

Orders in addition to penalty:

- In favour of person aggrieved by damage to property/income resulting (upon proof)
 - For compensation for loss
 - For cost of preventative/remedial action reasonably taken
- Orders enforceable