

INTRODUCTION

Neil Gunningham and Jennifer Norberry

ONE OF THE CRUCIAL ISSUES OF OUR TIME IS HOW TO PROTECT THE natural environment from pollution and other forms of degradation. Traditionally, the favoured mechanism invoked by government for these purposes has been the criminal law. Typically, legislators proscribe certain behaviour and set up a regulatory agency to monitor and police compliance with legal standards.

Until quite recently, the laws so enacted, although they included criminal penalties, were regarded as merely "regulatory" in character, excluding the mental element, stigma, and the potential severity of punishment associated with "real" crime. However, as Zada Lipman indicates in her paper, it is increasingly recognised that some environmental offences are far from trivial, and that in terms of harm done, the degree of intent and values threatened, they are in a very real sense "crimes".

Recent Australian legislation reflects this recognition. For example, the *Environmental Offences and Penalties Act 1989* (NSW) provides for maximum penalties of up to \$1m for corporations and seven years imprisonment for individuals. Other jurisdictions are also increasing the level of penalties in a similar fashion. This trend towards "criminalisation" has gone even further in the United States, where there has been a strong increase in environmental criminal enforcement and in penalties imposed. There, not only are companies facing higher than ever fines, but individuals in record numbers are getting substantial gaol terms.

Many environmentalists applaud this trend, believing that it both effectively deters and appropriately signals the seriousness of crimes against the environment. Others however, warn that the criminal law is an extremely blunt instrument for addressing environmental issues. Indeed, neoclassical economists, industry groups and others argue that the entire regulatory approach is rigid, legalistic, cumbersome, inflexible and reactive, that it is not cost-efficient, and that it does not encourage regulated companies to develop new technology or to go beyond compliance.

Many critics concede that criminal law (or more broadly command and control regulation) has had a significant effect in reducing pollution and environmental degradation, but progress has been slow and unduly expensive. It may well be that the command and control era has run its course in terms of results that can be generated, and that while it should not be entirely discarded, the focus in future should be on a variety of broader, more flexible and cost-efficient mechanisms for curbing environmental degradation.

If so, it is time for a fundamental reassessment of the role of criminal law in protecting the environment, and it is time to explore a range of other policy

instruments capable of complementing, or even replacing criminal law, as part of a broader regulatory mix.

It is this insight that motivated the Australian Institute of Criminology and the Australian Centre for Environmental Law to join forces to hold a major national conference on the broad theme of "Environmental Crime". The purpose of the conference was twofold. First, to examine the strengths and weaknesses of the criminal law as a mechanism of environmental protection. Second, to examine the appropriate role of innovative alternative mechanisms such as self-regulation, environmental audit, information based strategies, and the role of third parties. Here, the central question is how far is it desirable to move beyond the criminal law and focus on ways in which a range of other mechanisms, either individually or in combination, can improve environmental quality.

The Role of the Criminal Law in Environmental Protection

The criminal law is a heavy-handed mechanism through which to achieve optimal environmental outcomes. For this reason, it is valuable to consider whether the criminal law should have any role in protecting the environment, and if so, what that role should be. Assuming, as appears to be the case, that the criminal law should play a significant role, it is necessary to consider the further question of whether it can be adapted to better perform this function. This raises subsidiary issues such as;

- what are the difficulties—both legal and practical—of defending and prosecuting crimes against the environment?
- what problems arise when applying principles of criminal law to environmental law?
- how should the liability of corporate offenders be addressed? should Crown agencies be liable to prosecution?
- how should the law be enforced?
- what is the appropriate role of the Commonwealth and States?

A useful starting point in exploring these issues is to examine the *nature* of environmental crime. In his paper, Brian Robinson, chairman of the Victorian Environment Protection Authority outlines the development, both overseas and within Australia, of the concept of "environmental crime", tracing the establishment of Environmental Protection Authorities in Victoria and New South Wales and the concomitant creation of statutory environmental offence and penalty provisions. These developments, it is argued, may be seen as a reflection of the hardening public attitude towards polluters.

A number of the papers in this volume question the merit of an increasing reliance on the criminal law. Nicola Pain of the Commonwealth Environmental Protection Agency argues, with reference to pollution control laws, that recourse to criminal liability and sanctions is not an adequate solution to the problems apparent in the current cooperative regulatory system. She contends that civil law is more flexible and efficient than the criminal law, such that it should be used to regulate most aspects of environmental protection, with criminal law processes being reserved for persistent and severe breaches of the law.

Mr Justice Paul Stein of the New South Wales Land and Environment Court, and Zada Lipman from the Environmental Law Centre at Macquarie University, make similar points to those argued by Ms Pain. Mr Justice Paul Stein, whose paper is discussed below, advocates greater use of civil enforcement of environmental laws to complement criminal sanctions. In particular, His Honour supports the introduction of unqualified open civil standing provisions. In the context of the New South Wales *Environmental Offences and Penalties Act 1989* (EOPA), Ms Lipman contends that the criminal law is a "blunt instrument" in pollution control, such that it should be reserved only for more serious offences and the mens rea element should be preserved. Like Ms Pain, Ms Lipman considers that the use of civil laws is more appropriate than the use of the criminal law in relation to less serious environmental offences. This mix of civil and criminal law would, according to the author, be more effective than the criminal law alone in encouraging the proactive systemic change required to prevent pollution.

Some authors advocate use of mechanisms other than the criminal law to protect the environment because of the difficulties which arise in prosecuting environmental offenders. The problems which arise in relation to prosecution are identified in two papers; one by Steven Molino, an environmental engineer with ERM Mitchell McCotter, and another by Richard Bingham and Ian Woodward from the Tasmanian Department of Environment and Land Management. Mr Molino examines the practicalities of sampling, testing and interpreting evidence gathered in environmental cases, drawing attention to evidential difficulties involved in prosecuting environmental offenders. He argues that prosecutions often fail due to insufficient or inadequate evidence or due to the nature of a particular offence or problems of access. This is consistent with the experiences of Mr Bingham and Dr Woodward, who have found that prosecutions of environmental crimes often fail due to legal technicalities. Consequently, they conclude that the criminal law is not resource efficient, nor productive of good environmental results. In addition to advocating the use of civil enforcement measures, these authors contend that consideration should be given to the use of incentives, the use of government endorsement of environmental performance as an asset and transferable pollution rights.

Phillip Clifford and Sharon Ivey from the law firm, Freehill, Hollingdale and Page, address prosecution of environmental crime from the opposite perspective, discussing the difficulties associated with defending environmental offenders. They express particular concern about the application of the criminal law to corporate offenders, the dilution of the criminal law's basic tenets, the ineffectiveness of traditional criminal sanctions and some of the shortcomings of offence provisions. Mr Justice Paul Stein urges that the criminal law has an important role to play in environmental protection, but that it must be used cautiously and with a number of considerations in mind. His Honour writes that the most appropriate response to an environmental offender must be chosen with regard to the nature of the offence, the particular offender and with environmental protection outcomes in mind. His Honour sees innovative sentencing options as a means to adapt the criminal law to better protect the environment.

According to Darin Honchin, a Surveillance and Enforcement Officer with the Great Barrier Reef Marine Park Authority, there is an urgent need for legislators and policy makers to consider what level of criminal responsibility is appropriate to environmental offences. Mr Honchin considers ways in which the general principles of criminal responsibility outlined by the Criminal Law Officers Committee can be incorporated into statutes in order to ensure environmental legislation that is both fair

and enforceable as well as making suggestions as to the categorisation of marine offences. These issues are each considered in the context of the protection of the Great Barrier Marine Park under the *Great Barrier Reef Marine Park Act 1975* (Cwlth).

Matthew Goode, a Senior Legal Officer with the South Australian Attorney-General's Department, contends that, in light of the limitations of the common law in imposing primary criminal liability on corporations, the codification of corporate environmental offences is desirable in terms of criminal and social policy. He suggests that the difficulty with the criminal law as it now stands lies with the attribution of criminal fault. Whereas the *Tesco* principle is overly narrow and greatly restricts the scope of corporate criminal liability, the adoption of strict liability provisions is too broad and arbitrary. Mr Goode discusses the idea of a truly corporate notion of fault as an alternative to the existing models of corporate criminal liability (as outlined in the code proposed by the Criminal Law Officer's Committee), an idea which has attracted the favourable attention of the New South Wales Independent Commission Against Corruption.

Arguably, the traditional immunity of Crown agencies from prosecution causes additional difficulties in relation to the enforcement of environmental laws. Traditionally, such agencies have not been prosecuted for environmental offences in New South Wales even though some Crown agencies are significant polluters. Andrew Beatty, a solicitor with Allen, Allen & Hemsley, provides a summary of the views of those both for and against prosecution of Crown agencies.

Jennifer Norberry from the Australian Institute of Criminology argues that in order to effectively implement changes in environmental law, the practices, experiences and attitudes of regulatory agencies to prosecution must be taken into account so as to narrow the gap between the letter of the law and its practical application. She also examines offence and penalty provisions in Australian pollution legislation and the likely impact of a number of recent reviews of environmental protection laws.

Dorelle Pinch from the New South Wales Environment Protection Authority (EPA) discusses the purpose and content of Prosecution Guidelines published by the EPA in August 1993. The Guidelines are intended to inform the public about decision-making processes, provide a basis for decisions about environment and stimulate industry to be better environmental citizens. In particular, they provide a hierarchy of options which may be utilised by the EPA when statutory contraventions occur.

According to Wendy Fletcher from the Commonwealth Department of Environment, Sport & Territories, education has an important role to play in increasing compliance with environmental laws. Ms Fletcher discusses the particular difficulties inherent in enforcing environmental laws in remote locations, with particular reference to the Australian Antarctic Territory. She finds that compliance with environmental laws is high in the Antarctic despite difficulties in enforcement as a result of an environmental education program established to instil in Antarctic visitors the critical need to preserve this unique environment.

The creation of a new federal EPA may also enhance enforcement of environmental laws. Rob Fowler from the Australian Centre for Environmental Law at the University of Adelaide broadly outlines the features of the scheme proposed by the Intergovernmental Agreement on the Environment (IGAE) for the establishment of a national EPA. He examines the issues arising from a proposal for a hierarchy of uniform offences and penalties, and suggests as an alternative to the approach

envisaged by the IGAE, the creation of a federal EPA under federal rather than State environmental legislation.

Josephine Kelly, a Sydney barrister and Paul Nelson from the Australian Maritime Safety Authority each discuss important developments which have already occurred in environmental law. Ms Kelly charts the dramatic increase in the number of prosecutions and in the severity of fines and other penalties in the criminal jurisdiction of the Land and Environment Court since the late 1980s. These developments have resulted in more cases being defended with the result that a considerable body of case law is emerging. Ms Kelly provides a useful overview of that case law. Mr Nelson presents a case study of some of the international legal initiatives for dealing with ship-sourced marine pollution, especially oil spills. Two key international conventions—OILPOL and its successor MARPOL 73/78—are examined in depth, as are the domestic consequences flowing from their implementation in Australia.

Thus, for reasons identified above, there is a clear need both to go beyond the criminal law in looking for means to protect the environment and to redraft the criminal law so that it is better suited to environmental protection. A more difficult question is precisely what this involves. We address this question in the section below.

The Role of Alternative or Complementary Mechanisms

It is by now clear that there is need for a much broader range of regulatory strategies than criminal law or command and control regulation. However, merely listing the alternatives available is not enough. What is crucial is that we identify how and in what circumstances we should use different instruments, how and when they can appropriately be used to complement and reinforce the criminal law, or even to replace it.

The papers in this final section examine the "next generation" of tools for environmental protection, with a keen eye to future environmental policy. In particular they identify a crucial role for self-regulation, for oversight mechanisms and for third party involvement in the decision-making process.

In her paper, Sandra Edmonds, from Swinburne University of Technology, suggests overcoming many of the disadvantages of traditional command and control methods of ensuring compliance through the use of eco-management systems and environmental audits. She argues that the latter have the potential to succeed where more conventional compliance mechanisms have failed. In particular she explores the use of environmental audits both as a sanction for non-compliance under the Victorian *Environment Protection Act* and as an incentive to certain sectors of industry to be more environmentally responsible.

On a related issue, Jan McDonald from Bond University looks at the issue of the confidentiality of voluntary company internal environmental audits and examines the means by which these documents may be protected against disclosure to government prosecutors under existing common law principles, namely the privilege against self-incrimination and legal professional privilege. She goes on to suggest a statutory alternative—the self-evaluative privilege—which is aimed at encouraging industry led environmental compliance.

Ian Prince from Kinhill Engineers envisages the future of environmental protection and contrasts it with present regulatory practice. His vision of the first decade of the 21st century sees environmental factors being integrated into the decision-making processes of industry as a result of cooperative rather than confrontational

relationships between government, industry and scientists. He predicts a self-regulating, market-based approach to environmental improvement where regulatory controls will rarely be used. In contrast, Mr Prince characterises the present as command and control based and asks whether expansion of regulatory interventions can promote good environmental outcomes due to the limited resources of environmental agencies and the actions of industry itself to introduce environmental performance programs.

Finally, since firms are often unwilling to implement regulation voluntarily, and regulatory agencies are frequently under-resourced and relatively ineffective, there is a crucial role for third parties in achieving effective environmental protection. Specifically, we need to develop a tripartite regulatory strategy—one which involves not only business and government, but also the community, directly in environmental decision-making.

Public interest groups can clearly play an important role, and demonstrably already do so. They are, however, constrained by two serious impediments. First, they often lack information. Second, they commonly do not have the legal standing to challenge the behaviour of industry, or the decisions of government, in a court of law. These issues are examined by Neil Gunningham and David Mossop in their papers.

Neil Gunningham from the Australian Centre for Environmental Law at the Australian National University explores the importance of an information-based strategy, and in particular the potential role of Community Right to Know legislation. Such legislation is premised on the assumption that community groups and non-governmental organisations, if empowered by sufficient information, can act as an effective countervailing force to the private interests of private enterprise. Gunningham argues, based on the American experience, that Right to Know legislation is one of the most effective instruments available for reducing toxic emissions, and one which has had a dramatic impact on the behaviour of major chemical installations.

Moreover, regulation through information is made doubly effective if citizens are given the opportunity both to sue regulatory agencies for failure to enforce regulations and to sue corporations if the EPA does not bring action itself. This theme is picked up by David Mossop, a lawyer with the New South Wales Environmental Defenders Office. The focus of his paper is citizen suits, which he sees as an important mechanism for obtaining compliance with environmental laws, providing not only a form of accountability otherwise lacking from the processes of government, but also acting as an alternative to the deficiencies of enforcing environmental laws by way of criminal sanctions.

Another approach to the issue of third party rights would be to include environmental rights within a specific Bill of Rights. In his paper, NSW lawyer Peter Breen argues that by introducing the concept of community rights into the proposed legislation, the Queensland Electoral and Administrative Review Commission was able to move outside the boundaries traditionally associated with individuals' rights, thereby avoiding many of the conceptual difficulties involved in placing environmental rights into a Bill of Rights. Moreover, the Queensland Bill will, in the opinion of the author, adequately address the question of enforceability.

Finally, Mark Squillace from the University of Wyoming provides an international perspective, focusing on the innovative enforcement mechanisms of two pieces of US legislation that offer a better means of obtaining environmental protection: the Clean Air Act and the Surface Mining Control and Reclamation Act. Mechanisms within the former include a tradeable emissions program, compliance certifications and citizen

actions. Under the latter, provision is made for the mandatory enforcement of the Act, regular inspections, individual civil penalties against corporate officers, citizen complaints enabling the complainant to accompany the inspector during a mine site investigation and the payment of fines into escrow to avoid problems associated with fine collection.

The environment continues to be an important issue for Australian citizens. A recent Saulwick Opinion Poll found that 57 per cent of respondents gave environmental protection a higher priority than economic growth (*Sydney Morning Herald*, 12 April 1994).

There are two key threads of consensus throughout the conference papers discussed above. Firstly, that there is a role for the criminal law in environmental protection, but that to fulfil this role effectively, the criminal law must be adapted, and in particular adapted to encompass the notion of the "corporate" rather than the individual offender. Secondly, that effective enforcement will best be achieved by using the criminal law as one element in a more comprehensive system of environmental protection. A range of mechanisms, such as information-based strategies, environmental audit, and third party enforcement strategies have been put forward as other mechanisms which should be used as part of our system of environmental regulation. The challenge which remains is to identify which of these tools can best further the goal of efficient environmental protection and to use those tools strategically and effectively alongside the criminal law.