

Crisp Law Newsletter

December 2021

Principles of Ecologically Sustainable Development

The principles of “ESD” to be considered under “public interest” grounds are set out in section 6(2) of the *Protection of the Environment Administration Act 1991* (POEA Act).¹ The chapeau to section 6(2) provides that ...ecologically sustainable development requires the effective integration of social, economic and environmental considerations in decision-making processes.² What this requires is a balancing exercise whereby the social, economic and environmental advantages and disadvantages are weighed up to determine whether the Project should proceed.³

This Crisp Law newsletter provides a summary of what “ecologically sustainable development” means in the context of NSW legislation: the Environmental Planning and Assessment Act, in light of our earlier newsletters discussing the concept of “solastalgia”.

Precautionary Principle

In relation to the precautionary principle, section 6(2)(a) of the POEA Act provides if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and an assessment of the risk-weighted consequences of various options ...⁴ In *Telstra*, Preston CJ states the application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental

¹ *Protection of the Environment Administration Act 1991*, s6(2). See the Schedule at page 5 of the Newsletter.

² *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92, 43.

³ *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* (2013) 194 LGERA 347, [36].

⁴ POEA Act s6(2)(a).

damage.⁵ These conditions or thresholds are cumulative; once both of these conditions or thresholds are satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate.⁶

Intergenerational Equity & Intragenerational Equity

The principle of intergenerational equity is set out in section 6(2)(b) of the POEA Act. It provides that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations ... This principle of ESD includes two ethical elements: concern for the present – intragenerational justice or equity; and concern for the future – intergenerational equity.⁷ The needs that are to be equitably shared relate to the three components of ESD: economic development, social development and environmental protection.⁸ Accordingly, equity is not limited to the use or exploitation of natural resources and in fact extends to environmental protection.⁹ In *Taralga*, the Court recognised that the goal of intergenerational equity requires the present generation to ‘extend the life of finite resources and the benefits yielded by exploitation and use of the resources to future generations’.¹⁰ In *Gloucester*, Preston CJ explained that even after rehabilitation of a mine, the environmental, social and economic burdens will continue after the closure of the site.¹¹ In the case of the Rocky Hill Coal Project, his Honour stated that the visual impact of the Project, even after mining rehabilitation, will continue.¹² The natural scenery and landscape will be altered forever, replaced by an artificial topography and landscape.¹³ These could all be the impact of solastalgia in the community. The social impacts on culture and community, especially for the Aboriginal people whose Country has been mined, will persist.¹⁴ A sacred cultural land created by the Ancestors of the Aboriginal people cannot be recreated by mine rehabilitation... the Project

⁵ Ibid 128.

⁶ Ibid.

⁷ Environmental Defenders Office LTD “closing written submission for Undermined Inc” Public hearing 15-17 February 2021 for the Tahmoor South Coal Project.

⁸ Ibid.

⁹ Ibid.

¹⁰ *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* (2007) 161 LGERA 1, [74].

¹¹ *Gloucester Resources Limited v Minister for Planning* (2019) 234 LGERA 257

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

will emit greenhouse gases and contribute to climate change, the consequences of which will burden future generations.¹⁵

Conservation of Biological Diversity & Ecological Integrity

Section 6(2)(c) of the POEA Act states that ‘conservation of biological diversity and ecological integrity should be a fundamental consideration’.¹⁶ The importance of the principle of the conservation of biological diversity and ecological integrity is highlighted in the objects of the EP&A Act, which include, to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats ...¹⁷ This is related to solastalgia concept because biological and ecological degradation contribute to the feeling of solastalgia.

Future Impacts

The impact of these judgements will have significant consequences for businesses in emission-intensive industries and major urban developments seeking to get approval for their projects since the government decision makers will likely to put greater weight to the emission contribution and their social and environmental impacts of the projects before approving any project. Since *Sharma* (discussed in our previous newsletter), the object of the *Environment Protection and Biodiversity Conservation Act*¹⁸ was broadly interpreted to protect the interest of “people and communities” and specifically the future generation, rather than just the environment,¹⁹ this kind of broad interpretation may extend to other environmental legislations such as POEA Act. Therefore, it is anticipated that Australian courts may follow the decision in *Sharma* and impose similar novel duty of care on environmental decision makers by reference to the principle of inter-generational equity.²⁰ Moreover, since the courts gave legal credence to the concept of solastalgia in *Sharma*, *Bulga* and *Nerringillah* (discussed in our previous newsletters), one can predict that there might come a point that the courts would impose a novel duty of care to avoid causing solastalgia.

¹⁵ Ibid 415.

¹⁶ *Protection of the Environment Operations Act 1997* s6(2)(c).

¹⁷ EP&A Act s1.3(e).

¹⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

¹⁹ *Sharma v Minister for the Environment* [2021] FCA 560, 158.

²⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s3A(c).

Schedule –

Section 6 - Objectives of the Authority

(2) For the purposes of subsection (1) (a), ecologically sustainable development requires the effective integration of social, economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs –

(a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by—

- (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
- (ii) an assessment of the risk-weighted consequences of various options,
- (b) inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,
- (c) conservation of biological diversity and ecological integrity—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,
- (d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as—
 - (i) polluter pays—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,
 - (ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,
 - (iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.