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Monetary benefit orders are coming

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Background

The NSW Environmental Protection Agency (EPA) has recently introduced new guidelines in relation to recovering monetary benefits from environmental offenders.

Under the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**),¹ the EPA has the power to apply to the court for a monetary benefit order to be imposed on environmental offenders requiring them to pay back any monetary benefits made as a consequence of non-compliance with environmental laws. Other states in Australia have a similar power,² however it appears that the power is not often used.

The new *Guideline on recovering monetary benefits from environmental offenders* provides guidance on when the EPA will seek a monetary

benefit order and how the EPA will investigate and calculate such orders. The guideline has been introduced alongside a new *Protocol for calculating monetary benefits and Non-compliance Economic Assessment Tool (NEAT) Model*.

The guideline confirms there has been no change to the EPA's regulatory powers to recover monetary benefits but that the guideline 'reflects a more consistent, transparent and efficient approach to recovering monetary benefits' in order to level the playing field and ensure that operators who comply with the law are not at a disadvantage compared to those who do not.

What is a monetary benefit?

A monetary benefit is the monetary, financial or economic benefits that an offender gains from committing an environmental offence.³

A monetary benefit can be gained from avoiding or delaying spending money on complying with environmental legislation or earning profits that are a direct result of breaching environmental legislation. This can be in the form of:

- *Capital costs* – being the costs of equipment, infrastructure or machinery.
- *Operational costs* – being the costs of labour, materials, energy, training and the maintenance of equipment.
- *Illegal profits* – being the profits earned over and above what would have been earned if the law had been complied with.
- *Illegal competitive advantage* – being the economic savings from avoiding the costs of compliance in order to under-cut competitors and gain more market share.

An example was given,⁴ of a case involving the monetary benefit gained by a company choosing to bury 78 drums of copper chrome arsenate on their premises, in contravention of its environmental authority, rather than disposing of the material responsibly at a cost, risking a \$100,000 fine.

When the EPA will seek a monetary benefit order

The guideline only applies to an offender who has been successfully prosecuted by the EPA in the Land and Environment Court for a criminal offence under several specific pieces of legislation. The EPA website further states that initially the EPA only proposes to seek monetary benefit orders in criminal prosecutions under the POEO Act in the Land and Environment Court.

The guideline confirms that the decision to seek a monetary benefit order from the court is made by considering the nature of the offence, the subjective factors of the offender, and the relative significance of monetary benefits in the broader regulatory context of the case.

Under the guideline, the EPA will be more likely to seek a monetary benefit order where:

- the offence was serious;
- the offence was not an accident or was the result of intent, recklessness or negligence;
- environmental harm was caused or likely to be caused;
- the offender has previously been advised about similar or related non-compliance;

- what is required to comply with the legislation is generally accepted and understood;
- the offender holds or should hold an environment protection licence to operate lawfully.

Whether a monetary benefit order is imposed in any particular case is the decision of the court and forms part of the total penalty package forms part of the total penalty package, in addition to any other penalty or order which may be imposed on an offender such as a fine, publication order or order to pay legal costs.⁵

How the EPA investigates and calculates monetary benefits

Determining what should have been done

Where the EPA decides to seek a monetary benefit order from the court it will generally gather evidence and engage an independent expert to calculate the benefit gained. The guideline clarifies that the EPA does not expect or require the '*gold standard*' of compliance and that the '*least cost mode of compliance*' is satisfactory.

How the EPA calculates monetary benefit amounts

Along with the guideline, the EPA has also introduced the Protocol for calculating monetary benefits setting out a standard method for calculating monetary benefits. There is no maximum for the amount of a monetary benefit order.⁶

The protocol will be prescribed in the regulations as the method to be used in determining the amount that represents the monetary benefit acquired by the offender.⁷

For non-accountants, the EPA has also released the Non-Compliance Economic Assessment Tool or the '*NEAT Model*' which is a user-friendly excel-based calculator tool which uses the method set out in the protocol in order to calculate monetary benefits in any particular case. The NEAT Model can be accessed on the EPA website along with a User Guide for the model.

What does this mean for your business?

The introduction of monetary benefit orders across various Australia's jurisdictions formed part of a range of sentencing tools available to the courts in order to strengthen the environmental regulator's enforcement and penalty regime and provide a further deterrent to environmental offenders.

However, several instances have arisen where the potential to seek a monetary benefit order for unlawful development has been available, but not utilised.⁸

The lack of use of the power to date has meant that environmental offenders have been able to profit from their criminal activity or take the risk of a fine because it is deemed a financially better option than complying with the law.⁹

However, the introduction of the new guideline indicates a clear intention on behalf of the NSW EPA to more consistently recover monetary benefits in appropriate cases. We anticipate there will be an increase in these types of actions across NSW, and it may be that other Australian jurisdictions follow suit.

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¹ See section 249 of the *Protection of the Environment Operations Act 1997* (NSW).

² See section 502 of the *Environmental Protection Act 1994* (Qld) and section 329 of the recently passed *Environmental Protection Amendment Act 2018* (Vic) which is due to commence on 1 July 2020.

³ See section 249(3) of the *Protection of the Environment Operations Act 1997* (NSW)

⁴ See the second reading speech for the *Environmental Protection and Other Legislation Amendment Bill 2010*.

⁵ See section 249(1) of the *Protection of the Environment Operations Act 1997* (NSW).

⁶ See section 249(2) of the *Protection of the Environment Operations Act 1997* (NSW).

⁷ See section 249(2A) of the *Protection of the Environment Operations Act 1997* (NSW).

⁸ Justice Tim Moore of the Land and Environment Court of New South Wales refers to several instances of this occurring in NSW in his paper '*The scope of sentencing for environmental crime in NSW*' (4 March 2018).

⁹ For example, Justice Tim Moore refers to the case of the West Apartments development in which a significant number of additional apartments and an additional level of commercial area was added to the development as approved. In this case, a negotiated outcome was reached, however the payment required by way of the settlement did not reflect the financial benefit gained by the developer leaving a significant residual financial benefit.

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