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Not as Simple as Following Your Nose

Navigating Odour and the Law

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As residential housing infill and development rises in what were once traditionally industrial areas, industry will increasingly be required to manage its operations to limit possible impacts on new communities.

As recently as last week, media reported increasing agitation of Perth residents in the surrounds of the Tamala Park Landfill, in circumstances where a new residential estate is being built less than 1 kilometre away.[1] With increasing coverage and awareness of potential risks associated with industrial emissions, including climate activism, residents are likely to have a low tolerance for industrial impacts that interfere with their home. With this in mind, businesses previously operating without issue can find themselves navigating new challenges in complying with obligations under relevant environmental protection laws and at common law.

What Is Odour and How Is It Perceived?

An odour is the property of gaseous compounds perceived by the human sense of smell. In general, an odour that one individual considers to be unpleasant will be considered unpleasant by most people. Individuals' ability to detect odour, and perception of strength in general, varies but is able to be tested and rated using an "olfactory sensitivity" test. However, detection and perception of odour can be impacted by hypersensitivity (or conversely, desensitisation), and other personal factors, including experience and psychological beliefs about cause and toxicity. Reaction to odour is subjective and not uniform, and an odour that is faint and mildly unpleasant to one person in one context may be considered unbearable by a different person in another context.

Measuring Odour and the Extent of Its Presence for Regulatory Purposes

Unlike many other emissions, such as noise, there is no known technology that can accurately and objectively measure odour. In addition to the subjective matters discussed above, attempts to deal with odour at a chemical level are challenging. A very strong odour can sometimes be detected where the compounds that form the odour are at a level lower than the detection limit of equipment capable of measuring that compound. Even where compounds are at a measurable level, the interaction of compounds to create a specific odour is complex, and the relationship between the strength of odour and the level of contributing compounds is not linear. An odour may be detectable at one location but not at another only meters away, and detectable in one 10-second period but not in the next, which makes the precise point and time of measurement significant.

As the best available equipment for detecting odour is currently the human nose, measuring the level of odour in a community is typically done through a combination of "odour patrols" conducted by trained panellists and community surveys. Community surveys are often used as first line regulatory tools as they are useful for assessing a change in the presence of an odour in an area. These can be undertaken independently by the regulator or can be required to be undertaken by the business through imposition of licence conditions. Either way, experience suggests best practice in undertaking community surveys is rarely followed. By way of example, to ensure the responses provide reliable data, care must be taken in selecting people to take part. If the survey is directed at people who have previously reported odour or actively volunteer, as opposed to randomly selected cohort, there may be a bias, and the dataset is more likely the skew towards an impact. Similarly, care must also be taken to ensure the survey asks unbiased questions which do not presuppose the presence of odour or that its presence is problematic.

Regulation of Odour

Odour is regulated both at the planning and development stage, and the operational stage.

At the planning and development stage, when applying for necessary licences and approvals for a new premises or to alter operations of an existing premises, the relevant department may assess potential odour impact as part of the application process. This is particularly the case where the application relates to an odour emitting activity, such as that undertaken by an industrial premises, waste recovery premises, wastewater treatment plants, landfills and composting facilities.

Where a proposal has the potential to generate odour emissions, the business will need to provide the department with information relating to potential odour impacts and odour mitigation strategies. While the precise requirements vary between the states and territories, the analysis that may need to be provided usually includes an assessment of existing odour emissions in the area and computer modelling (typically prepared by an expert environmental consultant). If, based on this analysis, the relevant regulator considers there is a risk that the premises will emit an odour that may impact the community, they will likely impose licence conditions to mitigate the risk or refuse the application if the risk is not adequately mitigated.

At the operational stage, licence conditions and enforcement action are the key regulatory tools.

1 "Residents furious over smell from Tamala Park Landfill affecting Clarkson, Kinross, Burns Beach and Mindarie", PerthNow, 10 October 2024

In addition to common law nuisance claims that might be made by residents, a regulator may take action under the relevant environmental protection legislation. While the precise legislation varies between the states and territories, we note that in general:

1. Industries must not emit or cause to emit an unreasonable odour[2] or an offensive odour.[3]

   Whether an odour is unreasonable or offensive turns on the particular facts of each case. While there is no bright line, the assessment involves several factors that include, but are not limited to, the nature, strength, duration and frequency of the odour; the impact the odour had on the person(s) activities; and the social utility of the activities that caused the odour. It should also be noted that while the established use and character of the locality is another relevant factor, it is not a defence, either under statute or for nuisance, that the business has been operating in the same manner (often for several decades) prior to those affected moving to the area. The standard that needs to be met to infringe the prohibitions in some situations is low, with a few minutes of annoyance while conducting domestic activities potentially sufficient.

2. As noted above, for operations that require licensing, a regulator may impose licence conditions to mitigate the risk of odour. These licence conditions may impose additional controls on the business, and a failure to comply with them is an offence.[4] However, compliance with those conditions does not necessarily protect a business from common law liability or prosecution for a separate offence.[5]

The issues that arise with odour are particularly complex at the operational stage. Not only are limitations in theoretical modelling that may have been done at the planning stage exposed, but as the operation matures, the context may change. As residential developments and other sensitive land uses encroach closer on commercial and industrial areas, established business often face additional challenges as the influx of residents to the area often leads to an increase of odour complaints. In turn, this increases the risk of the relevant regulator imposing new conditions or taking enforcement action.

Significantly, the emission of an unreasonable or offensive odour, or breach of a licence condition, is a criminal offence. Accordingly, it is critical that a business is aware of the risk of potential odour impacts and is proactive in ensuring compliance with licence requirements.

Navigating a Sensitive Issue

Where odour issues do arise, it can be a complex issue to navigate. This is because:

1. As noted above, responses to odour are subjective, and there is no reliable technology that can objectively measure odour in the community.
2. After an odour has been emitted, the chemical compounds may begin to degrade and will mix with and be diluted by the air. In effect, this means the chemical makeup of the odour may change significantly by the time it is detected in the community. In turn, if there are several potential sources of odour, this can complicate identifying the premises from which the odour was emitted and the precise cause within a premises, and what can be done to reduce its detection offsite.
3. Whether odour will be present at a particular place in a community will depend on several meteorological factors, including wind direction and speed. As such, odour issues may occur intermittently, and it may be difficult to predict when, where or if they will occur.

As such, investigations into the source of an odour and the extent of the issue in the community can take several years and need to be managed very carefully.

Given the complicated nature of the investigations and risk of potential criminal offences, it is recommended that legal advice is sought when navigating odour investigations or dealing with odour-related licencing issues. Further, as regulators have statutory powers to require the disclosure of documents, involvement of legal advisors at an appropriate time can have the advantage of protecting an investigation or testing from production in regulatory investigations or proceedings (for further guidance, see our article on internal investigations and notices for document production and interviews).

Our team has experience in assisting clients in investigating odour related issues and responding to licence amendments led by the regulator in a way that minimises risk to the business and favourably positions the business in respect of further enforcement action (and experience with defending enforcement proceedings at trial if they are commenced).

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2 For example, *Environmental Protection Act 1986* (WA), S 49(5).

3 For example, *Protection of the Environment Operations Act 1997* (NSW), S 129.

4 For example, *Environmental Protection Act 1986* (WA), S 58(1).

5 See for example, *Crowther v State of Queensland* [2002] QPEC 79, [35].

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