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D6: Environmental Law

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Sustainable Development Law in the Courts: The Polluter Pays Principle

Introduction

The World Commission on Environment and Development in its report, *Our Common Future* articulated the concept of sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.¹ In Australia, the adjective “sustainable” is qualified by the word “ecologically” to emphasise the necessary integration of economy and environment.²

Ecologically sustainable development (ESD) involves a cluster of elements or principles including the principle of sustainable use, the principle of integration, the precautionary principle, the principles of inter-generational and intra-generational equity, the principle of conservation of biological diversity and ecological integrity and the principle of internalisation of external environmental costs.³

This paper focuses on the principle of internationalisation of external environmental costs and, in particular, on the polluter pays principle.

Internalisation of external environmental costs

Ecologically sustainable development involves the internalisation of environmental costs into decision-making for economic and other development plans, programs and projects likely to affect the environment. This is the principle of the internalisation of external environmental costs. The principle requires accounting for both the short-term and the long-term external environmental costs. This can be undertaken in a number of ways, including:

- (a) environmental factors being included in the valuation of assets and services;
- (b) adopting the polluter pays (or user pays) principle, that is to say, those who generate pollution and waste should bear the costs of containment, avoidance or abatement;
- (c) the users of goods and services paying prices based on the costs of the full life cycle of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste; and
- (d) environmental goals, having been established, being pursued in the most cost

¹ World Commission on Environment and Development, *Our Common Future* (United Nations, 1987) p 44

² Bates G, *Environmental Law in Australia* (6th ed, Lexis Nexis Butterworths, 2006), p 124 at [5.15]

³ See *Telstra Corp Ltd v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 146 LGERA 10 at [108]-[120]

effective way, by establishing incentives, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.⁴

The rationale underlying the principle of internalisation of external environmental costs is that if the real value of the environment, and components of it, are reflected in the costs of using it, the environment will be sustainably used and managed and not exploited wastefully.⁵

Polluter pays principle

The best known of the means of internationalisation of external environmental costs is the polluter pays principle. Expressed simply, the principle holds that those who generate pollution and waste should bear the costs of containment, avoidance or abatement. It requires the polluter to take responsibility for the external costs arising from its pollution. This can be done by the polluter cleaning up the pollution and restoring the environment as far as practicable to the condition it was in before being polluted. The polluter ought also to make reparation for any irremediable harm caused by its conduct, such as death of biota and damage to ecosystem structure and functioning.⁶

The polluter pays principle is an economic rule of cost allocation. The source of the principle is in the economic theory of externalities. By requiring the polluter to take responsibility for the external costs arising from its pollution, the principle allocates these costs to the polluter. The polluter must internalise these costs as a cost of doing business. Internalisation will be complete when the polluter takes responsibility for all the costs arising from pollution; it will be incomplete when part of the costs is shifted to the community as a whole.⁷

The polluter pays principle is also founded on a philosophical position as to ownership of the environment. As Moffet and Bregha explain:

“Under the polluter pays principle, the community effectively “owns” the environment, and forces users to pay for the damage they impose. By contrast, if the community must pay the polluter, the implicit message is that the polluter owns the environment and can use and pollute it with impunity. This message is inconsistent with the principles of sustainable development”.⁸

The polluter pays principle plays a role both in the prevention of pollution and in remediation, if pollution were to occur. The principle plays a role in prevention by justifying the imposition of responsibility for prevention and control of pollution arising

⁴ See s 6(2)(d) of the *Protection of the Environment Administration Act* 1991 (Cth); s 10(2) of the *Contaminated Land Management Act* 1997 (NSW) and s 3.5.4 of the *Intergovernmental Agreement on the Environment* 1992 (Cth)

⁵ See Preston BJ, “The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific” (2005) 9 *Asia Pacific Journal of Environmental Law* 109 at 193-194

⁶ *Environment Protection Authority v Waste Recycling and Processing Corp* [2006] NSWLEC 419; (2006) 148 LGERA 299 at [230]

⁷ de Sadeleer N, *Environmental Principles, From Political Slogans to Legal Rules* (Oxford University Press, 2002) p 21

⁸ Moffett J and Bregha F, “The Role of Law in the Promotion of Sustainable Development” (1996) 6 *Journal of Environmental Law and Practice* 3 at 8

from the development and use of land on the person carrying out that activity. This can be done by the imposition of conditions on any approval necessary to carry out the activity.

Further, the knowledge that, if pollution were to occur, the polluter would be responsible for its containment, avoidance and abatement has a deterrent effect, thereby preventing future pollution.⁹ The costs of containment, avoidance and abatement of pollution are usually likely to exceed the costs of prevention of pollution. Acting rationally, a person would undertake the cost of preventative measures, rather than the cost of remedial measures.¹⁰

Under the polluter pays principle the polluter should pay for the costs of: preventing pollution or reducing pollution to comply with applicable standards and laws; preventing, controlling, abating and mitigating damage to the environment caused by pollution; making good any resultant environmental damage, such as cleaning up pollution and restoring the environment damaged; and making reparation (including compensatory damages and compensatory restoration) for irremediable injury.

The polluter pays principle can be seen to be reflected in at least four situations in the courts:

- (a) in sentencing for environmental crime;
- (b) in imposing civil penalties for statutory breach, both pecuniary penalties and injunctive relief;
- (c) in reviewing administrative orders imposed by regulatory agencies; and
- (d) in granting approval for development on merits review appeals.

This paper examines these four situations, with a focus on decisions of courts in Australia and in particular the decisions of the Land and Environment Court of New South Wales.

Sentencing for environmental crime

The polluter pays principle is relevant in sentencing for environmental crime to the purposes of sentencing, sentencing considerations, severity of sentence and types of sentencing orders.

⁹ ANZECC, *Financial Liability for Contaminated Site Remediation: A Position Paper* (1994) pp 5-6; Kingsbury A, "Funding the Remediation of Contaminated Law: The Problem of Orphan Sites" (1998) *Waikato Law Review* 2 at 3

¹⁰ See *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at 359-360; *Bentley v Gordon* [2005] NSWLEC 695 at [98]-[99] and *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34; (2006) 145 LGERA 234 at [156]-[157]

Purposes of sentencing

There are various purposes for which sentences for offences may be imposed by the courts.¹¹ Of relevance to the polluter pays principle are the purposes of retribution, deterrence and restoration and reparation.

In relation to retribution, the severity of the sentence should be proportionate or commensurate to the seriousness of the criminal conduct. The offender should receive its just deserts or commensurate deserts. The nature, extent and duration of the external costs caused by the commission of the offence influences the seriousness of the criminal conduct.

In relation to deterrence, the sentence must deter both the offender and others from committing environmental offences. The sentence must be of both such magnitude or severity that the financial cost of offending outweighs the likely gains; that it makes it worthwhile to incur the costs of precautions to prevent the commission of the offence. The courts have repeatedly stated that deterrence is an important purpose of sentencing for environmental offences.¹²

Finally, in relation to restoration and reparation, the sentence should achieve restoration of the environment harmed by commission of the offence and reparation for the environment harmed.¹³

Sentencing considerations

One of the sentencing considerations relevant to the objective seriousness of the crime is the objective harmfulness of the offender's criminal conduct.¹⁴ Environmental offences can have environmental, social and economic impacts.¹⁵

Environmental impacts include direct harm to an animal or plant as well as indirect harm to their habitat. Harm to an animal or plant not only adversely affects that animal or plant, it also affects other biota having an ecological relationship to that animal or plant. Harm includes interference with ecological structure, functioning and processes. Harm includes impacts on biological diversity at all levels: genetic, species and ecosystem. Harm includes interference with the habitat of biota, such as the waters, land and soils.¹⁶

¹¹ See Preston B J, "Principled sentencing for environmental offences – Part 1: Purposes of sentencing" (2007) 31 *Criminal Law Journal* 91 at 92-100

¹² *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at 359; *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34; (2006) 145 LGERA 234 at [150]-[157]; *Environment Protection Authority v Waste Recycling and Processing Corp* [2006] NSWLEC 419; (2006) 148 LGERA 299 at [228]-[232]; *Environment Protection Authority v Lithgow City Council* [2007] NSWLEC 695 at [66]- [70]; *Director-General of the Department of Environment and Climate Change v Hudson* [2009] NSWLEC 4 at [81], [88]

¹³ Preston B J, "Principled sentencing for environmental offences – Part 1: Purpose of sentencing" (2007) 31 *Criminal Law Journal* 91 at 98-99

¹⁴ see s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW)

¹⁵ See Preston B J, "Principled sentencing for environmental offences – Part 2: Sentencing considerations and options" (2007) 31 *Criminal Law Journal* 142 at 145

¹⁶ *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34; (2006) 145 LGERA 234 at [174]-[175]; *Environment Protection Authority v Waste Recycling and Processing Corp* [2006] NSWLEC 419; (2006) 148 LGERA 299 at [145]-[147]; *Garrett v Freeman (No. 5)*; *Garrett v Port Macquarie Hastings Council*; *Carter v Port Macquarie Hastings Council* [2009] NSWLEC 1 at [92]

Social impacts include diminution in the value of the environment for the community or individuals, including the amenity, recreational, aesthetic, cultural, heritage, scientific or educational value.¹⁷ A deteriorated environment might have a disproportionately adverse effect on socially and economically disadvantaged persons.¹⁸

Economic impacts can include impacts on industry, business and employment, such as those dependent on waters that are polluted, fish breeding areas that are harmed, crops that are polluted, or environments visited by tourists or used for recreation that are harmed (eg beaches).¹⁹

Where an offence results in external costs (environmental, social or economic) being suffered, these costs contribute to the objective harmfulness of the offence. A sentencing court may reflect these external costs in its sentence and, by this means, bring them back to the offender. The offender is made to pay for the costs of the harm caused by the offence.²⁰

However, in order to do this in a meaningful way, the external costs, including the environmental harm, must be valued. As Bowman notes, “there is...little practical significance in the notion that the polluter must pay unless it can be established precisely for what he must pay and exactly how much it will cost him”.²¹ The valuation of environmental harm has been promoted, largely in the United States, through the enactment of statutes which require natural resources damages assessment.²²

Severity of sentence proportionate to seriousness of offence

The polluter pays principle is promoted by making the severity of the sentence proportional to the seriousness of the offence. Proportionality of the amount of a fine or custodial sentence to the objective seriousness of the offence may be achieved in two respects: first, the total penalty should be proportionate to the objective harmfulness of the offence (eg environmental harm caused) and, secondly, the total penalty may comprise a primary and an additional penalty.

As to the first, the culpability of the offender depends on the seriousness of the harm. Ordinarily, the more serious the lasting harm involved, the more serious the offence, and the higher the penalty should be.²³

As to the second, the maximum monetary penalty may comprise a primary penalty and an

¹⁷ See *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at 496, 499, 502, 507 (impact on recreational users of stream); *Environment Protection Authority v Hochtief AG* [2006] NSWLEC 200 at [99] (impact of noise on amenity of residents); *Environment Protection Authority v MacDermid Overseas Asia Ltd* [2007] NSWLEC 225 at [40], [44] (risk to public safety); *Environment Protection Authority v Delta Electricity* [2009] NSWLEC 11 at [20] (visual impact of dust on amenity of residents)

¹⁸ See Preston B J, “Principled sentencing for environmental offences – Part 2: Sentencing considerations and options” (2007) 31 *Criminal Law Journal* 142 at 145

¹⁹ *ibid*

²⁰ *ibid* at 147

²¹ Bowman M, “The Definition and Valuation of Environmental Harm: An Overview” in Bowman M and Boyle A, *Environmental Damage in International and Comparative Law*, Oxford University Press, 2002, p 1. See also Chapman D J and Hanemann W, *Environmental Damages in Court: the American Trader Case*, Department of Agricultural and Resource Economics, University of California, Berkeley, Working Paper No 913, 2000, p 1

²² Such as the *Comprehensive Environmental Response Compensation and Liability Act* 1980 (CERCLA) and the *Oil Pollution Act* 1990

²³ *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 701

additional penalty, such as a daily penalty for continuing offences (eg pollution) or a penalty for each item that makes up the commission of the offence (eg each plant or animal of a threatened species). Additional penalties are intended to make the total penalty proportionate to the duration or extent of the offence.²⁴

Types of sentence may promote polluter pays principle

The sentencing court may have statutory power to make orders against the offender in addition to or in substitution for a fine or custodial sentence. These additional orders are intended to make the polluter pay for the cost of prevention, control, abatement or mitigation of the harm caused by the offence, making good any resulting environmental harm and compensating persons who have suffered loss or damage or incurred costs or expenses by reason of the offence.

Orders for restoration and prevention

The court may order the offender to prevent, control, abate or mitigate any harm to the environment caused by the offence; to make good any resulting environmental damage; to prevent the continuance or recurrence of the offence.²⁵ Examples of restoration and prevention orders include:

- (a) taking specified measures to prevent further pollution;²⁶
- (b) obtaining an expert report specifying measures to address the causes of the offence;²⁷
- (c) rehabilitating the environment harmed, such as by: removal and disposal of waste²⁸, remediating a landfill²⁹ or planting and maintaining trees;³⁰ and
- (d) preparing and distributing to employees an environmental compliance notice to prevent recurrence of the offence.³¹

Orders for Costs, Expenses and Compensation at Time Offence Proved

The court may order the offender to pay:

- (a) the costs and expenses a public authority incurred in connection with the prevention, control, abatement or mitigation of any harm to the environment caused by the offence or making good any resulting environmental damage; or

²⁴ *Garrett v Williams* [2006] NSWLEC 785; (2006) 160 LGERA 115 at [94]

²⁵ see s 245 of the *Protection of the Environment Operations Act 1997* (NSW)

²⁶ *Environment Protection Authority v Warringah Golf Club Ltd (No 2)* [2003] NSWLEC 222; (2003) 129 LGERA 211; *Environment Protection Authority v Lithgow City Council* [2007] NSWLEC 695

²⁷ *Environment Protection Authority v Camilleri's Stock Feeds Pty Ltd* [1998] NSWLEC 221; *Environment Protection Authority v Ramsey Food Processing Pty Ltd* [2003] NSWLEC 82; (2003) 125 LGERA 369

²⁸ *Environment Protection Authority v Keogh* [1998] NSWLEC 225

²⁹ *Environment Protection Authority v Waight (No 3)* [2001] NSWLEC 126

³⁰ *Camden Council v Runko* [2006] NSWLEC 486; (2006) 147 LGERA 214

³¹ *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at 510-511

- (b) compensation for the loss of or damage to property of a person (including a public authority) or the costs and expenses a person incurred in preventing or mitigating, or attempting to prevent or mitigate, any such loss or damage.³²

Damage assessments evaluate two components:

- (a) **prevention and restoration costs:** the costs and expenses of, first, prevention of environmental harm caused by the offence and, secondly, restoration of the damaged environment; and
- (b) **compensatory damages:** compensation for the loss or damage to property³³ or for the cost and expenses in preventing such loss or damage.

Examples of orders for costs, expenses and compensation include:

- (a) paying clean up costs of a local government authority for a water pollution offence prosecuted by the Environment Protection Authority;³⁴
- (b) reimbursing a landlord for its costs in removing tyres dumped illegally by the offender who was the tenant of the land³⁵ and an owner for the costs of cleaning up hazardous industrial waste placed by the lessee of the land;³⁶ and
- (c) paying tipping fees and disbursements for disposal of dead fish killed by the pollution offence.³⁷

Recovery of costs, expenses and compensation after offence proved

If, after the court finds the offence proved:

- (a) a public authority has incurred costs and expenses in connection with:
 - (i) the prevention, control, abatement or mitigation of any harm to the environment caused by the offence; or
 - (ii) making good any resulting environmental damage; or
- (b) a person (including a public authority) has suffered loss of or damage to property or has incurred costs and expenses in preventing or mitigating, or attempting to prevent or mitigate, any such loss or damage,

the person or public authority may bring proceedings to recover from the offender the costs and expenses incurred or the amount of the loss or damage.³⁸

³² s 246(1) of the *Protection of the Environment Operations Act* 1997 (NSW)

³³ The property can include private property and public property, and be both real and personal

³⁴ *Environment Protection Authority v Warringah Golf Club Ltd (No 2)* [2003] NSWLEC 222; (2003) 129 LGERA 211

³⁵ *Environment Protection Authority v Obaid* [2005] NSWLEC 171

³⁶ *Environment Protection Authority v Buchanan (No 2)* [2009] NSWLEC 31

³⁷ *Environment Protection Authority v Coggins* [2003] NSWLEC 111; (2003) 126 LGERA 219

³⁸ s 247(1) of the *Protection of the Environment Operations Act* 1997 (NSW)

Orders regarding costs and expenses of investigation

The court may order the offender to pay to a regulatory authority the reasonable costs and expenses incurred during the investigation of the offence.³⁹ The order may relate to costs and expenses incurred by the prosecuting authority⁴⁰ as well as by other regulatory authorities.⁴¹

Orders regarding monetary benefits

The court may order the offender to pay, as part of the penalty for committing the offence, an additional penalty of an amount representing the amount of monetary, financial or economic benefits acquired by the offender, or accrued or accruing to the offender, as a result of the commission of the offence.⁴² Examples of monetary benefits orders include:

- (i) an amount in the fine representing the costs of legally disposing of sewage from a caravan park, which the offender saved by instead illegally discharging it into a river;⁴³
- (ii) confiscation and sale of timber logged illegally in a world heritage rainforest;⁴⁴ and
- (iii) paying an amount representing the profit that might be yielded from an exotic plantation established on land cleared illegally of native vegetation.⁴⁵

Environmental service orders

The court may order the offender to carry out a project for the restoration or enhancement of the environment in a public place or for the public benefit.⁴⁶ Examples of environmental service orders include:

- (a) stabilising levee and river banks in a degraded riverine environment and removing noxious weeds and plant native species;⁴⁷
- (b) undertaking an assessment of ways to reduce greenhouse gas emissions from the offender's coal-fuelled plant;⁴⁸
- (c) planting trees along a road reserve;⁴⁹ and

³⁹ s 248(1) of the *Protection of the Environment Operations Act 1997* (NSW)

⁴⁰ eg *Environment Protection Authority v Waste Recycling and Processing Corp* [2006] NSWLEC 419; (2006) 148 LGERA 299

⁴¹ eg *Environment Protection Authority v Warringah Golf Club Ltd (No 2)* [2003] NSWLEC 222; (2003) 129 LGERA 211

⁴² s 249(1) of the *Protection of the Environment Operations Act 1997* (NSW)

⁴³ *Environment Protection Authority v Gardner* [1997] NSWLEC 169

⁴⁴ *Dempsey v R* [2002] QCA 45

⁴⁵ *Director-General of Department of Environment and Climate Change v Wilton* [2008] NSWLEC 297

⁴⁶ s 250(1)(c) of the *Protection of the Environment Operations Act 1997* (NSW)

⁴⁷ *Environment Protection Authority v Simplot Australia Pty Ltd* [2001] NSWLEC 264; *Environment Protection Authority v Yolarno Pty Ltd* [2004] NSWLEC 765

⁴⁸ *Environment Protection Authority v Simplot Australia Pty Ltd* [2001] NSWLEC 264

⁴⁹ *Environment Protection Authority v Cargill Australia Ltd (No 2)* [2004] NSWLEC 421

- (d) fencing the common boundary between the offender's property and a nature reserve to protect wetlands from stock.⁵⁰

Orders for payment to environmental trust

The court may order the offender to pay an amount to an environmental trust or an environmental organisation for the purposes of a specified project for the restoration or enhancement of the environment or for general environmental purposes.⁵¹ Orders for payment to an environmental trust may be made for compensatory restoration, namely restoration of another environment to compensate for, first, irremediable injury caused by the offence to the environment or its component and, secondly, interim loss of a natural resource from the time of the offence to restoration to baseline conditions. Selecting compensatory projects may also involve habitat equivalency analysis. This involves identification of habitat that provides resources of the same type as the environment harmed by the offence.

Examples of orders for payment to environmental trusts include:

- (a) to a government mining authority for an erosion and sediment control project at an abandoned silver mine;⁵²
- (b) to local government authorities for restoration, in one case, of a wetland and, in another case, of an endangered ecological community (woodland) in the area;⁵³
- (c) to a catchment management authority for bushland rehabilitation and in-stream works.⁵⁴

Order to pay legal costs

The court may order the offender to pay the prosecutor's legal costs of the proceedings. The rationale is to compensate the successful party (the prosecutor), not to punish the unsuccessful party (the offender).⁵⁵

Civil penalties for statutory breach

Environmental statutes may provide for a court to remedy or restrain breaches of the statute by orders for payment of pecuniary penalties or injunctive orders to restrain future breaches or remedy past breaches.

⁵⁰ *Environment Protection Authority v Slade* [2004] NSWLEC 773

⁵¹ s 250(1)(e) of the *Protection of the Environment Operations Act 1997* (NSW)

⁵² *Environment Protection Authority v Arengo Pty Ltd* [2006] NSWLEC 244

⁵³ *Environment Protection Authority v Caltex Refineries (NSW) Pty Ltd* [2006] NSWLEC 335 (wetland); *Environment Protection Authority v Baiada Poultry Pty Ltd* [2008] NSWLEC 280; (2008) 163 LGERA 71 (woodland)

⁵⁴ *Environment Protection Authority v Centennial Newstan Pty Ltd* [2006] NSWLEC 732

⁵⁵ *Latoudis v Casey* (1990) 170 CLR 534 at 543, 563, 566-567; *Environment Protection Authority v Taylor (No 4)* [2002] NSWLEC 59; (2002) 120 LGERA 414 at [34]

Civil pecuniary penalties

Some environmental statutes provide for a court to impose civil pecuniary penalties for breach of the statute. One example is s 481(2) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Matters to be considered by the court in determining the penalty include: the nature and extent of the contravention; the nature and extent of any loss or damage suffered as a result of the contravention; the circumstances in which the contravention took place; and whether the person has previously been found by the Court in proceedings under this Act to have engaged in any similar conduct.⁵⁶ The first two of these matters enable consideration of the polluter pays principle. In addition to these matters, the court may apply orthodox sentencing considerations.⁵⁷

An example of a case in which a court imposed a civil pecuniary penalty is *Minister for the Environment and Heritage v Greentree (No 3)*.⁵⁸ The Federal Court of Australia imposed a record \$450,000 penalty on a NSW farmer and his company for illegally clearing and ploughing a wetland of international importance, the Gwydir Ramsar Wetlands, near Moree, in New South Wales. The court fined Mr Greentree \$150,000 and his company, AUEN Grain Pty Ltd, \$300,000 for significant impacts caused to the wetlands and awarded costs to the Australian Government. The court issued an injunction preventing Mr Greentree from taking any further agricultural activity on the land, and also from running livestock on the site until at least 2007. Mr Greentree was also ordered to rehabilitate the site.

Civil injunctive orders

Environmental statutes can also be enforced civilly. Some statutes enable any person (including a government agency) to bring proceedings to remedy or restrain a breach of the statute.⁵⁹ A court that finds a breach established may make such order as it thinks fit to remedy or restrain the breach,⁶⁰ including restraining unlawful use; requiring demolition or removal of unlawful buildings or works; or requiring reinstatement of the building, work or land to the condition it was in immediately before the breach was committed.⁶¹

An example of a case in which a court ordered the restoration of an environment harmed by conduct in breach of a statute is *Great Lakes Council v Lani*.⁶² The Land and Environment Court ordered the persons who cleared native vegetation comprising endangered ecological communities to refrain from future clearing; appoint a bush regenerator and an ecologist whereby the bush regenerator would carry out weed infestation control measures and remove timber and the ecologist would install fauna nest boxes and carry out a baseline survey; pay the costs and expenses of the bush regenerator

⁵⁶ s 481(3) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

⁵⁷ *Minister for the Environment and Heritage v Greentree (No 3)* [2004] FCA 1317; (2007) 136 LGERA 89 at [50]-[58], [68]-[81]

⁵⁸ [2004] FCA 1317; (2004) 136 LGERA 89

⁵⁹ egs s 123(1) of the *Environmental Planning and Assessment Act 1979* (NSW), s 176A(1) of the *National Parks and Wildlife Act 1974* (NSW) and s 41(2) of the *Native Vegetation Act 2003* (NSW)

⁶⁰ s 124(1) of the *Environmental Planning and Assessment Act 1979* (NSW)

⁶¹ s 124(2) of the *Environmental Planning and Assessment Act 1979* (NSW)

⁶² [2007] NSWLEC 681; (2007) 158 LGERA 1 at [13], [46]

and ecologist carrying out such work; provide to the local government authority the instructions to and the reports from the bush regenerator and the ecologist; and monitor the work and relist the matter before the Court to determine whether and, if so, what further orders should be made.

Administrative Orders

Under some environmental statutes, the regulatory authority may issue administrative orders, such as stop work orders and directions for remedial work. One example of administrative orders is in the context of clearing of native vegetation. Under the *Native Vegetation Act 2003* (NSW), the Director-General can:

- (a) make a stop work order that a person not carry out an activity in contravention of the Act (eg clearing native vegetation);⁶³ and
- (b) direct a person to carry out remedial work, including work to repair any damage caused by the clearing; work to rehabilitate any land affected by the clearing (including the taking of steps to allow the land to regenerate); and work to ensure that any land will not be damaged or detrimentally affected, or further damaged or detrimentally affected, by the clearing.⁶⁴

Whilst a stop work order can be framed in prohibitory terms, a remedial work order can only require the carrying out of specified work in positive terms and cannot impose a prohibition on work.⁶⁵

A person to whom an administrative order or direction has been given may appeal to the Land and Environment Court of NSW.⁶⁶ The Court determines the matter afresh and may affirm, vary or discharge the order or direction.⁶⁷ An example of an appeal is *Landers v Director-General of the Department of Infrastructure Planning and Natural Resources*⁶⁸ where the Land and Environment Court affirmed a remedial work order and dismissed the appeal.

Another example of an administrative order is in the context of contaminated land. Under the *Contaminated Land Management Act 1997* (NSW), the polluter bears the primary liability for the remediation of contaminated land for which they are responsible, including because they caused the contamination of the land. The Environment Protection Authority may make orders requiring:

⁶³ s 37 of the *Native Vegetation Act 2003* (NSW)

⁶⁴ s 38 of the *Native Vegetation Act 2003* (NSW)

⁶⁵ *Slack-Smith v Director-General of Department of Land and Water Conservation* [2003] NSWLEC 189; (2003) 132 LGERA 1 at [85], [88] and *Holmes v Director-General of the Department of Infrastructure Planning and Natural Resources* [2005] NSWLEC 264; (2005) 139 LGERA 102 at [28]

⁶⁶ s 39 of the *Native Vegetation Act 2003* (NSW)

⁶⁷ ss 17 and 39 of the *Land and Environment Court Act 1979* (NSW) and *Buttsworth v Director-General of the Department of Land and Water Conservation* [2003] NSWLEC 169; (2003) 127 LGERA 170 at [12]-[15]

⁶⁸ [2005] NSWLEC 284

- (a) investigation of whether land is contaminated and the nature and extent of contamination;⁶⁹
- (b) management of contaminated land including remediation of the land;⁷⁰ and
- (c) on-going maintenance.⁷¹

The appropriate person to undertake management of contaminated land is to be chosen in the following order:

- (a) a polluter: a person responsible for the contamination, or if it is not practicable to specify that person,
- (b) an owner of the land, or it is not practicable to specify that person,
- (c) a notional owner of the land.⁷²

The choice of the polluter involves the polluter pays principle. Choice of the owner or notional owner involves a beneficiary pays approach. Both approaches involve allocation of responsibility to a person who has benefited from the contaminating activities or will benefit from the remediation of the land and transfer of such responsibility away from the community.⁷³

A person subject to an order is liable to take the action specified in the order. The person can also be liable to pay:

- (a) the Environment Protection Authority's administrative costs associated with the orders;⁷⁴
- (b) a public authority's substantive costs in carrying out the order if the person fails to act;⁷⁵ and
- (c) the costs of any other person who might have carried out the requirements of an order and who was not responsible for the contamination.⁷⁶

A person subject to an order may appeal to the Land and Environment Court of NSW.⁷⁷

⁶⁹ ss 17-18 of the *Contaminated Land Management Act* 1997 (NSW) or, after the *Contaminated Land Management Amendment Act* 2008 (NSW) comes into force, s 10

⁷⁰ ss 23-25 of the *Contaminated Land Management Act* 1997 (NSW) or, after the *Contaminated Land Management Amendment Act* 2008 (NSW) comes into force, ss 14-16

⁷¹ s 28 of the *Contaminated Land Management Act* 1997 (NSW) or, after the *Contaminated Land Management Amendment Act* 2008 (NSW) comes into force, s 28

⁷² s 12(2) of the *Contaminated Land Management Act* 1997 (NSW) or, after the *Contaminated Land Management Amendment Act* 2008 (NSW) comes into force, s 13(2) and (3)

⁷³ B J Preston, "Ecologically sustainable development in the context of contaminated land" (2008) 25 EPLJ 164 at 177-179

⁷⁴ s 34 of the *Contaminated Land Management Act* 1997 (NSW)

⁷⁵ s 35 of the *Contaminated Land Management Act* 1997 (NSW)

⁷⁶ s 36 of the *Contaminated Land Management Act* 1997 (NSW)

⁷⁷ s 61 of the *Contaminated Land Management Act* 1997 (NSW) (against both an investigation order or remediation order) and, after the *Contaminated Land Management Amendment Act* 2008 (NSW) comes into force, s 61 (but only against a management order)

The Court determines the matter afresh and may confirm or revoke the order or make any other order the Environment Protection Authority may make.⁷⁸

Approval of Developments

A development may necessitate irremediable injury to the environment, such as loss of individuals or habitat of threatened species, populations or ecological communities. Approval may be granted on condition that offsets, compensatory habitat or compensatory restoration is provided.

Appeals against government decisions to refuse approval or against conditions of approval can be made to planning and environment courts or tribunals (eg Land and Environment Court of NSW). The court hears the matter afresh and re-exercises the administrative power to approve or refuse the development.⁷⁹ The court can determine conditions that implement the polluter pays principle.

One example of an approval requiring offsets was in *Gerroa Environment Protection Society Inc v Minister for Planning*.⁸⁰ The extension of the sand quarry necessitated the clearing of, and would have impacts on, endangered ecological communities. Approval was granted on conditions requiring the permanent conservation and restoration of other areas of endangered ecological communities, and compensatory planting. Another example of an approval on conditions requiring offsets is *Gales Holdings Pty Ltd v Tweed Shire Council*.⁸¹ An example of a case requiring compensation for environmental injury was *Taralga Landscape Guardians Inc v Minister for Planning*⁸² where a wind farm was approved on a condition that the developer pay a specified amount of compensation for the loss of each eagle killed by wind turbines to a specified wildlife rescue society.

Conclusion

Australia does not have legislation establishing a statutory cause of action for recovery of damages for injury to, or loss of publicly owned, natural resources, such as the *Comprehensive Environmental Response, Compensation, and Liability Act* 1980 (CERCLA) or the *Oil Pollution Act* 1990 in the USA. Australia also does not have a legislatively prescribed methodology to undertake Natural Resource Damages Assessment (NRDA).

Nevertheless, Australian courts do undertake assessments of the injury to, or loss of, natural resources in determining a range of matters, including determining criminal and civil penalties, and appeals concerning administrative orders and development approvals. There is scope for Australian courts to apply NRDA methodology and techniques from the USA in the determination of such matters.

⁷⁸ s 62(1) of the *Contaminated Land Management Act* 1997 (NSW) and ss 17 and 39 of the *Land and Environment Court Act* 1979 (NSW)

⁷⁹ s 39 of the *Land and Environment Court Act* 1979 (NSW)

⁸⁰ [2008] NSWLEC 173

⁸¹ [2008] NSWLEC 209

⁸² [2007] NSWLEC 59; (2007) 161 LGERA 1