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Agribusiness Insurance

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Developments in Liability in the Agricultural Sector

by Daniel Best, Partner

This agribusiness update highlights three recent cases where various areas of liability affecting the agricultural sector are discussed. The developments range from negligence to statutory penalties under the *Trade Practices Act* 1974 (Cth).

The first case details a judgement of Jones J handed down in June 2008, which sheds further light on the circumstances in which a public authority will owe a duty of care on policy matters, specifically considering rural pest eradication projects. The second, a requirement for rural land owners to undertake fire risk management assessments is also raised in terms of a duty to prevent fire damage to adjoining properties, and finally, the Federal Court discusses what sanctions are appropriate for misleading and deceptive conduct where producers and suppliers falsely label produce as 'organic'.

Colbran v State of Queensland [2008] QSC 132

The Colbrans, Malobertis and Hatmill Pty Ltd were all commercial coffee growers with plantations located on the Atherton Tablelands in Northern Queensland. All three parties have together recently recovered total damages in excess of $9.1 million from the Queensland Government for damage caused to their crops in 1996 in the course of a Papaya Fruit Fly eradication program implemented by the Department of Primary Industries ("DPI").

The eradication program was executed by the DPI in Northern Queensland in late 1995. One of the methods used was a protein bait spray, which involved spraying host plants with a mixture of chemical attractant and insecticide. This method was used specifically at sites identified as "breeding hotspots" where fruit was presently ripening.

The insecticide used was Maldison 500 which was produced by two manufacturers, Nufarm and Rhone. Both products contained the active ingredient malathion and a hydrocarbon solvent, Solvesso 150. The DPI obtained an off label permit which permitted 200g/L of Maldison to be applied to fruit trees and in areas of agricultural production at the rate of 100 – 200 ml per tree on a weekly basis. It specifically stated that large spray droplets should be used and contact with fruit should be avoided.

In late 1996, the plaintiffs' coffee plantations were identified as potential breeding hotspots and subsequently sprayed with the Maldison product. Several weeks after spraying commenced, the plaintiffs noticed the following:

- that ripening coffee berries were dropping off the trees;
- advanced flower spikes were disappearing;
- the leaves twisted and changed colour;
- the wax cover on flower buds turned black; and
- new growth sprouts were mutated.

The coffee plants from plantations that were not sprayed did not display any of these symptoms. The damages to the plantations resulted in financial loss for all plaintiffs due to the decrease in yields and the bad taste of some harvests rendering them unsaleable. Accordingly, the plaintiffs each brought an action in negligence against the State of Queensland for the damage suffered.

The decision

The court found that, despite being a public authority acting in the public interest, the defendant owed a duty to the plaintiffs to take reasonable care to avoid damage to their crops on the basis that:

- the emergency situation had passed;
- there was no evidence that spraying all coffee plantations was necessary for eradication;
- the number of hotspots was limited to where there was ripening fruit;
- scientific advice was readily available to the decision makers;
- the spray product was not a benign substance and had never before been used on coffee plants nor in the concentrations used; and
- the importance of acknowledging the need to care for the growers' interests to maintain the co-operation of the industry with DPI.

In Brief

Three recent developments in liability following court rulings relating to:

- A public authority's duty of care on policy matters;
- Misleading and deceptive conduct; and
- The need to carefully examine circumstances when seeking to establish negligence.

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The state was held to have breached its duty of care on the basis that:

- they had failed to make proper enquiry as to whether any constituent (not just the active ingredient) of the product would cause damage to the crops;
- the concentration and strength was excessive and likely to cause damage;
- not following the permitted regime for spot spraying (100-200 mls per tree) as opposed to cover spraying to the point of run off;
- not supervising staff or implementing a procedure to ensure the proper quantity of product was sprayed; and
- failing to suspend operations when advised of damage.

The hydrocarbon solvent in the spraying product Maldison 500 was found to be causative of the damage sustained by the coffee plants and the cause of continuing damage.

Damages

Together, the plaintiffs recovered damages in excess of $9.1 million for the loss of profits and diminution of future profits. The court's approach to calculations differed significantly between the parties.

The Colbrans' plantation had only just reached potential production levels, as for many years the soil suffered mineral deficiencies and had to be rectified over a period of time. After realising the permanent impairment of their crop, the Colbrans gave up their lease at the plantation and retired because by the time a new crop had become established their lease would be up. Accordingly the court based its figures for loss of profits for the remainder of the lease on industry evidence of productive capacity of mature plants in the area and average production costs.

The Malobertis' had relatively well established crops. As such the court was able to calculate their damage by reference to historical yields. It also took into consideration the fact that crops intermittently have seasons of reduced yields due to external factors and the loss of productivity of the plants over time. The Malobertis' did not mitigate their loss by replanting but continued to incur financial losses from reduced yields. Therefore their loss was calculated by reference to the difference between their actual income and the income they would have generated had the damage not occurred.

At the time of the spraying, Hatmill's plantation was fairly young as it was the first stage of a business plan to create a large high quality boutique coffee plantation. In addition to profits, Hatmill was therefore able to recover for the delay in the establishment of their proposed second stage ten hectare expansion and costs thrown away by establishment and attempted regeneration of the affected crops.

The Lessons

This case exemplifies the potential damage and consequential expense of failing to comply with an off-label permit for the use of chemicals in agriculture and the onus on employers to ensure their employees apply chemicals in accordance with instructions.

It also gives further consideration to the circumstances in which a public authority will owe a duty of care, specifically with reference to policy and planning decisions. The decision to eradicate the Papaya Fruit Fly was clearly a policy decision made in respect of an emergency situation for the public interest, specifically those in the agricultural community of northern Queensland. However, the act expressly provided that the DPI was to perform its functions bona fide and without negligence. This precluded it from claiming that no duty arose on the basis that decisions made in connection with the eradication program were of a policy nature.

Interestingly, had the issue arisen in late 2005 at the peak of the emergency situation brought about by the incursion of Papaya Fruit Fly, the state may have not have owed the relevant duty of care given the urgency of immediate widespread action.

Australian Competition & Consumer Commission v G.O. Drew Pty Ltd [2007] FCA 1246

The above case demonstrates the potential for liability for misleading and deceptive conduct under s52 of the *Trade Practices Act 1974* in the context of produce suppliers.

The respondents were in the business of commercially supplying eggs to retail and wholesale markets. Their business collected and purchased eggs from two sources: an independent farmer registered as 'Organic Producer no 3282', who was certified by the National Association for Sustainable Agriculture Australia (NASAA), and another farm which was not an organic producer.

The eggs were packaged by the respondent with labels containing various representations as to their quality, including the words '*certified organic by NASAA*' and '*Organic Producer No 3282*'. This represented to retailers and consumers that the eggs were:

- different from eggs not labelled as "organic" in terms of the chemicals, feed and other substances used in their production,
- certified by NASAA; and
- produced by Organic Producer 3282.

In fact, approximately 53.5% of the eggs packaged and sold as organic were no different from eggs not labelled as organic and were not obtained from the Organic Producer 3282. The respondents knowingly packaged falsely labelled eggs for almost two years knowing they were not organic, making a profit of approximately $69,326.27 from such eggs. The respondents resorted to this conduct when it became difficult to obtain a consistent level of supply from certified organic producers to fulfil supply requirements from customers.

In February 2005, the respondents were advised by NASAA that it believed the eggs currently being

supplied by the respondents were not certified organic. Realising that their conduct would be discovered, the respondents, through their solicitors, made full and frank disclosure of their conduct to the Australian Competition and Consumer Commission (ACCC). In addition, steps were taken to rectify the damage caused which included: issuing recalls and credit notes to customers who had been supplied the falsely labelled eggs, ceasing entirely to supply organic eggs, provide the retailers with an indemnity for damage they suffered as a result of the respondents' conduct, and making generous payments of $216,000 to the Organic Federation of Australia and $54,000 to NASAA for their potential loss of consumer confidence as a consequence of the respondents' conduct. In late 2005, the respondents sold their business to a competitor and signed a five year restraint of trade in the industry.

The court held that the respondents' conduct was very serious in the circumstances, especially given that the trade practices compliance officer (the second respondent) was the person responsible for formulating the practice of falsely labelling eggs. Notwithstanding the respondents' five year restraint from trading in the industry, their full disclosure and voluntary efforts to rectify the damage, the court held that it was still appropriate in the circumstances to grant a declaration that the defendants had engaged in misleading and deceptive conduct and an injunction prohibiting such conduct in the future.

The seriousness of the conduct and the fact that it was committed in part after having already given an undertaking to complete a Trade Practices Compliance Program, warranted more serious sanctions (ie contempt of court) in the event the respondents were to repeat the conduct.

Hobbs & Anor v Oildrive [2008] QSC 45

Grass and bush fires are a common source of damage to both property and agricultural resources in rural areas, particularly in the hot, dry months. As such, adjoining land owners have a duty of care to prevent damage to another's property by fire and will be liable for damage where the fire was either started or spread by that party's negligence. However, is an occupier of rural or agricultural property required to implement a fire risk management system in order to discharge this duty?

The facts of this case involved an employee of the defendant (Mr Hallar) slashing grass on the front paddock of its property. This task was routinely completed by Mr Hallar, using a ride-on tractor with an attached slasher trailing behind. It was about 30 degrees on the subject day and conditions were very dry. At approximately 12:40pm in the course of slashing long dry grass, Mr Hallar happened to notice flames ignite under the clutch of his tractor. He quickly dismounted the vehicle and attempted to stamp out the flames. By this time, the wind had already picked up embers and had scattered them from the back of the slasher into long dry grass where the fire quickly spread.

Fearing his safety, Mr Hallar evacuated the area by driving the tractor through more long dry grass towards the shed, causing a series of fires to start over a 300 metre front on the defendant's property. The fire consumed grass, vegetation and trees on the defendant's property and then crossed the road into the plaintiff's property causing damage to its commercial mango orchard.

Although the court accepted that the defendant owed a general duty to take reasonable care to prevent damage to the plaintiff's property as a result of fire, it was not convinced the duty was breached.

The plaintiff firstly alleged that the defendant's negligence had caused the fire vicariously from the conduct of its employee, Mr Hallar and consequently the damage to its orchard. The court accepted that Mr Hallar's conduct had not caused the fire as he:

- had in all respects operated and maintained the tractor and slasher correctly,
- had experience working on the defendant's mango farm and in particular slashing,
- had knowledge of the orchard area; and
- had taken all necessary precautions such as clearing rocks out of the way and clearing out built up debris from the slasher.

In addition, Mr Hallar and other property owners gave evidence that they had never experienced nor seen a slasher to cause a fire.

The plaintiff further alleged that the defendant's negligence caused the fire to spread to its property by failing to implement a risk management system to identify potential fire risks and have on hand suitable fire fighting equipment.

The court found no evidence upon which to conclude that the preparation of a fire risk management plan would have alerted the defendant to the risk of the slasher causing a fire. In addition there was no evidence led as to the cost to a farmer in 2001 of undertaking fire risk assessment, the availability of a consultant to perform the assessment, whether it was common practice for farmers in the area, or whether such assessments were recommended or advertised within community by the Rural Fire Board or other associations.

It was also found that fire fighting equipment such as a fire extinguisher, or water tanker on the property would not have extinguished or prevented the fire from spreading. Moreover, the defendant had no reason to take such precautions because:

- neither defendant nor other farmers in the community had heard of carrying extinguishers on slashers,
- none of the manufacturers of the slashers the defendant owned recommended the necessity for a fire extinguisher,
- the DPI had not made any such recommendation; and,

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- it had never been recommended to the defendant by the rural fire brigade of which he was a member.

Even Mr Hallar's apparently senseless action of driving the tractor to the shed while dragging flaming debris, subsequently causing a 300 metre fire front, did not constitute a sufficient breach. The court accepted expert evidence that even if Mr Hallar had left the slasher in situ, the fire would have spread 875 metres from the source in the 30 minutes before the rural fire brigade arrived and even this spread would have exceeded the capacity of the fire fighters to control or contain it.

Where a party seeks to establish negligence on the part of another, it is not sufficient to allege *any possible* course of action that should have been taken by the defendant in the circumstances. Such allegations are generally tainted with the benefit of hindsight. This case demonstrates the need to carefully examine the circumstances and general practices before the incident occurred. A defendant is not under a duty to take any precautions which could have averted the damage only those which are reasonable in the circumstances. Cogent evidence must therefore be provided of not only the utility of the precaution, but the availability, expense and common practice in the relevant industry or community.

Australian Civil Liability Guide

The 2007 *Australian Civil Liability Guide* is a publication produced by Carter Newell addressing legislative and case law developments relevant to civil liability throughout Australian since the reform process in 2002. Designed as a quick reference tool, the 2007 Australian Civil Liability Guide is currently available.

To obtain a copy of the Guide, please contact Jaqueline Stephan on jstephan@carternewell.com or by telephone on 07 3000 8335.

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