THIS PAPER FOCUSES ON THE POLLUTION CONTROL LAWS WITHIN THE environmental protection law family in order to discuss the role of criminal law and the general issues and themes which arise in environment protection.

Community concern about the effectiveness of environmental protection laws in Australia is ongoing. There is dissatisfaction in some jurisdictions as to what is perceived to be the failure of a system of regulation based upon a cooperative relationship between regulators and polluters.

One response to this concern has been an increased interest by politicians and legislatures in Australia and overseas, in the use of increased criminal sanctions and a widening of criminal offences so that governments are seen to be acting to secure environmentally desirable outcomes. For example, the Canadian Environment Protection Act 1987 imposes substantial penalties for criminal behaviour against the environment and provides for the confiscation of pollution-related profits. In the USA severe penalties can be awarded under pollution control legislation. Such changes have caused a re-evaluation of the role of criminal law in achieving environmental outcomes in academic writing, and this re-evaluation has been drawn on heavily for this paper.

Questions must be asked as to whether the punishment fits the offence. Some of the questions which will be addressed in this paper are:

- what is the role of criminal law in relation to environmental protection?
- are environmental protection outcomes actually best served by the more widespread criminalisation of acts causing harm to the environment?
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- do increased criminal sanctions "cure" perceived defects of a cooperative compliance system?

- do those sanctions affect environmentally detrimental patterns of behaviour? and

- what are the advantages and disadvantages of criminal law in providing a "moral mandate" for environmental protection?

Cooperation and Coercion

Criminal law has always had a place in the environmental protection regimes of all jurisdictions in Australia. It has, however, usually performed an ancillary and supportive function to the main purpose of the regime, which is to regulate the potentially harmful activities of polluters by complex licensing and permission schemes. The emphasis has been upon securing and promoting acceptable behaviour through a process of bargaining, negotiation and compromise carried out between the regulator and the regulated. The outcome of this process is legally acceptable levels of pollution and legalised polluters.

Criminal sanctions function primarily within such schemes as a "long stop" (Farrier 1992). They provide a last resort in both practical and symbolic terms for dealing with recalcitrant polluters who, although members of the scheme, refuse to "play fair". The threat of criminal sanctions is distant but has value in "reweighting the bargaining process in favour of the administrative agency" (Farrier 1992, p. 87) and therefore facilitating the negotiation of higher standards and more stringent requirements in the short term. Criminal sanctions also operate in such schemes to punish the behaviour of those who do not carry out all or part of their polluting activities within the approved scheme—the "midnight dumpers". This more immediate threat supposedly encourages polluting industries to bring themselves within the scheme where the threat of sanctions decreasing is more remote.

However, a number of commentators consider that there is a great deal of evidence that this approach is not effective in securing the level of protection desired by the community and required by the environment itself. Polluters ignoring their responsibilities are not promptly prosecuted, the environment continues to be degraded beyond an acceptable level and community anxiety continues to increase. In part these problems are related to perceptions of "capture" of regulatory bodies by their client groups where few prosecutions of polluters are seen to signal an unhealthy state of affairs.

The much-publicised political response in some jurisdictions has been to sharply increase criminal penalties and the scope of criminal offences in relation to the environment, and to tip the scale in favour of what is seen as coercion rather than the encouragement of compliance. Existing regulatory structures have also been tightened —standards and approved processes have been re-articulated as concrete achievable outcomes rather than vague goals. It is easier to determine a licensee's performance against such criteria and thus easier to detect prosecutable noncompliance. However, some problems are apparent in this shift. For example, recent litigation in the Land & Environment Court of NSW, Brown v. EPA (1992) 78 LGRA 119, concerned a challenge to the policy of applying a prosecutable reality approach to the issue of pollution licences by the NSW EPA. The case sought to raise questions about the
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application of this policy with respect to the setting of overall pollution standards. The applicant was unsuccessful in the Land and Environment Court of NSW at first instance. The parties have recently settled the matter and consequently it did not proceed on appeal.

In NSW there has been the enactment of the *Environmental Offences and Penalties Act 1989* which created a new broadly defined offence of "harm to the environment", in addition to increasing fines and imprisonment terms for all existing criminal environmental offences under the many NSW Acts relating to environment protection. The Act also introduced directors' liability provisions and extended criminal liability for some waste offences.

The intention of the Act was expressed as not to create a new criminal pollution control regime, but rather to bolster the threat behind the existing scheme and frighten "sleazy operators" (NSW Minister for Environment 1989) who had in the past taken advantage of the conciliatory attitude and the poor monitoring capability of the authorities. It also provided a bigger stick with which to beat "wildcat" polluters and "midnight dumpers" who operated outside the scheme entirely, and a bigger inducement with which to gain their cooption into the Scheme (NSW Minister for Environment 1989). As such it has focussed upon deterrence through coercion rather than cooperation.

The paper has so far painted the contrast between cooperative regulatory schemes and coercive criminal sanctions in somewhat black and white terms for illustrative purposes. It should be pointed out that most systems will be a continuum between the two.

**Some Problems in Utilising Criminal Law for Protecting the Environment**

There are certain inherent problems with the use of criminal law to achieve environmental outcomes that are caused by a conflict between the nature of criminal law as it currently stands, and the idea and ideals of environmental protection. Other conflicts are caused where the legislature has sought to change the balance between criminal law and regulatory rules without substantially changing current systems of regulation.

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**Not preventative by nature**  The criminal law is not immediately preventative by nature. It is, at least in its initial phase of operation, concerned primarily with the punishment of unacceptable behaviour. It does not, therefore, prevent the occurrence of environmental harm which should be the fundamental basis of environmental protection regimes. Criminal law is also adversarial in nature (the same can be said for civil law of course). Disputes are settled in court which takes up time and resources and may well delay the remediation of the harm for which liability is being debated. Litigation, moreover, absorbs resources that may be more valuably directed towards upgrading harmful processes or remediating damage.

**Scope and nature of offences are unclear**  The use of the criminal law in the field of environmental protection also suffers from uncertainties as regards the scope and nature of the offences. For example, what is the requisite state of mind for offenders?
What acts constitute harm to the environment? What should be the burden of proof and on whom should it lie?

In terms of the mens rea required for environmental offences, Farrier points out that although some recent legislation has tackled this problem, "there are vast numbers of old environmental offences which reflect the earlier legislative approach of maintaining silence on the issue, leaving the courts with the ostensible task of discovering Parliamentary intention" (Farrier 1992, p. 82).

The decision of the High Court in *He Kaw Teh* (1985) 157 CLR 523 has provided some guidance in finding that three alternatives on this question exist. Depending upon the type of act and the circumstances, mens rea can apply in full, or the offence may be one of strict liability for which the accused may be able to mount a defence of honest and reasonable mistake of fact (in the field of environmental law this defence includes the contention that the accused took all reasonable care or due diligence to prevent the acts leading to the offence) or the offence might be one of absolute liability. In a number of Australian cases (Farrier 1992, p. 83) strict liability has been taken up as the appropriate standard, but in at least one the court has applied the absolute liability classification (*Allen v. United Carpet Mills Pty* [1989] VR 323).

Other uncertainties lie in what actually will constitute the actus reus of the offence, what will constitute "harm" to the environment, what is "pollution" and what is "the environment"? Such terms have traditionally been broadly defined in order to give the authorities maximum flexibility in determining prosecution strategies. They also vary between jurisdictions. Such uncertainties are further exacerbated by the fact that our scientific knowledge of how the environment absorbs and transmutes toxic substances is in its infancy. Furthermore, research also remains firmly anthropocentric in how it calculates damage.

**Access to third parties restricted** There are further problems concerning the restriction of rights in bringing actions for the commission of environmental crimes. Third parties suffer from a lack of standing to initiate prosecutions. This is inconsistent with the trend in environmental law outside the criminal enforcement arena which has been towards opening up the regulatory process to external scrutiny. There are clearly practical difficulties in having third parties prosecute environmental crime but the principle is an important one.

**Political nature of prosecutions** The decision about whether or not to commence a prosecution can be subject to political influence where the decision to do so is discretionary. This presents challenges to regulators and has been the cause of criticism from communities where the decision not to prosecute is seen as going "soft" on industry.

**Failure to deal with wide range of pollution and other environmentally harmful issues** This problem can be said to affect all environmental protection laws, civil or criminal, where they fail to cover the field of environmental offences and penalties. How to deal with diffuse sources of pollution, urban runoff and excessive land clearing remain challenges for regulatory and land use planning regimes.
Some Reasons to Utilise Criminal Law—Promoting a "Fundamental Value" for Environment Protection?

Criminal law may be divided in terms of its function and purpose into two types: those laws which reaffirm and reinforce the fundamental values of the community, and which are by and large complied with without resort to regular sanctioning, and those which sanction and control behaviour, which convenience or social, political or economic policy dictate must be regulated in this way. It cannot yet be said that there is, underlying our social and political culture, a fundamental value of protecting the environment for its own sake. However, there are strong signs that such a value is becoming seen as desirable by the community and by government.

Although there are good arguments for keeping these two types of laws separate, and refining the criminal law so as to make only those offences that can be regarded as crimes against fundamental values subject to its tough penalties, it should be noted that the criminalisation of environmental offences could play a significant role in developing a "moral mandate" for environmental protection by a process of "value forcing". Placing "act of harm to the environment" under the auspices of the second type of criminal regulation has the advantage of sending clear signals that such harm is not socially acceptable. In time, such signals, when consistently and effectively enforced, may percolate down and become part of the moral framework of society. Patterns of acceptable behaviour, defined by the new laws and then refined by the process of enforcement, become new social norms. Protection of the environment from harm may then become a fundamental value and patterns of non-harmful behaviour become the norm.

The scope and nature of the fundamental value gained will depend upon the conceptualisation of harm to the environment that is developed and refined by the enforcement and administration of the law. Current approaches tend strongly towards anthropocentrism in definitions of the environment and what can therefore be considered harm. Even where the environment is defined in all embracing terms, the parameters of which are not defined solely by reference to human activity, definitions of what is harmful behaviour continue towards the impact of environmental degradation upon human health and amenity. Admittedly this is a resourcing and technical problem in that most knowledge has been gathered by reference to such benchmarks, but the balance must be redressed.

The Canadian Law Reform Commission report Crimes against the Environment (1985) recommended that a crime against the environment be instituted in the Canadian Criminal Code on the basis amongst other matters that this major step was supported by changes in community attitude.

Changing Cultures Midstream

There are considerable challenges, both practical and conceptual, with the trend towards emphasising the role of primarily coercive criminal sanctions within existing cooperative regulatory systems.

As mentioned in the previous section, criminal laws may be divided into two types. The first are those which reflect and reinforce what can be termed the fundamental values of the community from which it arises. Examples of this type of law include murder, which reflects the fundamental value that human life is somehow sacrosanct—a belief which tends to be shared by the majority of society. Such laws tend to have
high levels of voluntary compliance as they simply codify pre-existing widely held notions of acceptable behaviour. The other type of criminal laws are those which attempt to proscribe behaviour that is for some other reason socially unacceptable, whether it is for convenience or as a matter of policy. The Law Reform Commission of Canada (1976) has argued that this type of criminal law should not be termed criminal law at all but are mere regulatory rules and that the status of criminal law with all its attendant moral messages and symbolism should be reserved for those laws of the first type (see also Farrier 1992 & Franklin 1990 who deal with this issue and critique the Canadian position).

As it is arguable that a fundamental value in favour of the protection of the environment in situations that do not immediately threaten human life or amenity does not yet exist, compliance with environmental laws is not usually voluntary. Therefore, for the threat of criminal sanctions to be effective in inducing compliance the threat behind the command must be perceived as severe, realistic and imminent. The "big stick" must be visible.

However, as has been pointed out by Farrier (1992, p. 97), the conciliatory atmosphere of the regulatory process is not an appropriate or effective arena in which to implement a coercive strategy based on commands backed by threats. Most State and Territory authorities lack the resources to effectively monitor compliance or gather evidence about the activities of licensed polluters, let alone possess the intelligence-gathering and surveillance expertise to track down and catch in the act the midnight dumpers. Community based "neighbourhood environment watch" schemes such as "Dob in a Dumper" are not effective in filling this vacuum. Partly as a result of these difficulties, and partly as a concession to the interests of polluters, there is also in place a culture heavily reliant upon self-monitoring and self-regulation by industry. There seems to be no intention to abandon this practice. The detection of breaches remains difficult and the deterrent effect of the sanctions that attach to those breaches is subsequently lessened.

Some commentators have noted that although the larger monetary sanctions provided for may be a significant deterrent to small companies and individuals, there is evidence that many larger corporations are coming to view noncompliance fines as simply another form of licensing fee to be factored into their accounts. This is cheaper in the long run than changing their management structures or production processes and even where noncompliance has been uncovered, fines have been relatively low. This evidence conflicts with anecdotal experience which suggests that large companies are better able to implement pollution control devices and new technology and therefore to meet changes in pollution standards.

The adversarial nature of criminal law and the resulting harm that an increased emphasis upon it may do to the "trust relationship" that has developed between many polluters and the regulatory authorities may also have a detrimental effect on the good work being done within these structures to encourage change, provide technical information and educate polluters. It is also likely to result in less information being provided to the authorities.

**Is Criminal Law Effective in Securing Environment Protection?**

This question is difficult to answer in absolute terms because of the limited range of polluting activities targeted by criminal law.
There has been evidence of a substantial rise in the number of criminal prosecutions in NSW following the enactment of the Environmental Offences and Penalties Act. Prosecutions in the Land and Environment Court rose from 40 in 1988 to 193 in 1989 and 317 in 1990 (Stein 1992). It should be noted, however, that a large number of the prosecutions are for relatively minor offences. There have been a number of successful prosecutions, many against big corporations, although the penalties imposed have been nowhere near the maximum allowed for under the Act. Voluntary environmental audits also increased markedly during this period as corporations sought to determine the potential extent of their liability under the new arrangements. Thus there has been some change in corporate attitude. However, there has been a substantial decrease in the number of guilty pleas being entered (Stein 1992), increasing the number of cases that have been dragged out in the courts.

But has this new "hard line" been successful in reducing pollution which legal systems attempt to control. It is at this point instructive to consider issues raised by the regulation of corporate polluters. Most major point source pollution is by corporations rather than private individuals. If laws are in some way seeking to change behaviour, it is therefore arguably corporate values amongst others that must be changed to ensure adequate environmental protection. This proved difficult under the schemes focusing heavily on compliance. Breaches were not always immediately penalised and compromises were sought that often reflected the superior bargaining power, in terms of money and resources, of these organisations. Hence reliance on self-monitoring, confidential audits and standards requiring only that best efforts be applied resulted. There are arguments put forward that this approach led to the capture of regulating agencies by corporate goals and culture and the demise of the agencies' environmental imperative. Where breaches were punished, many corporations simply absorbed the costs, treating the fines as a type of additional licensing fee or simply another business cost. It was cheaper to do this than to restructure polluting processes or management structures.

As mentioned above, there are substantial difficulties for governments in effectively monitoring polluters and detecting noncompliance because of the large amount of resources required for these purposes. Sanctions may be more onerous but remain remote. For some commentators increasing the monetary sanction and introducing directors' liability provisions has also arguably been of little long-term benefit to changing corporate culture. These sanctions only punish misbehaviour, they do not demand change.

Brent Fisse and John Braithwaite (1988; see also Lipman 1991) have studied the ability of different types of criminal sanctions to deter or change corporate behaviour in a number of fields (not just environment). If the corporation is to be viewed as a (mostly) rational value maximising entity, sanctions which attach to values such as profit, prestige and stability are likely to have more of a deterrent effect than those which are largely irrelevant to the corporation except as another "cost of doing business". Hence punishments such as court-ordered adverse publicity, community service and stock dilution through equity fines (with a re-direction of the shares to environmental interest groups) should be considered as new criminal sanctions.

In order to actively change behaviour, courts should also have access to corporate probation orders such as are available under the NSW and Commonwealth Crimes Acts at s. 556A and s. 193 respectively, and to punitive injunctions against criminally liable corporations. Such "positive punishments" require environmentally responsible institutional reform rather than sanctioning noncompliance.
Shifting liability to individuals within the corporate structure, such as directors, may also not achieve the necessary level of deterrence or of long-term change in corporate values because with "the organisational divorce of responsibility for past offences from responsibility for future compliance" (Fisse & Braithwaite 1988, p. 497) liability ends with the removal of the "guilty" individual. There is no residual responsibility for the company to reform internal practice. Fisse and Braithwaite also doubt whether the diversion of scarce resources from the imposition of corporate liability is desirable and believe "the overall effect is likely to be a relaxation of the social control of corporate crime" (1988, p. 498) and recommend a mixed approach.

The author's experience is anecdotal but directors' liability provisions in NSW pollution control legislation appears to have created great concern in many large companies, causing greater attention to be paid to environmental management and more involvement in environmental issues higher up in corporate decision-making. The need for "due diligence" management regimes are certainly talked about a great deal by lawyers to their clients as an important part of reducing the risk of successful pollution prosecution.

Can criminal sanctions encourage an anticipatory approach to environmental protection? Perhaps the difficulties in prosecuting environmental offences, as well as a growing awareness of the role of effective management in ensuring environmental protection, have led to consideration of other avenues to ensure a focus on better environmental management practices as a means of reducing environmental damage through such avenues as environmental auditing. An anticipatory approach is important in environmental protection. The tension between the need to ensure adequate regulatory controls and to encourage better environmental management practice is demonstrated in issues such as whether there should be compulsory disclosure of environmental audit results to government regulatory agencies who may use the information obtained to launch prosecutions.

Appropriate and varied criminal sanctions such as those suggested by Fisse and Braithwaite (1988) may be more helpful in encouraging behaviour modifications in companies and therefore to take more anticipatory action. Greater exploration of the different remedies to encourage this appears justified.

Is Civil Law more Appropriate?

Given the drawbacks mentioned above in utilising criminal law for environment protection, there has been much discussion about whether civil law processes and sanctions may be more effective and appropriate in dealing with environmental offences. Civil law has the advantage of flexibility and its sanctions can be more effectively tailored to the particular situation. Civil law also allows for "preventative policing", through orders and injunctions to restrain prospective pollution. This has proved a problem with the traditional criminal law sanctions of imprisonment and monetary penalties, as mentioned above in the context of corporate polluters. Civil law is also more easily enforced against corporate polluters as it side-steps difficult to prove issues such as mens rea.

Enforcement practice seems to bear this out. Many breaches of environmental statutes which could be prosecuted by either civil or criminal provisions are by preference dealt with, at least in NSW, under the civil jurisdiction of the courts. This is because the process is generally faster, standards of proof are easier (balance of
probabilities), sanctions are more flexible and, often, individuals and resident groups will more readily have access to the civil process than the criminal (Stein 1992).

However, although civil law should be considered more appropriate for many aspects of enforcement that are now being regulated by criminal law provisions—such as sanctioning and the enforcement of preventative injunctions and orders—it may not be enough to provide the long-term value readjustment that is necessary for effective protection of the environment. Civil law is often held up to be "morally neutral" in that its penalties are not directed towards punishment but the prevention, cessation or remediation of harmful activity. This, when combined with a system in which some pollution is rendered lawful (and by implication socially acceptable), fails to send adequate signals about what sort of environmental harm is not acceptable. It is arguable that the criminal law continues to have a valuable role to play in this arena.

One area worthy of greater exploration in Australia is the cross-over in the United States to "civil" penalties. This approach has been used extensively in environment protection laws in the USA.

Conclusion

The cooperative regulatory approach emphasised the achievement of environmental responsibility by identifying, setting and negotiating acceptable standards of behaviour for corporations and individuals in conditional licences or permits, then encouraging compliance through education and persuasion. Such an approach supposedly encourages proactive systemic change rather than merely punishing noncompliance.

The perceived problems with this regulatory system, which arguably lie mostly in a lack of resources and resolve to prosecute offenders, have not been properly addressed by superimposing over it raised criminal penalties and by extending criminal liability. The same problems of monitoring compliance and detecting breaches with poor resources remain, and are further complicated by perceived losses in long established trust relationships. Indeed, Nicola Franklin has argued that criminal law has been used in this case not to offer a realistic "cure" for these problems, but to "offer a high-visibility political response without interfering with bureaucratic/business interests" (Franklin 1990, p. 92).

Also, in the absence of widespread and consistent community and corporate commitment to a "fundamental value" of environmental protection, the regulation of pollution remains reliant upon setting up acceptable norms of behaviour and sanctioning deviance from this norm. One emerging question is whether the enforcement process and those sanctions should be provided by the criminal law or by civil law. It is true that civil law offers greater flexibility and more efficient outcomes but possibly lacks the value-forcing quality of criminal law.

A mix of civil and criminal processes and sanctions would seem appropriate and does exist in most jurisdictions—it is the balance between the two which is important. Civil law would regulate most aspects of environmental regulation and civil sanctions and provide most of the "long stop" threat that drives the cooperative system. Certainly more narrowly defined criminal offences, providing tougher threats of punishment and sanctioning, will operate outside of and in support of the cooperative scheme where it is appropriate to do so, such as extreme negligence or wilful disregard for environmental or human health. The court's discretion as regards criminal penalties should also be expanded to provide a wide range of sanctions.
For many commentators this selective targeting approach would provide a more coherent building of a moral imperative in favour of environmental protection by focusing on this goal through the criminal law, while more appropriately and effectively regulating polluting behaviour in the short term through the civil law.

Any regulatory system should also be conducted in conjunction with an anticipatory system as it is clearly preferable that environmental damage be minimised in the first place. Measures such as environmental audits are clearly important in encouraging better environmental management practice. One of the challenges for those defining regulatory regimes is how to tailor these measures in such a way as to encourage greater anticipatory behaviour in terms of pollution prevention.

References


---------- 1985, Crimes Against the Environment, Information Canada, Ottawa.


NSW Minister for Environment 1989, Second Reading Speech, Parliamentary Debates, Legislative Assembly, 1 August, p. 8814.