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Air pollution- challenges for courts

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Thank you to Justice Kumar and his colleagues and the staff of the National Green Tribunal for the opportunity to attend this conference. It is proving a very interesting cross-cultural experience.

Leadership of Supreme Court of India

There is some irony in asking an Australian judge to discuss air pollution given the substantial leadership shown by the Supreme Court of India in numerous cases concerning air pollution. In many of these cases the applicant is the great environmental public interest advocate MC Mehta. Examples include the Taj Mahal case.¹ Determined in 1997, that landmark case celebrates its twentieth anniversary this year. More recently, the New Delhi air pollution case² resulted in orders made in 2015 restraining the use of diesel motor vehicles in parts of New Delhi.

Each nation has its own legal, political, social and economic structures which can help or hinder the achievement of satisfactory air quality. One striking legal difference between India and Australia is their respective constitutions. A number of the major

¹ *M C Mehta v Union of India & Ors (Taj Trapezium matter)* [1997] 2 SCC 353 – Petition responding to the impact of acid rain on the Taj Mahal and other sites in the Taj Trapezium zone and seeking the relocation of polluting factories, particularly those burning coke and coal. The Supreme Court ordered the relocation of 292 factories while the industries that were allowed to continue operating in the area were connected with the natural gas supply network.

² See originally *M C Mehta v Union of India & Ors (Vehicular pollution matter)* [1991] 1 SCR 866 – Several orders and judgments have been handed down by the Supreme Court since the 1990s restricting the use of lead-based petrol in New Delhi, particularly among buses, and improving access to natural gas for all consumers. As a result of this case New Delhi became the first city in the world whose entire public transport fleet uses compressed natural gas as fuel.

public interest environmental cases before the Indian Supreme Court were enabled by Article 32 of the Constitution of India (1950). This provides the Supreme Court with jurisdiction to determine cases enforcing fundamental rights conferred under the Indian Constitution. The Australian Constitution of 1901 lacks such broad rights-based provisions.

In the cases mentioned the remedies granted by the Indian Supreme Court have been far reaching in effect, requiring substantial actions by many companies and individuals to reduce air pollution. There is no doubt that the Indian Supreme Court leads the way in innovative and wide-ranging remedies to combat the many environmental problems which have come before it. Several of these remedies are measures I can only dream about applying as a state environmental court judge in Australia.

Land and Environment Court of New South Wales

To provide some context for my experience, I sit on a unique specialist environmental court in the Australian state of New South Wales (NSW) which has exclusive jurisdiction in many areas of environmental and planning law. Most importantly for my talk today we have jurisdiction in both civil and criminal enforcement of environmental and planning law in NSW which includes air pollution laws.

National/state government efforts to combat air pollution in Australia

National air quality standards for some particulates are determined by the National Environment Protection Council, a cooperative state and national government body.

A National Clean Air Agreement was finalised in December 2015 by federal, state and territory environment ministers. The Agreement aims to strengthen existing air quality management arrangements and assist in developing future policy in this area. It aims to encourage the development of partnerships between government and the

business and non-government sectors on the issue of air quality. The Agreement's initial two-year work period is underway with a formal review due by December 2017.

Most pollution control legislation occurs at the state level in Australia as state governments are principally responsible for regulating point source pollution from industrial sources, motor vehicle emissions (separately from setting national fuel quality standards) and sources such as wood smoke heaters. Local government also has an important role to play in regulating more localised pollution.

NSW Government consultation paper on Clean Air 2016

NSW is the most populous state and has the greatest level of economic activity in Australia. The NSW Government is presently considering its future clean air policy and released a consultation paper at the end of 2016 seeking public comment.³ NSW has generally good air quality by world standards but some areas are recognised as having particular air quality issues. There is certainly no basis for complacency and that is reflected in the consultation paper. Even with reasonable air quality by world standards the discussion paper identifies the public health impacts and costs of air pollution and the benefits of reducing exposure to air pollution in NSW as follows:

- 520 premature deaths and 6300 cumulative years of life lost in Sydney⁴
- 1180 hospital admissions in Sydney⁵
- an estimated \$6.4 billion (2015 AUD) in health costs in the NSW Greater Metropolitan Region (GMR)⁶

³ NSW Government, "Consultation Paper: Clean Air for NSW", (2016) NSW Environment Protection Authority and Office of Environment and Heritage on behalf of the State of NSW, Sydney, NSW, available at <<http://www.epa.nsw.gov.au/resources/air/clean-air-nsw-160415.pdf>>.

⁴ Morgan, G, R Broome and B Jalaludin, "Summary for policy makers of the health risk assessment on air pollution in Australia", (2013) prepared for the National Environment Protection Council, Canberra, ACT, available at <<https://www.environment.gov.au/system/files/pages/dfe7ed5d-1eaf-4ff2-bfe7-dbb7ebaf21a9/files/summarypolicy-makers-hra-air-pollution-australia.pdf>>.

⁵ Broome, RA, N Fann, TJ Navin Cristina, C Fulcher, H Duc and G Morgan, "The health benefits of reducing air pollution in Sydney, Australia", (2015) available at <<http://dx.doi.org/10.1016/j.envres.2015.09.007>>.

Factors that contribute to public health risk include:

- the type of pollutant and the harm caused at levels experienced in NSW
- regions and locations experiencing cumulative impacts and higher concentrations of harmful pollutants
- areas where population exposure is high and the risk is increasing as population and densities increase⁷

While the numbers of people affected by air pollution and the health costs are not as great as in India the paper shows that there is room for improvement in NSW concerning air quality.

Regulation of air pollution in NSW

In NSW the *Protection of the Environment Operations Act 1997* (NSW) (POEO Act) specifies a number of strict liability offences including in relation to air pollution.

The POEO Act provides the statutory framework for regulating air pollution in NSW. The regulatory system provides for licensing of certain premises with controls imposed in relation to specific pollutants. Breach of licence conditions is a criminal offence under the POEO Act. In addition to the environmental protection licence scheme, the Act is supported by the *Protection of the Environment Operations (Clean Air) Regulation 2010* (NSW) which aims to control emissions from wood heaters, open burning, motor vehicles and industrial sources by imposing controls and emission limits. The *Protection of the Environment Operations (General) Regulation 2009* (NSW) provides for a load-based licencing scheme that affords economic incentives for licenced premises to reduce air and water pollution.

The POEO Act and regulations focus on industrial and commercial sources of air pollution. Domestic air pollution is restricted to a limited extent where it is deemed

⁶ Department of Environment and Conservation, "Air pollution economics – health costs of air pollution in the Greater Sydney Metropolitan Region", (2005) available at <www.environment.nsw.gov.au/resources/air/airpollution05623.pdf>.

⁷ NSW Government, above n 3, p 10.

that excessive smoke is being emitted from a chimney on residential premises. The Environment Protection Authority (EPA) may also prohibit the burning of open fires when it considers that meteorological conditions warrant it (s 133 POEO Act).

A primary control mechanism employed under the POEO Act is the creation of criminal offences in addition to civil enforcement. Many of the offences created are strict liability so that no mental element need be proved as an element of an offence. This leads to very high numbers of guilty pleas in pollution cases before the Land and Environment Court.

Air pollution offences under the POEO Act carry a maximum penalty of \$1,000,000 (and \$120,000 per day for a continuing offence) for a corporation and \$250,000 (and \$60,000 per day) for individuals.

So what can an Australian state court judge add on this topic?

Referring to *M C Mehta v Union of India* (Taj Mahal case) again helps me make the first point which is key to courts having a role to play in air pollution and indeed environment protection more generally – access to the courts by citizens to seek remedies.

Another factor which the Indian Supreme Court cases highlight is the importance of effective remedies being available to a court to respond to pollution of any sort.

The role of government regulators is important in NSW (and indeed throughout Australia) as virtually all criminal prosecutions for air pollution and other pollution offences are commenced by them.

Access to court by citizens

The primary enforcement of pollution control legislation in NSW is by a government regulator whether at state or local government level including criminal enforcement through prosecution for pollution offences. In addition, in NSW any person can remedy or restrain any law which causes environmental harm under all major environment protection legislation.

Mechanisms for criminal and civil enforcement in NSW exist in the POEO Act.

Section 252 of that Act provides that any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the Act or regulations. Proceedings can be brought whether or not proceedings have been instituted for an offence against this Act or the regulations. Proceedings can be brought whether or not any right of the person has been or may be infringed by or as a consequence of the breach.

A person can bring proceedings on their own behalf or on behalf of another person. A body corporate or unincorporate (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings can also commence proceedings.

If satisfied that a breach has been committed or will be committed, the Court may make such orders as it thinks fit to remedy or restrain the breach. Breach includes a threatened or apprehended breach.

More broadly again, under s 253 of the POEO Act any person may bring proceedings in the Land and Environment Court for an order to restrain a breach (or a threatened or apprehended breach) of any other Act, or any statutory rule under any other Act, if the breach (or the threatened or apprehended breach) is causing or is likely to cause harm to the environment. Such proceedings may be brought whether or not any right of that person has been or may be infringed by or as a consequence of the breach (or the threatened or apprehended breach).

If the Court is satisfied that a breach, or a threatened or apprehended breach, will be committed or be likely to be committed, it may make such orders as it thinks fit to restrain the breach or other conduct of the person by whom the breach is committed or by whom the threatened or apprehended breach is likely to be committed.

Interestingly few cases have been commenced using these provisions. In *McCallum v Sandercock* (2011) 183 LGERA 399; [2011] NSWLEC 175 a neighbour commenced proceedings against another neighbour operating a quarry alleging breaches or threatened breaches of the POEO Act relating to air pollution amongst

other complaints. The applicant was not able to establish environmental harm as a result of the complaint so that no relief was granted.

In contrast civil enforcement of planning law by private citizens and community and environmental groups as well as regulators has occurred on many occasions in NSW.

In some cases in Australia private citizens have tried to enforce pollution control laws focussed on air pollution where in their view the regulator is not adequately controlling air pollution. Their success depends in large part on the statutory regime which applies. The issue of standing to sue can arise as the case of *Onesteel Manufacturing Pty Ltd v Whyalla Red Dust Action Group Inc*⁸ demonstrates.

In the Australian state of South Australia a citizens group the Whyalla Red Dust Action Group sought to restrain a large manufacturing plant from causing environmental harm through fugitive dust emissions from its large pellet manufacturing plant. Orders were also sought requiring the company to keep records and monitor emissions.

The first issue to arise was whether the action could be brought at all. Section 104(7) of the *Environment Protection Act 1993* (SA) in South Australia provided that an application can be made by any person whose interests are affected by the subject matter of the application, or by any other person with the leave of the Court. The court must be satisfied of certain matters before it gives leave, such as the proceedings are not an abuse of court process and there is a real and significant likelihood that the requirements for the making of an order restraining activity contravening the Act will be made.

The orders sought by the applicant group were:

1. Restraining the company from causing, permitting or suffering environmental harm through fugitive dust emissions from the plant.

⁸ (2006) 94 SASR 357; 145 LGERA 415.

2. That the company be ordered to monitor ambient air quality for particulate matter of a specified size at specified locations.
3. That the company pay damages to any persons whether members of the applicant association or not who have suffered injury loss or damage to property as a result of dust pollution from the plant.

At first instance a single judge of the specialist Environment Court held that the applicant was a person whose interests were affected by the subject matter of the application as the Act provided and that the manufacturing plant had a case to answer. The company appealed to the Supreme Court of South Australia.

On appeal the issues were whether the applicant association was a person whose interests are affected by the subject matter of the application and whether the company had a case to answer. The members of the association were identified as living, working or owning property in areas affected by dust from the plant. Its numerous activities directed to improving the quality of the environment in Whyalla were identified as the commissioning of technical reports on public health and amenity issues associated with particulate pollution from the plant. The appeal judge found that it was unable to identify any interest which is affected by the subject matter of the application other than an intellectual or emotional interest in the protection of the environment. Its objects confirmed that it is a public interest group which advocates protection of the environment in Whyalla. It did not point to any loss, injury or damage to it or its members as a consequence of the emissions targeted in the proceedings. The decision of the High Court of Australia in *Australian Conservation Foundation Inc v Commonwealth*⁹ that a special interest means more than a mere intellectual or emotional concern was referred to. The association could not satisfy the court that it had the requisite interest as required by the statute.

⁹ (1980) 146 CLR 493.

Remedies in criminal cases

There are wide powers under the POEO Act to make orders addressing air pollution offences which judges of the Land and Environment Court can apply. Some of these orders include:

245 Orders for restoration and prevention

The court may order the offender to take such steps as are specified in the order, within such time as is so specified (or such further time as the court on application may allow):

- (a) to prevent, control, abate or mitigate any harm to the environment caused by the commission of the offence, or
- (b) to make good any resulting environmental damage, or
- (c) to prevent the continuance or recurrence of the offence.

The Court has made orders under s 245 on numerous occasions. Examples include orders to remove used tyres from an unlawful waste facility (*Environment Protection Authority v Obaid* [2005] NSWLEC 171), to compact and cap a waste stockpile with clay (*Environment Protection Authority v Hardt* [2007] NSWLEC 284) and to construct a wash bay and chemical filling and emergency storage facility (*Environment Protection Authority v Warringah Golf Club Ltd (No 2)* [2003] NSWLEC 222).

246 Orders for costs, expenses and compensation at time offence proved

- (1) The court may, if it appears to the court that:
 - (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 commission of the offence, or
 - (ii) making good any resulting environmental damage, or
 - (b) a person (including a public authority) has, by reason of the commission of the offence, suffered loss of or damage to property or has incurred costs and expenses in preventing or mitigating, or in attempting to prevent or mitigate, any such loss or damage, order the offender to pay to the public authority or person the costs and expenses so incurred, or

compensation for the loss or damage so suffered, as the case may be, in such amount as is fixed by the order.

- (2) An order made by the Land and Environment Court under subsection (1) is enforceable as if it were an order made by the Court in Class 4 proceedings under the Land and Environment Court Act 1979.

...

An example of orders made under s 246 for third-party clean-up costs occurred in *Environment Protection Authority v Buchanan (No 2)* (2009) 165 LGERA 383; [2009] NSWLEC 31 where the defendant, the sole director of a company operating a hazardous industrial waste treatment facility, was ordered to pay the clean-up costs of the EPA (\$88,000) and the owners of the land leased by the defendant (\$376,000).

Under s 250 additional orders can be made by the Land and Environment Court. The Court can order an offender to:

- publicise the offence
- take action to notify specified people of the offence and its environmental consequences, for example, publication in an annual report
- carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit
- carry out a specified environmental audit of activities carried on by the offender
- pay a specified amount to a specified organisation for a specified project for the restoration or enhancement of the environment
- attend, or cause employees or contractors of the offender to attend a training course
- establish, for employees or contractors of the offender, a training course of a kind specified by the court
- if the EPA is a party to the proceedings, order the offender to provide a financial assurance 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

- carry out any social or community activity for the benefit of the community or persons that are adversely affected by the offence (a restorative justice activity) that the offender has agreed to carry out
- the Land and Environment Court can fix a period for compliance with any order

As can be seen from the terms of these sections a wide range of orders can be made by judges of the Land and Environment Court which enable them to respond to air pollution and other offences before them. Orders provided for under s 250 have been made on many occasions by the Land and Environment Court.

Cumulative impact of multiple air pollution sources

An obvious but important point to make is that there are myriad sources of air pollution so that traditional command and control regulation which is the standard model in Australia does not necessarily achieve a comprehensive outcome. Managing cumulative impacts is one of the major challenges of environmental law and policy in many areas of pollution with climate change another major example.

One of the limits of environmental regulation and therefore of courts in Australia is that they must consider the individual circumstances of the matter before them. It can be difficult to take into account the cumulative impacts of a number of single point sources of pollution. Whether the judge can depends on whether evidence adduced addresses that issue. One illustrative example of the nature of evidence before the Land and Environment Court in a criminal context was a prosecution for a “smoky vehicle”, *Environment Protection Authority v Bruce Panucci* (2003) 131 LGERA 119; [2003] NSWLEC 244. The defendant truck owner pleaded guilty to the charge of possessing a truck which emitted in excess of the emissions permitted under the relevant vehicle emissions control regulation. The EPA was the prosecutor and adduced evidence of air quality generally in the Sydney basin and evidence available from published scientific literature of the health and environmental effects of car emissions particularly diesel emissions. This was taken into account at a general level in sentencing by the judge of the Land and Environment Court.

Judicial minds may differ on matters of remoteness and causation when considering cumulative impacts. This is demonstrated in judicial review proceedings concerning greenhouse gases produced by the burning of coal mined in Australia domestically or overseas, so called downstream greenhouse gas emissions.

Gray v Minister for Planning & Ors (2006) 152 LGERA 258

In *Gray v Minister for Planning* the applicant's judicial review challenge on the ground that the Director-General of the Department of Planning had failed to take into account ecologically sustainable development (ESD) principles in his decision to accept the environmental assessment of the project under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) was upheld. In light of the principle of intergenerational equity and the precautionary principle, ESD considerations required the decision-maker to take into account cumulative impacts including downstream greenhouse gas emissions when assessing a large mine project.

Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources [2007] FCA 1480

Judicial review proceedings commenced by the Anvil Hill Project Watch Association Inc challenged the decision of a delegate of the Commonwealth Environment Minister that a large mining project was not a controlled action meaning it could proceed without further approval required under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The applicant contended that the mine would cause a significant impact on a matter of national environmental significance protected under the Act due to greenhouse gas emissions from the burning of coal.

The application was dismissed. The Federal Court held that the delegate did not commit legal error in determining whether greenhouse gas emissions from the mine would have a significant impact on a matter of national environmental significance. The delegate considered the substance of the threat of greenhouse gas emissions and associated global warming likely to result from the project to matters protected under the EPBC Act and was not satisfied that there was a significant impact or likelihood of one, at [49]. It was open to the delegate to conclude that "the relatively

small contribution of the proposed emissions to total global emissions could not be seen as having a significant impact”, at [40]. The project was estimated to contribute directly and indirectly approximately 0.04% of annual global greenhouse gas emissions assuming they remained at 2006-07 levels and more than 2% of Australia’s annual emissions based on 2004 levels, at [42]. That these emissions could be quantified as a proportion of overall emissions did not warrant departing from the decision in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736 in which a similar application was refused.

Closing remarks

There are many factors which determine whether courts can effectively consider and respond to air pollution. A few of these are identified by asking the following questions:

- Does a statute enable adequate criminal enforcement by a regulator?
- Does a statute enable regulator and third party civil enforcement?
- Does a statute provide adequate remedies to respond to air pollution offences?
- Does expert evidence adduced enable the Court to deal with **all** impacts of the air pollution before it?