AUSTRALIAN POLLUTION LAWS ¾ OFFENCES, PENALTIES AND REGULATORY AGENCIES

Jennifer Norberry

THE PURPOSE OF THIS PAPER IS TO BRIEFLY EXAMINE OFFENCE AND penalty provisions in Australian State and Territory environmental pollution legislation; then to describe a number of recent reviews of Australian environmental protection laws and their likely impacts on offence and penalty provisions. Lastly, the paper will look at the prosecution of environmental polluters by Australian environment protection agencies, that is, it will examine regulatory agency practice, experiences and attitudes to prosecution. These practices, experiences and attitudes must be taken into account when changes to environmental laws are mooted in order to minimise the implementation gaps that are otherwise likely to occur between statutory provisions and regulatory practice.

Two further riders must be added. The pollution legislation discussed here relates to air, noise, water and land pollution. This paper does not consider legislation relating to marine pollution. Nor does this paper consider the Intergovernmental Agreement on the Environment and the proposals for uniform offences and penalties contained in it (Schedule 4, cl. 8).

Historical Development of Environmental Pollution Laws

Pollution by white settlers in Australia dates from the establishment of the colony of New South Wales. Controls on pollution were, however, slower to materialise. For example, pollution of the Tank Stream in Sydney Cove, which provided a water supply for early colonists, did not engender much official concern until the mid-1850s, when the Sydney Commission was formed to investigate the need for a sewerage system.

The first environment-related laws were passed in the 19th century. They were designed to facilitate the development and exploitation of natural resources rather than to protect the environment. Where pollution was the target, the context was firmly one of public health—particularly the transmission of water-borne diseases.

The scope and number of pollution-related statutes increased with population growth and industrialisation, but there were no significant anti-pollution laws until the 1950s, 1960s and 1970s. In Sydney, for instance, the effects of unregulated industrialisation, where waterways were used as disposal sites for factory waste,

caused a public outcry in the 1960s and finally led to the enactment of the *Clean Waters Act 1970* (NSW).

Two themes emerge in relation to early pollution control laws. First, historically, pollution control was seen in many jurisdictions as an adjunct to responsibilities for public health and public utilities. Second, in many jurisdictions, pollution-related provisions have been scattered through a variety of statutes, often administered by diverse and changing government instrumentalities. Without making too much of these factors, it could be argued that they have had some influence on the fact that offence structures have been uncomplicated, penalties have historically been low and there has been little in the way of enforcement of pollution laws.

The first significant changes to penalty provisions occurred during the 1980s. Until 1981, in New South Wales the maximum fine that could be imposed under the *Clean Air Act 1961* and *Clean Waters Act 1970* was $10 000. In 1981, amendments to those two statutes resulted in a fourfold increase in maximum available penalties—to $40 000. Other amendments made to the law in New South Wales during the 1980s saw a distinction drawn between penalties applied to corporations and those imposed on natural persons—penalties for the former being set much higher.

However, it was not until the late 1980s that the first dramatic changes appeared in Australian environmental offence and penalty provisions—with the introduction of the *Environmental Offences and Penalties Act 1989* (NSW). As originally formulated, the Act provided for aggravated pollution offences carrying a maximum penalty of $1m for a corporation and $150 000 or 7 years imprisonment, or both, for an individual (s. 8).

Current Australian Pollution Laws

There is now a tiered structure of offences and penalties in New South Wales under the *Environmental Offences and Penalties Act 1989*. Offences of aggravated pollution —called Tier 1 offences—include the following:

- an offence of waste disposal if committed without lawful authority, wilfully or negligently, in a manner that harms or is likely to harm the environment (s. 5); and

- an offence where a person without lawful authority, wilfully or negligently causes a substance to leak, spill or otherwise escape in a manner that harms or is likely to harm the environment (s. 6).

The maximum penalty is $1m for a corporation and $250 000 and/or 7 years imprisonment for a natural person.

Substantive Tier 2 offences (Lipman 1991) involve breaches of air, water, noise and other pollution control legislation. In the case of air and water pollution, the maximum penalties are $125 000 and a maximum penalty of $60 000 per day for a continuing offence—in the case of a corporation; and $60 000 and $30 000 per day for a continuing offence—in the case of a natural person. Penalties for noise pollution are lower—$30 000 and, for a continuing offence, a maximum of $3 000 for each day the offence continues—the case of a corporation; and $15 000 and, for a continuing offence, $300 for each day the offence continues, in the case of an individual.

Administrative Tier 2 offences such as contravention of noise abatement orders or directions and failure to furnish information, attract penalties ranging from $1 500 to $30 000.

Tier 3 offences are designed to identify, penalise and deter minor offenders without the need to resort to the expensive and time-consuming business of litigation. Tier 3 offences include littering and other minor offences under clean air, clean water, noise control and pollution control statutes. In New South Wales fines for Tier 3 offences range from $150 to $600.

To some extent, the developments that have occurred in New South Wales are mirrored in Victorian legislation. In 1990 the *Environment Protection (Fees & Penalties) Act 1990* doubled most penalties under the *Environment Protection Act 1970*. In Victoria s. 59E of the *Environment Protection Act* now provides for an indictable offence where a person intentionally, recklessly, or negligently pollutes the environment or causes or permits an environmental hazard which results in:

- a serious threat to the environment;
- a serious threat to public health;
- a substantial risk of serious damage to the environment;
- a substantial risk of a serious threat to public health.

Penalties provided for these offences are the same as those found in New South Wales.

Penalties for what might be called mid-range offences are generally lower in Victoria than in New South Wales—a maximum penalty of $20 000 and $8 000 per day for a continuing offence—in the case of air (s. 41), water (s. 39) or land pollution (s. 45). These acts are more severely sanctioned if committed intentionally, attracting a maximum fine of $40 000 and an additional daily penalty of $16 000 for each day the offence continues (s. 67AA). Infringement notices, like Tier 3 notices in New South Wales, may be issued for minor pollution offences including waste disposal offences and air pollution from motor vehicles. Penalties range from $200 to $1 000.

Offence and penalty structures in other jurisdictions can generally be described as unreformed and unrefined, with penalties—except in new legislation—being small. In South Australia, the maximum penalty under the *Clean Air Act 1984* is $15 000 and a default penalty of $2000 in the case of a corporation[1]; and $8 000 and a default penalty of $1000 in the case of an individual (s. 59). These penalties apply to conventions of the Act such as carrying out a prescribed activity without a licence, breach of licence conditions, causing air pollution, and failure to meet specified air quality standards in relation to emissions. Under the *Noise Control Act 1976* the maximum penalty is $5000 (ss. 10, 11). These penalties relate to offences for noncompliance with a notice to control excessive industrial or commercial noise or noncompliance with the conditions of an exemption. More recent South Australian legislation reflects a national trend towards higher penalties. An example is the *Water Resources Act 1990* which subjects corporations to a maximum fine of $1m and individuals to fines of up to $60 000, where wastes are discharged or dumped in coastal waters either without a licence or in contravention of licence conditions.

1. Except in the case of recent ozone protection provisions where the penalties are much higher.

In Queensland, the maximum penalty under the *Noise Abatement Act 1978* for a second offence is $5000, with a daily penalty of $300 for each day the offence continues (s. 55). Under the *Clean Air Act 1963* the maximum penalties are $20 000 and a daily penalty of $2000 for each day the offence continues—in the case of a breach of licence conditions or a failure to comply with emission standards (s. 46(3A)). Under the *Clean Waters Act 1971* the maximum penalty for a first offence is $10 000 with a penalty of $1000 for each day the offence continues (s. 48). For a second or subsequent offence the penalty is $20 000 with a further penalty of $2000 for each day the offence continues, or 12 months imprisonment, or both (s. 48). These penalties apply to offences such as failure to hold a licence or failing to comply with water quality standards.

In Tasmania, the maximum penalty under the *Environment Protection Act 1973* is $100 000 for a corporation and $50 000 for an individual (ss. 15, 16, 17). The penalty applies to offences concerning pollution of air and water.

In Western Australia, the maximum penalty under the *Environmental Protection Act 1986* is, in the case of a corporation, $50 000 and a daily penalty of $10 000, and $25 000 and a daily penalty of $5000, in the case of an individual (Schedule 1). Individuals may also face a gaol term under the Act for some pollution offences, for example, the maximum penalty for causing pollution or allowing it to be caused is $10 000 or 6 months gaol, or both (s. 49(1)).

In the ACT, the *Air Pollution Act 1984* and the *Water Pollution Act 1984* were amended in 1991 to increase their penalties. Under the Air Pollution Act the maximum fine for the emission of a pollutant in excess of the prescribed concentrations is $50 000 in the case of a corporation, and $10 000 in the case of an individual (s. 23). Under the Water Pollution Act the maximum penalty for the offence of discharging waste into waters is $50 000 for a corporation, and $10 000 for an individual (s. 38).

Reviews of Environmental Pollution Laws

Since 1990, reviews of pollution legislation have taken place in virtually every Australian jurisdiction. In July 1990, New South Wales issued a Discussion Paper (NSW 1990) and then, in January 1991, an Information Paper (NSW 1991) on establishing an Environment Protection Authority. Stage 2 of the review of environment protection laws in New South Wales is currently under way with the aim of formulating proposals for the rationalisation and streamlining of these laws. A draft bill for public comment is expected in 1994.

In South Australia, a Discussion Paper on the establishment of a South Australian Environment Protection Authority (SA 1991) was released in 1991, followed by a draft Bill and information kit in August 1992 (SA 1992), and a revised Bill in August 1993 (SA 1993). The Act received Royal Assent in October 1993 and is likely to be proclaimed in the second half of 1994.

In Tasmania, a Discussion Paper on the *Environment Protection Act 1973* was circulated in 1991 (Tasmania 1991) and a draft Environmental Management and Pollution Control Bill was released for public comment in October 1993. In Queensland, a green paper on contaminated land legislation (Queensland 1991a) and a public consultation paper on proposed environment protection legislation (Queensland 1991b) were issued in 1991. Public comment was solicited and summarised in 1992 (Queensland 1992). A draft Bill was circulated for public comment in November 1993. It is expected that a Bill will be presented to Parliament in the middle of 1994.

In Western Australia, a statutory review of the Environmental Protection Act was completed in 1992 (WA 1992). It is understood that the Minister's office is now considering the ways in which the Act should be amended. In the Northern Territory, a review of the legislative and administrative needs for the regulation of pollution and waste commenced in February 1993. It is anticipated that a coordinating Act will be made and changes accomplished by regulation or amendments to existing Acts rather than by the introduction of new environment protection legislation. A draft strategy is due for release in October 1993.

In the Australian Capital Territory, a review of environmental protection legislation is under way and is expected to be completed in 1994.

Reviews in all States, and the public consultation processes associated with them, have addressed a myriad of issues relating to environmental protection laws, including: environmental auditing; environmental protection policies; civil remedies; alternative dispute resolution; and state of the environment reporting. All have addressed offences and penalties. Moreover, while offences and penalty provisions are not necessarily regarded as the cornerstone of environmental protection legislation, there appears to be a broad consensus among policy makers that higher penalties and tiered offence and penalty structures are necessary ingredients in the regulatory mix. What are the proposals relating to offences and penalties that have emerged from these reviews?

In South Australia, the *Environment Protection Act 1993* provides for tiered offences and penalties. In a media release which heralded the introduction of the Bill into Parliament in August 1993, the South Australian Minister of Environment and Land Management, Kym Mayes, described the Bill as establishing "greater co-operation between Government and industry to improve environmental practices, while giving the EPA extensive powers to step in and halt environmental abuse and pursue tough fines for offenders" (Media Release 1993).

General offence provisions are contained in Part 9 of the Act. Section 79 provides for the offence of causing serious environmental harm. As a prerequisite to proving the offence, the prosecution must establish that serious environmental harm has been caused, the act was committed intentionally or recklessly and that the offender knew that the pollution would or might result in serious environmental harm. The maximum penalty for this offence is a $1m fine for a corporation and a maximum fine of $250 000 or 4 years imprisonment, or both for a natural person. Where serious environmental harm has been caused but the mental element is not present, penalties are lower—a maximum fine of $250 000 for a body corporate, and $120 000 for an individual.

Section 80 of the Bill introduces the offence of causing material environmental harm. An offender causing material environmental harm by polluting intentionally or recklessly and with knowledge that material environmental harm will or might result is liable for a maximum penalty of $250 000 in the case of a corporation, or a fine of $120 000 or 2 years gaol, or both in the case of an individual. Where no mental element is present, the maximum fine available is $120 000 in the case of a corporation, and $60 000 in the case of a natural person.

An offence of environmental nuisance is provided in s. 82 and carries a maximum penalty of $30 000. Expiation fees for breaching a mandatory provision in an environment protection policy range from $100 to $300 (s. 34).

In Queensland, the draft Environmental Protection Bill 1993 contains offences including unlawful environmental harm, causing serious environmental harm, causing material environmental harm and causing an environmental nuisance. The maximum penalty for a corporation is five times the individual level. For the offence of causing serious environmental harm the penalty for a natural person is $249 900 or imprisonment for five years. The Bill also contains provision for community service orders and remediation orders.

In Western Australia, the review of the Environmental Protection Act concluded that a "three-tier system involving minor misdemeanours, offences under the Act and appropriately worded crimes of pollution" (WA 1992, p. 148) should be put in place and noted that "the level of penalties are low compared to penalties which apply in some other States" (WA 1992, pp. 148-9). It recommended that penalties should be increased and a three-tier system of pollution offences introduced.

The Tasmanian discussion paper, while taking the view that penalties should be used as a last resort did advocate the introduction of a four-tier system of offences and penalties ranging from on-the-spot fines to significant penalties for gross pollution. It went on to remark that "the statutory backing for enforcement has been weak and penalties for noncompliance have been minimal" (Tasmania 1991, p. 14). A draft Environmental Management and Pollution Bill was circulated for public comment in October 1993. It contains offences of causing serious environmental harm, material environmental harm and environmental nuisance. The maximum fine for a body corporate causing serious environmental harm is $1m and for a natural person, $250 000 or 4 years imprisonment, or both. Environmental infringement notices may be served on persons committing minor offences.

What then can be concluded about the current state of play in the Australian States with respect to environmental offences and penalties? There are moves to construct more complex offences structures married to increasing penalties for offenders. The usefulness of these provisions in deterring environmental polluters will not be debated here. However, it is instructive to look at this trend towards complexity

and severity in statutory provisions and overlay it with a snapshot of regulatory practice, experiences and attitudes.

Prosecutorial Practice

The two agencies described by Grabosky and Braithwaite as moderately adversarial in character make use of prosecution as a regulatory tool. Their prosecution statistics are detailed in Tables 1 and 2.

Table 1
New South Wales State Pollution Control Commission and Environment Protection Authority - Prosecutions

Year	*Number*	*Year*	*Number*
1984-85	15	1988-89	78
1985-86	22	1989-90	73
1986-87	68	1990-91	69
1987-88	36	1991-92	54

Source: *Annual Reports*. State Pollution Control Commission; Environment Protection Authority.

Table 2
Environment Protection Authority (Victoria)—Prosecutions

Year	*Number*	*Year*	*Number*
1984-85	34	1988-89	31
1985-86	50	1989-90	50
1986-87	71	1990-91	32
1987-88	39		

Source: *Annual Reports*, Environment Protection Authority.

Differences in prosecutorial activity between New South Wales and Victoria and the other States are striking. Contrast Queensland and Western Australia, for example. In Queensland, there have been twelve prosecutions commenced under the Clean Air Act since its enactment in 1963, six prosecutions under the Noise Abatement Act since its enactment in 1978 and five prosecutions under the Clean Waters Act since its enactment in 1971. In Western Australia, information on prosecutions brought since the Environmental Protection Act commenced in 1986 is not readily available. However, information has been published in recent Annual Reports of the EPA. They show that in 1989-90 there were three successful prosecutions, four in 1990-91, and two in 1991-92.

In South Australia, the Department of Environment and Planning's *Annual Report 1990-91* lists three noise pollution prosecutions but no air pollution prosecutions. An official from the Department's Air Quality Branch estimated in an interview in 1992, that there had been approximately six prosecutions for air pollution in the previous five years. The Electricity and Water Supply Department, which has been responsible for water pollution control in the State estimated that there had been fewer than ten prosecutions for water pollution under the *Water Resources Act 1976* (the predecessor of the current *Water Resources Act 1990*) and perhaps "one or two" under the current Act. Prosecution is infrequently used in Tasmania (*see* Table 3).

Table 3
Tasmanian Department of the Environment/Department of Environment and Planning/Department of Environment and Land Management—Prosecutions

Year	*Number*	*Year*	*Number*
1984-85	15	1988-89	5
1885-86	16	1989-90	2
1986-87	5	1990-91	0
1987-88	3	1991-92	0

Source: Annual Reports.

Where prosecution has been used in the non-adversarial States, penalties awarded by the courts have generally been small. In Tasmania, the highest fine ever imposed for a pollution incident appears to have been $6200. No successful prosecutions were brought in the 1990-91 or 1991-92 financial years under the Environment Protection Act. In the previous three financial years, fines were in the range of $200-$2500.

In South Australia, prosecutions under the Clean Air Act have reportedly resulted in fines ranging from $500 to $1000. In Queensland, the maximum fine ever imposed under clean air legislation was handed down in 1978 and was $10 000. The matter was appealed and on rehearing, a fine of $500 was imposed. More recently, the largest fines imposed have been $3000 and $2500 have been imposed under the Clean Waters Act and the Noise Abatement Act, respectively. Fines imposed in the few successful cases brought under the Environmental Protection Act in Western Australia have ranged from $200 to $37 500.

The situation is different in New South Wales since the commencement of the Environmental Offences and Penalties Act. In 1991-92, a Tier 1 prosecution resulted in a fine of $50 000. Fines imposed in the case of Tier 2 prosecutions ranged from $200 to $30 000. In Victoria, during 1990-91, fines imposed were in the range of $100 to $6000.

Attitudes of Environmental Regulators

In 1983-84 Grabosky and Braithwaite conducted interviews with environmental protection agency personnel as part of a larger study on Australian business regulatory agencies (Grabosky & Braithwaite 1986). They found that "despite the wide variations across Australia in policies relating to prosecution, environmental regulators invariably seek cooperative relationships with industry" (Grabosky & Braithwaite 1986, p. 47). They characterised only two agencies as "adversarial" in any way and described them as having "regulatory strategies of moderately strict enforcement" (Grabosky & Braithwaite 1986, p. 38). These agencies were the Victorian Environment Protection Authority and the New South Wales State Pollution Control Commission.

In 1992, almost a decade later, Duncan Chappell and the author interviewed personnel from some of the major environmental agencies in each Australian State.[2] These interviews were conducted as part of a larger study for the United Nations Interregional Crime and Justice Research Institute; a cross national investigation involving eight nations that also looked at legislative frameworks of environmental protection law (*see* Alvazzi & Norberry 1993). Despite the growth of political and public interest in the environment, the burgeoning of green politics and the review processes that had been under way; we found that Grabosky and Braithwaite's conclusions still held true.

What are the attitudes of regulatory agency officials to the use of offence and penalty provisions? The Chairman of the Victorian Environment Protection Authority described prosecution as a "very valuable tool". He stated that the Authority's position was that where there is evidence of a breach of the Environment Protection Act, then prosecution, or the issuing of an infringement notice would result. Officials in both Victoria and New South Wales described the effects of prosecution as salutary. In New South Wales, sanctions provided prior to the enactment of the Environmental Offences and Penalties Act were described as "petty cash offences".

In the other States, very different opinions were expressed, both regarding the more adversarial agencies and about the merits of prosecution. Environmental protection authorities in New South Wales and Victoria were categorised by one official as "shoot[ing] first and ask[ing] questions later".

According to officials in Queensland, prosecution is not used unless it is obvious that the transgressor has set out to flout the law and has caused a significant environmental problem. In South Australia, policy makers remarked on a long-standing

---

2. New South Wales: Environment Protection Authority, Waste Recycling and Processing Service, Water Board; Victoria: Environment Protection Authority; Tasmania: Department of Environment and Planning; Queensland: Department of Environment and Heritage, Queensland Transport; South Australia: Department of Environment and Planning; Engineering & Water Supply Department, Waste Management Authority, Department of Marine & Harbours; Western Australia: Environmental Protection Authority, Department of Marine & Harbours.

tradition that prosecution should be used as a last resort. In Western Australia, prosecution was similarly viewed and was said to be employed in cases of irresponsible behaviour or repeat offenders. Significantly, it was regarded as evidence of failure on the part of the agency. In Tasmania, officials stated that prosecution would be instituted if there was a major environmental impact from a pollution incident. At the time of the interviews, one Tasmanian official described prosecution as being effectively dormant in Tasmania.

The reasons for these attitudes are various but there is evidence of a number of underlying commonalities. In New South Wales and Victoria, prosecution was viewed and experienced as an effective tool in securing compliance. Regulatory officials in both jurisdictions provided examples where prosecution had been used to good effect. In New South Wales an example was provided to us of a government instrumentality, safeguarded from prosecution due to government policy for many years. In 1990 the New South Wales government reversed its policy of not prosecuting government agencies and the State Transit Authority, which had been unresponsive to the compliance strategies of the State Pollution Control Commission was prosecuted and fined $15 000. Regulatory agency officials reported that the STA felt severely compromised by the adverse publicity associated with the prosecution and following its conviction instituted environmental audits of its depots.

A similar example was provided by the Victorian Environment Protection Authority, of a company that had been unresponsive to negotiation over a number of years and had failed to honour its undertakings to improve. Prosecution resulted in substantially increased cooperation by the company.

Officials from other regulatory agencies were much less enthusiastic about prosecution processes or outcomes. They generally regarded prosecution as extremely time consuming of agency staff and financial resources, and as such a lengthy process that it minimised or negated any potential for deterrence. Prosecution outcomes were criticised on two grounds: first, officials believed that many magistrates viewed pollution offences as trivial and awarded minimal fines; second, officials believed that prosecution engendered antagonistic relationships with industry which were detrimental to achieving environmental protection. These agency officials believed that compliance with environmental laws was best achieved through conciliation, education and negotiation.

Other reasons for the hesitation expressed by regulatory officials about prosecution should be mentioned. One official remarked at an interview that environmental protection agencies had not, in the past, taken their law enforcement roles seriously. The mixture of advisory and enforcement functions appears to have contributed to a jaundiced view, or at best an ambivalence towards prosecution. In the words of one official, these agencies have tended to "own the problem with industry". Put another way, one officer from New South Wales remarked that, in the past, there had been a climate of "tolerance" towards industry.

Finally, one policy-maker in an environmental protection agency remarked that in the past, agencies and their regulatory officials had not realised that specialist skills were needed to effectively carry out an enforcement role. This view was borne out when we asked regulatory agency officials about training in environmental protection laws and prosecution. At the time of our interviews few agencies had instituted regular staff training programs in matters such as criminal investigation techniques.

Conclusions

Are the activities, experiences and opinions of regulatory agency officials important in the context of the reviews of environmental protection legislation presently occurring in Australia and the planned introduction of a hierarchy of uniform offences and penalties contemplated by the Intergovernmental Agreement on the Environment? My answer is "yes".

It is undeniable, of course, that prosecution of environmental offenders is only one potential tool in the expanding array of compliance mechanisms available to regulatory agency officials. However, offence and penalty provisions will continue to be part of environment protection legislation. Moreover, it appears that such provisions will become increasingly complex and that penalties will become more severe. Alongside these changes are Australian environmental protection instrumentalities—many with staff lacking experience in environmental prosecutions or with significant reservations about prosecution and its outcomes.

How can implementation gaps be addressed and inappropriate and ineffective practice avoided? First, by recognising that significant potential exists for the nullification of new and complex offence and penalty provisions—given the history of environmental laws and administration in this country, the experiences of regulatory agency officials and their attitudes to prosecution. Organisational cultures will need to be addressed if new statutory instruments are to be used effectively. Attitudes that must be marked out for change include the perception that prosecution must necessarily be an indicator of agency failure, rather than a view that prosecution is sometimes a necessary component in the regulatory mix.

Second, by recognising the significant challenges presented to agency staff by the complex evidential requirements in new offences relating to serious pollution. These offences may be indictable, require proof of intention and environmental harm or damage. Training in detection, investigation, evidence gathering and courtroom techniques and procedures must be put in place. Too often in the past, regulatory agency officials have not had timely, quality and ongoing training in law enforcement. Training will be important, not only in those States where officers continue to appear before lower courts, but also in those jurisdictions where the matter is heard on indictment or before a specialist environmental court—such as the new Environment, Resource and Development Court in South Australia.

Training will be particularly important given that new and severe penalties mean that the stakes will be higher. In these circumstances, it is more likely that defendants will contest charges and engage senior counsel. Anecdotal accounts provided to us by officers from the Environmental Protection Authority in New South Wales suggested this to be the case not only in relation to Tier 1 prosecutions, but also in respect of Tier 2 prosecutions. These officers told us that more information is being required by counsel engaged by the EPA and more cases are being defended. Contrast this situation with the casual attitude to prosecution displayed by an official in a less adversarial agency who suggested that prosecution was not too difficult a business and gave the example of a successful prosecution where "I had got the date wrong, I had got the time wrong and I had got the offence wrong".

Third, consideration should be given to the best method of training for regulatory agency personnel. Using the police to train environmental protection officers in investigatory and courtroom techniques is one possibility (Chappell & Norberry 1992). In the United States, Canada, The Netherlands and Germany there has been

considerable discussion about the need to enhance police involvement in environmental protection. In the United States and Canada, the police have been used to train environmental agency personnel, to participate in information exchange (O'Brien 1991), and to directly investigate environmental offences and enforce environmental laws (Mateluwich 1991). Training sessions are one way in which police may assist regulatory officers in the techniques of criminal investigation, evidence gathering and courtroom procedures. Their input may be particularly useful in view of the new generation of environmental offences and in view of the statutory responsibilities that may arise for regulatory officials questioning suspects in custody. Secondment of police to regulatory agencies might also be a useful step.

Fourth, agencies will need to construct enforcement guidelines to guide their officials through the maze of enforcement options being made available to them. The New South Wales EPA released draft prosecution guidelines for public comment in December 1992. The guidelines were released on 24 August 1993. In Victoria, the EPA has also released an enforcement policy. Guidelines should, among other things, indicate when enforcement options other than prosecution are appropriate, when on-the-spot fines should be used, when prosecution is the appropriate course, and if so, which offence and which defendant are the appropriate ones.

The existence of tiered offence and penalty options enables targeted responses to pollution incidents but by its very complexity has the potential to encourage officials to use the easiest option. Infringement notices are useful because they avoid the expense of litigation and are said to address minor problems and so prevent major difficulties arising with polluters. Anecdotal evidence obtained from New South Wales officials in 1992 suggested that Tier 3 penalty notices were issued on occasion because they were not as consuming of time and resources as Tier 2 prosecutions.

Last, if it is the case that agencies hesitate in prosecuting because of unsatisfactory outcomes in the courts, then consideration should be given to appropriate training for the magistracy and judiciary in environmental protection laws and to the establishment of specialist environmental courts.

References

Chappell, D. & Norberry, J. 1992, Critical issues—environmental offences and the police, paper presented to the 1992 Australasian Crime Conference and Seminar hosted by the Australian Federal Police, 16 November, Canberra.

Grabosky, P. & Braithwaite, J. 1986, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, Oxford University Press in association with the Australian Institute of Criminology, Melbourne and Canberra.

Lipman, Z. 1991, "Criminal liability and the amended Environmental Offences and Penalties Act 1989 (NSW)", *Environment and Planning Law Journal*, vol. 8, no. 4, pp. 322-37.

Mateluwich, V.A. 1991, "Environmental crimes prosecution. A law enforcement partnership", *FBI Law Enforcement Bulletin*, vol. 60, no. 4, April, pp. 20-5.

Media Release 1993, *EPA Bill. Greater Green Protection. Less Red Tape*, 4 August.

NSW Ministry for the Environment 1990, *Establishing an Environment Protection Authority for New South Wales*, Discussion Paper, July.

---------- 1991, *Establishing an Environment Protection Authority for New South Wales*, Information Paper, January.

Queensland. Bureau of Emergency Services. Chemical Hazards & Emergency Unit 1991a, *A Green paper on Contaminated Land Legislation*, Brisbane.

---------- Department of Environment and Heritage 1991b, *Environment Protection Legislation: Public Consultation Paper*, Brisbane.

---------- Department of Environment and Heritage 1992, *Environment Protection Legislation: A Summary of Public Responses*, April.

O'Brien, M.A. 1991, "The environmental protection forum", *FBI Law Enforcement Bulletin*, vol. 60, no. 4, April, pp. 9-12.

SA Department of Environment and Planning 1991, *Proposal for a South Australian Environment Protection Authority and Charter for Environmental Quality*, Discussion Paper, Adelaide.

---------- 1992, *Establishing the South Australian Environment Protection Authority*, August, Adelaide.

---------- 1993, *Establishing the South Australian Environment Protection Authority*, August, Adelaide.

Tasmania Department of Environment and Planning. Policy Division 1991, *Environment Protection Act 1973: Issues for Public Discussion*, Department of Environment and Planning, Hobart.

WA Independent Advisory Committee for the Review of the Environmental Protection Act to the Minister for Environment 1992, *Report*, October.