

**ENFORCEMENT OF ENVIRONMENTAL AND PLANNING LAWS IN  
NEW SOUTH WALES**

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# ENFORCEMENT OF ENVIRONMENTAL AND PLANNING LAWS IN NEW SOUTH WALES

## Abstract

*Environmental laws, to be effective, need to be enforced. Prior to the development of open standing and civil enforcement provisions in NSW, the responsibility fell on government agencies administering the statutes to bring prosecutions in order to enforce compliance with environmental legislation. Over time, wide powers of civil enforcement and open standing provisions were adopted to allow any person to bring proceedings in the Land and Environment Court to remedy or restrain a breach of environmental legislation. Individuals may now even prosecute criminal proceedings in certain circumstances with leave of the Court. The range of administrative measures available to government agencies to promote compliance with the law has also greatly expanded. This speech will canvas the variety of criminal, civil and administrative tools for enforcing environmental laws in NSW.*

## Introduction

“Without enforcement, environmental legislation is useless. And, as governments are often involved in projects said to transgress the law, it often falls to individuals, and to groups of individuals, to approach the courts for enforcement orders.”<sup>1</sup> The proliferation of different mechanisms for enforcing environmental laws in recent history is attributable partly to the emergence of environmental degradation as a significant issue of public interest, and partly to a perception that the government agencies charged with enforcing the environmental laws were failing in their duty.

In a recent review on the enforcement of Commonwealth environmental laws, Lipman concluded that “despite increasing environmental degradation, there has been a significant lack of enforcement by the Commonwealth.”<sup>2</sup> This is primarily due to the fact that even though various enforcement mechanisms exist, they are under utilised by the government.<sup>3</sup>

In order for environmental laws to be effectively enforced, it is not sufficient to rely on public authorities to do the enforcing. Environmental laws must have “teeth”, in that important prohibitions and duties ought not to be left entirely to the unfettered discretion of Ministers, government agencies, or public officials. The inclusion of structures or procedural controls in the statute to govern the exercise of discretion and ensure judicial review enables the public to maintain some control over improper execution of the law.<sup>4</sup>

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<sup>1</sup> Justice Murray Wilcox ‘Foreword’ in Preston BJ, *Environmental Litigation* (Law Book Co, Sydney, 1989).

<sup>2</sup> Lipman Z, ‘An Evaluation of Compliance and Enforcement Mechanisms in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and their Application by the Commonwealth’ (2010) 27 EPLJ 98.

<sup>3</sup> Lipman, n 2 at 100.

<sup>4</sup> Preston BJ, ‘Public Enforcement of Environmental Laws in Australia’ (1991) 6 *Journal of Environmental Law and Litigation* 39 at 42.

There are six main types of legal enforcement mechanisms in environmental law:

1. Criminal enforcement, by government agencies and citizens;
2. Civil enforcement, encompassing a range of remedies including injunctions and remediation orders;
3. Civil penalties, which are a hybrid between civil and criminal enforcement (although not used in NSW);
4. Administrative measures including various notices, on the spot fines, and written undertakings from individuals;
5. Judicial review to enforce compliance by the executive with environmental legislation; and
6. Merits review appeals in which the reviewing court or tribunal reaches the correct or preferable decision under the law.

The first four types involve enforcement of environmental law against a person or body, private or public, in breach of the law and are intended to prevent continuation of the breach in the future, punish the past breach and remedy the environmental consequences of the breach. The last two types involve reviewing administrative or executive action with a view to enforcing conformity with environmental legislation and the law.

I will canvass the first four of these enforcement mechanisms.

## **Criminal enforcement**

### *Who can prosecute?*

Criminal enforcement of environmental statutes is primarily undertaken by the government, usually the regulatory agency or government body with responsibility for the administration of the statute. Illustrations include planning and building control laws which are usually enforced by criminal prosecutions brought by state or local government,<sup>5</sup> pollution laws by the Environment Protection Agency (“EPA”) and protected areas, wildlife and threatened species laws by the relevant national parks and wildlife agency.<sup>6</sup> Certain regulatory offences may be prosecuted by the police, such as noise pollution or littering offences.<sup>7</sup>

Under general criminal procedural law, private citizens may also bring private prosecutions including for environmental offences, unless the statute creating the offence confers the right to institute the prosecution only on a specified person or

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<sup>5</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 125(1).

<sup>6</sup> *National Parks and Wildlife Act 1974* (NSW), s 191(1), (1A).

<sup>7</sup> *Protection of the Environment Operations Act 1997* (NSW), s 218(4).

class of persons.<sup>8</sup> The environmental statute creating the offence may also confer a right on specified private citizens or class of citizens to institute prosecutions for offences against the statute. For example, a person who was the applicant for a noise abatement order may institute proceedings for an offence of contravening the order.<sup>9</sup> More generally, any person may institute proceedings in the Land and Environment Court of New South Wales for an offence against the *Protection of the Environment Operations Act 1997* (NSW) (“the POEO Act”) with leave of the Court.<sup>10</sup> The Court may only grant leave if it is satisfied that:

- (a) the EPA has decided not to take any relevant action in respect of the act or omission constituting the alleged offence or has not made a decision on whether to take such action within 90 days after the person or authority requested the EPA to institute the proceedings; and
- (b) the EPA has been notified of the proceedings; and
- (c) the proceedings are not an abuse of the process of the Court; and
- (d) the particulars of the offence disclose, without any hearing of the evidence, a prima facie case of the commission of the offence.<sup>11</sup>

The relevant action is not limited to the institution of criminal proceedings, but includes action under the POEO Act to require the defendant to prevent, control, abate or mitigate any harm to the environment caused by the alleged offence or to prevent the continuance or recurrence of the alleged offence.<sup>12</sup>

#### *Who is liable?*

Just as there are a number of different people who can prosecute environmental crimes, there are a number of different people who can be prosecuted for any given offence. Broadly speaking, proceedings may be brought against:

- (a) a principal offender who is primarily liable for the offence;
- (b) other individuals who might be vicariously liability for the acts of another person, such as employers or corporations;
- (c) individuals who might be liable as an accessory for participating in a crime committed by another person;
- (d) individuals who attempt or conspire to commit an offence;
- (e) corporations, either by attribution or vicarious liability; and

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<sup>8</sup> *Criminal Procedure Act 1986* (NSW), ss 14, 49.

<sup>9</sup> *Criminal Procedure Act 1986* (NSW), s 218(5).

<sup>10</sup> *Criminal Procedure Act 1986* (NSW), s 219(1).

<sup>11</sup> *Criminal Procedure Act 1986* (NSW), s 219(2).

<sup>12</sup> *Criminal Procedure Act 1986* (NSW), s 219(3).

- (f) directors and other corporate officers for offences committed by their corporation.<sup>13</sup>

For example, the POEO Act explicitly provides that a person who aids, abets, counsels or procures another person to commit an offence, or a person who attempts or conspires to commit an offence under the Act is guilty of an offence and is liable, on conviction, to the same penalty applicable to an offence against the relevant provision.<sup>14</sup>

Of interest for environmental offences is the liability of directors and executives of corporations. Much economic activity that can impact the environment is conducted by corporations. Because a corporation does not have physical existence, it can only act and have a state of mind through its directors or executive officers. These directors and executive officers are the directing mind and will of the corporation and are responsible for the corporation complying or not complying with environmental laws. Imposing liability on directors and executive officers of corporations is an important tool to ensure corporate compliance with environmental laws.<sup>15</sup> The directors and executive officers cannot hide behind the corporate veil; they become personally liable for the offence committed by the corporation of which they are a director or executive officer. Where the penalty to the offence includes imprisonment, the existence of executive officer liability is likely especially to influence the behaviour of directors and executive officers; gaol time is not an expense that can be passed on to the consumer or customer.

An illustration of executive officer liability is under the POEO Act. If a corporation contravenes the Act, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision, unless the court is satisfied that:

- (a) the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision; or
- (b) the person used all due diligence to prevent the contravention by the corporation.<sup>16</sup>

Thus, an executive officer of a company can be held liable for any offence by the corporation without proof of personal fault, and liability is presumed unless the officer can establish a defence.<sup>17</sup> A person may be prosecuted and convicted whether or not the corporation has been prosecuted or been convicted under that provision. The legislation also imputes the state of mind of employees to the company. Evidence that an officer, employee or agent of a corporation had, at any particular time, a

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<sup>13</sup> For a discussion of these different sources of liability see Preston BJ, 'Environmental Crime' in *Environmental Responsibilities Law NSW* (Thomson Lawbook Co) vol 4, 3-501 at 530-545.

<sup>14</sup> *Protection of the Environment Operations Act 1997* (NSW), s 168.

<sup>15</sup> Lipman, n 2 at 108.

<sup>16</sup> *Protection of the Environment Operations Act 1997* (NSW), s 169(1).

<sup>17</sup> Lipman, n 2 at 108.

particular state of mind, is taken as evidence that the corporation had that state of mind.<sup>18</sup>

Similarly, under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the EPBC Act"), where a corporation contravenes certain sections of the Act, and

- (a) an executive officer of the company knew that, or was reckless or negligent as to whether, the contravention would occur; and
- (b) the officer was in a position to influence the conduct of the body in relation to the contravention; and
- (c) the officer failed to take all reasonable steps to prevent the contravention,

the officer is guilty of an offence punishable on conviction by imprisonment for a term not exceeding 2 years.<sup>19</sup>

#### *What are the penalties?*

Penalties for environmental offences vary in severity and nature depending on the type of offence. Statutory offences fall into three categories: mens rea, strict liability and absolute offences. The penalties tend to decrease between each of these three categories, corresponding with the diminishing seriousness and culpability involved. This threefold classification is reflected in the POEO Act where offences are classified into three tiers. Tier 1 offences involve forms of mens rea and include:

- (a) the wilful or negligent disposal of waste in a manner that harms or is likely to harm the environment;<sup>20</sup>
- (b) wilfully or negligently causing a substance to leak, spill or escape in a manner that harms or is likely to harm the environment;<sup>21</sup> and
- (c) wilfully or negligently emitting an ozone depleting substance into the atmosphere.<sup>22</sup>

Tier 2 offences involve strict liability and comprise all other offences under the POEO Act, such as the pollution of land,<sup>23</sup> pollution of water<sup>24</sup> or the unlawful transporting or depositing of waste.<sup>25</sup> Tier 3 offences involve absolute liability and are those that are enforceable by way of penalty notice.<sup>26</sup>

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<sup>18</sup> *Protection of the Environment Operations Act 1997* (NSW), s 169(4).

<sup>19</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 495(1).

<sup>20</sup> *Protection of the Environment Operations Act 1997* (NSW), s 115(1).

<sup>21</sup> *Protection of the Environment Operations Act 1997* (NSW), s 116(1).

<sup>22</sup> *Protection of the Environment Operations Act 1997* (NSW), s 117(1).

<sup>23</sup> *Protection of the Environment Operations Act 1997* (NSW), s 142A.

<sup>24</sup> *Protection of the Environment Operations Act 1997* (NSW), s 120(1).

<sup>25</sup> *Protection of the Environment Operations Act 1997* (NSW), s 143.

<sup>26</sup> *Protection of the Environment Operations Act 1997* (NSW), s 114.

Criminal penalties of up to \$5 million can be imposed upon a corporation for a Tier 1 offence that is committed wilfully, and \$2 million where it is committed negligently.<sup>27</sup> An individual can be liable for a maximum penalty of \$1 million and/or seven years' imprisonment for wilful offences, and \$500,000 and/or four years' imprisonment for an offence involving negligence.<sup>28</sup> Tier 2 offences can involve penalties of \$1 million for a corporation and \$250,000 for an individual and, in the case of a continuing offence, a further penalty of up to \$120,000 for a corporation and \$60,000 for an individual.<sup>29</sup>

In addition to the conventional penalties of imprisonment and fines, many environmental statutes provide alternative sentencing options to enable the Court to make orders in order to minimise environmental harm or rehabilitate the environment.<sup>30</sup>

Under the POEO Act, in addition to any penalty or custodial sentence given, the Court may make orders requiring the offender to prevent or mitigate any harm to the environment caused by the offence, to make good any resulting environmental damage, or to prevent the continuance or recurrence of the offence.<sup>31</sup>

The Court may also order the offender to pay the costs and expenses that a public authority has incurred in connection with the prevention or mitigation of any harm to the environment, or rehabilitation of the environment.<sup>32</sup> If a person or public authority has suffered loss of or damage to property as a result of the offence or has incurred costs and expenses in preventing or mitigating, or in attempting to prevent or mitigate, any such loss or damage, the Court may also order that compensation be paid.<sup>33</sup> Further expenses that are incurred by a public authority or individual as a result of the offence after the offence has been proved in court, may also be recovered as a debt.<sup>34</sup> The Court may order the offender to pay the public authority's costs and expenses in relation to the investigation of the environmental crime.<sup>35</sup>

Under the POEO Act, the Court may order the offender to pay, as part of the penalty for committing the offence, an additional penalty of an amount the Court is satisfied, on the balance of probabilities, represents the amount of any monetary benefits acquired by the offender, or accrued or accruing to the offender, as a result of the

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<sup>27</sup> *Protection of the Environment Operations Act 1997* (NSW), s 119(a)

<sup>28</sup> *Protection of the Environment Operations Act 1997* (NSW), s 119(b).

<sup>29</sup> See, *Protection of the Environment Operations Act 1997* (NSW), ss 123, 132, 141, 142A, 152, 211 as examples of Tier 2 offences.

<sup>30</sup> For a discussion on the availability and use of various sentencing options for environmental offences see Preston BJ, 'Principled sentencing for environmental offences - Part 1: Purposes of sentencing' (2007) 31 Crim LJ 91; Preston BJ, 'Principled sentencing for environmental offences - Part 2: Sentencing considerations and options' (2007) 31 Crim LJ 142; Preston BJ, 'Establishment of an environmental crime sentencing database in NSW' (2008) 32 Crim LJ 214; Preston BJ, 'Environmental crime sentencing database a world first' (2008) 28 *Judicial Officers' Bulletin* 27; Preston BJ, 'A Judge's perspective on using sentencing databases' (2010) 9 *The Judicial Review* 421.

<sup>31</sup> *Protection of the Environment Operations Act 1997* (NSW), s 245.

<sup>32</sup> *Protection of the Environment Operations Act 1997* (NSW), s 246(1)(a).

<sup>33</sup> *Protection of the Environment Operations Act 1997* (NSW), s 246(1)(b).

<sup>34</sup> *Protection of the Environment Operations Act 1997* (NSW), s 247.

<sup>35</sup> *Protection of the Environment Operations Act 1997* (NSW), s 248.

commission of the offence.<sup>36</sup> Other supplementary orders that may be made include:

- (a) an order the offender take specified action to publicise the offence (including the circumstances of the offence) and its environmental and other consequences and any other orders made against the person;
- (b) an order the offender take specified action to notify specified persons or classes of persons of the offence (including the circumstances of the offence) and its environmental and other consequences and of any orders made against the person (including, for example, the publication in an annual report or any other notice to shareholders of a company or the notification of persons aggrieved or affected by the offender's conduct);
- (c) an order the offender carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit;
- (d) an order the offender carry out a specified environmental audit of activities carried on by the offender;
- (e) an order the offender pay a specified amount to the Environmental Trust established under the *Environmental Trust Act 1998* (NSW), or a specified organisation, for the purposes of a specified project for the restoration or enhancement of the environment or for general environmental purposes;
- (f) an order the offender attend, or to cause an employee or employees or a contractor or contractors of the offender to attend, a training or other course specified by the court;
- (g) an order the offender establish, for employees or contractors of the offender, a training course of a kind specified by the court;
- (h) if the EPA is a party the proceedings, an order the offender provide a financial assurance, of a form and amount specified by the court, to the EPA, if the court orders the offender to carry out a specified work or program for the restoration or enhancement of the environment.<sup>37</sup>

## **Civil enforcement**

### *Who can bring proceedings?*

Civil proceedings to enforce compliance with environmental legislation are mostly brought by government, usually the regulatory agency or governmental body responsible for administering the legislation. Local councils, for example, will bring proceedings for an order that a person comply with a statutory obligation or administrative order under environmental and planning legislation to do or cease doing something.

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<sup>36</sup> *Protection of the Environment Operations Act 1997* (NSW), s 249(1).

<sup>37</sup> *Protection of the Environment Operations Act 1997* (NSW), s 250(1).

If the regulatory agency does not bring proceedings to enforce compliance by a person who is in breach of the law, the traditional remedy for another person who is dissatisfied with such governmental inaction is to bring proceedings seeking an order of mandamus compelling the regulatory agency to perform its public duty to enforce compliance. A more direct and quicker alternative is for the person to bring civil proceedings directly against the person in breach of the law seeking orders restraining and remedying the breach. However, the person needs to have standing to bring such direct civil enforcement proceedings. Absent a statutory standing provision, the person needs to establish standing under the common law test. This requires that the person have some private right which is being interfered with or a special interest in the subject matter of the action.<sup>38</sup>

Increasingly, however, environmental legislation is making specific provision for citizens and non governmental organisations to have standing to bring civil proceedings to remedy or restrain breaches of the legislation.

The most liberal provisions are those which effectively abolish the common law standing requirement and instead allow open standing to any person. For example, any person can bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the *Environmental Planning and Assessment Act 1979* (NSW) ("the EPA Act"),<sup>39</sup> the *National Parks and Wildlife Act 1974* (NSW), the *Native Vegetation Act 2003* (NSW),<sup>40</sup> the *Protection of the Environment Operations Act 1997* (NSW)<sup>41</sup> the *Wilderness Act 1987* (NSW)<sup>42</sup> and the *Heritage Act 1977* (NSW).<sup>43</sup> However, section 75T of the EPA Act requires the Minister's approval to commence proceedings in respect of critical infrastructure projects.

In addition, under the POEO Act, any person may bring proceedings in the Land and Environment Court to restrain a breach of any other Act, if the breach is causing or likely to cause harm to the environment.<sup>44</sup> Under the POEO Act, any such proceedings may be brought regardless of whether criminal proceedings have been instituted, and regardless of whether or not the person bringing the proceedings has suffered any infringement of their rights.<sup>45</sup> Because such proceedings are civil in nature, any finding of breach is made on the evidence to the civil standard of proof on the balance of probabilities.

An example of the use of the open standing provisions is in the *Gray v Macquarie Generation*<sup>46</sup> case. The applicant brought proceedings under the open standing provision, seeking an order that the respondent electrical power generator cease disposing of waste through the emission of carbon dioxide into the atmosphere in contravention of s 115(1) of the POEO Act, which states that it is an offence to

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<sup>38</sup> *ACF v Commonwealth* (1980) 146 CLR 493; Preston, n 4 at 40.

<sup>39</sup> *Environmental Planning and Assessment Act 1979* (NSW), s123.

<sup>40</sup> *Native Vegetation Act 2003* (NSW), s41.

<sup>41</sup> *Protection of the Environment Operations Act 1997* (NSW), s 252.

<sup>42</sup> *Wilderness Act 1987* (NSW), s 27.

<sup>43</sup> *Heritage Act 1977* (NSW), s 153.

<sup>44</sup> *Protection of the Environment Operations Act 1997* (NSW), s 253(1).

<sup>45</sup> *Protection of the Environment Operations Act 1997* (NSW), s 252(2), (3).

<sup>46</sup> *Gray v Macquarie Generation* [2010] NSWLEC 34; *Gray v Macquarie Generation (No 3)* [2011] NSWLEC 3.

wilfully or negligently dispose of waste in a manner that harms or is likely to harm the environment.

The importance of open standing provisions in ensuring enforcement of environmental laws is evidenced by the fact that, under the EPBC Act, the number of civil enforcement proceedings brought by citizens considerably outweigh the number of government actions, both civil and criminal.<sup>47</sup> This is so, even despite the fact that the EPBC Act does not contain an open standing provision as wide as those contained in New South Wales environmental legislation. Under the EPBC Act, if a person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of the Act:

- (a) the Minister; or
- (b) an interested person (other than an unincorporated organisation); or
- (c) a person acting on behalf of an unincorporated organization that is an interested person, may apply to the Federal Court for an injunction.<sup>48</sup>

An interested person is defined as an individual whose interests have been or would be affected by the conduct or proposed conduct or an individual engaged in a series of activities for conservation of, or research into, the environment at any time in the two years prior to the case.<sup>49</sup>

#### *What are the remedies?*

The main benefit of civil as opposed to criminal proceedings is that the Court, upon finding that a breach of the statute has occurred, has a wide discretion to make such order as it things fit “to remedy or restrain the breach”.<sup>50</sup> This enables the Court “to mould the manner of its intervention in such a way as will best meet the practicalities as well as the justice of the situation before it”.<sup>51</sup>

The use of the word “restrain” has been interpreted widely by the courts, so that orders are not limited to only orders that grant injunctive relief.<sup>52</sup> Those orders may be declarations, injunctions, or orders for mandamus.<sup>53</sup> Such a wide discretion even enables the Court to monitor compliance with its orders.

Under some pieces of legislation, a court sentencing a convicted offender for an environmental offence can make supplementary orders of a civil nature such as orders for payment of costs, expenses and compensation<sup>54</sup> and orders regarding

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<sup>47</sup> Lipman, n 2 at 105.

<sup>48</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 475(1).

<sup>49</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 475(6).

<sup>50</sup> *Protection of the Environment Operations Act 1997* (NSW), s 252(5).

<sup>51</sup> *F Hannan Pty Ltd v Electricity Commission (NSW) (No 3)* (1985) 66 LGRA 306, 311.

<sup>52</sup> *Brown v Environment Protection Authority and North Broken Hill Ltd* (No 2) (1992) 78 LGERA 119, 126.

<sup>53</sup> *Brown v Environment Protection Authority and North Broken Hill Ltd* (No 2) (1992) 78 LGERA 119, 126.

<sup>54</sup> *Protection of the Environment Operations Act 1997* (NSW), ss 246(1), 247(2).

costs and expenses of investigation.<sup>55</sup> Section 250 of the POEO Act specifies a range of other additional orders the court can make, including publicising the offence and its environmental consequences, giving public notice or notifying shareholders, and ordering the carrying out of a specified project for the restoration or enhancement of the environment caused by the commission of the offence or of another environment.<sup>56</sup>

An example where a court has ordered in civil enforcement proceedings the restoration of the environment harmed by commission of the breach of law is in *Great Lakes Council v Lani* (2007) 158 LGERA 1. The respondent had cleared native vegetation comprising endangered ecological communities in contravention of the *National Parks and Wildlife Act 1974* (NSW) and the *Native Vegetation Conservation Act 1997* (NSW). The only dispute between the parties concerned the orders that the Court should make to remedy or restrain the breaches. The regime agreed to by the parties involved the respondents undertaking work in the short and mid term and then returning to the Court to determine any further injunctive orders. The Court made orders in the terms as agreed by the parties, including: that the respondent retain a bush regenerator and an ecologist to complete certain remediation measures within the cleared area including weed infestation control and installing fauna nest boxes. The time period given for the return of proceedings to the Court was five months, in order to allow one month after the last of the steps in the orders. Specific time frames were given as to the steps to be taken. This was to allow the parties to consider the effectiveness of the orders and negotiate further court orders that might be appropriate.<sup>57</sup>

The Court pointed out that the Council could have brought criminal prosecutions in respect of each breach of the statutes, but elected not to do so. The reasons why the Council undertook this course was perfectly understandable and related to the greater range of remedial relief available in civil enforcement proceedings compared to that available in criminal prosecutions and to the lower standard of proof in civil enforcement proceedings compared to criminal prosecutions.<sup>58</sup>

## **Civil pecuniary penalties**

### *What is a civil penalty?*

Some environmental statutes enable a court to impose a civil pecuniary penalty for breach of the statute. These types of penalties have been described as a “hybrid” of the civil and criminal legal systems, because they are punitive sanctions imposed through the civil process.<sup>59</sup> The EPBC Act allows the Minister to apply to the Federal Court for an order that the wrongdoer pay the Commonwealth a pecuniary penalty for contravention of any of the Act’s civil penalty provisions. Matters to be considered by the court in determining the penalty include:

- (a) the nature and extent of the contravention;

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<sup>55</sup> *Protection of the Environment Operations Act 1997* (NSW), s 248.

<sup>56</sup> *Protection of the Environment Operations Act 1997* (NSW), ss 250(1)(a), (b), (c), 245.

<sup>57</sup> *Great Lakes Council v Lani* (2007) 158 LGERA 1, 17.

<sup>58</sup> *Great Lakes Council v Lani* (2007) 158 LGERA 1, 13.

<sup>59</sup> Grigg B, ‘Environmental Civil Penalties in Australia: Towards Deterrence?’ (2011) 28 EPLJ 36.

- (b) the nature and extent of any loss or damage suffered as a result of the contravention;
- (c) the circumstances in which the contravention took place; and
- (d) whether the person has previously been found by the court in proceedings under the Act to have engaged in any similar conduct.<sup>60</sup>

The advantage of civil penalties, like civil enforcement proceedings, is the lower evidentiary burden associated with the civil process.<sup>61</sup> The Federal Court has embraced the capacity of civil penalties to deter breaches of the *Corporations Act 2001* (Cth) and the *Trade Practices Act 1975* (Cth). However, the EPBC Act's civil penalty scheme has been used infrequently by the Commonwealth government.<sup>62</sup>

#### *Examples of cases imposing civil penalties*

To date, there have only been two decisions, where significant penalties have been given, namely *Minister for the Environment and Heritage v Greentree (No 3)* (2004) 136 LGERA 89 (*Greentree*) and *Minister for Environment and Heritage and the Arts v Rocky Lamattina and Sons Pty Ltd (Lamattina)* (2009) 258 ALR 107; (2009) 167 LGERA 219.

In *Greentree*, the Federal Court of Australia imposed a record penalty of \$450,000 on a NSW farmer and his company for illegally clearing and ploughing a wetland of international importance, the Gwydir Ramsar wetlands near Moree in NSW. The Court fined Mr Greentree 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 from running livestock on the site until at least 2007. Mr Greentree was also ordered to rehabilitate the site.

In *Lamattina*, the Federal Court imposed a penalty of \$220,000 upon the respondent corporation for the clearance of 170 eucalypts on a property in south-eastern Australia. The property was in the nesting range of the south-eastern red-tailed black cockatoo which is a listed endangered species under the EPBC Act. The Court rejected the agreed penalty of \$110,000 suggested by the parties. The Court reasoned that the deliberate nature of the contravention, the respondent's indifference to the consequences of contravention, the significance of the contravention to the endangered species, and the need to impose a penalty commensurate with the need for general deterrence all pointed to a penalty significantly greater than that suggested.<sup>63</sup>

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<sup>60</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 481(3).

<sup>61</sup> Grigg, n 42 at 38.

<sup>62</sup> Grigg, n 42 at 38.

<sup>63</sup> *Minister for Environment and Heritage and the Arts v Rocky Lamattina and Sons Pty Ltd* (2009) 258 ALR 107, 122. The Court imposed a penalty of \$220,000.

## Administrative orders

### *What is an administrative order?*

Criminal and civil proceedings are not the only options available to government agencies to enforce environmental laws. Under most environmental statutes, including the EPBC Act, the regulatory authority may issue administrative orders, such as stop work orders and directions for remedial work. Since these orders do not require court action before being issued they are less expensive to implement and therefore more attractive to administrators. However, their shortcoming lies in the fact that it removes the breach from public scrutiny and decreases the likelihood of any civil or criminal actions being brought in the future, provided of course these orders are complied with. If the orders are not complied with, the government agency will need to bring civil enforcement proceedings for an order compelling compliance.

### *Administrative orders under pollution law*

The POEO Act illustrates the range of administrative orders able to be given by the relevant regulatory agency, the EPA.

When a breach of the POEO Act occurs, a number of options are available to the EPA, including warning letters, clean up notices, prevention notices, prohibition notices, penalty notices, and written undertakings. The EPA can issue a clean up notice, requiring the occupier of a premises, or a public authority to clean up a pollution incident.<sup>64</sup> The clean up notice may require the person to provide reports on the carrying out of the clean up action.<sup>65</sup> The EPA can issue a prohibition notice requiring a person to cease emitting or discharging pollutants.<sup>66</sup>

A person (not including a public authority) who does not comply with a clean up notice or prohibition notice is guilty of an offence and can be prosecuted by the relevant authority, or any individual with leave of the Court.<sup>67</sup> If a person does not comply with a prohibition notice given to the person, the EPA may take action to cause the notice to be complied with by itself or by its employees, agents or contractors.<sup>68</sup>

A penalty notice is a notice to the effect that, if the person served with the notice does not wish to have a specified penalty notice offence dealt with by a court, the person may pay the penalty prescribed under the regulation for that offence not exceeding the maximum penalty that may be imposed by a court on a conviction for the offence.<sup>69</sup> Penalty notices may be given for Tier 3 offences under the POEO Act.

In trying to achieve compliance with the POEO Act, the EPA may accept written undertakings by persons for the purposes of the Act, and it may apply to the Land

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<sup>64</sup> *Protection of the Environment Operations Act 1997* (NSW), ss 91(1), 92(1).

<sup>65</sup> *Protection of the Environment Operations Act 1997* (NSW), s 91(3).

<sup>66</sup> *Protection of the Environment Operations Act 1997* (NSW), s 101(1).

<sup>67</sup> *Protection of the Environment Operations Act 1997* (NSW), ss 91(5), 102.

<sup>68</sup> *Protection of the Environment Operations Act 1997* (NSW), s 103.

<sup>69</sup> *Protection of the Environment Operations Act 1997* (NSW), ss 223, 227.

and Environment Court for an order to enforce the undertaking. If the Court is satisfied that the person has breached a term of its undertaking, the Court may make all or any of the following orders:

- (a) an order directing the person to comply with that term of the undertaking;
- (b) an order directing the person to pay to the State an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
- (c) any order that the Court thinks appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
- (d) an order suspending or revoking any environment protection licence held by the person;
- (e) an order requiring the person to prevent, control, abate or mitigate any actual or likely harm to the environment caused by the breach;
- (f) an order requiring the person to make good any actual or likely harm to the environment caused by the breach; and
- (g) any other order the Court considers appropriate.<sup>70</sup>

An example of an enforceable undertaking that the EPA could accept would be an undertaking from an offender to remedy a breach of the Act, where an offence has been committed. The EPA's ability to accept enforceable undertakings enhances its enforcement capability by giving it a legislative basis for negotiating administrative solutions and accepting undertakings which can be enforced through civil proceedings in the Land and Environment Court.<sup>71</sup>

#### *Administrative orders under planning law*

Under Division 2A of the EPA Act, the Minister, Director-General, local council, or other consent authority may issue an administrative order to a person requiring them to do or refrain from doing a certain thing.<sup>72</sup> The range of possible orders is vast and can include an order to carry out various works in order to restore premises to its original condition, or an order to comply with a development consent.

#### *Administrative orders under contaminated land law*

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 EPA

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<sup>70</sup> Ibid, s 253A(4).

<sup>71</sup> Environment Protection Authority of New South Wales, *Enforceable Undertakings Guidelines* (August 2009).

<sup>72</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 121B.

may make orders requiring an investigation of whether land is contaminated and the nature and extent of contamination, the management of contaminated land, including remediation, and ongoing maintenance.<sup>73</sup>

A person subject to an order is liable to take the action specified in the order. The person can also be liable to pay the EPA's administrative costs associated with the orders, a public authority's substantive costs in carrying out the order if the person fails to act, and the costs of any other person who might have carried out the requirements of an order and who was not responsible for the contamination.<sup>74</sup>

#### *Administrative orders under native vegetation and wildlife laws*

Under the *Native Vegetation Act 2003* (NSW) and the *National Parks and Wildlife Act 1974* (NSW), the Director-General may issue a stop-work order to prevent the contravention of the Act and to prevent damage to protected fauna or native plants or their environment.<sup>75</sup> Under both Acts the Director-General may also order remedial work to be done.<sup>76</sup> The order takes effect immediately, and is subject to such conditions as the Director-General may specify in the notice. Failing to comply with an order is an offence under each Act. Under the *Native Vegetation Act* the offence carries a maximum criminal penalty of \$220,000 for a corporation plus \$22,000 for each day the offence continues, and \$110,000 for an individual plus \$11,000 for each day the offence continues.<sup>77</sup> Under the *National Parks and Wildlife Act* failing to comply with a stop work order carries a maximum criminal penalty of \$1,100,000 for a corporation plus \$110,000 for each day the offence continues, and \$110,000 for an individual plus \$11,000 for each day the offence continues.<sup>78</sup>

Under the EPBC Act, the Minister can make a remediation determination in respect of a person who he considers to have contravened a civil penalty provision of the Act.<sup>79</sup> The Minister may require the person to take any action to repair or mitigate damage to the environment.<sup>80</sup> The first remediation determination was issued in 2008 and arose out of unauthorised clearing of approximately 17 hectares of native vegetation at Clarke's Cove on the Queensland coast. Investigations showed the clearing works had the potential to have a significant effect on the heritage values of the Great Barrier Reef World Heritage Area through erosion runoff and sedimentation. This action was a potentially serious breach of the Act, with long-term actions required to rehabilitate the site.<sup>81</sup>

The Minister issued a remediation determination under the Act, requiring those responsible to stabilise and revegetate the site. The immediate benefit of this remedy is apparent in that the Commonwealth was able to take action to remediate the site before it had been completely destroyed. However, because it is so easy to

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<sup>73</sup> *Contaminated Land Management Act 1997* (NSW), ss 10, 14, 28.

<sup>74</sup> *Contaminated Land Management Act 1997* (NSW), ss 34, 35, 36.

<sup>75</sup> *Native Vegetation Act 2003* (NSW), s 37; *National Parks and Wildlife Act 1974* (NSW), s 91AA.

<sup>76</sup> *Native Vegetation Act 2003* (NSW), s 38; *National Parks and Wildlife Act 1974* (NSW), s 91K.

<sup>77</sup> *Native Vegetation Act 2003* (NSW), s 37(5).

<sup>78</sup> *National Parks and Wildlife Act 1974* (NSW), s 91AA(6).

<sup>79</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Pt 17, Div 14B.

<sup>80</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 480D.

<sup>81</sup> Lipman, n 2 at 101.

implement an administrative order, it is likely to be used in preference to costly litigation such as the *Greentree and Lamattina* cases.<sup>82</sup>

The EPBC Act also empowers the Federal Minister to accept an enforceable financial undertaking from any person who has contravened a civil penalty provision. It provides an alternative to litigation and gives the Minister flexibility to set an appropriate financial amount which is to be directed towards the conservation of the protected matter.<sup>83</sup>

### **Enforcement of court orders**

A discussion on the enforcement of environmental laws would not be complete without also referring to the means of enforcing any order a court might make in proceedings, such as in civil enforcement proceedings to enforce compliance with a statutory obligation or an administrative order. The primary means is by proceedings for contempt but other means include sequestration of the person's property.

#### *Contempt proceedings*

Courts can commit defendants to prison for contempt of court where there has been a wilful and deliberate breach of an order of the court.<sup>84</sup> All proceedings for contempt are criminal in nature, even if the original orders were given in civil enforcement proceedings, and therefore, contempt must be proved beyond reasonable doubt. The powers of the court to punish for contempt are unlimited. There is no maximum penalty applicable and the court can either impose a sentence of imprisonment or a fine.<sup>85</sup> In sentencing for contempt of court, the court will generally consider the seriousness of the contempt proved, the reason for contempt, whether there has been any apology or public expression of contrition, and the character and antecedents of the contemnor.<sup>86</sup>

In the recent Western Australian case of *Chief Executive Officer, Department of Environment and Conservation v Szulc* [2010] WASC 195 the Department sought an order from the WA Supreme Court that the defendant be committed to prison for contempt of court. The contempt committed took the form of failing to comply with the interim injunction that was issued by the Court, by clearing an additional area of 42ha of native vegetation. The Supreme Court of WA found that by his wilful and deliberate actions, the defendant had contravened the terms of the order of the court, and he was therefore convicted of contempt of court.

The court regarded the contempt as serious because the Department had previously issued notices to the defendant to restrain the defendant from carrying out clearing work. The defendant's refusal to comply with those notices caused the Department to commence the proceedings for an injunction because it appeared that the notices and the risk of imposition of heavy fines did not discourage the defendant from

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<sup>82</sup> Lipman, n 2 at 102.

<sup>83</sup> Lipman, n 2 at 102.

<sup>84</sup> *Witham v Holloway* (1995) 183 CLR 525.

<sup>85</sup> Supreme Court Rules 1970 (NSW), Pt 55, Div 4, r 13.

<sup>86</sup> *Chief Executive Officer, Department of Environment and Conservation v Szulc* [2010] WASC 195, [37].

carrying out the work. The possible consequences of a breach of the order for an injunction were explained to the defendant on a number of occasions, and his attention was drawn to the proposition that imprisonment was a potential outcome in the event of a breach of that order.<sup>87</sup> The breach of the order was undertaken wilfully and deliberately as part of an ongoing campaign by the defendant against the work of the Department and its efforts to protect the native vegetation on his property.<sup>88</sup> The clearing was substantial. The Court stated that the defendant had many opportunities to desist from his contravening conduct and, despite being given those opportunities, continued to breach. Personal deterrence therefore required it to be made abundantly clear to the defendant that continued contravention of the legislation would simply not be tolerated.<sup>89</sup> He was sentenced to 3 months imprisonment.

Other penalties for contempt include fines. In *Fairfield City Council v Adams (No 2)* [2010] NSWLEC 45 the council had commenced civil enforcement proceedings against the defendant concerning the placement of fill without development consent, and the defendant agreed to orders by consent to remove the fill from his property within a specified time. The defendant failed to do so, and the Council brought contempt proceedings against him. The council sought weekend detention for three months. However, the Court found that the fact that the defendant was in a difficult personal and financial position, which resulted in his inability to comply with the Court orders, meaning that his contempt was wilful, but not deliberate or contumacious. The defendant was not deliberately seeking to defy the Court's authority by his lack of action.<sup>90</sup> In those circumstances, the Court considered the appropriate sentence was a fine of \$15,000. The Court understood that the defendant was bankrupt, but the need for general deterrence, necessitated that one be imposed.

### *Civil orders*

Under the Uniform Civil Procedure Rules 2005 (NSW) where a judgment or order requires a person to do an act and the person fails to do the act so required, other than a judgment or order for the payment of money, a court has the power to enforce the judgment or order by committal (imprisonment) of the person bound by the judgment or sequestration of the property of the person or both.<sup>91</sup> The *Civil Procedure Act 2005* (NSW) prohibits enforcement of a judgment for the payment of money by committal, but preserves the power of the court to commit as a sanction for contempt.<sup>92</sup>

The Court also has the power to commit an officer of a corporation who is not complying with an order.<sup>93</sup> The power does not directly enforce the judgment, but is

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<sup>87</sup> *Chief Executive Officer, Department of Environment and Conservation v Szulc* [2010] WASC 195 at [41].

<sup>88</sup> *Chief Executive Officer, Department of Environment and Conservation v Szulc* [2010] WASC 195 at [44].

<sup>89</sup> *Chief Executive Officer, Department of Environment and Conservation v Szulc* [2010] WASC 195 at [45].

<sup>90</sup> *Fairfield City Council v Adams (No 2)* [2010] NSWLEC 45 at [15].

<sup>91</sup> Uniform Civil Procedure Rules 2005 (NSW), Pt 40, r 40.6.

<sup>92</sup> *Civil Procedure Act 2005* (NSW), ss 130, 131.

<sup>93</sup> Uniform Civil Procedure Rules 2005 (NSW), Pt 40, Div 2, r 40.6(2).

directed towards obtaining the cooperation of an officer in causing the corporation to comply with its obligations under the judgment.<sup>94</sup>

### **Innovations in enforcement**

In *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* G. R. Nos. 171947-48, 18 December 2008, the Supreme Court of the Philippines issued for the first time a continuing mandamus through which the Authority was compelled to perform its duties in cleaning and preserving the polluted Manila Bay, and was obliged to submit quarterly progress reports to the Court for monitoring. This extraordinary ruling was adopted from the famous Indian case, *M.C. Mehta v Union of India* (1987) 4 SCC 463, which introduced the concept of continuing mandamus.<sup>95</sup>

Due to the special nature of this remedy, the Court was able to monitor the execution of its judgment until it is fully satisfied. To facilitate the cleanup, the Supreme Court created the Manila Bay Advisory Committee, headed by Associate Justice Velasco Jr, who wrote the judgment.

Following this judgment, the Supreme Court of the Philippines adopted new Rules of Procedure for Environmental Cases in 2010. The new rules allow citizen suits, in which plaintiffs representing the public interest may bring environmental claims even though they did not necessarily experience any injury. These actions are permitted, so long as they are done for the protection, preservation or rehabilitation of the environment. The Environmental Rules also incorporate the recent judgment by providing for the issuance of a writ of continuing mandamus. The writ may command a party to perform acts for an unlimited period up until judgment is satisfied. Additionally, the court can monitor, or direct a government agency to monitor this execution, through whatever means necessary, including the submission of periodic progress reports to the Court.<sup>96</sup>

### **Conclusion**

Most environmental and planning laws in NSW can be enforced through civil or criminal proceedings combined with a vast range of administrative orders. The advantages of civil enforcement proceedings as opposed to criminal prosecutions are that it is easier to prove a breach of the law on the civil standard of proof, and that action is taken to restrain wrongful conduct and its environmental impacts before they happen, rather than await and then punish the conduct. The Court also has a wide remedial discretion to make such orders as it sees fit to remedy or restrain the breach. Open standing provisions that allow any person to bring civil enforcement proceedings are a hallmark of NSW environmental law. They enable citizens to enforce environmental laws against individuals where the government agencies have failed to do so, and even bring proceedings against public authorities themselves. This reflects the significant public interest in the enforcement of environmental and planning laws.

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<sup>94</sup> *Ritchie's Uniform Civil Procedure NSW* vol 1 (LexisNexis Butterworths) p 8610.

<sup>95</sup> Peralta D M, "A Brief Overview: The Environmental Initiatives of the Philippine Supreme Court" (Paper presented at the ACPECT Conference, Sydney, 31 August – 3 September 2010) at 7.

<sup>96</sup> Peralta, n 94 at 8.