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Chapter 8 – Private Regulation

Individuals seek to regulate other people's behaviour through private regulation, using the courts (or the possibility of recourse to the courts) as the lever to do so. They also use other means, such as the possibility of direct action or social pressures (non-law threats or persuasion), but we will not deal with these approaches in this book. Private regulation for our purposes is concerned with rights and relationships between citizens. It is developed and enforced through litigation in courts, and has its basis in common law – the traditional law developed through the history of court judgement (precedents).

Of the many categories of common law, five are the most relevant to natural resource management:

1. **Contract**: The law of enforceable agreements.
2. **Tort:** This category includes many subcategories with *negligence* – the law protecting people from harm caused through the carelessness of others, and *nuisance* – the law preventing others from harming the integrity of a person's self or property being particularly relevant for natural resource management.
3. **Property:** This law gives effect to ownership, such as mechanisms of transfer, and interpretation of the meaning of interest and the results of transactions.
4. **Equity:** The law which requires those who have certain types of ethical obligation with respect to others to act fairly and 'equitably'.
5. **Administrative:** Concerned primarily with the right of the citizen to have administrative decisions made fairly and in accordance with proper process.

In our society citizens protect their private interests through civil action based on common law. The fact that it is a private citizen taking action, rather than government, is the point of difference between public and private regulation. Having noted this, we hasten to add that the distinction between civil law and parliamentary law (public regulation – discussed in Chapter 9) is blurred because of their complex interactions. Overlaid on common law categories is a myriad of statutes applied by courts. Some of these are refinements of common law (such as Trade Practices enlargement of the obligations of traders under contract), others establish duties, which can be the basis for civil claims for negligence, and others establish new rights and obligations for resource users and owners. Beyond this there are rights created by statute that are used in actions by citizens to protect their interests. These include rights to compensation (for example in the event of forced acquisition of land by the State), or for recompense for harsh and unconscionable dealing.

It is conventional wisdom that the role of the law is to resolve conflicts. Luhmann (1984), who provided a number of the insights on social systems discussed in earlier chapters, provides an alternative view to the role of the law. He believes the role of law is to promote and channel conflicts in paths that are more constructive for society than other forms of conflict. Conflict, played out through the often intense debates in society and the actions of courts is a fundamental part of how society evolves. Debate and conflict are essential parts of the process of change that enriches society. What gets fought over in the courts and public forums is an important determinant of the direction that society will follow. Change and conflict are constant bedfellows.

Private law is an instrument of social change

Courts continually redefine the nature of legal rights (and their corollary obligations). Sometimes this redefinition is hand-in-hand with the creation of statutes, and sometimes it is solely through decisions made by judges. For example, the famous decision in *Donoghue v Stephens*[1] extended accountability beyond individuals with whom one had a contract, to a broader class where harm was foreseeable. This concept of liability for negligence has been extended to encompass non-physical injury, such as economic loss, and the consequences of non-physical actions or inactions (such as liability for partial disclosures where the failure to completely disclose causes loss). With the advent of the corporation, artificial entities as well as people became the subject of legal accountability.

Private law is intrinsic to the operation of markets. Private agreement is the way in which private obligations are created at law. For example contracts are how people agree to transfer value, including property, services and natural resources. The contract terms may include conditions to restrict harm to the environment, the underlying nature of what is transferred may be affected by environmental zoning, or the quality of the environment may be an element in the contract (such as warranties on mineral deposits, or water quality). All market mechanisms are based on contract, and the range of natural matters becoming the subject of contract continually increases.

Private law is also very closely aligned social standards of behaviour. Because the rights of individuals are often bound up with their rights to own or use resources, environmental law and human rights are natural partners. Civil liability actions – actions in tort – shape the community's concepts of acceptable risk, and standards of risk management. Successful litigation can influence insurance requirements, and defensive programs such as quality systems, administration and contracts and insurances. Once courts decide that a duty and a standard of care exists and that those harmed are entitled to be compensated, a chain of events is begun. Insurers revise their risk pricing and contract requirements; lawyers warn clients; companies review policies; and potential litigants visit their lawyers. Civil action results in a complex mix of desirable and undesirable outcomes. It is desirable that polluting industries be liable to downstream water users, or that firms which are careless with dangerous chemicals find themselves paying penalties. These liability risks are an incentive to manage operations responsibly. But they come with a cost to the community; perhaps in increased costs of consumer goods, as well as a cost to the potential doers of harms who may, for example, need to pay higher insurance premiums to cover possible payouts for pollution incidents.

Claims of nuisance, from air pollution, noise, wandering cattle, to spillage of oil where the interests of one person are potentially interfered with by another, establish rules that sit well with sustainable resource use. Often they require one person to refrain from emitting harmful by-products – noise, smell, pollutants – or losing control of something harmful. Feral animal control, noise and air pollution, water pollution and

[1] In which a consumer, Donaghue, sued a drink manufacturer, Stephens, for negligence by selling her a bottled drink containing the remains of a snail.

various other environmental harms are in part addressed by this tort, though environmental protection is not the original purpose of the law.

Some judgements, such as the 1992 Mabo High Court case, have implications for political and economic structures, and natural resource ownership, including the operation of property rights. The Mabo decision was a battle for land rights to protect the social and economic interest of a disadvantaged community. Respect for the environmental and cultural meanings of the land was at the heart of the claim. But, as with many social system issues, matters are rarely as simple as they might initially seem. Some court cases have used the recognition of property rights as an alternative basis to secure protection of environmental values. However, the same call for the property rights has been used by indigenous people to circumvent laws aimed at protecting environmental values - such as their right to take protected fauna.

Such actions – unlike statute – do not create new rights and obligations, but they recognise rights that have been hidden from view. However this may be, the recognition of traditional ownership has triggered a shift in the political and economic power of Aboriginal people, added to the transaction costs of resource exploitation, and accelerated moves to have Aboriginal interests in natural resources reflected in how these resources are managed. Human rights and property rights often strengthen each other. In Australia and Canada, and other parallel jurisdictions to Australia, human rights are creating new environmental rights. In doing so they are creating new concepts of property. For example, a form of property rights in native fauna could eventually be the basis for new legal developments. Such matters as rights to cell lines, flora, or natural medicines could eventually depend on rights that are currently being identified.

Laws designed to protect consumers can also protect environmental values. For example, deception in environmental claims is actionable under the Trade Practices Act. This type of issue is likely to come to prominence once environmental certification and environmental marketing become more evident in commerce.

Resource scarcity driven by increasing population and greater demands on resources and the consequences of failures in caring for the environmental commons – such as depleted fisheries, salinity, reduced biodiversity – is likely to see a continued growth in civil action with ecological sustainability implications. Certainly the studies of international trends we carried out in 2000 (Martin and Verbeek 2000) suggest that collective actions to protect rights will expand, spurred by the availability of class actions, contingent fees, and civil rights law.

Accomodating the pressure to extend legal rights to include greater civil opportunities to protect the environment is already causing a number of policy challenges for the court system including:

- **Certainty versus responsiveness to change:** Certainty is based on a linear development of law. More radical interpretations are sometimes required to meet rapid changes in social conditions. The courts must weigh up the respective importance of these competing requirements.
- **Individual freedom versus community interest:** Determining the extent of individual freedom is a common concern in the arguments over regulation of resource use. Every case in which an administrative or zoning decision adjusts the exploitation rights of a landowner involves this balance.

- **Responding to emerging needs versus overburdening the courts by allowing too many cases:** Courts may restrict a legal remedy if it is possible that the benefits to the community do not justify the added burden on the court system.
- **Individual ethical choice versus maintaining the system:** This involves consideration of the extent to which matters ought to be decided by the individual's ethics rather than legal dictates. In the 1960s, conscription and conscientious objection raised such conflicts.
- **Societal cohesion versus cultural diversity.** The courts may have to decide whether to restrict a particular practice (e.g. child marriage) that is accepted by a particular culture, but not generally acceptable to the dominant social ethic.
- **Enforcing community views versus respect for the individual.** Many of the issues above are encapsulated in a continual conflict between the freedom of the individual and the collective wishes of the community.

In a society that depends on diversity and change for its enrichment, it is unrealistic to expect complete consistency in judgements. Emphasis on one set of policy priorities may indeed make the law a straitjacket. This is true in relation to natural resource management laws as for any other field of law. Whilst the sustainability imperative is powerful, so too are competing imperatives for economic performance and individual or corporate rights. In this next section we shall see how the operation of these pressures has resulted in a confusing state of the common law. Whilst understandable as a reflection of competing imperatives and the need for flexibility, in a later chapter we shall see that this state of the law is not conducive to its optimal use to pursue sustainability.

There are two patterns which will determine whether private regulation is able to be harnessed effectively to pursue sustainability. The first is the pattern of decisions, since it is precedent that will determine the policy that is applied by civil courts. The second is the patterns of use of the courts – who can use the courts and for what purpose. Both of these patterns are not conducive to the effective use of civil law to achieve improved natural resource custodianship. This is not to say that these patterns are unchangeable, for in later chapters we outline a number of strategies to shift towards a more effective application of private regulation. But for now we will simply observe what patterns do exist in civil law and the environment.

The pattern of Australian court environmental decisions

Courts find it difficult to embrace sustainability. Difficulties arise in interpretation of key concepts such as the definition of "sustainability" and the "precautionary principle", and in supporting actions for the implementation of sustainable practices.

The term "sustainability" may be (for judges) often understood as a term with very narrow economic meaning. For example, in *Bannister Question Pty Ltd v Australian fisheries Management Authority (1997)*[2] the court's approach to the requirement for ecologically sustainable development was to focus on survival of fish stocks so that they can be harvested in the future. Given that the legislation contained a separate requirement of maximising economic efficiency, it is hard to see why parliament

[2] 48 ALD 53, (1997) 77 FCR 503

would have inserted a sustainability requirement if they had not meant it to be a balancing consideration alongside - rather than subsumed within - economic considerations.

Courts give effect to environmental concepts by considering the economic interests of individuals. This raises difficult problems of application of environmental concepts when there is no clear "wrongdoer". The situation becomes clearer when the law specifies liability, and where wrongdoing can be readily identified by objective evidence. *McLennan v Holden(1999)*[3] provides an instance. In that case, Holden was convicted of polluting a river in contravention of the South Australian Environment Protection Act 1993.

The concept of "precautionary principle" is also difficult for courts. It would appear from the review of cases we carried out in 2000 (Martin and Verbeek 2000) that the precautionary principle may have a lesser status than parliament intended. Cases, such as *Nicholls v Director General of National Parks and Wildlife (1994)*[4], show that, generally, courts have found the precautionary principle unworkable. They have not pushed its substantive inclusion in disputes over development, focusing more on whether the developer has failed administrative compliance with such policy requirements.

Many environmental law principles are translated into action by shaping the decision processes and criteria of the administrative bodies. For example, environmental principles are written into town planning, rezoning, licensing, and resource access regulations. However even in these cases there is no certainty that the environmental principles will be upheld. In *Randwick City Council v Minister for the Environment (1999)*[5], the Federal Minister for the Environment made a decision that neither an environment impact statement nor public environment report was required for the operating plan for Sydney Airport. The court found that the Minister had acted within his legal rights. Whilst the case is based on laws designed for environmental protection, the outcome was determined on the basis of compliance with administrative procedure. Administrative law provided the foundation on which the community sought to base claims for a stronger emphasis on the local environment.

Other cases, including *City of Botany Bay Council v Minister for Transport and Regional Development (1999)*[6], and *Minister for Urban Affairs & Planning v Rosemount Estates PIL & Ors*[7] are also ultimately about defining the degrees of freedom of the administration when faced with requirements for environmental protection. The pattern of decisions is of preservation of the freedom of administration rather than furthering sustainability.

The courts are less sympathetic to authorities if official standards, rather than environmental law, are the concern, particularly when human health is at risk as in

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[3] SAERDC 83

[4] 84 LGERA 397

[5] FCA 1494

[6] FCA 1495

[7] Supreme Court of NSW, 1996, 40127/96; LE40140/95

Ryan v Great Lakes Council (1999)[8], where people became ill after consuming oysters from Wallis Lake which had been contaminated by sewerage – the regulation of which is the responsibility of council.

It seems, though, that the extent of an authority's obligation to oversee and test water quality is still not settled law. The case *Water Administration Ministerial Corp v Punteriero (1997)*[9] shows that courts are concerned to ensure that there is a demonstrated breach of a duty, as well as harm. In that case, the Water Administration Ministerial Corp (WAMC) was found to have a statutory immunity and no duty to protect Punteriero from the harm his crops had suffered from polluted waters from an irrigation system operated by WAMC.

Courts have found that it is necessary to prove that a person is owed a specific duty, show how that specific duty was breached, and prove foreseeable harm was caused as a result of an action that is demonstrably an environmental hazard. In the case of *Kranich v Minister of Education (1997)*[10], Kranich suffered a psychogenic disorder as a result of the use of a pesticide in his workplace he had been assured was safe. The court held that it was not reasonably foreseeable that the pesticide's unpleasant odour would cause Kranich's disorder.

Courts have been used as an alternative to regulation to try to secure protection of environmental values. They are, however, unreliable forums for doing so. In the case *The Lockhard River Aboriginal Council v Cook Shire Council ((1998)*[11], the Aboriginal Council argued, unsuccessfully, that indigenous people should be freed from the constraints of laws designed to protect environmental values, but in *Yanner v Eaton (1999)*[12] Yanner was successful when using apparently the same principles.

Rights to access the environmental commons are at the heart of economic activity – particularly extractive and primary production activities. As well as disputes over collective property rights, therefore, there are also legal conflicts between citizens (*inter-partes actions*) over resources. Contracts are the main legal mechanisms, but there are many other approaches in tort or equity. The case, *Qantas Airways ltd v Mascot Galvanising (Holdings) Pty Ltd ((1998)*[13], illustrated how claimed right to protect property – in this case the value of Qantas land – from damage from corrosive runoff from a neighbouring property can be upheld by the Court.

The civil right to protect land from adverse flows from neighbours is not limited to immediate neighbours. The ancient right to the flow of water through the rivers on (or bounding) a property can be a basis for the protection of broader environmental values. This is demonstrated in *Van Son v Forestry Commission of NSW(1995)*[14]

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[8] FCA 177

[9] CA 40367/96

[10] 190 LSJS 346

[11] QPE:R 344

[12] HCA 53

[13] 17/12/1998 SCNSW 3610/96

[14] Supreme Court, NSW, Cohen J, 3 Feb)

where Van Son succeeded in arguing that the Forestry Commission had been negligent in its operations. It is interesting to note that the legal action succeeded on the broad basis of the duty to avoid actions that will interfere with the ordinary comfort of human existence. This is a very broad foundation for actions to protect one's rights to enjoy one's (owned) environment.

The right to obtain not only enjoyment but also value from the land is also upheld by the court. The *E M & E S Petroleum Pty Ltd v Shimden Pty Ltd (1995)*[15] case is representative of a number of cases where exploitative rights are considered by the courts, under a range of legal categories – contract, misleading and deceptive conduct and the like. In this case, E M and E S Petroleum attempted to rescind a contract on the grounds that it had entered into the contract relying on false representations.

This case also shows the intersection between civil matters and legislation. It represents the norm of how environmental issues come into dispute through contract. Within the value that is received with land are exploitative rights. If these rights do not exist or are compromised, either by legislation or by some physical constraint, then one can anticipate contractual disputes. These disputes may in turn bring other fields of law – such as negligence, Trade Practices, equity or tort – into play.

It is not only the exploitative values of the land that can be in dispute. Information, about environmental values has economic value, and can be a source of conflict. *Armidale City Council v Alec Finlayson Pty Ltd* and *Ryan v Great Lakes Council (1999)*[16] illustrate this and show the extent to which the laws of negligence have been extended to encompass duties to protect environmental utility, and compensate for the consequences of environmental degradation and pollution.

It is interesting to note that in the *Armindale City Council v Alex Finlayson Pty Ltd* case the court found that council had a common law duty of care beyond that imposed by the Environmental Planning and Assessment Act. Statute does not set the limits to the duty not to cause harm to others as a result of causing environmental harm.

Phelps v Western Mining Corporation Ltd (1978)[17] illustrates how laws designed to protect consumers can protect environmental values. The court identified that deception in relation to environmental claims is actionable under the Trade Practices Act.

In summary, the courts have not taken a consistent approach to sustainability, but issues that are relevant to sustainability are often litigated. The contexts within which people contest environmental interests in the courts is typically about the administrative requirement to consider sustainability, or because of damage to some other recognised economic or property interest. In general, the environment continues to be a secondary interest in civil law. This indicates a major area where reform could significantly alter the way in which natural resources are considered by the courts, and protected by the law. We develop recommendations for this type of reform in the final two chapters of this book.

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[15] SCNSW 2483/92

[16] FCA 330; (1999) 104 LGERA 9

[17] 20 ALR 183; (1978) 33 FLR 327; 1978) ATPR 40-077

Patterns of access to private law

If you have no right to use the court system then it matters little whether you have a good legal argument about the substance of the issues you wish to litigate. Issues of 'standing" (the right to sue) and capacity to bear the costs of taking action, are both impediments to the greater use of private regulation to replace public regulation in the pursuit of sustainability. Financial power and legal status are important strategic issues in this regard.

Costs, or the threat of incurring costs, of civil action often turn advocates for sustainability away from using the court system. In spite of the rise of industries, such a eco-tourism and macrobiotic foods, which rely on high quality environments, it remains true that we are more likely to find economic interests aligned with degrading exploitation of the environment than with conservation. The location of this power is a determinant of who will be heard in the court system. The civil law of defamation provides a good example of how such power can be used. The law of defamation allows individuals (and companies) to protect their reputations, compensating them for the losses that arise from harm to that reputation. That is the theory, but practice is far more politically charged. In environmental disputes, it is frequently the case that advocates of harm are pursuing commercial goals like property development or industrial activity. The opponents are in many cases individual citizens or relatively poor organisations. The advocates of harm are more likely to have a business reputation to which economic value can be attached, to have the resources to take legal action, and a strong incentive to prevent the spread of views counter to their commercial interest. They can stifle criticism by threatening activists with defamation if they call into doubt the good faith, ability or honesty of the advocate of harm. Arguments against harm will often at least imply that the harm advocate is self-interested and uncaring of the common good, or that their analysis is biased or incorrect – implying a lack of competence. This means intrinsically questioning the good faith or competence of the advocate, and therefore in theory causing harm to their reputation[18].

There are, of course, defences to such actions. However, the threat itself is often sufficient to stifle the voices for the environment. The defences to defamation are complex, and to mount them requires good legal advice. The transaction costs – legal costs and the stress associated with legal process – of defending oneself, the redirection of effort and emotional energy, and the cost of failure to defend effectively – particularly given the risk of exemplary damages being claimed – are very high. There is no real penalty for the ruthless advocate of harm using this tactic. In the US jurisdiction there is a tort of "frivolous and vexatious litigation" under which the wrongfully sued person can claim damages. In Australia the only mechanism to redress this abuse is the right of the judge to allocate costs. The dice in this game are heavily loaded in favour of those with wealth and ruthlessness.

A second limiting factor to the capacity to use the courts to support sustainability is the absence of a voice for future generations, or for the environment itself. This goes

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[18] Whilst the citizens and voluntary organisations may value their reputations highly, the economic loss that they could claim for a loss reputation are likely to be far less, even if they were successful in any action.

to the problem of a lack of 'standing' for citizens to take action. The concept of 'intergenerational equity' is a component in the policies for sustainability but it has little meaning until someone can speak for the future. In civil courts there is no litigant to act for the unborn, except where a statutory right has been created for other interests to be heard[19]. Neither is there a basis on which the interests of kangaroos, dolphins, the humble snail or any other living creature apart from humans can be represented directly in court. The civil law is a forum for citizens to resolve their rights and, even if the unborn have rights, neither they nor non-human beings are counted as citizens. The limited voice for the natural world and for the interests of the next generation is in administrative actions and bureaucratic processes which may incidentally require taking sustainability into account in making a determination.

It is now common for government to have spokesmen for environmental interests on natural resource consultative committees. These voices are meant to balance the interests of industry, resource owners and resource users. However, unlike ownership and economic interests, these voices are not supported by the capacity to sue if the results of consultation will override the interests that are being spoken for. They can make no credible threats of recourse to law if the interests they represent are overridden. The courts can require compliance with regulatory processes but this is weak compared with the right to force substantive consideration or to seek damage or other compensation if the interest is discounted. The ability to obtain compensation makes exploitative interests more powerful than non-exploitative interests.

A final difficulty for those wishing to use civil law to advocate for the environment is the structure of the legal system. There are hundreds of pieces of legislation to deal with various interests touching sustainability[20]. It is virtually impossible for a person to be clear about his or her obligations, let alone rights, within this morass. Enforcement effectiveness is also clouded by too much, too fragmented, regulation. This complexity is compounded by the fact that the common law on which many actions could be based is even less accessible. Principles are not codified and often so complex that it is not until after the court case that anyone can say with any confidence that they had the right that was claimed. The transaction costs of using the civil law are substantial fixed costs, which means that only those people or organisations which can afford to risk losing these sums can consistently have access to the law.

It is not impossible for a clear voice for the environment to emerge in the courts using the existing structures of the law. The indications are, however, that unless parliaments or other societal institutions – such as the Supreme courts of the states, or the High Court - intervene to clarify sustainability issues, emergence will be slow.

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[19] See, for example, *Byron Environment Centre Inc v The Arakwal People & Ors (1998) AILR 16*, where the right to have other interests considered under the Native Title Act 1993 was considered. The court indicated that even where there is a legislative provision, the right to a voice is not on behalf of the environment. This contrasts with previous cases where interests such as fishing or sailing were considered sufficient to found a right to participate.

[20] We will discuss this point further in Chapter 9 on public regulation.

The operation of common law

The legal system is a weak approximation of community values. It can only regulate tangible aspects of choices made by individuals. Effective laws are more likely to be those that work in concert with other social mechanisms promoting desired behaviours. There is circularity in this relationship. The law helps to shape behavioural norms. The pattern of penalties and the interpretation of the rationale behind the awarding of penalties shape beliefs about right and wrong. People internalise standards expressed through common law and come to expect that this standard will be maintained. When we are faced with complex ethical problems we often use what is required by law as the touchstone.

There are many historical examples of how legal standards and community beliefs are mutually supporting. The difference between a *thieves market* and a modern western economy is largely the effect of belief systems that have evolved with the common law. We now believe that traders are responsible for providing safe products and deception is not – in most instances – acceptable commercial behaviour. The proof of the belief is our outrage when traders violate our expectations. A history of civil actions has created this condition.

The common law operates using precedent[21] and policy choices. Reliance on history and policy shapes the pattern of decisions and resource allocations made through the courts. Judgements send signals to the community – as well as to the parties – about rights and responsibilities[22]. The media and other interpreters of decisions are responsible for the dissemination to the broader community.

Risk avoidance by resource owners and users are where "the rubber hits the road" in the behavioural effects of common law. The landowner who puts in drains to prevent runoff entering his neighbour's property, or fences in his stock to prevent them running onto the road is often responding to financial risks created through common law. The true measure of law's effectiveness is not in the economics of wins and losses; it is in the risk-minimising choices to reallocate resources to avoid the possibility of losses.

There are few sources of information about judgements that have a powerful incentive to provide an objective picture of common law. Consequently resource users are not necessarily responding to what the courts say but to politicised stories about what the courts say. Legal advisors, industry associations and, particularly, those involved with insurance are key information providers about common law and its implications for resource use choices. Their needs colour the way information is passed onto other users. Some media have an interest in the shock value of extraordinary cases. Insurers have an incentive to highlight the risks of civil claims, as do some lawyers because this justifies expenditure on their services. Insurance costs drive up the price of potentially harmful actions, acting through the market to alter patterns of resource use. It is clear that these factors have strongly influenced resource use, and in particular discouraged environmental harm impacts on other resource owners and users.

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[21] The history of past decisions.

[22] Exemplary damages imposed to send a signal to the broader community are a recognition of this role of judgements.

As we have already noted, avoidance of situations which would require incurring the legal costs associated with courts is a powerful motivator to avoid resource use that could harm others. The possibility of litigation, rather than regulation, has been the cornerstone of traditional protection of riparian rights, and other access and use rights of property owners. Advocates for private property regimes to protect the environment, such as the English author Elizabeth Brubacker (1995) point out that it would be more effective to rely on civil action based on property rights and the common law to protect the environment, than on statutory regulations. In a foreword to Brubacker's book on property rights, Anthony Scott writes:

> *Property can be a weapon that victims use in their own defense. Those who care more about nature than about the glorification or vilification of government will find property protects it better than government does.*
>
> *Protection by property tends to avoid courtrooms as well as legislatures. Although legal professors too often forget it, property law does its job best when land is held and exchanged in an orderly way without litigation. A good standard property right works regularly and informally to keep disputes out of the courts; indeed knowledge of it prevents disputes from even arising.*
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> *(Page 8)*

Private regulation for sustainability

A system that relies on past judgements to guide future behaviour is understandably slow to adapt. In the interest of accelerating the adoption of sustainability issues in the courts, what strategies might be worthwhile to introduce?

Individuals – and organisations legally defined as individuals – are the main actors within the institutional framework of the court system. Within that institutional framework are lawyers and judges who operate using prescribed modes of debate. Although all players rely on statute or precedent as sources of principles, they can also arrive at innovative resolutions to social issues. The natural tendency of judges is to put a high priority on things they understand. Matters of sustainability are not simple and obvious. It is far from clear to the uninitiated why, for example, allowing a waterfront property owner to replace native vegetation with grass can be a significant contributor to damaging shellfish; or why a compensatory wetland in a different location, which looks almost identical, may be no compensation at all.

We have outlined some of the factors that cause the law to be an expensive and uncertain medium to use for those who wish to force someone who has caused environmental harm (or who proposes to cause harm) to bear the consequences. In addition to high costs and uncertainty of outcomes, those advocating for the environment often have difficulty finding the specific common law category into which the actions of harm-causing fits. There is no tort of harm to the environment and no compensation for harm to the ecosystem. Whilst there may be a demonstrable economic or other harm to future generations, it is not compensible since there is no person with the standing to sue and the injuries are entirely prospective.

The discussion in this chapter leads us to a number of conclusions about the use of common law to support sustainability:

- Civil action is unreliable when issues are poorly defined, and precedent and belief systems are not in place to guide the court in its deliberations.
- It is possible to increase the likelihood of success by clarifying issues through improved information, such as clarification of regulations, and education of lawyers and judges regarding environmental issues.
- It may also be possible to clarify the legal meaning of concepts of sustainability by declaratory action by the Supreme Courts of the states, or perhaps the High Court.
- Increasing the legal resources of those who are advocating for the environment to use common law will accelerate the development of applicable principles and precedents in the court system.
- It would be possible to increase the use of common law to protect the environment by creating new torts – either through statute or precedent – and developing the right of a citizen to stand for future generations.
- It may be necessary to create some form of representative plaintiff to stand for the environment in court cases.

The latter chapters of this book take up these reform suggestions and expand them. But before we get to the stage of proposing solutions, we still have a range of options that are available to us that need to be explored. In the next chapter we will look more closely at public regulation – direct action by government to protect the environment by penalising harmful acts and supporting restorative work.

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