DISTRICT COURT OF QUEENSLAND

CITATION:	*Fletcher v. May* [2001] QDC 081
PARTIES:	**JAMES GORDON FLETCHER (Appellant)** **v.** **PETER JOSEPH MAY (Respondent)**
FILE NO/S:	Appeal 1 of 2000 Warwick File 352/00, 993/00
DIVISION:	
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court Warwick
DELIVERED ON:	9 March 2001
DELIVERED AT:	Brisbane
HEARING DATE:	13 February 2001
JUDGE:	McGill DCJ
ORDER:	**Appeal allowed in part; one complaint to be listed for further hearing.**
CATCHWORDS:	ENVIRONMENT PROTECTION – offences – significance of authority to operate feedlot – whether emission of odour a nuisance – *Environmental Protection Act 1994* ss. 45, 119, 123 – Environmental Protection Regulation 1998 s.5. Colless v. Overseas Game Meat Export Pty Ltd (Roma Appeal 1/00, Wylie DCJ, 19.9.00, unreported) – distinguished Don Brass Foundary Pty Ltd v. Stead (1948) 48 SR(NSW) 482 – cited Baulkham Hills Shire Council v. Domachuk (1988) 66 LGRA 110 – cited Jones v. John Lysaght (Aust) Ltd (1983) 51 LGRA 90 – cited R v. His Honour Judge Dodds; ex parte Smith [1990] 2 Qd.R. 80 - applied
COUNSEL:	D. Grealy for the appellant G M McGuire for the respondent
SOLICITORS:	Crown Solicitor for the appellant Gaffney Lyons & McMahon for the respondent

[1] This is an appeal pursuant to s.222 of the *Justices Act* from the decision of a Magistrate at Warwick who on 18 July 2000 dismissed two complaints alleging

offences under the *Environmental Protection Act 1994* ("the Act") and the *Environmental Protection Regulation 1998* ('the Regulation"). The complaints were dismissed without a full hearing, the Magistrate accepting submissions on behalf of the defendant in relation to preliminary points, that because of an environmental authority issued on 21 July 1999, both prosecutions had to fail.

First Complaint

[2] The defendant was charged with an offence under s.5(1) of the Regulation, which prohibits carrying out a Level 2 environmentally relevant activity without a Level 2 approval, subject to exceptions not presently relevant. One of the Level 2 environmentally relevant activities as set out in Schedule 1 is:

> "Cattle feedlotting – feeding cattle prepared or manufactured stock feed at levels greater than necessary for survival in a confined area having a capacity of –
> (a) 150 or less standard cattle units."

It was alleged that the defendant had between 14 and 16 December 1999 undertaken a "cattle feedlotting operation" on premises at Vanneck Street Yangan which were not approved under the Act for that activity. According to Schedule 4 a "Level 2 approval" means an approval under Chapter 3 Part 4 to carry out a Level 2 environmentally relevant activity. Part 4 of Chapter 3 includes s.45 which provides for an administering authority which has decided to grant an application for an environmental authority to "issue an appropriate environmental authority in the form approved by the Chief Executive." Exhibit 8 includes a form of environmental authority, which purports to be given in accordance with s.45(1) of the Act, and authorised the respondent to carry out cattle feedlotting. Presumably it is in the approved form.

[3] The preliminary point which was argued before the Magistrate was that, assuming that the respondent was undertaking a cattle feedlotting operation at the relevant time, he had this environmental authority issued under s.45(1) and therefore the required level of approval in respect of that operation. The authority stated that it was issued "in respect of carrying out the environmentally relevant activity cattle feedlotting at the following place(s): L201 and 202/D342, Parish of Robinson, Shire of Warwick. Located at: Swanfels Road, Yangan Qld 4371." It was said to be issued subject to the conditions set out in the attached schedules A to G, and to take effect from 14 July 1999, 7 days prior to the date on which it was issued. I was told that the purported retrospective operation of the approval (which strikes me as inconsistent with s.45(3) of the Act) was because that was the day on which the property was inspected.

[4] It was common ground before me, and I take it before the Magistrate, that whatever the respondent was doing was done at a site within Lot 201, which ran between Hawes Road and Swanfels Road near Yangan, and was close to four other parcels of land which fronted Vanneck Street which were also owned by the respondent.

The Magistrate's decision was that this authority permitted the respondent to carry out cattle feedlotting at Lots 201 and 202 located in Swanfels Road, and therefore a cattle feedlot operation carried out within Lot 201 was covered by the authority. On that basis the complaint was dismissed.

[5] It was submitted on behalf of the appellant that on its true construction the authority only authorised a cattle feedlotting operation to be constructed on a different site located on Lot 202, and was closer to Swanfels Road and further from both Hawes Road and Vanneck Street. It did not authorise the existing operation on Lot 201.

[6] The argument on behalf of the appellant was that under the scheme of the Act the contents of the approval were not conclusive as to what environmentally relevant activity might be carried on and where that might be done. The approval was approval of an application to carry on an activity, so that it was relevant to refer to the application to determine what activity was sought the application to be carried on. This is not an argument which, in my opinion, receives much support from the terms of the legislation. Section 41 provides the requirements for an application for an environmental authority, but all the statute provides is that the application must "be made to the administering authority in the approved form; and be supported by enough information to enable the authority to decide the application, including, for example, relevant information about the likely risks to the environment, details of wastes to be generated, and any waste minimisation strategy, and be accompanied by the appropriate application fee." That is a very general provision, and does not require anything very specific about matters such as precisely where within a parcel of land a particular activity is to be conducted.

[7] In addition, it is an argument which suggests that the only course open to an environmental authority under s.44 would be to grant or refuse an application precisely as it was made. Yet it is clear that the authority has power to impose conditions, this being referred to both in s.44 and in s.46. Those conditions may include conditions requiring the approval holder to take stated measures to minimise the likelihood of environmental harm being caused: ss.(4). Furthermore, s.41 also applies to an application for a licence (which according to Schedule 1 is included in the expression "environmental authority") and by s.46(3) the conditions of a licence might include a requirement that the licensee install and operate stated plant or equipment in a stated way within a stated time, or prohibit the licensee from changing, replacing or operating any plant or equipment installed in the licensed place if the change, replacement or operation of the plant or equipment increases or is likely to increase substantially the risk of environmental harm. Such a specific provision suggests that in the absence of such a condition, the licensee would not be restricted in such matters, which strikes me as inconsistent with the notion that the approval (in this case in the form of a licence) is an approval only for an activity carried out precisely in accordance with the details provided in the application.

[8] In my opinion, a preferable construction of the Act is that an environmental authority authorises a person to carry out environmentally relevant activity which

would be prohibited but for that authority, and that what is relevant in determining the scope of the approval is the content of the approval. An approval may be subject to conditions, and therefore conditions which restrict the way in which the relevant activity may be carried out. The relevant activity is for present purposes cattle feedlotting, and if the intention is to require that the cattle feedlotting be carried on in a particular way, such as at a particular place, that in my opinion is a matter which can properly be made the subject of a condition under s.46.

[9] There is nothing in the Act which requires that the approval be in respect of a particular place, although in my opinion the Act authorises the imposition of a condition that the activity be carried on only at a particular place. Given the nature of the activity of cattle feedlotting, it is one which ordinarily would be carried on only at a particular place, so it would be natural for this particular activity to be regulated in this way, but the legislation is not specific to cattle feedlotting; any activity may be prescribed by regulation as an environmentally relevant activity if the Governor-in-Council is satisfied that "a contaminant will or may be released into the environment when the activity is carried out; and the release of the contaminant will or may cause environmental harm: s.38(1)." It is not difficult to imagine examples of activities which would be capable of satisfying that test, but which would be by their very nature not undertaken at a specific place.

[10] For example, the operation of a vehicle of a kind which was capable of releasing contaminants into the environment would appear to fall within it, particularly because the term "contaminant" is very widely defined, and is capable of including for example noise: s.11. Almost any form of vehicle, from a traction engine to a space shuttle, produces contaminants of some sort, and the operation of either a particular vehicle or particular category of vehicles, or (at least in theory) any sort of vehicle, could be prescribed as an environmentally relevant activity under s.38. If therefore regulations required that approval be obtained in order to operate say a traction engine, and a person applied for such approval and such approval was forthcoming, there is nothing in the legislation which would, as far as I can see, necessarily require that that approval be only in respect of operation of the engine at a particular place, although a condition of the approval could be imposed restricting the engine to operation within, or outside of, a specified area.

[11] In those circumstances, in my opinion, what matters for the purposes of the operation for legislation are the terms of the approval, that is the authority. Is there an authority in force in respect of the relevant activity, and if so, what are its conditions? That, in my opinion, is found by looking at the terms of the authority which on its face permits the environmentally relevant activity cattle feedlotting at lots 201 and 202 at Swanfels Road Yangan. If there was some ambiguity about this document, it would be permissible to have regard to extrinsic matters such as the application, the history of the matter, and other surrounding circumstances in order to assist in its construction[1]. However, the approval is unambiguous and it is

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1 Codelfa Constructions Pty Ltd v. State Rail Authority of NSW (1982) 149 CLR 337 at 352, concerning the interpretation of a contract in writing.

therefore unnecessary and impermissible to go beyond its face, and the Magistrate's approach to that matter was correct.

[12] In any case, if one did go beyond the face of the approval and looked at the terms of the application, Exhibit 4, it is not unambiguous. Under the heading "Activity Information" the scheduled activity is identified as "cattle feedlotting", the street address of "premises/place of activity" is given as Swanfels Road, Yangan (lot 202), but the real property description is given as "L201/D342, L202/D342." The form requires a copy of the current certificate of title to be attached to the application, and what was provided was a "current title search" in respect of Lot 202 only. This stated that a certificate of title had issued, but certificates of title do not necessarily exist for land under the *Land Title Act* anymore, and I do not think that the inclusion of a title search only for lot 202 is conclusive. The position is that one part of the form makes reference only to Lot 202 but the other part makes reference to both Lot 201 and Lot 202.

[13] There was information provided with the application, although on a separate document. This was in accordance with the terms of the approved form, and is consistent with the requirement of s.41(1)(b) that the application be "supported by" information rather than include that information. In the circumstances I will pass over the question of whether it is permissible to look at the information to construe the approval as well as the terms of the application itself. The information contains a plan but not one which I can relate to the Land Title plan Exhibit 9, and principally seems to be concerned with the size and shape of the proposed feedlot, the presence of feed and water and concrete pads within it, and its relationship to a nearby corn shed and dam. It gives a distance from what is described as "town boundary (Yangan)". I have no idea where that boundary would be.

[14] There is also information provided on p. 2 in relation to separation distances, which identifies three "receptors", Yangan township, McConville and Garety. This on its face is meaningless to me, although counsel for the appellant submitted that it would be possible, no doubt with the assistance of additional evidence, by some process of triangulation on the basis of the information listed in this table to identify a particular site within the land owned by the respondent in respect of which the application was made. I think it is sufficient to say that the terms of the approval would need to be extraordinarily vague before they would be likely to be clarified by anything as ambiguous and unhelpful as that. For example, I find it very difficult to understand precisely how one can identify a point which is 283 metres away from "Yangan township"; I am not familiar with Yangan but it would have to be a very small place for a distance as precise as 283 metres from it to be meaningful. In my opinion, the application and the information contained with it, rather than being less ambiguous than the approval, is actually more ambiguous than the approval.

[15] It was also submitted that the history of the matter was relevant, in that there had been an earlier application, Exhibit 2, for approval of the particular feedlot which was then in existence (and for the purpose of deciding the preliminary point, was

assumed to be still in existence), which was rejected. I was told that what subsequently happened is that the application, Exhibit 4, was made, and that on 14 July 1999 someone inspected a site for a new feedlot (on Lot 202) which was intended to be constructed and on that basis the approval was issued. It was submitted on behalf of the appellant that this indicated that the approval was in respect only of cattle feedlotting in the new facility to be constructed in accordance with the information contained in the application, Exhibit 4, on the site inspected on that day.

[16] I can see the point of this argument and acknowledge that it has some force, although if the intention had been that the activity of cattle feedlotting was to be permitted under the authority only in a new feedlot which at that stage was yet to be constructed, the approval could have said so. It would have been easy enough to make it a condition of the approval that the cattle feedlotting was to take place only in the new facility to be constructed, but that was not done. On the face of it, the inspector has seen the existing facility and a site where a new facility was to be constructed, something that was obviously going to take some time to build, although there is nothing that I have seen to indicate how long that would take, and has issued an approval to take effect immediately. That seems to me to be consistent with the idea that cattle feedlotting on the site was approved in the expectation that in the near future the new facility would be constructed and the operation would then be transferred from the old facility to the new facility, but covering the old facility until that occurred. Counsel for the appellant was unable to point to anything objective which was inconsistent with that interpretation of the events. In my opinion therefore, the history, if that could properly be looked at in order to resolve any ambiguity, would not itself clearly indicate that the approval was to be confined to a new feedlot to be constructed on a different site.

[17] In my opinion therefore, if the various matters referred to by the appellant were taken into account, the result would not be sufficient to make it clear that the approval did not apply to the conduct of a cattle feedlot on Lot 201. The Magistrate was quite entitled to take the view that the approval applied to Lots 201 and 202, and that therefore no offence was committed under the Regulation by conducting a feedlot operation on Lot 201.

[18] Some reference was also made to Condition A1 in Schedule A of the Conditions, that:

> "The cattle feedlot development shall be established and managed in accordance with the documentation, plans, specifications and drawings supplied by the applicants …"

For reasons that I have already given, in my opinion the plans supplied with the application as part of Exhibit 4 did not assist in demonstrating that the feedlot was to be constructed only in a particular place, and this condition did not, in my opinion, have the effect of confining the operation of the approval to a particular place within the whole area of land. As I have indicated already, a condition could have been imposed which had that effect, but in my opinion that has not been done by this condition. In any case, it was conceded on behalf of the appellant that the respondent

had not been charged with breaching a condition of the approval, which is a different offence. The only significance of something in the condition therefore would be if it affected the proper construction of the approval, and in my opinion that condition does not.

[19] The appellant referred to the decision in Colliss v. Overseas Game Meat Export Pty Ltd (Roma appeal 1/2000, Wylie

[20] DCJ, 19.9.2000). In that case the question was whether an accreditation under the *Meat Industry Act 1993* was subject to conditions in circumstances where the relevant authority had sent the respondent a "certificate of accreditation" which contained no conditions or reference to conditions, and a handbook entitled "Conditions for Accreditation for Meat Processing", under cover of a letter which said that it enclosed the certificate, advised conditions attaching to the accreditation, and advised of the right to appeal against the conditions. His Honour noted that the accreditation was not required to be in any particular form, and said that it could be any writing containing an expression of the grant of authority and a statement of the conditions to which the grant was subject. On this basis the letter satisfied the requirements of the accreditation, and it was expressed to be subject to the conditions set out in the booklet, which were incorporated by reference. His Honour therefore concluded that the conditions in the booklet were conditions "stated in the accreditation" for the purpose of s.60(2) of the Act.

[21] In my opinion, this decision does not assist the appellant, because in that case there was an express incorporation by reference, whereas there is no incorporation by reference in the authority which is part of Exhibit 8, and even if condition A1 involves an incorporation by reference of the various documentation, plans, specifications and drawings supplied by the applicant, that material, as I have already indicated is itself ambiguous or unhelpful, and in any case the respondent is not charged with a breach of the condition of the authority. Further, the decision is distinguishable because in the present case the environmental authority, unlike the accreditation in Colliss, is required by s.45(1)(a) of the Act to be in the approved form.

[22] It follows that the appeal in relation to the first complaint should be dismissed.

Second Complaint

[23] By the second complaint the respondent was charged that between 13 and 17 December 1999, he did wilfully and unlawfully cause an environmental nuisance, contrary to s.123 of the Act. The complainant was asked to particularise that charge and did so during the hearing at p.6, line 48:

> "The defendant did cause an environmental nuisance by causing an odour to be emitted from the cattle feedlot operation at his Vanneck Street Yangan premises."

By s.123:

> "A person must not wilfully and unlawfully cause an environmental nuisance."

By subsection (2) it is also an offence unlawfully to cause an environmental nuisance, and subsection (3) permits a person to be convicted of that offence on the prosecution for wilfully and unlawfully causing the nuisance, if the court is satisfied that that offence was committed but was not satisfied it was done wilfully.

[24] This section needs to be read with s.119(1) which provides:

> "An act or omission that causes serious or material environmental harm or an environmental nuisance is unlawful ("unlawful environmental harm") unless it is authorised to be done or omitted to be done under –
> (a) An environmental protection policy; or
> (b) An environmental management program; or
> (c) An environmental protection order; or
> (d) An environmental authority; or
> (e) A development condition of a development approval; or
> (f) An emergency direction."

Causing serious or material environmental harm is also made an offence by s.120 and s.121 respectively. Environmental harm is defined in s.14 and environmental nuisance in s.15; interestingly, environmental harm is defined as including "environmental nuisance": s.14(1). However, environmental nuisance is excluded from the definitions of "serious environmental harm" in s.17, and "material environmental harm" in s.16. I am not sufficiently familiar with the Act to determine whether this proliferation of defined terms has any effect other than to uphold the modern Queensland practice of legislative complexity.

[25] It follows from s.119(1) that an act or omission that is authorised to be done or omitted to be done under an environmental authority, which includes, as I have already indicated, an authority under s.45(1) of the Act, is not unlawful even though it causes an environmental nuisance. Therefore if a person is alleged to have caused unlawfully an environmental nuisance, it is a defence to show that the act that caused the environmental nuisance was authorised to be done or omitted under the authority. In the present case the Magistrate concluded that the act which caused the environmental nuisance was operating the feedlot, and this act was done under the environmental authority, so it was not unlawful.

[26] The argument on behalf of the appellant focused on the question of what it was that was authorised to be done or omitted under, relevantly, an environmental authority. It was submitted that, relevantly, the environmental nuisance was causing the emission of the odour, and that therefore s.119 would not apply unless the emission of the odour was something authorised to be done under an environmental authority. Because the authority, Exhibit 8, did not in terms authorise the emission

of odour, s.119 did not provide a defence to this complaint. It was submitted on behalf of the respondent that the case as particularised was that the relevant act or omission was operating a feedlot, and reliance was placed on the particulars referred to earlier. It was inherent in the operation of a feedlot that odour would be emitted, so that the approval was pointless unless it permitted the emission of an odour.

[27] I do not accept the respondent's submission for two reasons. First I would interpret the particulars given as indicating that the relevant act or omission was causing the odour to be emitted, rather than operating the cattle feedlot. Second, although the emission of an odour may be inherent in the operation of a feedlot, it is by no means automatic that the emission of an odour results in an environmental nuisance. That term is defined in s.15 as follows:

> "Environmental nuisance is unreasonable interference or likely interference with an environmental value caused by –
> (a) noise, dust, odour, light; or
> (b) an unhealthy, offensive or unsightly condition because of contamination; or
> (c) another way prescribed by regulation."

An environmental value is in turned defined in s.9 as:

> "(a) a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety; or
> (b) another quality of the environment identified and declared to be of environmental value under an environmental protection policy or regulation."

No reliance was placed on para. (b) of s.9 for the purposes of this prosecution.

[28] The term "environment" is defined in fairly broad terms, in s.8. An absence of unpleasant odour could be described as a quality of a place, and hence the environment, that is conducive to public amenity, and therefore an environmental value for the purposes of s.9, so that unreasonable interference or likely interference with that quality caused by odour is an environmental nuisance. But the key consideration here is the word "unreasonable"; as with public nuisance at common law, it is not any interference with the environment which is an environmental nuisance, it needs to be unreasonable. What is unreasonable is obviously a matter which can only be decided by reference to a particular case, involving all of the factors relevant in the circumstances, but factors such as the nature and intensity of the odour, the regularity with which it is emitted, and the number of people affected, as well as the character of the neighbourhood would all be factors which I would expect, by analogy from the position in relation to common law public nuisance, would be relevant: Don Brass Foundary Pty Ltd v. Stead (1948) 48 SR(NSW) 482 at 486-7; Baulkham Hills Shire Council v. Domachuk (1988) 66 LGRA 110. A feedlot located in a rural area where there were few people living

close enough ever to notice the odour, and where the odour would be no more than an occasional inconvenience, could probably produce large quantities of odour without constituting an environmental nuisance. Whether or not a tree falling in a forest creates a sound if there is no one there to hear it, a feedlot operating in the bush does not create an environmental nuisance if there is no one there to smell it.

[29] Accordingly, it is not necessarily inherent in the approval of a feedlot operation that the emission of odour in circumstances constituting an environmental nuisance is also approved. But it does not necessarily follow that the act on its true constructions produces the result that the approval is irrelevant to the question. What matters is the true construction of s.119(1). In relation to the appellant's argument, if the relevant act is the emission of an odour rather than carrying on an activity which generates an odour, I would expect to see some provision in the Act for the emission of an odour to be authorised under the various things listed in subsection (1). I will have to consider them separately.

[30] An environmental protection policy is referred to in s.24; it may be made about the environment or anything that effects or may effect the environment and therefore may be made about either the emission of odours or the carrying on of activities which would result in the emission of odours. However, it does not look like the sort of thing that would be brought into existence just to authorise the emission of an odour from a feedlot. An environmental management programme is explained in s.80 as a specific program for matters dealt with by the programme which reduces environmental harm or details the transition to an environmental standard. However, by s.81, an environmental management programme must:

> "(a) State the objectives to be achieved and maintained under the program for an activity; and
> (b) State how the objectives are to be achieved, and a timetable to achieve the objectives, taking into account –
> (i) the best practice in environmental management for the activity; and
> (ii) the risks of environmental harm being caused by the activity …"

An environmental management programme is therefore something which is put into effect for an activity, which seems to me to be, relevantly, the activity which results in the emission of an odour rather than the emission of odours as such. It is apparent from both s.14(2) and s.18(1) that an activity is something which may cause environmental harm. The term "activity" is not defined in the Act, and the term "environmentally relevant activity" is not defined in a helpful way.

[31] An environmental protection order is mentioned in Schedule 4 with a reference to s.156, which deals with emergency powers. Authorised persons who are satisfied on reasonable grounds of certain matters, and that urgent action is necessary for particular purposes, may "direct any person to take specified reasonable action within a specified reasonable time, or take the action, or authorise another person to

take the action". Without wishing to suggest that the interpretation of this section is in any particular way confined, it is a provision which it seems to me more readily applies to the carrying out of some sort of activity rather than to something like the emission of an odour.

[32] An "environmental authority" means a licence or approval (Schedule 4) both of which are issued under Chapter 3 Part 4 or 4A. Part 4 is concerned with authorities for carrying out an environmentally relevant activity (s.40A), as is Part 4A: s.60F. It seems to me that the terms used in those Parts are consistent with the regulation of activities which may produce adverse effects to the environment, rather than regulating the actual process of adversely affecting the environment, for example, by the emission of an odour.

[33] A development condition of a development approval is a condition of the approval imposed by, or imposed because of a requirement of, the administering authority as assessment manager or concurrent agency for the application for the approval: Schedule 4. A development approval means development approval under the *Integrated Planning Act 1997*. Under that Act by s.3.1.4 and s.3.1.5, a development approval is required for certain examples of "development" which means carrying out building work, carrying out plumbing or drainage work, carrying out operational work, reconfiguring a lot, or making a material change of use of premises: s.1.3.2. These terms are all defined in that Act. I suppose something like the emission of an odour could be something authorised by a development condition of a development approval, but it seems to me that a development approval, and hence a development condition, is much more likely to be concerned with the regulation of an activity which may cause an odour to be emitted, rather than the emission of an odour itself.

[34] Finally, an emergency direction may be given under s.157 by an authorised person for the release of a contaminant into the environment if the authorised person is satisfied it is necessary and reasonable to release the contaminant because of an emergency, and there is no other practical alternative to the release: s.157(1). That could authorise the emission of an odour, since an odour is a type of contaminant (s.11), but only in an emergency. It is the sort of thing I would expect to see mentioned in a provision like s.119(1), but it does not suggest that it is part of the ordinary process of the administration of the legislature for approval of the emission of odours to be granted or withheld.

[35] Overall it seems to me that the various forms of authorisation nominated in s.119(1) are generally concerned with authorising activities the carrying out of which may result in the creation of one of the matters listed in paras. (a), (b) or (c) of s.15. More importantly, it does not seem that any of these provisions would permit an authority simply to authorise the emission of an odour from a feedlot. If the construction contended for by the appellant were correct, one could expect to find some mechanism in the legislation by which a person could apply for an authorisation, relevantly, to emit an order, and there does not seem to me to be any mechanism in the Act for it. Nor was counsel for the appellant able to point to any

mechanism which would enable a person to apply for such an authorisation, or would enable a relevant authority to grant such an authorisation, although he did submit that it was inherent in the nature and purpose of the Act that this sort of thing would be controlled.

[36] The object of the Act is set out in s.3:

> "To protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (ecologically sustainable development)"

The way in which this is to be achieved is set out in some detail in s.4, which is too long to quote, and is in any case far too general to throw any light on the question of whether the object of the Act is to be achieved relevantly by prohibiting acts or omissions done in the course of carrying out activities or by prohibiting acts or omissions by which environmental values are affected. Reference to the object of the Act therefore is not of assistance in interpreting s.119, but in the light of my analysis of the nature and operation of the various forms of authorisation listed in s.119, in my opinion that section does not contemplate an authorisation of the process of damaging an environmental value, as distinct from the carrying on of activity which may cause something to happen by which an environmental value is impaired.

[37] Applying that to the present case, in my opinion the relevant "act or omission" in s.119 would not be the emission of an odour, but either the carrying on of a feedlot at all (if that was what is alleged to have caused the environmental nuisance) or some act or omission in the course of carrying on the feedlot. If it is simply the ordinary operation of the feedlot that is alleged to produce the nuisance, then what matters for the purpose of s.119 is whether the operation of the feedlot was authorised under one of the forms of authorisation listed, such as an environmental authority. But odour amounting to an environmental nuisance could be generated by the way in which the feedlot was operated, so that the relevant act or omission might be not the operation of the feedlot, but the operation of the feedlot in a particular way. Compare Jones v. John Lysaght (Aust) Ltd (1983) 51 LGRA 90, where the defendant had a licence to store oil but was charged in relation to the manner of the storage.

[38] This emphasises the importance of the charge being properly particularised, that is by the prosecutor properly identifying the act or omission relied on as being unlawful because it has caused an environmental nuisance. If what was relied on was simply cattle feedlotting, then that should have been the act particularised. If what was relied on was some inappropriate feature of the way in which the cattle feedlotting was being conducted, that ought to have been particularised. If the act or omission alleged to have been rendered illegal by s.119 had been properly particularised by the prosecutor at the hearing, in my opinion the difficulty would have been overcome. As it stood, what was particularised was the emission of an odour; the prosecutor did not identify what it was alleged that the defendant had

done or omitted to do which caused that emission of the odour. What had been particularised was the characteristic of the environmental nuisance relied on (odour) but not the act or omission relied on as illegal, unless it can be said that the reference to the odour being omitted "from the cattle feedlot operation" meant that what was relied on as the relevant act or omission was simply operating the cattle feedlot.

[39] If that was what was meant by the particulars, then in my opinion the decision of the Magistrate was correct. If the act or omission alleged to have been unlawful was simply operating the cattle feedlot, that was something authorised to be done under an environmental authority, for the reasons I gave when discussing the other charge. However, it would not necessarily follow that this was the only act or omission which could have been alleged. For example, the authority contains a condition limiting the number of standard cattle units accommodated in the feedlot: Condition A2. If the prosecutor were alleging, for example, that there was an environmental nuisance, in the form of an odour causing unreasonable interference with environmental values, caused by the accommodation in the feedlot of more than the maximum number of standard cattle units permitted by this condition, the authority would not be a defence to the charge because the relevant act (having more than the authorised number of standard cattle units in the feedlot) was not something authorised to be done under the authority.

[40] To take another example, Condition F1 requires pen cleaning at intervals ordinarily not beyond 14 days. If there were a persistent omission of pen cleaning so that the amount of odour produced built up and led to unreasonable interference of environmental value, and it was alleged that the respondent had caused an environmental nuisance by omitting to clean the pens regularly, the authority would not be a defence. On the other hand, if it were alleged that the environmental nuisance was caused by omitting to clean the pens daily, the respondent could say that under the conditions in the approval he was impliedly authorised not to clean daily, so the authority would be a defence.

[41] There is also the significance of Condition D1:

> "The feedlot shall be operated so as to avoid unreasonable interference with the comfortable enjoyment of life and property off site, or with off site commercial activity."

If the relevant act was operating a feed lot in such a way as to cause unreasonable interference with the comfortable enjoyment of life and property off site, or with off site commercial activity, then the existence of the authority would not be a defence under s.119, because the effect of the imposition of this condition is that the authority does not authorise the feedlot being operated in a way which causes unreasonable interference with the comfortable enjoyment of life and property off site, or with off site commercial activity. If the intention were that this condition would prevent the feedlot from being operated in a way which would cause an environmental nuisance, it is unfortunate that the condition was not expressed in

those terms; the condition as presently expressed seems to adopt a similar but different test.

[42] If the ordinary operation of a particular cattle feedlot was such that it would produce an environmental nuisance (or for that matter unreasonable interference with the comfortable enjoyment of life and property off site) there does not seem to me to be much point in granting an authority for the operation of a feedlot if causing an environmental nuisance, (or interfering with the comfortable enjoyment of life and property off site) is still to be an offence. However, that is really a matter for those responsible for the administration of the legislation, rather than a matter which assists in the determination of its true construction.

[43] In my opinion, if the act relied on as being illegal is simply operating the cattle feedlot, then the decision of the Magistrate was correct. But it seems to me, with respect, that the difficulty in this case is that the act relied on as illegal for the purposes of the charge was never properly identified, either in the complaint or in the particulars. If that had been done, in my opinion the question of whether the authority, Exhibit 8, provided a defence under s.119 would have been easily resolved. There is no power to send the matter back for further hearing – R v. His Honour Judge Dodds; ex parte Smith [1990] 2 Qd.R. 80 - so in my opinion the appropriate course is to allow the appeal, set aside the decision of the Magistrate and list the matter for further hearing before myself. In the course of argument however it was foreshadowed by counsel for the appellant that in the event of the appeal being allowed the appellant would take a certain course. In the absence of some indication to the contrary when judgment is delivered, I will assume that that remains the appellant's position and will act accordingly.

[44] With regard to costs, this has not been separately argued, but subject to argument my view is that the appellant should pay the costs of the appeal. The appeal dealt with two complaints, and in respect of one of them the appeal was unsuccessful. In relation to the other, the appeal was successful, but the argument relied on by the appellant was not upheld, and the appeal succeeded really because of a failure on the part of the appellant properly to particularise his case when the charge was heard. In those circumstances, I think it is on the whole only fair for the appellant to pay the respondent's costs of the appeal to be assessed.