



# Court of Public Opinion

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## People of Tasmania v O'Byrne [2010] TASPACOPO 1 (8 March 2010)

Last Updated: 8 March 2010

[2010] TASPACOPO 1

**COURT:** TASMANIAN COURT OF PUBLIC OPINION

**CITATION:** *O'Byrne v People of Tasmania* [2010] TASPACOPO 1

**PARTIES:** O'BYRNE, Michelle Anne

v

PEOPLE OF TASMANIA

**FILE NO/S:** OBY 1/2010

**DELIVERED ON:** 8 March 2010

**DELIVERED AT:** Launceston

**HEARING DATE:** 5 June 2009

**JUDGMENT OF:** Stannus J

### CATCHWORDS:

Environmental Management and Pollution Control Act 1994 - controlled burns – material environmental harm – serious environmental harm – high impact on health – smoke pollution – Environmental Protection Authority – Parks and Wildlife Service - air monitoring - wood burners – asthma - effects cumulative – person responsible – Memorandum of Understanding – native forest logging and plantations – increased burning regime – respiratory and smoke sensitivity problems – recurrence of asthma – permanent health problems – default of non-appearance

### REPRESENTATION:

*Counsel:*

**Applicant:** G Allan

**Respondent:**

**Judgement Number:** [2010] TASPACOPO 1

**Number of paragraphs:** 7

Serial No 1/2010

File No OBY 1/2010

PEOPLE OF TASMANIA V MICHELLE ANNE O'BYRNE

REASONS FOR JUDGEMENT STANNUS J

8 March 2010

## Introduction

**1** The defendant is the Minister for Environment, Parks, Heritage and the Arts. She is currently a Member for Bass, in the House of Assembly, representing the members of her electorate, and more widely, in her capacity as Minister, the People of the State of Tasmania. As Minister, she is responsible for a number of Government bodies, including the Department of Primary Industries, Parks, Water and Environment. Within that Department are to be found the Parks and Wildlife Service and the EPA Division. The chief legislation for the control and management of the environment is the ENVIRONMENTAL MANAGEMENT AND POLLUTION CONTROL ACT 1994

**2** There has been introduced into the Court documents evidence which records that the defendant was given notice of impending proceedings and, before trial commencement such notice was served by delivery at her Launceston office, being an indictment charging her with wilfully failing to discharge her obligations under the Act and with occasioning material and/or serious environmental harm to Clive Stott and Richard Butler. These charges were subsequently amended upon application by the prosecution to include the charge of failing to discharge her duties and honour her obligations as so sworn in the House of Assembly, as an elected representative of the People of Tasmania. The non-appearance of the defendant in the Court to answer the charges against her, her failure to enter a plea and her failure to have presented on her behalf a defence to the charges against her has been a significant impediment to the proper carriage of these proceedings. Nevertheless, it was the decision of the Court to proceed and to try the defendant in absentia.

**3** During the course of 2008 and 2009 there were a number of controlled burns conducted in various parts of the state and it was the prosecution's contention that the Minister wilfully failed to discharge her obligations under the Act, namely:

- “**3.** The objectives of the environmental management and pollution control system established by this Act are, in support of the objectives set out in Part 1 of this Schedule –
- (a) to protect and enhance the quality of the Tasmanian environment; and
  - (b) to prevent environmental degradation and adverse risks to human and ecosystem health by promoting pollution prevention, clean production technology, reuse and recycling of materials and waste minimization programmes; and
  - (c) to regulate, reduce or eliminate the discharge of pollutants and hazardous substances to air, land or water consistent with maintaining environmental quality; ...”

**4** It is also that prosecution's contention that the Minister was responsible for occasioning material and/or serious environmental harm involving an actual adverse effect that was of a high impact on the health or safety of Clive Stott of Grindelwald, and that was of a high impact on the health or safety of Richard Butler, of Victoria, by continuing to allow/promote various planned burns in and around the Tamar Valley. The Act defines Environmental harm thus:

### **5. Environmental harm**

(1) For the purposes of this Act, environmental harm is any adverse effect on the environment (of whatever degree or duration) and includes an environmental nuisance.

(2) For the purposes of this Act, the following provisions are to be applied in determining whether environmental harm is material environmental harm or serious environmental harm:

- (a) environmental harm is to be treated as serious environmental harm if –
  - (i) it involves an actual adverse effect on the health or safety of human beings that is of a high impact or on a wide scale; or
  - (ii) it involves an actual adverse effect on the environment that is of a high impact or on a wide scale; or
  - (iii) it results in actual loss or property damage of an amount, or amounts in aggregate, exceeding ten times the threshold amount;

**5** In seeking to establish its case, the Prosecution introduced a body of evidence and heard testimony from a number of witnesses. This evidence is as follows:

- i) 5/6/09 [http://tasmaniantimes.com/images/uploads/mock\\_trial.doc](http://tasmaniantimes.com/images/uploads/mock_trial.doc) (Photos et al. accompanying Public Notice & indictment)
- ii) 9/07/09 [Clive Stott – Witness: Evidence - Part 1](#)  
23/07/09 [Clive Stott – Witness: Evidence Part 2](#)
- iii) 7/08/09 [Shirley Brandie – Witness: Evidence](#)
- iv) 20/08/09 [Richard Butler – Witness: Evidence Parts 1 & 2](#)
- v) 21/08/09 [Greenwich00 - Witness: Evidence](#) (See: Comment #109)
- vi) 14/09/09 [Garry Stannus - Witness: Evidence Part 1](#) and  
[Garry Stannus - Witness: Evidence Part 2](#) (See: Comments # 120-145)
- vii) 28/02/10 [Angelika Allen - Witness: Evidence](#) (See: Comment #160)

I turn to this evidence now.

**5i)** The photographic record submitted to the Court includes 29 images of smoke pollution occurring in and around the Tamar valley between 13 April 2009 and 22 May 2009. These events occurred over the town of Launceston itself, and

across substantial portions of the Tamar estuary. Accompanying the photos were written eye witness accounts in which residents confirmed the various smoke infestations. There is also included documentary evidence associating the Parks and Wildlife Service with one of the most serious smoke infestations during that period. The PWS is a government body which operates within the minister's portfolio. There is also included documentary evidence from both Clive Stott and Richard Butler at the time, setting out how the events of the period in 2009 affected them. There is included reference to s8 of the principal Act which confers on any person on whom a function is imposed or a power is conferred under this Act to perform or to exercise the power in such a manner as to further the objectives set out in Schedule 1 of the Act. Until 1 July 2008 an explicit power resided with the Minister under s15 of the Act which placed the Board of the Environment Protection Authority under the control of the Minister. This control was subsequently superseded by a new s15, s15A and s15B which changed the nature of the relationship between the Minister and the Board. The Court notes that Mr Stott's health problems began before this period, when he was admitted to hospital on 13 April 2008.

**5ii)** Mr Stott's evidence was delivered in two parts. The first dealt with a description and explanation of the sections of his website which, after becoming ill, he had set up to campaign against the intrusions of smoke and the unhealthy consequences it brings. In the second part, he gave evidence that linked his serious deterioration in health to smoke pollution from controlled burns conducted by the forest industries and from Parks and Wildlife. He detailed deficiencies in the State's air monitoring programme for PM10s and told the court that it was the smaller PM2.5 particles which did the greater harm.

**5iii)** Ms Brandie's evidence, from Canada, served to confirm the threat of wood smoke on people's health. Her evidence linked the essential common danger to health, be it from burn-off smoke or wood burners. She had said that many of the symptoms described by those who come into contact from forest burn-offs was surprisingly similar to that reported by those who were exposed to wood-burner smoke.

**5iv)** Richard Butler, described himself as an asthmatic for 35 years, and described how it was to visit this state and to be caught overnight in Exeter, by a white-out of smoke, how he had been well for the past week but found that on arrival at the property that he was staying at that night, he became immediately ill from asthma due to the smoke that limited visibility to about 30 metres from the house. Mr Butler gave some quite revealing detail concerning different medications that he uses from time to time, advice he'd been given by his doctor on dosages, and his need that night to take what some would think excessive amounts of Ventolin in order to control the smoke induced asthma. His opinion of the event was that he could have died as a result of the smoke inhalation. Mr Butler gave in evidence how he found the air in the middle of Melbourne more breathable than that of Tasmania.

**5v)** Greenwich00 [identity withheld by application to the Court] detailed how she and her husband – a late onset asthmatic, had moved to Tasmania believing they would experience clean air which would help her husband's illness. Instead she wrote that they found that he became progressively worse. They went to Sydney for a week and her husband's health improved immediately. On arrival back in Launceston, he was again assailed by coughing associated with asthma. This pattern of illness respite then return has been repeated subsequently whenever they travel. Greenwich00's husband has been advised by a specialist to leave the Tamar permanently, and to leave Tasmania for the burning period. They are presently trying to relocate to the mainland. Greenwich00's evidence parallels and tends to corroborate that of Richard Butler's.

**5vi)** Garry Stannus, stepping down from the Bench, with Boeder AJ officiating, gave evidence in two sessions. In the first session, he spoke of his own experiences with fire, at his rural property and said that over the years he'd seen much smoke in the landscape and while his health had not seemed to suffer from exposure to it, he had heard that its harmful effects could be cumulative. Mr Stannus gave evidence concerning the 29 photographs which he had taken over a period of five weeks during April and May, 2009. [See 5i)] He detailed the events of 5 June 2008, of the cloud of smoke beyond the north-east of the town, of seeing smoke coming from the Minister's office, of the burn smoke covering the town that night, when the wind changed direction and of his subsequent meeting with Clive Stott, the first witness. In Mr Stannus's second session of evidence, he told how he'd initially read an account of Clive Stott's pain and health deterioration and contacted him. He had begun photographing the smoke events in the Tamar Valley at that time and had received an email from Mr Stott which described his worsening physical condition. Mr Stannus described other communications received from TT correspondents and told how and where he had taken each of the photos presented in 5i). Subsequently he went to the Minister's office and wrote and left there a letter of complaint about the smoke. The letter also informed the Minister that she was the person responsible for the quality of the air and that she would be put on trial in the Court of Public Opinion. Mr Stannus then recalled how in the week following, the smoke in the valley and around the City of Launceston worsened. Though receiving a letter of acknowledgment from the Minister's office, the burns continued and the smoke persisted. This induced him to wait no longer, and to prepare the Trial indictment which Mr Stott delivered to the Minister's office on 5 June 2009 – approximately 1 year after the events which had precipitated Mr Stott's health crisis. Mr Stannus told the Court of the Memorandum of Understanding between the Forestry

Corporation and the then Dept of Environment. By signing the MOU the Dept of Environment effectively washed its hands of responsibility to investigate air pollution caused by forestry controlled-burns.

5vii) The last witness to give evidence was Mrs Angelika Allen. She described how in the last few years, a massive increase in native forest logging and plantations in the NE of the state, had been accompanied by a like increase in logging burn-off smoke. She recounted how, similarly to Clive Stott, she had tried to meet the Minister to discuss her concerns relating to the smoke, or to speak to her via telephone, but all requests for such meetings or phone links had been rejected. Mrs Allen referred to 13/18 consecutive days of exceedence due to winter burn-offs in 2009. She described how the increased burning regime around her home in Patersonia had caused her to experience respiratory and smoke sensitivity problems, for the first time in her life. Her daughter too, had experienced a recurrence of asthma symptoms for the first time since infancy. She described how the burn-offs of 2008 had left her with permanent health problems.

6) At this stage of the trial, the prosecution made application under Supreme Court Rules 2000, Part II, Division 2 – Judgment in default of appearance or pleading. The motion, argued that the defendant was in default, because of non-appearance, and requested the Court proceed to judgement. This matter was dealt with through the comments section of the Trial, the Court finding that

Where a respondent party to a proceeding in this Court is by virtue on non-appearance deemed to be in default, that the claims as made by the plaintiff (prosecution) by default stand proven and that the Court move to judgement.

Accordingly the Court declared the accused, Michelle O'Byrne, to be a defaulting defendant, and reserved its judgement in default of appearance. In her application for a judgement in default of appearance, Mrs Allan argued that since the evidence and various witness testimony heard in the Court had not been disputed, there was no dispute as to material facts. Mrs Allan's argument was that the Court should move to judgement on the basis of the body of evidence – unchallenged - that had been admitted. Mrs Allan's application was for a judgement from the prosecution, meaning that in the absence of a defence i.e. by the default of the defendant, the prosecution case must stand. The Court, in accepting the application for judgement in default of appearance, accepts the contention that the prosecution case must stand.

7) The evidence and testimony presented to the Court establishes that over two years, 2008 and 2009, the Tamar Valley and its residents experienced a number of smoke infestation events which at times lasted for days on end. It is established that these events caused serious harm to the health of three people, one a visitor to the state, another to a resident of the Tamar region and in the case of the third, to a resident in the North east of the state. It is established that the Minister had refused to meet with Clive Stott and Angelika Allen to discuss their health concerns and that the burning continued with the Minister declining to halt it. It is established that some of the worst of the burn smoke to affect the valley, was in fact from controlled burns by the Parks and Wildlife Service. This Government body is administered by the defendant in her capacity as Minister. MICHELLE ANNE O'BYRNE MHA is charged with two offences: -

1. Failing to discharge her obligations as minister under the *Act [Environmental Management and Pollution Control Act 1994* (NO. 44 of 1994)] and with occasioning material and/or serious environmental harm to CLIVE STOTT and RICHARD BUTLER, both of the Tamar Valley, by continuing to allow/promote, despite continued requests, various planned burns across Tasmania and pernicious smoke in and around the Tamar valley.
2. Failing to discharge her duties and honour her obligations as so sworn in the House of Assembly, as an elected representative of the People of Tasmania.

The Court finds the defendant guilty as charged.